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OF LEGAL USUFRUCT, THE SURVIVING SPOUSE, AND ARTICLE 890 OF THE LOUISIANA CIVIL CODE: HEYDAY FOR ESTATE PLANNING*

A. N. Yiannopoulos**

INTRODUCTION: MAKING HAY OF SUCCESSION LAWS

Civil codes provide the legislative framework for the private life of citizens from birth to death.¹ This framework consists mostly of suppletive rules of law,² which embody the wisdom of many generations of jurisconsults and are said to correspond with the wishes and intent of the average citizen. Thus, in civil law jurisdictions, there is little need for the confection of elaborate and lengthy contracts, trusts, or testaments. Parties may and do rely on the existing legal framework governing special contracts, such as donations, sales, or leases, and the contractual forms are compellingly simple. In particular, the average citizen, relying on the existing legal framework governing intestate successions, will usually make no testament. If the individual wishes to modify the order and terms of intestate succession, he or she may execute a simple testament designed to derogate from certain suppletive rules of law. Of course, a testator may not by testamentary dispositions infringe on the legitime of his forced heirs.³

Until recently, the Louisiana Civil Code of 1870 efficiently and effectively regulated the devolution of property upon the death of the owner. It provided a well-defined order of intestate succession, elaborate rules governing the execution, effect, and interpretation of testaments, and an essentially fair system of forced heirship. The scheme of the Louisiana Civil Code of 1870 also made proper and fair provision for the surviving spouse. The surviving spouse was not an heir of the deceased spouse if that spouse had left descendants, but was protected by the community property system, the right to the marital portion,

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and the legal usufruct under article 916 of the 1870 Code.\textsuperscript{4} Under the circumstances, most Louisiana citizens could opt not to make a testament, and many did choose that course. If a spouse died and left issue of the marriage, the surviving spouse acquired a usufruct by operation of law over the community property that the children of the union had inherited. If a spouse wished to give to the surviving spouse more property, he could by testament bequeath the disposable portion of his estate in full ownership to the surviving spouse and, under article 916 of the 1870 Code, could "confirm" the legal usufruct over the legitime inherited by the issue of the marriage.

By the mid-seventies, however, things began to change rapidly in Louisiana. Article 916 of the Louisiana Civil Code of 1870 was twice amended, and a movement against the institution of forced heirship gained strength.\textsuperscript{5} The conservative Louisiana Trust Code of 1964, which had been carefully drafted to conform as much as possible with civilian precepts, was tampered with to provide for tenures unknown to Louisiana civil law before that time.\textsuperscript{6} The forced heirship of ascendants was abolished, and the forced heirship of descendants was emasculated by special legislation and amendments to the governing provisions of the Civil Code. The significance of the principle \textit{le mort sasit le vif} diminished and estate administration proliferated. Finally, a partial revision of the law of successions introduced common law terminology\textsuperscript{7} and replaced article 916 of the Louisiana Civil Code of 1870 with the first, second, and third versions of article 890.\textsuperscript{8}

Because the law of successions has so much changed, a great number of Louisiana citizens can no longer afford the risks associated with dying intestate. Neither can the average citizen sustain the risks of a homemade will and the pitfalls of article 890. Article 890 is poorly drafted and full of holes. While it can be a flexible instrument in the hands of an experienced estate planner, it can also be a blunt and dangerous tool for the lay do-it-yourself testator.\textsuperscript{9} Hence, since estate

\begin{itemize}
  \item \textsuperscript{4} See A. Yiannopoulos, \textit{Personal Servitudes} §§ 99-105, in 3 Louisiana Civil Law Treatise (2d ed. 1978).
  \item \textsuperscript{7} See, e.g., \textit{La. Civ. Code art. 872, as revised by 1981 \textit{La. Acts No. 919}, § 1}.
  \item \textsuperscript{9} Cf. infra text accompanying notes 22, 42, 60, 79, 94.
\end{itemize}
planning may have become a necessity for almost everybody, these developments in the successions law have heralded the arrival of a heyday for estate planners in Louisiana.

The irony is that the avoidance of federal estate taxes was a major force behind the movement for the enactment of the Louisiana Trust Code, the push for unlimited freedom of testation, and the resultant elaborate estate planning. After recent federal tax reforms, however, only the very rich need worry about inheritance taxes. Thus, leaving aside trusts for minors and other incompetents, estate planning for the average citizen primarily serves the selfish desire of dead hand control over the use of the wealth by the living.

Be this as it may, it seems that article 890 of the Louisiana Civil Code is here to stay. Therefore, systematic analysis of its provisions in relation to the general law of usufruct and the rest of the law of successions is desirable. It is hoped that the following discussion will shed some light on the obscure provisions of article 890, and that, in the interest of justice for everyone, this will contribute toward a meaningful interpretation of its loose language.

THE LEGAL USUFRUCT OF THE SURVIVING SPOUSE

Legislative Evolution

The usufruct of the surviving spouse was introduced in Louisiana by Act 152 of 1844. In the 1870 revision, the English version of that Act was reproduced almost verbatim and was designated article 916 of the Louisiana Civil Code of 1870. This article declared:

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 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.

10. See A. Yiannopoulos, Property § 168, in 2 Louisiana Civil Law Treatise (2d ed. 1980).

11. 1844 La. Acts No. 152, § 2. The surviving spouse is also protected in Louisiana by other institutions. He may be called to the succession of the deceased spouse under articles 889 and 894 of the Civil Code, as revised in 1981; he may have a right to the marital portion under articles 2432 through 2437 of the Civil Code, as revised in 1979; and he may have a privilege under article 3252 of the Civil Code, as amended by 1979 La. Acts No. 711. See also A. Yiannopoulos, Personal Servitudes §§ 214, 219, in 3 Louisiana Civil Law Treatise (3d ed. 1989).

The text of article 916 remained intact for more than a century. In 1975, however, article 916 was amended and an "unless" clause was added after the words "second marriage":

unless the usufruct has been confirmed for life or any other designated period to the survivor by the last will and testament of the predeceased husband or wife, and the rights of forced heirs to the legitime shall be subject to any such usufruct, which usufruct shall not be an impingement on the legitime.\(^\text{13}\)

In the following year, the Louisiana legislature enacted article 916.1, which established a legal usufruct on the family home.\(^\text{14}\) Article 916 was again amended in 1979 and a last sentence was added:

Further, a husband or wife may, by his or her last will and testament, grant a usufruct for life or any other designated period to the surviving spouse over so much of the separate property as may be inherited by issue of the marriage with the survivor, and the rights of forced heirs to the legitime shall be subject to any such usufruct, which usufruct thus granted shall be treated in the same fashion as a legal usufruct and not be an impingement upon the legitime.\(^\text{15}\)

In 1981, the legislature passed two acts designed to overhaul the law governing the usufruct of the surviving spouse. Act 911 amended article 916. As amended, the article provided:

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 (sic) may by testament grant a usufruct for

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\(^{15}\) 1979 La. Acts No. 678, § 1 (emphasis added).
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 an 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.\(^{16}\)

Act 919 of the same year repealed articles 870 through 933 of the Louisiana Civil Code of 1870 and replaced them with new articles 870 through 902. Article 916 was among the articles that were repealed; it was replaced by article 890. The provisions of the new article were identical to those of old article 916, as amended by Act 911, but with one exception. The second paragraph of the Act 919 version read:

The deceased may by testament grant a usufruct for life or for a shorter period to the surviving spouse over so much of the separate property as may be inherited by issue of the marriage with the survivor or as may be inherited by illegitimate children.\(^{17}\)

Article 916 of the Louisiana Civil Code of 1870, as amended by Act 911, was in force from September 11, 1981 through December 31, 1981.\(^{18}\) Article 890 of the Louisiana Civil Code, as revised by Act 919, acquired the force of law on January 1, 1982.\(^{19}\) In that year, the legislature passed Act 445, which amended the second paragraph of article 890 so that it read the same as the second paragraph of article 916 had after the 1981 amendment by Act 911.\(^{20}\)

**Purposes of the Usufruct of the Surviving Spouse**

Since its introduction into Louisiana law the usufruct of the surviving spouse has served several important purposes. First, the usufruct provides means of sustenance for the surviving spouse. Second, the usufruct serves to keep the community intact and prevents partition or liquidation of the community to the prejudice of that spouse. As usufructuary of one-half of the community property and owner of the other one-half, the surviving spouse may live in the family home and continue the


\(^{17}\) Id. art. 890, as amended and reenacted by 1981 La. Acts No. 919, § 1.

\(^{18}\) See 1981 La. Acts No. 911, § 1; cf. Succession of Blythe, 531 So. 2d 1073 (La. 1988). The conflict between Act No. 911 and Act No. 919 was noted in Succession of Skinner, 426 So. 2d 740 (La. App. 3d Cir. 1983), but the cases involved a legal usufruct created *ab intestato*.


operation of a community business, unrestricted by the desires of the heirs of the deceased spouse.\textsuperscript{21}

The usufruct of the surviving spouse attaches by operation of law only to community property. An argument could be made that the usufruct ought to attach to both community and separate property by operation of law. The Louisiana legislature, however, primarily guided by the policy of preventing partition of the community, provided for the creation of a usufruct by operation of law only over community property, not over separate property. Although the law does not automatically supply the usufruct over separate property, under article 890 a spouse is free to grant to the surviving spouse a usufruct over his separate property, and this usufruct is treated as legal. Absent such a testamentary disposition, however, there can be no legal usufruct over separate property.

There are three requirements for the creation of a usufruct by operation of law under article 890 of the Civil Code: (1) there must be a community of acquets and gains; (2) the share of the deceased spouse in that community must be inherited by his descendants; and (3) the deceased must have died intestate or must not have disposed of his share in the community by testament adversely to the interests of the surviving spouse. These requirements form the topics of the following discussion.

\textit{Community of Acquets and Gains}

According to article 890 of the Louisiana Civil Code, the usufruct of the surviving spouse attaches by operation of law to the share of the community property inherited by the descendants of the deceased spouse.\textsuperscript{22} A spouse may also grant a usufruct over his separate property\textsuperscript{23} to the surviving spouse by testament, and this usufruct is treated as a legal usufruct.\textsuperscript{24} This usufruct, however, is not created by operation of law.

\begin{itemize}
\item \textsuperscript{21} Cf. Hall v. Toussaint, 52 La. Ann. 1763, 28 So. 304 (1900); Folse v. Maryland Cas. Co., 193 So. 385 (La. App. 1st Cir. 1940); Comment, The Usufruct of the Surviving Spouse, 25 La. L. Rev. 873 (1965). See also Succession of Guercio, 359 So. 2d 996 (La. App. 4th Cir.), reh'g granted, 359 So. 2d 1000 (1978); infra notes 46-47 and accompanying text.
\item \textsuperscript{22} See La. Civ. Code art. 890, para. 1:
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.
(emphasis added).
\item \textsuperscript{23} Id. art. 890, para. 2: "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." (emphasis added).
\item \textsuperscript{24} Id. art. 890, para. 3: "A usufruct authorized by this Article is to be treated as a legal usufruct . . . ."
\end{itemize}
In the absence of a testamentary disposition, there can be no usufruct over separate property under article 890 of the Louisiana Civil Code. Thus, the first requirement for the creation of a usufruct under article 890 of the Louisiana Civil Code by operation of law is the existence of a matrimonial regime of community of acquets and gains.\(^{25}\)

In Louisiana, the law superinduces a regime of community of acquets and gains between spouses who contract marriage within the state, unless the community is excluded by agreement.\(^{26}\) Prospective spouses may establish a conventional community property regime by an agreement that either excludes or modifies the legal regime. The usufruct of the surviving spouse ought to attach regardless of the qualification of a community as conventional or legal, for nothing in article 890 or elsewhere in the law indicates that the community must be legal rather than conventional. Therefore, it ought to be accepted that when the community is governed by contract, in whole or in part, the usufruct of a surviving spouse over the deceased's one-half share is subject to article 890, unless, of course, the agreement establishing the community precludes its application.\(^{27}\)

Termination of the community before the death of a spouse prevents the article 890 usufruct from attaching. The community property regime ends with separation from bed and board.\(^{28}\) Accordingly, the usufruct

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\(^{25}\) The question whether a spouse may grant a usufruct to the surviving spouse under article 890 of the Louisiana Civil Code if the spouses do not live under the regime of community of acquets and gains is interesting but beyond the scope of this discussion.

\(^{26}\) Louisiana law also creates a community property regime between spouses married elsewhere when the spouses relocate in this state; however, the immigrating couple may exclude the community by agreement within one year of the time they settle here. See La. Civ. Code arts. 2325, 2334. Nonresident spouses who acquire immovable property in Louisiana are, to that extent, also subject to the community property laws; but the spouses may exclude the community by a contrary agreement, and in some instances a contrary provision of law may preclude application of the community property regime. Id. art. 15, as redesignated by 1987 La. Acts No. 124, § 2.

\(^{27}\) Thus, for example, the usufruct may be defeated by adverse testamentary disposition, unless this is expressly excluded by the agreement establishing the conventional community. See La. Civ. Code arts. 2328, 2330; infra text accompanying notes 54-60.

\(^{28}\) Other events that bring the community property regime to an end include: the dissolution of marriage by divorce or death, the separation of property by judgment, and dissolution of the marriage when one spouse is an absentee. See La. Civ. Code arts. 64, 101, 159, and 2356. The absolute nullity of marriage prevents the creation of the community property regime. See La. Civ. Code art. 96 (Supp. 1989). However, when one party contracted the absolutely null marriage in good faith, the civil effects, including the community property regime, flow in favor of the good faith spouse; but, the law allows the good faith spouse this benefit only so long as that spouse remains in good faith. Id. Hence, another event that terminates the community property regime is the bad faith of a spouse formerly in good faith. For further discussion of the putative spouse and the surviving spouse usufruct, see infra text accompanying notes 31-32.
under article 890 does not attach in favor of a judicially separated spouse. This follows from the rule that a judgment of separation from bed and board dissolves the community as of the date of the filing suit as well as from the classification of the usufruct of the surviving spouse as a right of inheritance.

A null marriage contracted with one party in good faith creates a putative community in favor of the good faith spouse. The usufruct under article 890, however, may attach in favor of the surviving spouse of a bigamous marriage only when both spouses are in good faith. The reasons for this are clearly illustrated by the following analysis of the logical possibilities when one spouse is in good faith and the other is not. If the good faith spouse dies first, the usufruct could not attach in favor of a surviving spouse who contracted a putative marriage in bad faith, for the law makes no provision for the bad faith spouse. If the impediment nullifying the marriage were a prior, undissolved marriage of the bad faith spouse, for example, the community acquired during the coexistence of the two marriages would belong in indivision to the abandoned lawful spouse and the putative spouse in good faith of the null marriage. If, on the other hand, the bad faith spouse dies first, there could be no article 890 usufruct. The spouse in bad faith has no share in the community. When he dies, his descendants inherit nothing from the community, and so the prerequisites for the usufruct of the surviving spouse could not be met. From all this it is clear that the article 890 usufruct should not apply to putative spouses unless both were in good faith.

The usufruct of the surviving spouse attaches to the share of the deceased in the community of acquets and gains as it may be burdened with succession and community debts, that is, without the necessity of


31. Id. arts. 96 and 97. For the proposition that a putative spouse in good faith has a right to a share in the community, see Prince v. Hopson, 230 La. 575, 89 So. 2d 128 (1956); Succession of Fields, 222 La. 310, 62 So. 2d 495 (1952); Succession of Chavis, 211 La. 313, 29 So. 2d 860 (1947). In Succession of Gordon, 461 So. 2d 357 (La. App. 2d Cir. 1984), writ denied, 464 So. 2d 319 (1985), the court following Prince v. Hopson, awarded to each of the two wives one-quarter of the putative community and the remaining half to the heirs of the deceased spouse, issues of the first or of the second marriage. Apparently there was no request for the recognition of a legal usufruct in favor of either surviving spouse.

32. Succession of Choyce, 183 So. 2d 457 (La. App. 2d Cir.), writ refused, 249 La. 64, 184 So. 2d 735 (1966).
prior partition or liquidation of the community property. If community property has been used to satisfy separate obligations of the deceased spouse, the surviving spouse is entitled to claim reimbursement from the heirs of the deceased spouse for one-half of the amount or value that the community property had at the time it was used. If separate property of the surviving spouse has been used to satisfy community obligations, the surviving spouse is entitled to reimbursement for one-half of the amount or value that the separate property had at the time it was used. Of course, if the community is partitioned or liquidated, the usufruct of the surviving spouse attaches to the net share of the deceased.

In language from a great number of Louisiana decisions, courts assert that neither the spouses nor their heirs have anything to claim from the community of acquets and gains “until all debts are paid.”

33. Succession of Bringier, 4 La. Ann. 389 (1849). The issue in this case was “whether . . . the surviving widow is not entitled to the usufruct of the share of the deceased in the community property, from the moment of the husband's death, and previous to paying debts; or whether the debts must be first discharged and the right exercised upon the residue.” Id. at 394. The court concluded that the last proposition “conflicts with the rules which govern usufruct.” Id. at 395. See also Demoruelle v. Allen, 218 La. 602, 50 So. 2d 208 (1950); Long v. Dickerson, 127 La. 341, 53 So. 598 (1910).


35. See La. Civ. Code art. 2365. If separate funds of the deceased spouse were used to satisfy a community obligation, reimbursement is due to the estate. Cf. Succession of Blythe, 496 So. 2d 1180 (La. App. 5th Cir.), writ denied, 498 So. 2d 15 (1986). The court held that the burden of proof is on the heirs of the deceased spouse to show that separate funds existed and were used to benefit the community. In the absence of strong and substantial economic advantage that has inured to the community, restitution claims should be denied.

36. See Succession of Russel, 208 La. 213, 23 So. 2d 50 (1945); Succession of Daste, 210 So. 2d 521 (La. App. 4th Cir. 1968), modified, 254 La. 403, 223 So. 2d 848 (1969). But cf. Succession of Gabriel, 344 So. 2d 24 (La. App. 4th Cir.), writ denied, 346 So. 2d 217 (1977). The court held, under the regime of the Louisiana Civil Code of 1870, that when succession property in excess of that necessary for the satisfaction of debts is sold with the participation of the usufructuary the proceeds are apportioned between the usufructuary and the naked owner. This decision has been legislatively overruled by Louisiana Civil Code article 616, as revised by 1976 La. Acts No. 103, § 1.

37. Demoruelle v. Allen, 218 La. 603, 617, 50 So. 2d 208, 212 (1950), and cases cited therein; Comment, Creditor's Rights, 25 La. L. Rev. 201, 225 n.156 (1964), and cases cited therein. Cf. Succession of Acosta, 396 So. 2d 499 (La. App. 4th Cir. 1981); Smith v. Hebert, 348 So. 2d 200 (La. App. 3d Cir.), writ denied, 351 So. 2d 179 (1977). In context, these declarations occur frequently in cases in which a former spouse or his heirs are in competition with the other spouse, his heirs, or creditors of debts which as between the spouses are assignable to the community, and refer to the obvious: that the former spouse or his heirs may recover only one-half of the assets of the community, subject to the obligation to pay the debts of the community. See, e.g., Harman & Stringfellow v. Legrande, 151 La. 253, 91 So. 726 (1922); Gauthier v. Gauthier, 502 So.
This does not mean that the community must necessarily be liquidated. Judicial declarations concerning the residuary nature of a spouse's interest in the community are frequently found in cases in which a former spouse or his heirs are in competition with the other spouse, his heirs, or creditors having claims that are assignable to the community property. The assertions refer only to the obvious: the former spouse or his heirs may recover one-half of the net assets of the community.

Inheritance by Descendants

The usufruct of the surviving spouse under article 890 attaches by operation of law to the community property that is inherited by the descendants of the deceased spouse. The word *descendants* includes all persons related to the deceased in the direct line by blood or adoption, and has the same meaning as the word *children* in article 3556(8) of the Civil Code.

According to the second paragraph of article 890, a spouse 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. The third paragraph of the same article categorizes such a usufruct as a legal usufruct. Read in isolation, these provisions could be taken to mean that a testator may grant a legal usufruct to the surviving spouse over his separate property inherited by persons other than his descendants. These pro-

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38. See La. Civ. Code art. 890, para. 1, as revised in 1981 and amended by 1982 La. Acts No. 445, § 1: "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 *descendants*." (emphasis added).

39. Id. art. 3556(8), as amended by 1981 La. Acts No. 919, § 2: "*Children*—under this name are included persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line." (emphasis added).

40. Id. art. 890, para. 2, as revised in 1981 and amended by 1982 La. Acts No. 445, § 1: "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."

41. Id. art. 890, para. 3, as revised in 1981 and amended by 1982 La. Acts No. 445, § 1: "A usufruct authorized by this article is to be treated as a legal usufruct and is not an impingement upon legitime."

42. See Succession of Daly v. McNamara, 515 So. 2d 661 (La. App. 3d Cir. 1987), writ denied, 519 So. 2d 119 (1988). In this case, testator had no descendants and bequeathed the usufruct of his separate property to the surviving spouse. The surviving spouse treated this bequest as an inheritance tax-free legal usufruct under article 890 of the Civil Code but the Louisiana Department of Revenue and Taxation rejected the claim and litigation ensued. The court did not accept the Department's argument that the second paragraph of article 890 "must be read in conjunction with the first paragraph limiting the application
visions, however, ought to be read in combination with the first paragraph of article 890 and in the light of the legislative history of the entire article.\footnote{43} It makes little sense to assert that inheritance by descendants is an indispensable requirement for the creation of a legal usufruct over community property but is not required for the creation of such a usufruct over separate property. Accordingly, it is submitted that the surviving spouse cannot have a legal usufruct under article 890 when persons other than the descendants of the deceased spouse inherit either the separate property of the deceased or his share in the community of acquets and gains.

Under old article 916, the usufruct of the surviving spouse attached only to the community property inherited by "issue of the marriage with the survivor."\footnote{44} The usufruct, therefore, did not attach when children of a previous marriage inherited the community property. If there were children of a previous marriage as well as children of the last marriage, the usufruct burdened only the part of the community property that was inherited by the children of the last marriage.\footnote{45} This restriction was justified in the light of the purpose of the survivor's usufruct and by considerations of natural equity. In an early case, the court declared that the purpose of the survivor's usufruct:

[The purpose,] where there are children of the marriage, may have been to keep the family estate together, and provide a home for the surviving father or mother, who, in the nature of things, uses the estate with an eye to the welfare of the children. It is manifest that the impulse is no longer the same between the daughter and the stepmother, and the nature of the law finds nothing to sustain it in such a case.\footnote{46}

Further, it was thought that since the surviving spouse had no obligation to support the children of a deceased spouse's former marriage, the survivor should not be permitted to encroach on their legitime.\footnote{47}

\footnote{43} See supra text accompanying notes 15-17.
\footnote{44} La. Civ. Code art. 916 (1870).
\footnote{45} See Succession of Williams, 168 La. 1, 121 So. 171 (1929); Succession of Emonot, 109 La. 359, 33 So. 368 (1902); Hall v. Toussaint, 52 La. Ann. 1763, 28 So. 304 (1900); Succession of Heckert, 160 So. 2d 375 (La. App. 4th Cir. 1964).
\footnote{46} Hall v. Toussaint, 52 La. Ann 1763, 1767, 28 So. 304, 305 (1900).
\footnote{47} At the time the usufruct of the surviving spouse was first established by 1844...
Grandchildren taking the deceased grandparent’s share in the community property by representation were *issue of the marriage*; therefore, their share was subject to the usufruct of the surviving grandparent.\(^{48}\) Children adopted during marriage were likewise *issue of the marriage* for the purposes of the surviving spouse’s usufruct.\(^{49}\) Any distinction between blood and adopted children in this respect would have been unfortunate, for since the adopted child holds the position of a blood child of the marriage with respect to inheritance rights, it should also be subject to the limitations imposed on blood children.\(^{50}\)

**Intestate Succession**

The usufruct of the surviving spouse under article 890 attaches by operation of law in case of intestacy, that is, when the deceased “shall not have disposed by testament of his share in the community.”\(^{51}\) Intestacy may be only partial. If the deceased spouse disposed of only a portion of his share in the community, the usufruct of the surviving spouse attaches to the undisposed portion. In *Succession of Glancy*,\(^{52}\) the court declared that “[i]f by his will he had disposed of certain specific property, and no more, in full ownership, that particular property would pass out of the succession by the legatee, free from the usufruct,

La. Acts No. 152, article 1745 of the Louisiana Civil Code of 1825 allowed the deceased to give only a child’s portion in usufruct to his second spouse, when there were issue of his former marriage. Thus, if the survivor’s usufruct were to attach to property inherited by issue of a former marriage, the terms of article 1745 would have been emasculated. See Comment, supra note 21, at 875 (1965). Article 1752 of the Louisiana Civil Code of 1870, corresponding to article 1745 of the 1825 Civil Code, lessened the restrictions on property that may be given to a second spouse. Under article 890 of the Louisiana Civil Code, as revised in 1981, there is no longer distinction between the spouse of the first marriage and spouse of the second marriage.

48. See West v. Goodwin, 176 La. 873, 147 So. 20 (1933). The court reasoned that “issue of the marriage” in article 916 must be read *in pari materia* with article 3556(8) of the Civil Code defining children to include grandchildren. The result is fair because under the general rules of representation the grandchild would take only what the pre-deceased child would have taken: the ownership of a share in the community burdened with the usufruct of the surviving spouse. See La. Civ. Code arts. 881, 882. Further, under article 229 of the Civil Code a needy descendant is entitled to support from an ascendant. It would thus be unfair if the surviving spouse were to incur this obligation, yet be deprived of the usufruct.


50. Cf. *Succession of Grubbs v. First Nat’l Bank of Shreveport*, 182 So. 2d 203, 206 (La. App. 2d Cir. 1966) where the court declared that “[t]here can be no question as to the surviving spouse’s usufruct of the share of the community estate of the deceased wife which was inherited by their [adoptive] son, where the wife and mother died intestate.”


52. 108 La. 414, 422, 32 So. 356, 359 (1902).
but the usufruct would attach to the balance; . . . [t]he cutting off of the usufruct would be measured exactly by what had been disposed of by the deceased spouse to the prejudice of the usufruct, and inconsistent with it."

CONFIRMATION OF THE LEGAL USUFRUCT BY TESTAMENT

Testamentary Succession; Adverse Disposition

Early Louisiana decisions applied article 916 literally, holding that the mere execution of a will by the deceased spouse amounted to a disposition of his share in the community that defeated the legal usufruct. Later, however, Louisiana courts concluded that the legal usufruct could be confirmed by will. Only an adverse testamentary disposition deprived the surviving spouse of the legal usufruct. This jurisprudence continues to be relevant for the application and interpretation of the first paragraph of article 890.

The question of what constitutes an adverse disposition is a matter of will construction, controlled by the intention of the testator. Courts thus ought to scrutinize the language in the will and the scheme of distribution in order to ascertain the intention of the testator. When the testator exhausts his estate by bequests to third persons or, without exhausting his estate, manifests his intention that the surviving spouse should not receive the usufruct, the disposition is adverse.

53. See, e.g., Succession of Schiller, 33 La. Ann. 1, 1 (1881) (will providing for distribution of the estate among "legal heirs, according to the laws now in force in Louisiana"; held, no usufruct); Forstall v. Forstall, 28 La. Ann. 197 (1876) (gift to the survivor of the entire share of the deceased in the community property; held, bequest reduced to the disposable portion without usufruct over the remainder); Grayson v. Sanford, 12 La. Ann. 646 (1857) (gift of the disposable portion to the survivor; held, no usufruct over the remainder).

54. See, e.g., Succession of Waldron, 323 So. 2d 434 (La. 1975); Succession of Chauvin, 260 La. 828, 257 So. 2d 422 (1972), discussed in Note, Successions—Usufruct—Testamentary Confirmation of Legal Usufruct of Surviving Spouse, 47 Tul. L. Rev. 217 (1972); Succession of Baker, 129 La. 74, 55 So. 714 (1911); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888); Succession of Brown, 94 So. 2d 317 (La. App. Orl. 1957); Succession of Lynch, 145 So. 42 (La. App. Orl.), cert denied (1932). In Succession of Glancey, 112 La. 430, 36 So. 483 (1904), the deceased bequeathed by will only movable property of small value to third persons. It was held that the disposition as to the remainder was not adverse to the usufruct of the surviving spouse.


56. See Succession of Waldron, 323 So. 2d 434, 437 (La. 1975): "The testator can exclude the operation of Article 916 if he exhausts, by means of donations mortis causa, to persons other than his spouse, the portion of his estate that under Article 916 is subject to the legal usufruct." See also Note, Donations—The Effect of a Will Upon the Legal Usufruct Created by Article 916 of the Louisiana Civil Code, 18 La. L. Rev. 574, 577 (1958). But see Comment, supra note 21, at 881, advancing argument that when the testator leaves all his property to his children he does not intend to defeat the usufruct.
Sometimes a testator's dispositions implicitly indicate an intention to disclaim the surviving spouse usufruct. In *Succession of Schiller*, for example, the testator made provision for distribution of his estate among "his legal heirs, according to the laws now in force in Louisiana." The court held that the testator had evidenced an intent to deprive the surviving spouse of the usufruct over half of the community, and that the testator had disposed of his property within the meaning of article 916. When the testator makes a will, the court reasoned, he is presumed to intend something different from the result occurring in the absence of a will. The court refined its position somewhat in *Succession of Maloney*. The testatrix in that case had bequeathed all her property in Biloxi, Mississippi, to her three daughters and then stated: "My interest of whatever character and wherever situated, outside the said city of Biloxi, Mississippi, I leave to be disposed according to the laws where the same may be." The court, in upholding the surviving spouse's usufruct on property in Louisiana, distinguished the *Schiller* case because in the present case the testatrix had not intended to dispose of her property in Louisiana by will, but her will had been intended to affect only property in Mississippi. The *Maloney* decision confirms the broader proposition that distribution by the testator of only part of his estate does not necessarily defeat the usufruct over undisposed property.

When the testator exhausts his estate by dispositions to third persons, argument may be made that the testator has manifested an intention to defeat the legal usufruct by adverse disposition. But when the testator merely confirms the operation of the laws of intestacy, such as when

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58. 127 La. 914, 54 So. 146 (1911).
59. See also *Succession of Glancy*, 108 La. 414, 32 So. 356 (1902). But cf. *Succession of Denegre*, unreported. The testator in his case bequeathed $10,000 to one of his daughters and directed that the rest of his property should be administered for the benefit of his wife and children. The court held that the testator had disposed of his interest in the community. The result was repudiated in *Succession of Moore*, 40 La. Ann. 531, 538, 4 So. 460, 463 (1881), as involving incorrect interpretation of the will. The court stated that the widow should have been allowed the usufruct of the undisposed property.
60. See *Ludowig v. Weber*, 35 La. Ann. 579 (1883) (deceased husband left by will four-fifths of his community share to his four children and one-fifth to the widow; the court concluded that the survivor's usufruct did not attach to the portions inherited by the children). In cases of partial disposition of the estate in favor of the survivor, however, question arises as to whether the survivor may take both under the will and under article 890.
61. See *Succession of Maloney*, 127 La. 913, 54 So. 146 (1911); *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1888); *Fricke v. Stafford*, 159 So. 2d 52, 53 (La. App. 1st Cir. 1963) (the testator declaring that his estate should be distributed "subject only to the usufructuary claim of my wife should she survive me as fixed by law in her favor"). In *Grayson v. Sanford*, 12 La. Ann. 646, 647 (1857), the court stated: "As the Act of 1844 only gives the right of usufruct in the portion of the community coming to the
he disposes of only part of his estate without manifesting an intention that the usufruct over the balance should be defeated, or when the surviving spouse is given more than if the decedent had died intestate, the disposition should not be considered adverse.

Another question arises when a testator disposes of his entire estate in favor of strangers, that is, persons other than his surviving spouse or his descendants, and the disposition is reduced to the disposable portion at the instance of the forced heirs. While it is clear that the legal usufruct of the surviving spouse does not attach to the disposable portion, it is not clear whether the legal usufruct attaches to the descendants' legitime. Article 890, which declares that the surviving spouse shall hold in usufruct so much of the share of the deceased in the community property as may be inherited by his descendants, might be given a literal application. A proper interpretation, however, should allow application of this provision only when an excessive disposition in favor of the surviving spouse is reduced to the disposable portion. The disposition of the entire estate in favor of strangers ought to establish the intention of the testator to make an adverse disposition and the usufruct should be defeated.

When an excessive disposition made to a person other than the surviving spouse does not exhaust the estate, the usufruct of the surviving spouse attaches to the property inherited by the descendants as a result of the partial intestacy, in the absence of other indication of the decedent's intention. It ought to be equally clear that if the legitime is satisfied by the reduction of a donation, the usufruct does not attach to the part needed to make up the forced portion. The disposition of that part is adverse.

In light of the foregoing, the legal situation in Louisiana may be summarized as follows: First, if the testament confirms the distribution under the laws of intestate succession, it cannot be considered an adverse disposition, and the legal usufruct of the surviving spouse attaches. Second, if the testator attempts to give the surviving spouse more than

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63. See Succession of Waldron, 323 So. 2d 434 (La. 1975); Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888).
64. Supra text accompanying notes 51, 52.
65. See Comment, supra note 21, at 883. Of course, if the disposition is in favor of the surviving spouse, the usufruct will always attach to the forced shares after reduction of the excessive donation.
the laws of forced heirship allow, he has still not made an adverse disposition. In such a case, the excessive disposition is reduced to the disposable portion, which will devolve to the surviving spouse in full ownership. In addition, the surviving spouse receives the usufruct over the forced portion inherited by descendants. Third, if the testator makes an excessive disposition in favor of a person other than the surviving spouse, the usufruct is defeated to the extent the disposition exhausts the estate. Fourth, if there are assets not disposed by the testator that are inherited by descendants, the determination that the disposition is adverse and excludes the usufruct must rest on some clear indication of the testator's intent.

**Confirmation of the Legal Usufruct by Testament**

In Louisiana, a usufruct may be testamentary or legal. According to the plain meaning of the words, a testamentary usufruct is one created by a testament, and a legal usufruct is one created by operation of law. The classification of a usufruct as legal or testamentary carries significant consequences. When a usufruct is created by operation of law under article 890 over the share of the deceased spouse in the community, it terminates upon the remarriage of the surviving spouse; the surviving spouse is not liable for the payment of Louisiana inheritance taxes; the usufructuary is relieved of the obligation to give security when the naked owners are children of the marriage; and, the usufruct does not impinge on the legitime of forced heirs. When a usufruct is created by testament, the opposite results follow. Thus, in the absence of contrary testamentary disposition, the usufruct is for life; the usufructuary owes inheritance taxes; in the absence of testamentary dispensation, the usufructuary must furnish security; and the usufruct may be an impingement on the legitime of forced heirs, giving them the right to reduce the disposition.

The doctrine of confirmation of the legal usufruct by will has blurred the distinction between legal usufruct and testamentary usufruct. Ac-

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67. Id. art. 890, para. 1.
68. Succession of Marsal, 118 La. 212, 42 So. 778 (1907).
70. Succession of Waldron, 323 So. 2d 434 (La. 1975); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888).
73. Succession of Carlisi, 217 La. 675, 47 So. 2d 42 (1950).
According to jurisprudence interpreting Article 916, a testamentary disposition that was not adverse to the interests of the surviving spouse did not defeat the legal usufruct created under that article. Such a disposition merely confirmed the legal usufruct. This doctrine of confirmation of the legal usufruct by testament had no statutory foundation until the 1975 amendment to Article 916. Nevertheless, it became deeply imbedded in Louisiana law because it strongly favors the interests of the surviving spouse. In effect, this doctrine allows the surviving spouse in community to cumulate rights granted directly by law with those given by the testament of the deceased spouse. This doctrine is now a part of the statutory scheme of Article 890.

Under the first paragraph of Article 890 a spouse may confirm the legal usufruct by testament in favor of the surviving spouse "for life or for a shorter period" over the community property inherited by descendants. The second paragraph of Article 890, in contrast to the first and to prior law, allows one spouse to grant a usufruct to the surviving spouse over separate property for life or for a shorter period. According to the third paragraph of Article 890, the usufruct created by that article "is to be treated as a legal usufruct." Since a usufruct in favor of the surviving spouse may now be confirmed over all types of property, separate or community, the question arises in every case whether that usufruct is testamentary or legal.

In the past, under the regime of Article 916, the question whether a testator intended to create a testamentary usufruct or merely to confirm a legal usufruct could be answered in the light of the intent of the testator as well as objective criteria. For example, a will granting a usufruct over separate property of the deceased or over property inherited by persons other than issue of the marriage was necessarily a testamentary usufruct. The question of confirmation of legal usufruct by will could arise only when the issue of the marriage inherited the naked ownership of community property and the surviving spouse was given a usufruct over that property. In such a case, an interested party could claim that the usufruct was either a legal usufruct confirmed by will or a testamentary usufruct. Ordinarily, a surviving spouse would be expected to claim that the usufruct was legal in order to avoid the undesirable incidents of a testamentary usufruct. However, if the surviving spouse

75. Succession of Maloney, 127 La. 913, 54 So. 146 (1911); Fricke v. Stafford, 159 So. 2d 52 (La. App. 1st Cir. 1963). See also Succession of Waldron, 323 So. 2d 434 (La. 1975). It has been held that the usufruct of the surviving spouse may also be confirmed, at least insofar as tax consequences are concerned, by a disposition in trust. See Succession of Belligner, 229 So. 2d 749 (La. App. 1st Cir. 1969), cert. denied, 255 La. 279, 230 So. 2d 587 (1970).

76. See supra notes 70-74.
reached, it would be to that spouse's advantage to claim that the usufruct was testamentary, and, therefore, for life.

The Louisiana Supreme Court laid down the test for distinguishing a legal usufruct from a testamentary usufruct in Succession of Chauvin.\(^7^7\) In that case, the predeceased spouse had left his entire succession to his son in naked ownership and to his wife in usufruct. The entire succession consisted of community property, and thus all the terms for creation of a legal usufruct under article 916 had been met. The court reexamined the doctrine of confirmation and established an objective test for the classification of a confirmed usufruct as testamentary or legal. In the opinion of the court, a confirmed usufruct could be legal only when the disposition in favor of the surviving spouse was compatible with article 916. Dicta indicated that when a testator strayed from the terms of article 916, he did not confirm the legal usufruct but created a testamentary usufruct. This would be so in all cases in which the testator granted either greater or lesser rights than under article 916. If, for example, a testator granted a usufruct for life prior to the 1975 amendment of article 916, the usufruct would necessarily be testamentary. If the testator did not specify the duration of the usufruct over the share of the community property inherited by issue of the marriage, the disposition would be a legal usufruct confirmed by will. Thus, Chauvin not only established a clear distinction between legal and testamentary usufructs but also a clear test for the classification of a usufruct as legal or testamentary.

Subsequently, in Succession of Waldron,\(^7^8\) the Louisiana Supreme Court reaffirmed Chauvin to the extent it had held that a legal usufruct could be confirmed by will and that an adverse disposition defeated a legal usufruct. However, the court repudiated the Chauvin dicta that confirmation required full compliance with the terms of article 916. Based on this reasoning, the court held that a usufruct

77. 260 La. 828, 257 So. 2d 422 (1972) discussed in Note, supra note 54.
78. 323 So. 2d 434 (La. 1975). The decision might be cited for the proposition that when a spouse confirmed the legal usufruct of the surviving spouse by testament under article 916 of the 1870 Code the usufruct could be both legal and testamentary. It was legal to the extent that the disposition conformed with the provisions of article 916 and it was testamentary to the extent that the deceased gave to the surviving spouse additional rights. Specifically, the court declared that the usufruct was legal and did not impinge on the legitime of a child for as long as the surviving spouse did not remarry. Upon remarriage of the surviving spouse, the usufruct would become testamentary and could impinge on the legitime of the child. This idea should not be carried forward into the interpretation and application of article 890 of the Louisiana Civil Code.
granted for life prior to the 1975 amendment of article 916 was legal until the remarriage of the usufructuary. After remarriage, the same usufruct would be considered testamentary.

Under article 890, the question whether a testator intended to create a testamentary usufruct or to confirm the legal usufruct is bound to arise frequently. In all cases in which a predeceased spouse bequeaths a right of usufruct to the surviving spouse, even if the usufruct is over separate property, the right may qualify as a legal usufruct. However, it would be absurd to suggest that because the application of article 890 ordinarily favors the interest of the surviving spouse, a testator necessarily establishes a legal usufruct when he grants a usufruct to the surviving spouse. A testator enjoys testamentary freedom not to confirm the legal usufruct under article 890, and he may by testament enlarge or diminish the rights that the surviving spouse would have had in the absence of a testament. As in the past, the question of the nature of the usufruct that the testator intended to create is a matter of testamentary interpretation.

In the absence of express language qualifying the usufruct as legal or testamentary, the intent of the testator must be gathered from the provisions of the will. When a testator grants rights that are incompatible with the notion of legal usufruct to the surviving spouse as usufructuary, he intends to grant a testamentary usufruct. Some examples help to illustrate the point. In a legal usufruct, the usufructuary is not entitled to grant a mineral lease without the consent of the naked owner.79 If the testator authorizes the usufructuary to grant mineral leases acting alone, the usufruct is testamentary rather than legal. Likewise, a legal usufructuary may only dispose of nonconsumables under the limitations of the second sentence of article 568 of the Civil Code, that is, he may dispose as a prudent administrator of those corporeal movables that are gradually and substantially impaired by use and decay. When the usufructuary is given free discretion to dispose of corporeals and incorporeals, movables and immovables, the usufruct can only be testamentary.

Consequences of Confirmation

Question has arisen whether the confirmation of the legal usufruct by testament converts the legal usufruct into a testamentary usufruct. According to well-settled Louisiana jurisprudence, when the testator confirms the legal usufruct by testament, it remains legal. Thus, the surviving spouse whose usufruct has been confirmed owes no Louisiana inheritance taxes.80 Unless the property subject to the usufruct is separate

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80. Succession of Steen, 508 So. 2d 1377 (La. 1987); Succession of Baker, 129 La. 74, 55 So. 714 (1911); Succession of Brown, 94 So. 2d 317 (La. App. Orl. 1957); Succession of Lynch, 145 So. 2d 42 (La. App. Orl. 1932), cert denied (1933).
property or community property inherited by descendants other than children of the marriage,81 the spouse's obligation to give security82 is dispensed by law. Further, the confirmation of the legal usufruct does not impinge on the legitime of forced heirs.83 Controversy, however, surrounds the question whether a confirmed usufruct over separate property without provision for its duration is for life or terminates upon remarriage of the usufructuary.84

In Succession of Waldron, a testator gave to the surviving spouse, in effect, full ownership of the disposable portion of his estate and usufruct for life over the legitime of a child of the marriage. Since the disposition conferred greater rights on the surviving spouse than those granted by article 916, the question arose whether the life usufruct over the legitime was a testamentary usufruct, which would impinge on the legitime of the issue of the marriage, or a legal usufruct confirmed by testament, which would not impinge on the legitime. The court held that the usufruct was a legal usufruct so long as the surviving spouse did not remarry. The usufruct would become testamentary upon the remarriage of the surviving spouse, and the question of impingement on the legitime would arise then.

The idea that a testamentary disposition in favor of the surviving spouse may establish a legal usufruct which can subsequently become testamentary, or a usufruct which is at the same time both legal and testamentary is a complexity that should be avoided in the interests of clarity and certainty of the law. The confining text of article 916, which did not permit a testator to confirm a legal usufruct for life in favor of the surviving spouse over the community property inherited by issue of the marriage, justified the Waldron solution when that case was decided. The strained interpretation that Waldron placed on article 916 favored the interests of the surviving spouse strongly. In the 1981 revision, however, the legislature strengthened the rights of the surviving spouse at the expense of forced heirs, and a testator may now give to the surviving spouse much more than under article 916, even as expanded by Waldron. Indeed, under article 890, a testator enjoys a great measure of freedom to provide for the surviving spouse and to confirm a legal usufruct in favor of that spouse. Article 890 expressly permits the confirmation of usufruct for life. Hence, the underlying rationale of

82. See La. Civ. Code art. 573; Succession of Waldron, 323 So. 2d 434 (La. 1975); cf. Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888). Accord, Succession of Novak, 449 So. 2d 54 (La. App. 1st Cir. 1984) (confirmation of legal usufruct by will; no security is due).
83. See La. Civ. Code art. 890; Succession of Waldron, 323 So. 2d 434 (La. 1975); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888).
84. See Succession of Waldron, 323 So. 2d 434 (La. 1975).
Waldron no longer has any relevance and there is therefore no reason for perpetuation of the Waldron anomaly. If the testator gives the surviving spouse greater rights than those under article 890, the disposition establishes a purely testamentary usufruct, Waldron not withstanding.

Cumulation of Rights Under the Will and Under Article 890

When the deceased spouse has made a testamentary disposition in favor of the surviving spouse, either in full ownership, in naked ownership, or in usufruct, the question arises whether the surviving spouse may receive both the testamentary gift and the legal usufruct under article 890.

When the testator gives the disposable portion of his property to the surviving spouse without mentioning usufruct, the question ought to be resolved in light of the intention of the testator, as gathered from the language in the will and the scheme of distribution. In the absence of some indication, such a disposition should not be considered adverse to the interests of the surviving spouse and should not defeat the legal usufruct under article 890. In effect, the testator disposed of only a part of his estate, and the undisposed portion should devolve according to the law governing intestate succession.\footnote{85. See Succession of Glancy, 108 La. 414, 422, 32 So. 356, 359 (1902): If the deceased left the survivor the full ownership of certain property, he or she would take that, holding the balance of his share in usufruct. If he left a legacy to a third person, payable out of the revenues of either the whole of his share in the community property, or of a particular or specific part of it, the survivor would take the usufruct, but with the charge upon it making payments of the legacy out of the revenues to the extent; the legatee having the right to make his legacy available by and through the usual legal remedies.\footnote{86. Grayson v. Sanford, 12 La. Ann. 646, 647 (1857).}\footnote{87. Succession of Moore, 40 La. Ann. 531, 538, 4 So. 460, 463 (1888).}\footnote{88. Succession of Waldron, 323 So. 2d 434 (La. 1975); Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957).}}

In an early Louisiana decision, the will read: “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 should sue for a partition during her life, I then will and bequeath to her all of the property that I can dispose of by law, forever.”\footnote{86. Upon a suit by the children for partition, the court limited the widow to the disposable portion, without usufruct over the rest of the property. This rule was not to remain, however, as the case was first distinguished\footnote{87. Succession of Moore, 40 La. Ann. 531, 538, 4 So. 460, 463 (1888).} and then overruled sub silentio.\footnote{88. Succession of Waldron, 323 So. 2d 434 (La. 1975); Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957).}} Upon a suit by the children for partition, the court limited the widow to the disposable portion, without usufruct over the rest of the property. This rule was not to remain, however, as the case was first distinguished\footnote{87. Succession of Moore, 40 La. Ann. 531, 538, 4 So. 460, 463 (1888).} and then overruled sub silentio.\footnote{88. Succession of Waldron, 323 So. 2d 434 (La. 1975); Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957).} Thus, the surviving spouse is now entitled to the disposable portion in full ownership under the will and, unless the court gathers from the will that the testator intended to defeat the legal usufruct, to the usufruct under article 890.
When the testator gives his entire estate in full ownership to the surviving spouse, the disposition impinges on the legitime of his descendants and must be reduced.\textsuperscript{89} The disposition, however, is not adverse to the interests of the surviving spouse and does not defeat the legal usufruct. Under the regime of article 916, the surviving spouse was entitled to receive both the disposable portion in full ownership by the terms of the will and a usufruct over the community property inherited by children of the marriage by operation of law. \textit{Winsberg v. Winsberg}\textsuperscript{90} illustrates the effect of this rule. In that case, a spouse bequeathed to his spouse the entire estate, consisting exclusively of community property, in full ownership. The court found that the testator intended to give the surviving spouse more than the law permitted and reduced the donation to the disposable portion in full ownership under article 1493 of the Civil Code. However, since the testamentary disposition was not adverse to the interests of the surviving spouse, she was also entitled under article 916 to a legal usufruct over the deceased's share in the community property inherited by issue of the marriage. This usufruct attached by operation of law; hence, it was not an impingement on the legitime of the children.

\textit{Winsberg} continues to be relevant for the interpretation of article 890 and the reduction of excessive donations in favor of the surviving spouse. As in the past, a donation of the deceased's entire estate to the surviving spouse impinges on the legitime of descendants and must be reduced upon their demand. Under the authority of \textit{Winsberg}, the surviving spouse should then receive the disposable portion in full ownership and a legal usufruct over the share of the deceased in the community property that has been inherited by his descendants. Since, however, no usufruct may arise on the separate property of a spouse by operation of law, the surviving spouse should not be given a usufruct

\textsuperscript{89} See \textit{Winsberg v. Winsberg}, 233 La. 67, 96 So. 2d 44 (1957), Succession of Heckert, 160 So. 2d 375 (La. App. 4th Cir. 1964). For the determination of the disposable portion, inter vivos donations to the survivor are fictitiously returned to the mass from which they came, i.e., the separate estate of the deceased or the mass of the community. The surviving spouse, however, not being an heir, is not required to collate if the donations exceed the disposable portion. See Succession of Moore, 42 La. Ann. 332, 7 So. 561 (1890).

\textsuperscript{90} 233 La. 67, 96 So. 2d 44 (1957), discussed in Note, supra note 56 and Note, Successions—Usufruct of Surviving Spouse—Article 916, Louisiana Civil Code of 1870, 32 Tul. L. Rev. 328 (1958). In Forstall v. Forstall, 28 La. Ann. 197 (1876), a donation by the testator of all his property to the surviving spouse was reduced to the disposable portion. The court reasoned that any disposition by the testator of his interest in the community nullified the operation of article 916 of the Louisiana Civil Code of 1870, 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 testator could legally donate. The \textit{Forstall} case was expressly overruled in \textit{Winsberg}.
over the separate property of the deceased spouse without an express testamentary provision to that effect. Reduction of the excessive donation to the disposable portion in full ownership, without a usufruct on separate property, would also accord with article 1499 of the Louisiana Civil Code.

When the testator gives full ownership of the disposable portion of his estate and a usufruct over the legitime to the surviving spouse, the disposition does not impinge on the legitime. It is considered to be a testamentary donation of the disposable portion and a confirmation of the legal usufruct under article 890.91

When the testator gives a usufruct over his entire estate to the surviving spouse, the disposition will ordinarily be considered a confirmation of the legal usufruct under article 890. In such a case, there is no impingement on the legitime of descendants and the question of reduction of the donation does not arise. Likewise, there is no need for cumulation of rights under the will and under article 890.

Impingement on the Legitime

The maximum that a testator with living descendants may give to the surviving spouse is full ownership of the disposable portion and a usufruct over the legitime. The disposable portion to which the usufruct attaches, as determined by article 1493 of the Louisiana Civil Code,92 is three-fourths of the estate if the deceased left one child and one-half if he left two or more children.

In contrast to the prior law, there is no impingement on the legitime of descendants when a spouse grants to the surviving spouse a usufruct over his entire estate. This is true whether the estate consists of community property, separate property, or of both community property and separate property, and whether the usufruct is for life or for a shorter period. Such a usufruct is authorized by article 890 and is treated as a legal usufruct.93

According to certain writers, a testamentary disposition conferring the power on the surviving spouse to dispose of nonconsumables that are subject to a legal usufruct under article 890, which, in effect, converts the usufruct of nonconsumables into one of consumables, impinges on the legitime of descendants.94 The grant of this additional right to the

92. Id. art. 1493.
93. Id. art. 890.
surviving spouse exceeds the limits of article 890 and is, in essence, a disposition in the framework of a testamentary usufruct rather than a confirmation of a right granted to the survivor by operation of law in case of intestacy.\footnote{95}

Article 916 did not expressly state that the confirmation of the legal usufruct by testament was not an impingement on the legitime. It was early established, however, that when a testator gives the disposable portion of his estate in full ownership and a usufruct over the rest of the property to the surviving spouse, there is no impingement on the legitime. In Succession of Moore,\footnote{96} the deceased had done exactly that. Over arguments by heirs that their legitime had been infringed upon, the court concluded that since an encumbrance placed by law on the legitime could not violate article 1710 of the Louisiana Civil Code, the mere confirmation of such an encumbrance could not either. In Succession of Waldron,\footnote{97} the testator not only left the usufruct of the entire estate, consisting of his share in the community, to his wife, but also gave her the naked ownership of the disposable portion. In effect, this disposition included the disposable portion in full ownership and the forced portion in usufruct. The supreme court held, under the pre-1975 version of article 916, that the disposition was valid until the surviving spouse remarried.\footnote{98} Upon remarriage, the usufruct over the forced portion would convert into testamentary usufruct, and the question of impingement on the legitime would arise.\footnote{99}

\footnote{95} For the contrary view, see Comment, The Life Usufruct as an Estate Planning Tool, 45 La. L. Rev. 93, 103 (1984).

\footnote{96} 40 La. Ann. 531, 4 So. 460 (1888). See also Succession of Baker, 129 La. 74, 55 So. 714 (1911), involving questions of liability for inheritance taxes. The testator had given to his wife the disposable portion of his estate in perfect ownership and the remainder in usufruct. The court imposed tax on the disposable portion which came to the widow by way of "inheritance" and declared that no taxes were due on her usufruct over one-third of the deceased's share of the community, the part inherited by the sole forced heir. The court assumed, without discussion, that the widow received both the disposable portion in perfect ownership and usufruct of the remainder. Cf. Succession of Schrader, 94 So. 2d 317 (La. App. Orl. 1957).

\footnote{97} 323 So. 2d 434 (La. 1975).

\footnote{98} In such a case, article 1499 of the Louisiana Civil Code is inapplicable, because the burden on the legitime is permitted by article 890. Moreover, article 1499 cannot apply because the disposable portion is left to the survivor in full ownership. Article 1499 requires the forced heir to abandon to the donee the disposable portion in full ownership. But under the circumstances the forced heir "cannot abandon that which she does not own" and exercise of the option is not possible. Succession of Waldron, 323 So. 2d 434, 439 (La. 1975).

\footnote{99} The holding that the question of impingement in the legitime may arise only in case the surviving spouse remarries resembles the solution reached by the court of appeal for the fourth circuit in Succession of Chauvin, 242 So. 2d 340 (La. App. 4th Cir.), writ refused, 257 La. 857, 244 So. 2d 609 (1971), affirmed, 260 La. 828, 257 So. 2d 422
When the testator gave the usufruct of his entire estate to the surviving spouse, whether the disposition could violate the legitime of children of the marriage depended on the composition of the deceased's estate. If the entire estate consisted of the deceased's share in the community, the disposition was valid and not subject to reduction, for it only confirmed the operation of article 916. If the estate of the deceased was composed entirely of separate property, the disposition could be reduced at the option of the forced heirs under article 1499. In the latter case, the surviving spouse was entitled to receive the disposable portion in full ownership and the forced heirs their legitime in full ownership. If, finally, the estate was composed of both community property and separate property, and the forced heirs exercised their option to reduce the donation, the surviving spouse received the disposable portion in full ownership and the usufruct over that part of the forced portion which represented the deceased's interest in the community and was inherited by issue of the marriage. The forced heirs received their legitime in full ownership out of the separate property of the deceased and in naked ownership out of the deceased's share in the community.

**INCIDENTS OF THE LEGAL USUFRUCT**

**Application of the General Provisions Governing Usufruct; Exceptions**

In principle, the usufruct of the surviving spouse under article 890 is governed by the provisions in Title III, Book II of the Louisiana Civil Code. For example, questions concerning the liability of the usufructuary for lost things, termination of the usufruct on account of abuse of the enjoyment, availability of real and personal actions (1972), appeal after remand, 286 So. 2d 793 (La. App. 4th Cir.), writ denied, 293 So. 2d 166 (1974). According to the decision of the Louisiana Supreme Court in Succession of Chauvin, 260 La. 828, 257 So. 2d 422 (1972), which has not been disturbed by the decision in Succession of Waldron, 323 So. 2d 434 (La. 1975), a disposition that confirms the legal usufruct of the surviving spouse in community without a designation as to its duration terminates upon the remarriage of the usufructuary; hence, the question of impingement on the legitime at the time of remarriage could not arise under such a disposition.

101. For detailed discussion, see Yiannopoulos, supra note 3, at 521.
for the protection of the usufruct, the rights of the usufructuary to unharvested crops or ungathered fruits of trees, and the obligation of the usufructuary to contribute to the payment of the debts of the grantor are determined by application of the pertinent provisions of the Louisiana Civil Code as if the usufruct were conventional.

By way of exception, special rules apply to the creation and termination of the legal usufruct of the surviving spouse under article 890. Further, Louisiana jurisprudence and legislation have established other exceptions from the general provisions governing the usufruct of the surviving spouse, with respect to such matters as the liability of the surviving spouse for inheritance taxes, the obligations to make an inventory of the property subject to the usufruct and to give security, and the use and enjoyment of mineral rights.

**Security and Inventory**

Article 571 requires the usufructuary to post security to insure performance as a prudent administrator. Under the regime of the Louisiana Civil Code of 1870, courts declared that the surviving spouse usufructuary was not required to give security, relying on the provision

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109. See infra text accompanying notes 135-40.

110. See infra text accompanying notes 120-21.

111. See La. Civ. Code arts. 573 and 890. For the obligation of parents who have a legal usufruct of the property of their children to bear the expenses of litigation concerning that property, see La. Civ. Code art. 595.


113. See La. Civ. Code art. 571; id. art. 558 (1870); Succession of Carlisi, 217 La. 675, 47 So. 2d 42 (1950); Maguire v. Maguire, 110 La. 279, 34 So. 443 (1903).

that relieved parents who had the enjoyment of their minor children's property from giving security.115 This solution has been criticized as anachronistic.116 The rule was indeed developed when immovable property represented the bulk of the wealth, so that the probability of injury to the interests of the naked owners was slight. Today, when wealth consists mostly of movable values, the interests of the naked owners may be seriously prejudiced in the absence of some form of security. Nevertheless, article 573 has codified the prior jurisprudence. This provision, which dispenses with the obligation of legal usufructuaries to give security, accords with the basic philosophy of strongly favoring the interests of the surviving spouse that came into the law with the revision.

According to article 890, the surviving spouse is relieved of the obligation to give security only for a usufruct over the community property that was inherited by children of the marriage. If the usufruct is over any part of separate property or community property that has been inherited by descendants other than children of the marriage the survivor must furnish security for that part.

While the law dispenses with the obligation of security for a surviving spouse usufructuary, a survivor who serves in another capacity, such as executor, may be compelled to furnish security for that function. The Succession of Watson117 case illustrates the point. In that case, the deceased left the disposable portion of her estate to her surviving spouse as well as a lifetime usufruct over the forced portion, which she had bequeathed in naked ownership to her descendants. Although the deceased dispensed with the furnishing security by express testamentary provision, two forced heirs nonetheless sought security. The court seemed prepared to assume that the surviving spouse was relieved of the obligation to furnish security in his capacity as usufructuary. However, the court ordered the surviving spouse in his capacity as executor of the will to provide security under article 3154 of the Code of Civil Procedure, which governs the succession representative's obligation to post security. In the opinion of the court, this article establishes a mandatory rule of law that could not be derogated from by testament.118

In sum, the fact that the law did not require the survivor to post security in his capacity as usufructuary did not mean that the survivor was exempt from the law requiring security for executors.

Other obligations may fall upon the surviving spouse usufructuary. Article 570, which was added to the Code in the 1976 revision, imposes

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116. See Comment, supra note 21, at 884; Comment, The Repeal of the Louisiana Trust Act, 10 Tul. L. Rev. 110, 115 (1935).
117. 517 So. 2d 276 (La. App. 1st Cir. 1987).
118. Id. at 278. See also La. Code Civ. P. art. 3154.1, added by 1981 La. Acts No. 911, § 2 and No. 919, § 3.
the obligation to make an inventory on the usufructuary, and declares
that in the absence of inventory, "the naked owner may prevent the
usufructuary's entry into the possession of the property." 119 Louisiana
courts, however, have held under the corresponding provision of the
1870 Code that the failure of the surviving spouse to make an inventory
does not prevent him from acquiring the legal usufruct. 120 The analogy
of the parent's usufruct of the property of minor children is not followed
in this respect. 121

**Legal Mortgage**

The interests of the children as naked owners of property subject
to the usufruct of the surviving spouse may be protected by a legal
mortgage. If the surviving spouse has the natural tutorship of minor
children, the children have a legal mortgage under article 3314 of the
Civil Code. 122 Further, if the surviving spouse as tutor or tutrix chooses
to make an inventory, according to Louisiana jurisprudence a legal
mortgage arises under article 3318 of the Civil Code, "reckoning from
the closing of the inventory." 123

The *Canal Bank & Trust Co. v. Liuzza* 124 case is an example of
how courts have used the legal mortgage. In that case, a widow was
placed in possession of her husband's entire estate, consisting only of
community property; the widow held one-half of the estate as owner
and one-half as usufructuary. She delivered funds subject to her usufruct
to her brother for investment, but he squandered them. Later, she
borrowed funds from a bank by means of an unsecured note. In order
to effect a settlement with her children, the widow renounced the usufruct

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120. See Burdin v. Burdin, 171 La. 7, 129 So. 651 (1930); Thomas v. Blair, 111 La.
678, 35 So. 811 (1903); Heirs of Gryder v. Gryder, 37 La. Ann. 638 (1885); Succession
of Vialaud, 11 La. Ann. 297 (1856). However, the survivor is still under an obligation, as
any other usufructuary, to make an inventory. Saloy v. Cheynaide, 14 La. Ann. 567
(1859). And, if the survivor is not in possession of the property subject to usufruct, the
naked owners may refuse to deliver the property until the inventory is made. See Succession
121. It is submitted, however, that article 3350 of the Louisiana Civil Code, which
provides that "[B]efore fathers and mothers, who by law are entitled to the usufruct of
property belonging to their minor children, shall be allowed to take possession of such
property and enjoy the fruits and revenues thereof, they shall cause an inventory and
appraisement to be made of such property, and the same to be recorded in the
mortgage book of every parish in the State where they or either of them have immovable
property," should apply by analogy to the legal usufruct under article 890.
Code Civ. P. art. 4134 (c).
124. 175 La. 53, 143 So. 2 (1932).
and consented that her share of certain immovables go to the heirs in partial satisfaction of their share in the estate. The bank brought action on the note, alleging that the partition was made for the purpose of placing the property beyond the reach of the widow's creditors and asking that the transfer to the children be annulled. The supreme court refused to annul the transfer to the children. The court declared that since the children had a legal mortgage under article 3311 and 3318 "reckoning from the closing of the inventory" and could have recorded and foreclosed on the mortgage, the partition by the widow gave did not prejudice unsecured creditors.

The court also rejected the argument that since the inventory had not been recorded, the legal mortgage was ineffective against third parties.125

It is submitted that reliance on article 3318 is unwarranted; its language indicates that the purpose of the provision is to give the heirs protection in the period between death and appointment of an administrator, during which the property of the succession is entrusted to the care of the surviving spouse.126 Since the making of an inventory is a prerequisite for the operation of article 3318, the surviving spouse may render the remedy illusory by simply neglecting or refusing to make an inventory.

Duration of the Legal Usufruct of the Surviving Spouse

When a spouse dies intestate, article 890 confers on the survivor a legal usufruct over the community property that has been inherited by the descendants of the intestate. This usufruct terminates on the remarriage of the surviving spouse. However, according to article 890, a spouse may also by testament confirm a legal usufruct in favor of the surviving spouse over both community property and separate property, and may provide that the duration of that usufruct will be for life or for a shorter period. The question of the duration of a confirmed legal usufruct is an involved matter in Louisiana.

According to the first paragraph of article 890, a spouse may by testament confirm the legal usufruct of the surviving spouse over community property "for life or for a shorter period." Thus, a spouse enjoys freedom to determine the duration of the legal usufruct by an express testamentary provision. The duration of the usufruct may be set for life, for a certain term, or even for an uncertain term, but it may not exceed the lifetime of the usufructuary. When the testator does not designate a period for the duration of the usufruct, the legal usufruct

under the first paragraph of article 890 terminates upon the remarriage of the surviving spouse. 127

Prior to the 1975 amendment of article 916, lower courts and commentators, seeking to avoid termination upon the remarriage of the surviving spouse, had reached the conclusion that a confirmed legal usufruct was nevertheless testamentary insofar as its duration was concerned. However, there was no law, reason, or controlling authority for this inconsistency. The conclusion that a confirmed usufruct was testamentary and did not terminate upon remarriage ostensibly rested on two Louisiana Supreme Court decisions, *Smith v. Nelson* 128 and *Succession of Carbajal*. 129

Actually, neither decision supported the conclusion. In *Nelson*, the testatrix bequeathed a usufruct to her second spouse over her share in the second community, leaving the naked ownership to children of a former marriage. Article 916 clearly did not apply because the naked owners were not issue of the marriage. Hence, the usufruct was clearly testamentary, and the court correctly held that it had been granted for life. There was no question of confirmation of the legal usufruct by will in this case. The *Carbajal* court, citing *Nelson*, merely declared in a per curiam opinion that “the will being valid, the usufruct of the whole estate, given by will continues despite the second marriage.” There was no indication that the property was community. Moreover, the court’s opinion did not reproduce the language of the will, and the citation to *Nelson* indicated that the court was concerned with a purely testamentary usufruct.

Since neither *Nelson* or *Carbajal* supported the proposition that a legal usufruct confirmed by will was testamentary and did not terminate upon the remarriage of the usufructuary, there was no controlling Louisiana authority for that conclusion. In fact, the supreme court seemed to have rejected such a rule when, in *Succession of Moore* 130 it pointedly declared: “Next, Mrs. Moore will be entitled to the usufruct of the remaining share of the deceased in community during her widowhood, under the law, as confirmed by will”; and in the decree the court ordered that the widow “be declared entitled, during her widowhood, to the usufruct of the share of her husband, inherited by the issue of their marriage.” 131

128. 121 La. 170, 46 So. 200 (1908).
129. 154 La. 1060, 98 So. 666 (1924).
130. 40 La. Ann. 531, 542, 4 So. 450, 466 (1888).
131. Id. (emphasis added).
The court had the question directly presented to it in *Succession of Chauvin*.\(^{132}\) The testator in that case left his entire estate to his only son subject to a usufruct in favor of his wife. The will did not designate that the usufruct was for life. The entire estate consisted of the testator’s half interest in the community of acquets. When the surviving spouse remarried, the son filed a rule to show cause why his mother’s usufruct should not be declared terminated by application of article 916. He argued that the confirmation of a legal usufruct by will does not convert it into a testamentary usufruct, and, therefore, the confirmed usufruct ceases upon the remarriage of the usufructuary. The usufructuary argued that a legal usufruct confirmed by will is testamentary insofar as its duration is concerned; hence, it does not terminate upon remarriage. The Louisiana Supreme Court held that the disposition in favor of the surviving spouse merely confirmed the operation of article 916 and that the usufruct was legal. Therefore, the usufruct terminated in its entirety upon the remarriage of the surviving spouse.

According to *Chauvin*, a testator could, under the original text of article 916, choose to leave a usufruct for life over his share in the community to the surviving spouse, in which case the usufruct did not terminate on remarriage but was testamentary for all purposes. Alternatively, stated the *Chauvin* court, a testator could confirm the legal usufruct, in which case the usufruct was legal for all purposes and terminated on remarriage. The surviving spouse, however, could not choose to treat the usufruct either as legal or testamentary, depending upon which classification was most beneficial to that spouse’s interests.\(^{133}\)

The *Chauvin* holding—that when a testator grants to the surviving spouse in community a usufruct without specifying its duration, the usufruct is legal and terminates upon the remarriage of the survivor—was subsequently reaffirmed by the Louisiana Supreme Court in *Suc-

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132. 260 La. 828, 257 So. 2d 422 (1972). For commentary, see Yiannopoulos, The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Property, 32 La. L. Rev. 172, 194-99 (1972); Note, supra note 54. For disposition of the case on remand, see Succession of Chauvin, 286 So. 2d 793 (La. App. 4th Cir. 1974). The Louisiana Supreme Court refused writs, 293 So. 2d 166 (La. 1974), stating that “under the peculiar procedural posture of this case the result is correct.”

133. In a concurring opinion, Justice Tate expressed the view that when a spouse conferred a usufruct by will over his share of the community inherited by issues of the marriage, the usufruct of the surviving spouse was neither legal nor testamentary but it partook of the nature of both. Thus, it was legal to the extent that it did not violate the legitime of children prior to the remarriage of the surviving spouse; it was testamentary to the extent that it did not terminate upon remarriage and that it could infringe on the legitime if and when the surviving spouse remarried. One of the drawbacks of the majority solution, according to Justice Tate, was that identical language could create a testamentary usufruct or a legal usufruct, depending on the nature of the testator’s property as community or separate property. *Waldron*, 257 So. 2d at 427 (Tate, J., concurring).
cession of Waldron. But the Waldron court disclaimed dicta in Chauvin suggesting that a usufruct granted for life is ab initio testamentary for all purposes. According to Waldron, when a testator grants a usufruct for life over his share inherited by issue of the marriage to the surviving spouse, the disposition confirms the legal usufruct until the remarriage of the usufructuary. Upon remarriage, the usufruct is converted into a testamentary usufruct. The result is the same as if the testator had expressly confirmed the legal usufruct and had also expressly provided that in case of remarriage of the usufructuary the usufruct should become testamentary.

The Waldron interpretation remains relevant under the text of article 890. If the testator does not designate the period for the duration of the usufruct, the usufruct terminates on remarriage. But the testator may confirm the legal usufruct for life, in which case, the usufruct remains legal until the death of the surviving spouse.

Consistent and even-handed administration of justice ought to treat a confirmed usufruct as either legal or testamentary for all purposes. The question whether a confirmed usufruct is legal or testamentary may be resolved by application of the following tests. If the testator intended to give the surviving spouse what the law would have accorded the survivor in the absence of a will, the usufruct is legal. If, on the other hand, the intention of the testator was to alter the scheme of intestate succession and to give to the surviving spouse additional rights, the usufruct to that extent ought to be classified as testamentary. When article 890 does not apply, as, for example, when the usufruct attaches to property inherited by persons other than descendants of the deceased spouse, there should be no doubt that the usufruct is testamentary.

According to the second paragraph of article 890, a spouse 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." The third paragraph of article 890 indicates that such a usufruct "is to be treated as a legal usufruct." It is apparent that when a spouse dies intestate, the surviving spouse has no legal usufruct over the separate property of the deceased spouse. Thus, the second paragraph of article 890 advisedly uses the verb grant rather than confirm, because, in the absence of a testament, there is no usufruct over the separate property of a deceased spouse created by operation of law, and hence there is nothing to be confirmed. Normally, a usufruct created by a testament ought to qualify as a testamentary usufruct; however, according to the second and third paragraphs of article 890, the usufruct that a spouse establishes by a testament over his separate property in favor of the surviving spouse does qualify as a legal usufruct. The testator enjoys freedom to

134. 323 So. 2d 434 (La. 1975).
determine the duration of this usufruct so long as it is not extended beyond the lifetime of the usufructuary.

The duration of a surviving spouse usufruct over separate property that is granted without specifying the duration of the usufruct is not clear. Argument might be made that this is not a usufruct "authorized by this article," that is, by article 890, and therefore that the usufruct is testamentary, with all the concomitant disadvantages. It is preferable, however, to read the second and third paragraphs of article 890 in the light of the first paragraph of the same article, and to conclude that the usufruct should terminate upon the remarriage of the surviving spouse. The alternative solution, qualifying the usufruct as testamentary, would, in certain cases at least, be contrary to the intent of the testator.

**Taxation and the Usufruct of the Surviving Spouse**

The legal usufruct of the surviving spouse escapes the state inheritance tax. According to well-settled Louisiana jurisprudence, this usufruct is created by operation of law as an incident of the marriage rather than by inheritance,\(^\text{135}\) even when the legal usufruct is confirmed by testament.\(^\text{136}\) In *Succession of Norton*,\(^\text{137}\) the first circuit held that the surviving spouse is entitled to deduct the value of the usufruct even if the children renounce their inheritance and the surviving spouse acquires one-half of the community as heir of the deceased spouse. This decision has been criticized, for it implies, contrary to the Civil Code and the Louisiana jurisprudence, that the usufruct of the surviving spouse exists before the descendants of the deceased spouse inherit the com-


\(^{136}\) See *Succession of Baker*, 129 La. 74, 55 So. 714 (1911) (confirmation of legal usufruct by will is not sufficient to change the nature of usufruct into a testamentary one for purposes of taxation). See also *Succession of Brown*, 94 So. 2d 317 (La. App. Orl. 1957); *Succession of Lynch*, 145 So. 42 (La. App. Orl. 1932).

\(^{137}\) 157 So. 2d 909 (La. App. 1st Cir. 1963). In *Succession of Baker*, 129 La. 74, 55 So. 714 (1911), questioned in *Succession of Steen*, 508 So. 2d 1377, 1380 (La. 1987), deceased husband had bequeathed to his wife the disposable portion of his estate in full ownership and the remainder in usufruct. Since the only forced heir was a child of the marriage, the court held that the widow owed taxes on two-thirds of the deceased's separate property and on two-thirds of his share in the community property as owner, as well as on one-third of the deceased's separate property as testamentary usufructuary. No taxes were due on one-third of the deceased's share in the community property which the widow acquired in usufruct under article 916 of the Civil Code of 1870.
munity property.\textsuperscript{138} Norton must be regarded as overruled by \textit{Succession of Steen}.\textsuperscript{139} In Steen, the testator left the usufruct of his entire estate to the surviving spouse, and, in addition, the disposable portion of his estate in full ownership. The court held that the surviving spouse could not deduct the value of the usufruct from the disposable portion that she inherited in full ownership. The court also declared that, to the extent that its decision conflicted with \textit{Succession of Norton}, Norton was "incorrect."\textsuperscript{140}

In computing the value of the usufruct to be deducted from the gross estate, courts do not take into account the possibility of early termination of the spouse's remarriage. The value of the usufruct is determined merely on the basis of the usufructuary's life expectancy.\textsuperscript{141} It was clear under the regime of the Louisiana Civil Code of 1870 that the spouse could not deduct anything when the usufruct of the surviving spouse could not be created by operation of law, such as in the absence of children of the marriage.\textsuperscript{142} Under article 890, however, a court has held that a surviving spouse may deduct the value of a usufruct in her favor even though the deceased spouse left no descendants.\textsuperscript{143} This decision, relying on questionable dicta in \textit{Succession of Steen},\textsuperscript{144} obliterates completely the distinction between the testamentary usufruct and the confirmed legal usufruct. The decision also seems to imply that any

\begin{itemize}
\item \textsuperscript{138} See Comment, supra note 21, at 889.
\item \textsuperscript{139} 508 So. 2d 1377 (La. 1987).
\item \textsuperscript{140} Id. at 1380 n.15.
\item \textsuperscript{141} Succession of Baker, 129 La. 74, 55 So. 714 (1911); In re Stelly's Estate, 185 So. 637 (La. App. 1st Cir. 1939); cf. La. R.S. 47:2405 (1952 & Supp. 1989).
\item \textsuperscript{142} See Succession of Eisemann, 170 So. 2d 913 (La. App. 4th Cir.), writ refused, 247 La. 489, 172 So. 2d 294 (1965). Testator left his entire estate, consisting principally of community property to his wife. On the authority of the Norton case, the widow sought to deduct for taxation purposes the value of usufruct over the deceased's share in the community. The court declared that
\begin{quote}
Succession of Norton must be distinguished from this case. There, the existence of forced heirs created the usufruct of the surviving spouse by operation of law. Here in the absence of forced heirs, no usufruct ever existed.... We hold, therefore, that the inheritance tax due on the Succession of Ludwig Eisemann should be computed on the value of the whole property and there can be no deduction for a nonexistent usufruct by the surviving spouse.
\end{quote}
Id. at 915.
\item \textsuperscript{143} Succession of Daly v. McNamara, 515 So. 2d 661 (La. App. 3d Cir. 1987), writ denied, 519 So. 2d 119 (1988).
\item \textsuperscript{144} See Succession of Steen, 508 So. 2d 1377, 1379 (La. 1987):
\begin{quote}
[A]ny usufruct granted by a testator to a spouse is to be treated as a legal usufruct.... The jurisprudence, now codified by Article 890, holds that any usufruct in favor of a surviving spouse, whether passing by intestacy or confirmed by testament, is a legal usufruct. While a testamentary usufruct to a surviving spouse is a tax-free legal usufruct, other testamentary usufructs are subject to Louisiana inheritance taxes.
\end{quote}
\end{itemize}
usufruct in favor of a surviving spouse is a legal usufruct, which escapes Louisiana inheritance taxes. It would seem, however, that a usufruct in favor of a surviving spouse may be testamentary. For example, when the surviving spouse is given the right to convert a usufruct of non-consumables into a usufruct of consumables the usufruct is not one authorized by article 890.145 Hence, the usufruct is testamentary rather than legal, and it follows that the usufructuary should owe Louisiana inheritance taxes.

An income interest in trust given to a surviving spouse is treated, for Louisiana inheritance tax purposes, as equivalent to a usufruct. In Succession of Bellinger,146 the trust instrument gave an income interest for life to the settlor’s surviving spouse and designated the settlor’s descendants as principal beneficiaries. The instrument also conferred authority on the trustee to invade the principal for the maintenance and support of the income beneficiary, the surviving spouse. The tax collector claimed that the entire principal of the trust was taxable to the income beneficiary. The surviving spouse claimed that the income interest should be treated as a usufruct, which would be immune from taxation. The first circuit held that the part of the deceased’s disposable portion falling within the trust must be taxable to the income beneficiary because of the invasion provisions of the trust instrument; but the court went on to apply the tax rules relating to usufruct for that part of the trust that covered the forced portion. The court reasoned that income interest is synonymous with usufruct insofar as application of section 2405, Title 47, of the Revised Statutes is concerned, although the statute does not use either term. Likewise, the court equated a surviving spouse’s income interest in a trust containing the forced portion of an estate inherited by the children of the marriage to a legal usufruct under the Civil Code. Therefore, the court concluded, the income interest of the surviving spouse was partially exempt from inheritance tax liability.

Equating an income interest in trust to a usufruct may be correct for most purposes, including matters of taxation. One may question, however, equating an income interest in favor of the surviving spouse to a legal usufruct under the Civil Code, even if that income interest is attributed to the forced portion inherited by children of the marriage. The legal usufruct of the surviving spouse may be confirmed by will, and this confirmation does not convert the legal usufruct into testamentary. But it seems farfetched to say that the creation of an income interest in trust in favor of the surviving spouse merely confirms the

legal usufruct under the Civil Code. A will granting a usufruct over property inherited by descendants is quite different from an instrument creating an income interest in trust.

**Termination of the Usufruct; Causes**

In principle, the provisions of the Louisiana Civil Code dealing with termination of the enjoyment apply directly to the usufruct of the surviving spouse. Louisiana courts, however, stressing the social purposes underlying this legal usufruct, were frequently reluctant to apply the rules of the Civil Code governing termination of the enjoyment for abuse or loss of the things when the usufructuary was a surviving spouse. Thus, according to at least one Louisiana decision, when the surviving spouse abused her position as usufructuary by selling assets of the former community, the legal usufruct did not terminate; instead, it attached to the proceeds of the sale.

Under articles 614 through 616 of the Louisiana Civil Code, a usufruct does not terminate when the property subject to it is lost, extinguished, or destroyed through the fault of a third person; when it is sold by agreement between the usufructuary and the naked owner; or when it changes form without any act of the usufructuary, as in case of expropriation of an immovable or liquidation of a corporation. In such cases, as well as when proceeds of insurance are due on account of the loss, extinction, or destruction of property subject to the usufruct, the usufruct attaches to the proceeds. The naked owner, however, may demand that the money be safely invested within one year from the receipt of the proceeds by the usufructuary.

Quite apart from the provisions of the Civil Code governing termination of the usufruct, article 890 declares that the usufruct of the

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148. See Magee v. Gatlin, 51 So. 2d 154 (La. App. 1st Cir. 1951) (motor vehicles subject to the survivor's usufruct sold by the survivor); cf. Rosenthal v. Rosenthal, 436 So. 2d 670 (La. App. 4th Cir. 1983) (application of article 568 of the Civil Code perhaps questionable). The rule of the Magee decision has been adopted by article 568 of the Louisiana Civil Code, as revised in 1976, insofar as things that are gradually and substantially impaired by wear and decay are concerned. But article 623 of the same Code has overruled Magee in all other respects. Of course, it is a different matter when the survivor sells assets of the community to pay debts. The usufruct ought to attach the proceeds of the sale remaining after the payment of the debts by application of articles 590 through 592 of the Louisiana Civil Code, as revised in 1976.
149. For the rights of the usufructuary in case the property is destroyed by the fault of a third person, see Barry v. United States Fidelity & Guaranty Co., 236 So. 2d 229 (La. App. 3d Cir. 1970).
150. See La. Civ. Code art. 617. However, if the usufructuary or the naked owner has separately insured his interest only, the proceeds belong to the insured party. Id.
151. Id. art. 618.
surviving spouse terminates when that spouse contracts another marriage, unless the deceased spouse confirms the usufruct by testament for life or for a shorter period.\(^{152}\) Remarriage, then, can be an additional cause of termination of the legal usufruct, and the surviving spouse who remarries must account to the children for all fruits received after remarriage.\(^{153}\) If the surviving spouse dies without making an accounting to the children, the obligation for accounting may be covered by Louisiana Revised Statutes 9:3721, which excludes, subject to certain exceptions, parol evidence for the proof of "any debt or liability of a deceased person against his succession representative, heirs, or legatees when no suit enforce it has been brought against the deceased prior to his death."\(^{154}\)

**Epilogue**

An attempt was made in 1983 to amend article 890 for the purpose of clarifying its provisions. Senator Thomas A. Casey introduced Senate Bill 137, which provided

Civil Code Article 890 is amended and reenacted to read as follows:

**Art. 890. Usufruct of surviving spouse**

If the deceased spouse is survived by descendants, and shall not have disposed by testament of his share of the community property, the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants.

Regardless of the matrimonial regime that may exist between the spouses, a spouse may by testament grant to the surviving spouse a usufruct over all or part of his separate property that is inherited by descendants.

A usufruct authorized by this article terminates when the surviving spouse contracts another marriage, unless confirmed by testament for life or for a shorter period. A usufruct authorized by this article is to be treated as a legal usufruct and is not an impingement upon legitime.

If the usufruct authorized by this article affects the rights

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\(^{153}\) See Burdin v. Burdin, 171 La. 7, 129 So. 651 (1930); Succession of Gilmore, 154 La. 105, 97 So. 330 (1923); In re Tutorship of Davis, 22 La. Ann. 497 (1870); Succession of Heckert, 160 So. 2d 375 (La. App. 4th Cir. 1964); Succession of Franklin, 13 La. App. 289, 127 So. 767 (Orl. 1930).

\(^{154}\) La. R.S. 13:3721 (1968); Succession of Grubbs, 182 So. 2d 203, 205 (La. App. 2d Cir. 1966). See also Succession of Flach, 437 So. 2d 379 (La. App. 4th Cir. 1983) (no evidence of written promise to pay or other acknowledgment of debt by the deceased).
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.

The second paragraph of the proposed amendment would make it clear that a spouse may grant a legal usufruct to the surviving spouse regardless of the matrimonial regime that exists between them. Thus, in the interest of equal protection under the law, the benefits of article 890 would be extended to spouses living under a separate property regime.

The third paragraph of the proposed amendment would clarify the ambiguity of the present law concerning the termination of a usufruct granted to the surviving spouse over separate property without indication as to its duration. Under the proposed amendment, a usufruct over separate property would terminate, like a usufruct over community property, upon the remarriage of the surviving spouse, unless confirmed by testament for life or for a shorter period.

These modest amendments met resistance from professors and attorneys and were advisedly deferred.