

Usu-what?

Ever heard of “usufruct”? (It is pronounced “you’ su fruckt.”) Likely you have, but you’re not sure what it means. It’s a Louisiana legal term that refers to a particular type of property right. Actually, the concept exists in many countries, other than any of those whose laws originate from England.

Is it a good thing or a bad thing? Is it simple or complex? And what is it, really? This article gives a basic explanation of the concept. A detailed explanation could fill a good portion of an entire publication.

It’s a bad thing.

Ask Mr. Jones. His wife died about 10 years ago. She didn’t have a will, so her only child, a son, inherited her one-half share of the community property owned by her and her husband, but subject to a usufruct in favor of Mr. Jones. As a result, he was able to use all of Mrs. Jones’ property and receive any income it generated. All seemed to go well for Mr. Jones, as far as the property was concerned. But last year he remarried, and then things didn’t go so well.

Mr. Jones received a letter from his son’s attorney. Mr. Jones hadn’t seen much of his son lately, as his son didn’t seem to care for Mr. Jones’ current wife. The attorney explained that now that Mr. Jones had remarried, his usufruct was gone and his son owned his deceased wife’s one-half share of the community property. And by the way, his son wanted it, and he wanted it now.

Mr. Jones called his own attorney, who said, “Yes, it’s true. The instant you remarried your usufruct over your wife’s half of the property terminated. I wish your wife would have seen me. She could have written a will to make the usufruct continue past your remarriage right up until the time you die, or she could have just given her estate to you completely, not just the usufruct.”

Mr. Jones tried to call his son, but he wouldn’t respond. Instead he got

another letter from his son's attorney saying that Mr. Jones needed to cut a check or prepare to move from the house so it could be sold. Mr. Jones was pretty upset and wished he had never heard of a usufruct.

It's a good thing.

On the other hand, ask the children of Mrs. Smith, who died without a will. Her husband had tried to convince her to write a will leaving everything to him, but before agreeing to meet with her husband's attorney she visited another attorney who explained what would become of her property if she died without a will. After that meeting, she declined to write a will. Her husband couldn't figure out why she refused to do so, as she had terminal cancer and really needed to get this done.

What Mr. Smith didn't realize was that his wife knew about his girlfriend. There was no way she was going to leave anything to him. She felt sure that he would remarry soon after she died and would probably spend everything on his paramour, leaving nothing to the children.

Sure enough, within days after Mrs. Smith's death, Mr. Smith took his two children to a lawyer to handle his wife's estate. He told the lawyer that his children would probably disclaim or renounce their inheritance from their mother, allowing him to inherit everything. His children looked at him with astonishment. His daughter quickly retorted, "Dad, Mom has been gone only a month and you have moved your girlfriend into the house. You have been giving her jewelry, some of it Mom's, and lots of money. Pretty soon you'll be broke. We don't want you to give Mom's share to that other woman. No sir, we'll keep our inheritance."

Mr. Smith was upset, to say the least. The next day he married his girl friend, as earlier planned, thereby terminating his usufruct rights. Mrs. Smith's children inherited her one-half share of the property, then promptly told their father to vacate the house so it could be sold.

Mrs. Smith would have been pleased. Things worked out exactly as she had planned. (She should have written a will to assure that her husband didn't receive even the usufruct, but fortunately for her children he couldn't wait

to remarry, so the usufruct terminated before he could dissipate her estate.)

What is it?

Usufruct is a limited property right, similar to a “life estate” in the other 49 states. It is the right to use property that belongs to someone else and to receive any income generated by that property. The person who has the usufruct is known as a “usufructuary.” The underlying owner of that property is known as the “naked owner,” having the “naked ownership” of the property. You might think of the naked owner as the person owning property stripped of the rights to the use and income of the property. (You might also wonder why the Louisiana legislature doesn’t find different names for these concepts.)

Its exact effects depend on the type of property to which it attaches: consumables or nonconsumables. A consumable is something that is destroyed or consumed when used. A nonconsumable is something that is not consumed when used.

Real estate is a nonconsumable. For example, if you have the usufruct of a house, you may live in it, or you may rent it out and keep the net rent proceeds, even though you don’t own the house. In general, you can’t sell the house without the consent of the naked owner, unless the person who gave you the usufruct says otherwise, such as in that person’s will. Another example of a nonconsumable is a mutual fund or other investment. You have the right to any dividends or interest generated by the mutual fund, but you do not own the shares of the fund.

The most common example of a consumable is cash. If you have the usufruct of cash, the only way you can use it is to spend it. True, you can invest it, but that is not using it. Because you must have the power to spend it, you become the complete owner of the cash, but you must pay it back to the naked owner when the usufruct terminates (such as when you die). Think of it as an interest-free loan or IOU. What if you are broke when you die? Too bad for the kids, as they, like any other creditor, can’t collect from an estate that has no assets. For some people that’s just fine, for others it’s a disaster.

How do you get a usufruct?

A usufruct can be granted by operation of law or by the specific act of the owner of the property. If you die without a will, your surviving spouse automatically receives the usufruct of your one-half share of the community property, with the naked ownership going to your children, by operation of law. Your spouse does not receive the usufruct of your separate property. (Space does not permit addressing other situations, such as where you do not have children.) However, this usufruct is somewhat limited. It terminates if you spouse remarries, and he or she cannot sell any nonconsumable property (like the house) without the consent of the children.

However, if you make a will, you can provide that the usufruct does not terminate at remarriage and that your spouse can sell the property without the consent of the children, and even that the usufruct will attach to the proceeds of the sale, thereby converting it to a usufruct over cash.

Do you want to leave a usufruct to someone?

Is that what you want, though, to leave your spouse the usufruct over the assets you want to leave to your children? Remember Mrs. Smith, above, who wanted her husband's usufruct to terminate when he remarried. Had she written a will and confirmed her husband's usufruct for life, he most likely would have spent all the money and died a pauper, and his estate would have been unable to pay the usufruct debt to her children. The children would have received nothing.

Or, if you want to advantage your spouse as much as possible, why not just write a will that leaves him or her all of your property in whole, not just the usufruct? Some people do just that. Or you may go half way, leaving the naked ownership to your children and the usufruct to your spouse, either until remarriage or until death. A usufruct for life will greatly increase the chances that your children will receive something upon your spouse's death. Your share of any real estate and other nonconsumables that still exist when your spouse dies will automatically pass to possession of your children. Your spouse's estate will owe to your children the value of the

usufruct over consumables. In other words, your children will be creditors of your spouse's estate in an amount equal to the value of the cash that was subject to usufruct. As creditors, they will get paid before anyone inherits.

Is there a better way?

Attorneys have different opinions about the usefulness and benefits of usufruct. In my opinion, usufruct is no better than a very poorly drafted trust. A trust offers more control over the assets, better protection from creditors and governmental programs such as Medicaid (extremely important if you have a disabled heir or if you want to make sure the kids inherit something if the surviving spouse needs nursing home care), and is understood and recognized by organizations outside of Louisiana, such as brokerage firms, who often have a great deal of trouble dealing with usufruct. Additionally, the law concerning trusts is much clearer and more detailed, and the trust document, written by you, can be as flexible as you want it to be. Very importantly, you can specify in the trust document a method to remove the trustee (your spouse) if he or she becomes incompetent, or, if you want, you can name someone else as the original trustee in order to guaranty that your wishes will be followed if you have any reason at all to believe that your spouse could mishandle the trust assets.

A discussion of trusts is beyond the scope of this article, but suffice it to say that most people prefer a trust over usufruct once informed of the pros and cons of each.

Confused?

You probably find this usufruct business to be more than a bit confusing. It is a strange concept and has bizarre rules. In some cases it works just fine, but in many cases it causes a lot of problems. Does it have a place in your estate plan? Well, if you don't have a will, it probably does, like it or not, and it is one of many reasons that you should write a will. But to know if it's right for you, and if so in what form, will require the advice of an experienced estate planning attorney.