

ARTICLES

2010 REVISION OF THE LAW OF USUFRUCT

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I. INTRODUCTION

Act No. 881 of the 2010 Regular Legislative Session of Louisiana adopted a comprehensive revision of the Louisiana Civil Code provisions on the law of usufruct, which are found in articles 535 through 629 of the Louisiana Civil Code. The revision is the result of a four-year study requested by the legislature in 2006, authorizing and requesting the Louisiana State Law Institute (the Institute) to study and make recommendations to the legislature on the laws of usufruct and naked ownership, expressly in light of Hurricanes Katrina and Rita. The law of usufruct was substantially revised in 1976 as part of the ongoing revision and modernization of the Louisiana Civil Code, which the Institute began years earlier. The 2010 revision does not effect a fundamental change in the Louisiana law of usufruct; instead it focuses primarily on clarification of the law and seeks to implement the legislative mandate by providing more modern and flexible rules that account for societal and legal developments that have taken place since 1976.

II. CAUSES AND EFFECTS OF THE 2010 REVISION TO THE LAW OF USUFRUCT

The devastation brought on by the hurricanes prompted the Institute to review and revise the law of usufruct, but the timing was especially opportune because it also enabled the Institute to review the entire law of usufruct and to determine important areas of the law that needed to be revised for other reasons. In the interest of clarifying uncertainties and removing potential ambiguities, the Institute took full advantage of the opportunity to clarify both minor and major matters.

A number of substantial changes in other areas of Louisiana

law since 1976 have impacted the law of usufruct. The enormous revision of the law of successions, donations, and wills over the last 25 years, which included the adoption of new rules regarding the payment of “estate debts” and the removal of a number of archaic terms and phrases in succession law, illustrates such changes. Also, the upheaval or “revolution” regarding forced heirship, which began in 1989 and culminated in 1997, made the 2010 revision of usufruct law especially important regarding a surviving spouse. With the passage of time, it became apparent that some of the innovations in the law of usufruct—hailed when they were implemented in 1976—had unanticipated consequences and had given rise to practical problems and theoretical issues that, in retrospect, needed clarification. Apart from the immediate issues regarding hurricanes and other natural disasters, the task of revising the law of usufruct proved to be a great deal more complicated and more sophisticated than expected. Although the 2010 revision of the law does not represent a radical departure in the law of usufruct, it is nevertheless truly *comprehensive*, not merely cosmetic or stylistic. It is a progressive step in modernizing the rules to make them more practical, workable, theoretically consistent, and, one hopes, clear than before.

Some of the changes made necessary or appropriate by developments in the law since 1976 are as follows. Article 549 changes the term “legal entity” to “juridical person,” a seemingly minor change, but one that is consistent with the new designation of “person” in Civil Code article 24.¹ The change has some importance in the thirty-year limitation of a usufruct in favor of a juridical person (formerly a “legal entity”) or with reference to the dissolution of a “juridical person.”²

In 1976, article 553 resolved an unsettled issue and clarified the law to provide that the usufructuary has the right to vote shares of stock.³ In 2010, the article needed to be amended to recognize innovations regarding forms of business associations other than corporations and to clarify rights that technically do not constitute “voting” but are akin to it. The new article expands the effect of the rule to include the new business entity, the limited liability company, which in its short existence has far surpassed the corporation in popularity as a form of business

1. LA CIV. CODE ANN. art. 549 (2011); LA CIV. CODE ANN. art. 24 (2011).

2. See LA. CIV. CODE ANN. art. 608 (2011).

3. LA. CIV. CODE ANN. art. 553 (2011).

organization. It also recognizes that in other juridical entities the usufructuary may exercise rights that are similar to voting rights in corporations, such as management.

Before 1976 a usufructuary had only a limited power to dispose of nonconsumable property without the consent of the naked owner. The power was limited to items that were subject to decay as a result of depreciation or wear and tear. The 1976 revision greatly expanded the rights of usufructuaries by providing that the grantor of a usufruct could authorize the usufructuary to “dispose” of nonconsumable property. In the context of the 1976 revision, it was generally assumed at the time that the new “power to dispose” essentially referred only to the power to sell, but that limitation was not express. The language of the 1976 revision failed to address whether the “power to dispose” included the power to grant a mortgage or security interest or lease the property beyond the term of the usufruct, all of which were “dispositions”; thus, the revision also failed to address the ramifications of such actions.

The “power to dispose” has become increasingly important over time, especially in the area of forced heirship, where it may significantly affect the rights of a forced heir. It is now clear that the grant of such power to a surviving spouse who has a usufruct over property that is part of a forced heir’s legitime does *not* constitute an impingement on the legitime.⁴

Articles 568 through 568.3 of the 2010 revision now provide detailed rules on the “disposition” of nonconsumable things by the usufructuary.⁵ The revision does not change the rule that the usufructuary may *not* dispose of nonconsumables unless the power has been granted to him,⁶ but it substantially revises the rules in other ways. Before the revision, article 568 simply provided that after the sale of nonconsumables by the usufructuary, the usufruct became a usufruct of “money,” a result that is consistent with the idea that “disposition” was intended only to include sales. Article 568 of the 2010 revision now makes it clear that the right to “dispose” of a nonconsumable is not limited to sales. Rather, it includes the rights to alienate, lease, and encumber the thing but does not include the right to donate

4. LA. CIV. CODE ANN. art. 1499 (2011).

5. LA. CIV. CODE ANN. art. 568-68.3 (2011).

6. LA. CIV. CODE ANN. art. 568 (2011).

the thing, unless *that* right is expressly granted.⁷ These new articles provide specific rules governing the effects of alienating property,⁸ encumbering property,⁹ and leasing property subject to the usufruct beyond the termination of the usufruct.¹⁰ Those new provisions are discussed in greater detail in the redactor's comments to the articles themselves.¹¹

Article 577 adds "force majeure" as a cause for need of ordinary repairs for which the usufructuary is responsible.¹² Although the term "force majeure" is French, it has an accepted meaning in both common law and civil law jurisdictions, particularly in the area of insurance law. The term means a superior or irresistible force. The addition of this term is an important and useful innovation, particularly in light of natural events such as hurricanes, which did not properly fit under the category of "accident." Similarly, article 583 now includes "force majeure" in the list of causes of total destruction of property for which restoration of the property is not mandatory,¹³ and article 613 now includes "force majeure" to the causes of loss of property for which a usufruct terminates.¹⁴

Most usufructs arise when a person dies and are created either by testament or under the laws of intestacy. However, a usufruct may be established by donation *inter vivos*, and there are slightly different rights and duties imposed on the usufructuary whose usufruct is established *inter vivos* instead of *mortis causa*.

The 2010 revision preserves the distinction between consumable and nonconsumable things, a distinction that has proved to be useful and workable. It also preserves the obligation of a usufructuary to act as a prudent administrator.¹⁵

The distinction between the kinds of fruits, natural and civil, is preserved, and the rules regarding apportionment of fruits have not been changed. Rules regarding improvements and

7. LA. CIV. CODE ANN. art. 568 (2011).
8. LA. CIV. CODE ANN. art. 568.1 (2011).
9. LA. CIV. CODE ANN. art. 568.3 (2011).
10. LA. CIV. CODE ANN. art. 568.2 (2011).
11. See LA. CIV. CODE ANN. art. 568-68.3 (2011).
12. LA. CIV. CODE ANN. art. 577 (2011).
13. LA. CIV. CODE ANN. art. 583 (2011).
14. LA. CIV. CODE ANN. art. 613 (2011).
15. LA. CIV. CODE ANN. art. 539.

alterations are preserved, as are the rules regarding liability for repairs, whether ordinary or extraordinary.

All of the changes are discussed in the redactor's comments to the various Code articles, which explain why the Institute believed that a change was needed and what change was made. Taken item by item, or article by article, the general trend of changes in the law may not be as apparent as a broad view will demonstrate. Essentially, law regarding the usufruct has changed considerably over the years, especially the last fifty, and today the usufruct differs substantially from the usufruct as it existed over the previous 2,000 years in Rome, France, and Louisiana. The metamorphosis occurred for a number of reasons, some sociological, some technological, some legal. Among other things, changes in the nature of the family, the emancipated role of women, the forms of wealth, and the widespread acceptance of the trust in Louisiana since the adoption of the Trust Code in 1964, have all caused the law regarding the usufruct to evolve into an almost new and different institution. The revisions of 1976 and 2010 have recognized the changing nature of the usufruct and in response have made the law more workable when usufruct is appropriate. The attorney who practices law in this area needs to be aware of these new provisions and consider carefully their application in planning.

III. LARGER IMPLICATIONS OF THE REVISION

Civil Code article 568 was amended in 2010 to clarify the rules regarding disposition of nonconsumable things. The second paragraph now provides: "The right to dispose of a nonconsumable thing includes the rights to lease, alienate, and encumber the thing. It does not include the right to alienate by donation *inter vivos*, unless that right is expressly granted."¹⁶

The first paragraph of Civil Code article 568, as amended, retains the general rule that a usufructuary may not dispose of nonconsumable things unless the right has been expressly granted, but it includes exceptions for the disposition of corporeal movables that are gradually and substantially impaired by use, wear, or decay.¹⁷ It continues the rule that a usufructuary may dispose of nonconsumable property subject to the usufruct if the right has been expressly granted.¹⁸ The "right to dispose" can

16. LA. CIV. CODE ANN. art. 568 (2011).

17. LA. CIV. CODE ANN. art. 568 (2011).

18. *Id.*

only arise in the context of an *inter vivos* usufruct or a testamentary usufruct; it does not apply to a usufruct of community property that arises under the law of intestacy.¹⁹ The provisions of new article 568 are amplified in three corollary articles: Civil Code article 568.1,²⁰ Civil Code article 568.2,²¹ and Civil Code article 568.3.²²

Civil Code article 568.1 addresses the rights and obligations of the usufructuary and the naked owner when nonconsumable property has been donated or otherwise alienated by the usufructuary of such property.²³ In the event of a donation, the article provides that at the termination of the usufruct the naked owner is entitled to receive the value of the donated property, as of the time of the donation.²⁴ The right to donate the property is not included in a grant of a “power to dispose”; it must be expressly provided.²⁵ For alienations other than a donation, such as a sale or an exchange of property, the article provides that the usufruct attaches to the proceeds of a sale, such as cash, or to property received by the usufructuary as a result of an exchange. In the event that property is received by the usufructuary, the property received is classified as consumable or nonconsumable, and the usufruct remains in place, subject to the provisions of the original act that established the usufruct and other applicable law. For example, the Civil Code distinguishes between consumable property and nonconsumable property, and those distinctions apply to property received in an exchange.

Estate planners should note that if the value of the property received by the usufructuary, whether movable or immovable, is *less* than the value of the nonconsumable property alienated by the usufructuary (at the time of the alienation), then the usufructuary must pay the difference in value to the naked owner when the usufruct terminates. At first glance this provision may appear to be onerous, and even to contain a so-called “ticking

19. LA. CIV. CODE ANN. art. 890 (2011).

20. LA. CIV. CODE ANN. art. 568.1 (2011) (dealing with donations and other alienations).

21. LA. CIV. CODE ANN. art. 568.2 (2011) (dealing with the right to lease).

22. LA. CIV. CODE ANN. art. 568. 3 (2011) (dealing with the right to encumber the property).

23. LA. CIV. CODE ANN. art. 568.1 (2011).

24. *Id.*

25. MAX NATHAN JR. & CARROLL NEFF, LOUISIANA ESTATE PLANNING, WILL DRAFTING AND ESTATE ADMINISTRATION WITH FORMS (2nd ed. 2004); *see* Form 15.3.6.5 “Usufruct to Surviving Spouse with Power to Donate.”

time bomb,” because the usufructuary may not know whether it will apply and may owe money to the naked owner until the usufruct terminates, which could be years away.

Obviously, there are more difficult problems of proof of the value of the property alienated at the time of the alienation if the valuation is not made until years later. In addition to potentially serious proof difficulties, the possibility for expensive litigation is inherent in the rule because of the need for expert testimony. Nonetheless, this rule does clarify what was previously uncertain, and it does set forth parameters of which the estate planner must be aware. The potential for litigation may be even riskier, given that the Civil Code does not require the usufructuary to notify the naked owner when he disposes of nonconsumable property, but it should be noted that former law did not require such notification either. As a result, it may be difficult for a naked owner to fully protect his rights if he is entitled to more than the value received by the usufructuary.

Potential litigation is also quite serious because the prescriptive period for an action by the naked owner against the usufructuary would appear to be ten years under Civil Code article 3499,²⁶ and that time period would not begin to run until the usufruct terminates. For all these reasons, when the legitime is not involved, it may be preferable for an estate planner to review the alternatives with the client and design a remedy that suits the client, i.e., tailor the pattern to suit the cloth.

The rules may be a matter of public policy where the naked owner is a forced heir and the usufruct applies to property that is part of his legitime. But, in my opinion, if the property is not legitime, then the provisions are suppletive and may be varied by the testator who grants the usufructuary the “power to dispose.” For that reason, I have proposed that, in a suitable case, the testator may want to provide that the usufructuary has no duty to reimburse the difference in value to the naked owner when the usufruct terminates and that the obligation may, instead, be limited to the usufructuary’s paying of the value he received with no obligation to pay more than that, even if what he receives is less than the value of the nonconsumable property that he alienated.

In the situation outlined above, there may still be a serious

26. LA. CIV. CODE art. 3499 (2011).

issue of whether the usufructuary has acted as a prudent administrator in alienating property for less than its fair market value. However, since the grantor of the usufruct could have left the property in full ownership to the usufructuary instead of leaving a usufruct—because it did not constitute the legitime of a forced heir—then, in one sense, the legacy constitutes little more than a legacy of what remains at the termination of the usufruct. This has long been recognized as valid in the so-called *substitutio de residuo* or the *substitutio de eo quod supererit*.²⁷

With regard to the right to lease, the usufructuary has always been able to lease nonconsumable property, but the problem has been that the lease would terminate when the usufruct terminated. Article 568.2 clarifies that a usufructuary with the right to dispose may lease property for a term that extends beyond the term of the usufruct.²⁸ Thus, if the usufructuary grants a ten-year lease, and the usufructuary dies five years after signing the lease, the lessee is fully protected for the balance of the lease term. One of the major benefits of the adoption of article 568.2 is that it assures tenants of the stability of their leases.

The problem from a usufructuary's standpoint, however, is one of uncertainty: if the property remains subject to the lease at the termination of the usufruct, then the usufructuary is accountable to the naked owner for any "diminution" in the value of the property at that time attributable to the lease. Without a crystal ball, no one knows when the time will be relevant or what rental conditions will be at that time. Again, the potential for litigation is serious because the value of the property at that time and the extent of the diminution in the value, if any, would undoubtedly require expert testimony; thus, there could be expensive litigation if the problem occurs.

I do not believe that this is a matter of public policy except when it applies to property that is the legitime of the naked owner. It should be observed, however, that the usufructuary may be required to act as a prudent administrator, and, arguably, a lease of the property for an extraordinarily low price may be in violation of that duty. Another solution is to have the naked owner join in the lease, but that may be cumbersome or

27. See LA. CIV. CODE ANN. art. 1520 emt. C (2001); LA. CIV. CODE ANN. art. 568.2 (2011).

28. LA. CIV. CODE ANN. art. 568.2 (2011).

undesirable, if not impossible. Thus, advising the testator to regulate the remedy will probably be the preferable approach.

Regarding the ability to grant an encumbrance on the property, Civil Code article 568.3 provides that, when the usufruct terminates, if the thing subject to the usufruct is burdened by an encumbrance that is established by the usufructuary to secure an obligation, the usufructuary is “bound to remove the encumbrance.”²⁹ It should be noted that this requirement does not automatically remove the encumbrance; rather, it obligates the usufructuary to remove it.³⁰ Since the usufructuary presumably received the proceeds of the encumbrance and benefitted from them, the obligation is properly imposed on the usufructuary to remove the encumbrance. For reasons discussed above, unless the property of the naked owner is part of his legitime, then this provision may not be invariable as a matter of public policy, but may be relieved in whole or in part by the grantor of the usufruct.³¹ Also, if the usufructuary replaces a pre-existing mortgage by refinancing it with a new mortgage, then the usufructuary will be entitled to a credit for the payment that he made of the pre-existing encumbrance.³²

IV. CONCLUSION

The usufruct law adopted in 2010 is highly beneficial in the sense that it clarifies areas of uncertainty and protects the security of transactions. But a careful attorney needs to be familiar with the solutions that have been adopted and with their implications for both usufructuaries and naked owners. They are solutions, but not perfect solutions in the sense that “one size fits all.” A testator may prefer a different result from the legislatively adopted result, and, if so, he may be well advised to fashion his own remedy when he is able to do so (e.g., where the naked owner is not a forced heir). But if the settlor merely grants the usufructuary a “power to dispose,” then, under the new law, at least the rights and obligations are now known so a usufructuary can plan intelligently, as can third parties. The solutions are commercially reasonable and represent legitimate tradeoffs to balance the interests of the usufructuary, the naked

29. LA. CIV. CODE ANN. art. 568.3 (2011).

30. *Id.*

31. MAX NATHAN JR. & CARROLL NEFF, LOUISIANA ESTATE PLANNING, WILL DRAFTING AND ESTATE ADMINISTRATION WITH FORMS (2nd ed. 2004); see Form 15.3.6.5 “Usufruct to Surviving Spouse with Power to Donate.”

32. *Id.*

owner, and bona fide third parties like mortgagees, lessees, and third party purchasers. Louisiana has every reason to be justly proud of the way it has adapted an old and honored institution so that it is a useful, functioning, and modernized institution—one that is theoretically consistent internally and workable practically.