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Of Personal Servitudes

from the desk of David M. Touchstone

Last month we had a discussion about the nature of predial servitudes. At the end of that article, I promised you an article on personal servitudes.

So just what the heck is a "personal servitude"? Before I answer that, let me digress for a moment. One of the things I love about the civil law, especially as it has developed in the Great State of Louisiana, is how simple and accessible it is. When clients ask me a legal question, I often tell them I will read the pertinent law to them and it will answer their question. At this point they usually get a pained look on their face which gradually softens as I begin reading to them. When I finish, the client will usually say something along the lines of "Well, that's pretty simple". It is simple. Our law is so beautifully written that any educated person can usually understand it. So, let's get back to the point. What is a "personal servitude"? We'll let the law itself answer the question. Article 534 of the Louisiana Civil Code states: "A personal servitude is a charge on a thing for the benefit of a *person*. There are three sorts of personal servitudes: usufruct, habitation, and rights of use." There are two really important concepts laid out in this law: (a) that a personal servitude exists for the benefit of a *person*, and (b) and an enumeration of the three types of personal servitudes: usufruct, habitation, and rights of use.

Let's first talk about the idea that a personal servitude is for the benefit of a person. This is to be contrasted with a predial servitude. If you recall from last month's article, a predial servitude is a charge on an estate for the benefit of *another estate*. The effect of a predial servitude is that whoever may own the beneficiary estate ("dominant estate"), as the ownership of that estate should change from time to time, automatically has a right against the benefactor estate ("servient estate"), as ownership of that estate should change from time to time. If you think about it, a predial servitude can potentially last a very long time. For instance, if an owner grants a servitude of passage across his property for the benefit of a landlocked tract and owners of that landlocked tract are still traversing the servitude 200 years later, that will serve to maintain the legal enforceability of the servitude of passage. On the other hand, a personal servitude such as usufruct or habitation will terminate, at the latest, on death of the grantee (owner of) the right.

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Well, let's get into the three different types of personal servitude: usufruct, habitation, and rights of use. More to the point, let's get the two minor versions of personal servitudes out of the way. For our purposes, rights of use are the most insignificant because issues related to rights of use will seldom show up on your radar. Nowadays, rights of use are generally applicable to pipelines, utility company rights of way, and water line and sewer line rights of way in favor of local governments. A distinction has been made in the law to refer to these as "rights of use" (though for our purposes they function like predial servitudes) so as to maintain the full transferability of these rights and to avoid their termination as a result of the passage of time. For, as you will see as we continue this

article, there *are* limits on transferability as well as time limits on the other personal servitudes of habitation and usufruct.

So, what's a right of habitation? Again, I'll let the Civil Code answer the question. Article 630 of the Civil Code describes it thusly: "Habitation is the non-transferable real right of a natural person to dwell in the house of another". This requires some explanation. When Article 630 says habitation is a "real right" what it means is that it is a right against the house itself, so that *no matter who may be the owner of the house*, the owner of the right of habitation will be entitled to dwell in the house. Of course, this rule is subject to the rule of recordation. By this, I mean that if a right of habitation is created, the document that creates it must be filed in the records of the parish clerk of court in order for the owner of and future owners of the house to be bound by it. A pause for reflection is in order here. Title lawyers are understandably pretty nervous about rights of habitation. If there is a document in the chain of title which contains within it the creation of a right of habitation, that can really cause problems. If we have handled the sale of a property that has an outstanding right of habitation in the chain, and a year after we close, Professor Bittleman who has been on a two year research sabbatical in Austria shows up to move back into the house for which his Aunt Matilda granted him a right of habitation 25 years ago, well……you get the picture. It won't be pretty. So, when do these things go away? I guess I'm being lazy here, but again, I'll let the Code do the work. Article 638 states: "The right of habitation terminates at the death of the person having it unless a shorter period is stipulated". Oftentimes, in our title search we find a right of habitation that has never been terminated as a matter of public record, but has unofficially terminated because the owner of the right has died. When this is the case, we obtain an affidavit signed by two persons who knew the owner of the right of habitation; the affidavit will be to the effect that the owner of the right of habitation has died. We record the affidavit with the parish clerk of court and that's that. Just for fun, let's consider a worst case scenario. Suppose you and I were to handle a sale and just miss one of these rights of habitation? Let's say that Professor Bittleman shows up with all his bags and other stuff ready to move back in. Well, if the grant from Aunt Matilda to the good Professor granted him the right of habitation "to the house", that means the whole thing. In this case, the Professor will have *exclusive* use of the house. On the other hand, if the grant of the right from Aunt Matilda to the Professor is of a *nonexclusive* use of the house, then the buyer at our closing will get to share the house with the good Professor. Likewise, if Aunt Matilda's grant to the Professor was of "the master bedroom". It gets worse. Article 633 of the Code says: "A person having the right of habitation may reside in the house with his *family*, although not married at the time the right was granted to him." And even if the Professor was granted only a portion of the house, Article 634 tells us that the Professor "…may receive friends, guests, and boarders".

Fortunately, rights of habitation only pop up from time to time. The right of usufruct, however, well, that's a horse of a different color. There's probably not a title in this state that hasn't at one time or another been subject to a right of usufruct. But let me try to put myself in your shoes for a minute. What is this really strange sounding word? Like so much of our civil law, it goes back to the Romans. The word "usufruct" is literally the combination of two Latin words "usus" and "fructus". Fortunately, the meanings of these two Latin words are pretty similar to their English cousins "use" and "fruits". A person having a right of usufruct is entitled to use the thing and to take and keep any fruits that the thing produces during the term of the usufruct. Let's say that someone is granted the right of usufruct to a tract of land that has a farmhouse, pond, and pecan grove. The owner of the right of usufruct (who we call the "usufructuary") will be entitled to live in the farmhouse, ride his horses, four wheelers, and F-150 all over the farm, catch all the fish in the pond, and keep all the pecans. He won't be entitled to sell the farm, mortgage the farm, cut down the pecan orchard, drain the pond, or raze the farmhouse. The usufructuary is said to have the usus (use), and fructus (fruits), but not the "abusus" (another Latin word, the meaning of which is the power to alienate or encumber). While the usufructuary has the rights of usus and fructus, someone else has the power of abusus; we call that someone else the "naked owner". Well, our legal words may be a little strange, but at least they're kind of sexy. What is the naked owner able to do with his right of abusus? Not very much, it turns out. If the usufructuary has an exclusive right of usufruct, the naked owner can't even go on the property without permission of the usufructuary. So the naked owner just has to sit around and wait. Well, you might be asking yourself: "Wait for what?" The answer is: "Wait for the usufruct to end." Usufructs end accord-

ing to the term in the document or law that creates them. It is possible for a person to create a usufruct for a specific time period, say ten years. It is possible to create a usufruct that will terminate at some time in the future when a certain event occurs, such as a usufruct created in a will that says the usufruct for the benefit of a spouse will end if the spouse should remarry. What isn't possible is to create a usufruct that lasts beyond the end of the usufructuary's life. Every usufruct must end, at the latest, when the usufructuary dies. In the case of people, an exception to this rule, and the only exception to this rule, is a usufruct created for the benefit of multiple persons. For instance, let's say that Tom makes a donation along these lines: "I hereby donate a right of usufruct in the old home place to my brothers, Dick and Harry". If Tom didn't say anything else, Dick and Harry will share the usufruct. When Dick dies first, then Harry will succeed to the entirety of the usufruct right. When Harry dies, the property will be free of the usufruct and Tom's three kids Huey, Dewey, and Louie will take possession of the property (because Tom died without a will). If you are really clever and a careful reader, you may have noticed that I began one of my sentences with "In the case of people…" I did this because not all usufructs are for the benefit of people; sometimes they are granted to entities such as corporations, limited liability companies and so forth. Since entities can last a very long time, the law has supplied an arbitrary drop dead provision. The law states that a usufruct granted to an entity terminates if the entity ceases to exist or thirty years transpire after the commencement of the usufruct.

So far all our examples of things subject to a usufruct have been real estate. But what about other kinds of property? For example, what about a usufruct over cash or stocks and bonds? This brings us to a fork in the analytical road. A usufruct may be either over "consumables" or "nonconsumables". Article 536 of the Code tells us that consumables are those things "that cannot be used without being expended or consumed". Article 537 of the Code tells us that nonconsumables are those things "that may be enjoyed without alteration of their substance…" So, obviously, cash is a consumable. There's not a whole lot you can do with cash other than spend it and by "cash" I mean money in the bank or any other form of liquidated funds. But, you might be asking yourself, what about the naked owner? Isn't the naked owner the guy who really *owns* the cash? "Yes" is the answer. Here is the way it works: the usufructuary gets the cash and can spend every last nickel of it, but at the end of the usufruct, the usufructuary is obligated to restore the principal amount of cash to the naked owner. The usufructuary is entitled to keep any interest he may have earned, but is obligated to turn over to the naked owner the amount of cash he received at the beginning of the usufruct. "But, wait" you may be asking yourself "don't a lot of usufructs end with the death of the usufructuary and how will a dead usufructuary pay the money back if he's dead?" It's just like the national debt; you and I won't pay it back. We're leaving that to the kids and grandkids. When mama who received $10,000 in usufruct, and who blew through it like a kid in the cookie bag, dies, her heirs are stuck with paying it back (out of mama's estate, if she had anything when she died). What about stocks and bonds? The usufructuary is entitled to the stock dividends and the bond coupons, but the usufructuary is not entitled to sell these securities. In the case of stock, the usufructuary is also entitled to vote the stock. I'm not going to try to address every kind of property and how the law of usufruct would treat it; that's beyond the scope of this article. I thought I would give you a couple of examples to outline the concepts. However, there is one other type of property right I would like to address because all of us are receiving so many questions about it. I am speaking of mineral rights. While there are some wrinkles and curlicues that can vary the outcome, the general treatment of mineral rights held in usufruct is this: if there was already oil or gas production at the time the usufruct came into being, the usufructuary is entitled to the revenue stream that would otherwise have been received by the person who created the usufruct. On the other hand, if there is no mineral production at the time the usufruct is created, the usufructuary cannot create new mineral rights and will not be entitled to any revenue generated by mineral rights that were in place before creation of the usufruct but which were not actually producing oil or gas prior to the creation of the usufruct. One pretty major exception to the foregoing rule is that surviving spouses who have the right of usufruct over land owned by their deceased spouse are entitled to the benefits generated by mineral production whether it was in place prior to the granting of the usufruct or came on line after the creation of the usufruct. Even in the case of the surviving spouse, however, no mineral lease can be granted by the surviving spouse without the agreement of the naked owner. I recommend that if you are asked a question about the rights of parties as to minerals subject to a usufruct that you don't try to answer the question yourself; you should

direct your client to an attorney familiar with these matters.

Since I've raised the issue of surviving spouses and usufructs, I think it is time that we plunge into that topic. After all, that is what most of you will be encountering most frequently in your profession. Louisiana law provides that if a spouse dies intestate (without a will) survived by descendants, his interest in community property will descend to his descendants burdened with a right of usufruct in favor of the surviving spouse. There is no distinction as to whether the descendants are those of the deceased spouse alone or are the descendants of both the deceased spouse and the surviving spouse. On a number of occasions I have handled closings in which there was friction between the surviving spouse and his/her own children (who were also children of the deceased spouse). But those situations pale against the closings we have handled in which the children of the deceased spouse are not the children of the surviving spouse. Some of the closings in this latter category have been pretty nasty. What does this mean for you? First, you need to be very careful at the time you take a listing on property in which there is a deceased spouse. When you hear this, you need to inquire as to whether the succession of the deceased spouse has been filed. If the succession has been filed and completed it will behoove you to review it so that you have a really good handle on who has interests in the property you are listing and what are the interests of the various heirs. If no succession has been filed, you should get an attorney involved as quickly as possible to help you safely sort out who has an interest in the house. Also, you should inform your clients that a succession will have to be filed prior to the sale of the property and the sooner the heirs hire counsel and get moving with it, the better. Whether the succession has been filed or not, obviously, you need to get your listing signed not only by the surviving spouse, but also from all the heirs. If I were an agent handling this type of listing, at the same time as I obtained signatures on the listing agreement, I would also get everyone involved to sign a document stipulating how the money from the sale will be divided. There are a couple of reasons for this. Sometimes one of the heirs has spent extra money or done extra work on the property and is owed a reimbursement. Getting this settled at the beginning can prevent later strife. But the main reason for getting all of the folks involved to sign a disbursement agreement at the time of the listing is to be found in Code Article 6l6: "When property subject to usufruct is sold…by agreement between the usufructuary and the naked owner, the usufruct attaches to the proceeds of the sale unless the parties provide otherwise." What this means is that, without agreement between the heirs and the usufructuary, the usufructuary gets *all the money* from the sale. So let's work one of these situations through. Example: Husband had three children by a prior marriage. Husband remarries and purchases a home with his second wife (who we will call "Wife"). Husband dies without leaving a will and Wife calls you to list the property. The succession has been filed sending all persons into possession of their respective interests. You review the succession papers and realize that you have to get the three kids to sign the listing agreement. During your listing appointment with the kids they ask you what they will receive from the sale of the house. You tell them that Wife will receive one half of the net proceeds (for her one half interest in the former community) and the kids will each receive one sixth of the net proceeds. Based on your representation to the kids, they sign the listing agreement. Thereafter, you find a buyer and Wife and the three kids sign the buy/sell contract. A little before the closing there is a conversation between one of the kids and their stepmother, the wife. During the conversation, Wife tells the kid that she intends to get all the net proceeds from the closing because, after all, she owns one half of the house in her own right and has a right of usufruct over the other half. The kid objects vehemently and calls you to see if Wife is entitled to get all the net proceeds. You decide to check this out a little more closely and call me at which time I sadly inform you that Wife is entitled to get all the money. You then ask me if the kids are obligated to go forward with the deal and I tell you that they are because they have signed a contract which the buyer is entitled to enforce—in court, if necessary. Meanwhile, all three kids have consulted with their own attorney who gives them the same sad news as I gave you. The day before you attend the closing you find out Wife is a gambleholic and that there is no way that the three kids will ever see their share of the proceeds. By the time Wife dies there won't be a farthing in her estate. The other thing the kids' attorney told them is to sue you after the dust settles. Remember, you were the one who told them that they would each get a sixth of the proceeds and you were the one who failed to inform them that without an agreement as to distribution of the proceeds the default position of the law is that the usufructuary gets the money. Remember, the kids told you that they weren't interested in listing or selling the property

unless they could get their shares. This problem comes up more often than you think.

That's enough drama for a while. Although there are about a million other things we could discuss about usufruct, we'll have to forgo the rest of it due to space limitations. But there is one other thing I want to bring to your attention. If you recall, I told you that a usufructuary does not have a right of disposition of nonconsumables. That means that *ordinarily* a usufructuary has no power to sell the interests of naked owners in real estate. However, it is possible to create a usufruct in which the usufructuary is specifically granted the right of disposition. I call this a 568 usufruct because Article 568 of the Civil Code is the source of authority for the grantor to create this type of "superusufruct". When a usufructuary has been granted a 568 usufruct, we don't need the naked owners to list the property, to sign the buy/sell contract, or to sign the deed.

Well, I've had a lot of fun writing this, but it's time to sign off. Next month we'll talk about a timely subject – how bankruptcy affects real estate rights.