

Article: The Question of Spousal Rights

ENERGY CENTRE - 36TH FLOOR
1100 POYDRAS STREET
NEW ORLEANS, LA 70163

LEON RITTENBERG III AND JOHN ROUCHELL - POSTED ON MAY 23, 2011 BY BALDWIN, HASPEL, BURKE & MAYER

Article last updated: March 27, 2019

A. Statutory Rights Upon Death of a Spouse

Louisiana and the United States of America both grant substantial statutory rights to surviving spouses. The Louisiana community property laws provide that upon the death of the first spouse, the community regime terminates, resulting in the surviving spouse's right to obtain possession of one-half of the former net community. In addition, Louisiana provides a surviving spouse with certain intestate rights and additional rights in the event that the deceased spouse dies rich in comparison with the surviving spouse. The United States of America provides surviving spouses with substantial rights in retirement plans.

1. The Marital Portion

When a Louisiana spouse dies rich in comparison with his or her surviving spouse, the surviving spouse is entitled to claim the marital portion from the deceased's succession. La. Civil Code article 2432. The revision comments under this article note that "rich" is a relative term – property which would make a person rich in one walk of life may be inadequate to supply the wants of another. While no concrete test has ever been devised, the surviving spouse will ordinarily be awarded the marital portion when the deceased's assets are five-to-one greater than those of the survivor. The survivor's earning capacity is not considered nor are the survivor's anticipated donations from other family members. If the amount of a surviving spouse's patrimony does not equal \$1,000, then the surviving spouse is in effect a privileged creditor for said sum. La. Civil Code articles 3252 through 3254.

A surviving spouse who is either separated in fact or judicially from the decedent at the time of the deceased spouse's death is still entitled to the marital portion if the separation occurred without the fault of the survivor. La. Civil Code article 2433.

Louisiana Civil Code article 2434 quantifies the marital portion at one-fourth of the decedent's succession. However, "succession" is not defined. Does succession include non-probate assets, such as an individual retirement account, and assets that are not included in a probate proceeding? Also, would it include assets excluded from the claims of creditors and the rights of heirs and legatees? For example, La. R.S. 22:912 exempts a life insurance policy or endowment policy, together with its proceeds, from all liability for any debt. (Excluded from this exemption are certain policy values arising from a policy contract issued within nine months or the issuance of a writ of seizure or bankruptcy.) Likewise, similar protection is now awarded for annuity contracts.

The quantum of the marital portion is one-fourth of the decedent's estate if the decedent died without children. However, if the decedent is survived by three or fewer children, then the surviving spouse's interest is a usufruct only. In addition, if the decedent is survived by more than three children, then the marital portion is a usufruct on a child's share.⁽¹⁾ In no event, however, shall the amount of the marital portion exceed one million dollars. La. Civil Code article

2434. There are no judicial decisions as to whether the million dollar limitation pertains to the value of the property subject to the usufruct or whether it pertains to the value of the usufruct. The better argument is that the limitation pertains to the value of the property subject to the usufruct.

The quantum of the marital portion is not absolute since it is reduced by legacies made to the surviving spouse and life insurance proceeds, social security benefits and pension benefits payable to the surviving spouse. La. Civil Code article 2435. The surviving spouse's rights are personal and nonheritable. La. Civil Code article 2436. In addition, during the administration of a succession, the surviving spouse may be entitled to a periodic allowance out of the projected marital portion. La. Civil Code article 2437.

A usufruct may be on consumables, such as money, or on non-consumables, such as property that may be enjoyed without alteration of its substance. If the usufruct is on a consumable, then the usufructuary becomes the owner, but at the termination of the usufruct, the usufructuary has a debt to the naked owner. On the other hand, a usufructuary of a non-consumable only has the right to the use of the non-consumable. It is not unusual for a question to be raised as to whether the usufructuary must post a bond. It could be very important on a usufruct of cash but less important on land since a usufructuary cannot sell land without the permission and cooperation of the naked owner. However, in some cases, land may be sold without the concurrence of the usufructuary and the naked owner as a result of a condemnation proceeding or a partition suit. La. Civil Code article 615. Even though article 573 of the Louisiana Civil Code provides that a legal usufructuary is not required to post security, an argument can be made to the contrary. This is particularly so in light of article 618 of the Louisiana Civil Code that states in certain enumerated instances the naked owner may demand, within one year from receipt of the proceeds by the usufructuary, that the usufructuary give security for the proceeds.

In addition, article 2330 of the La. Civil Code states that spouses may not, by agreement before or during marriage, renounce or alter their rights to the marital portion.

2. Intestate Rights

In the event that a deceased spouse leaves no descendants, the surviving spouse inherits the deceased's share of community property. La. Civil Code article 889. If the deceased spouse is survived by descendants, the surviving spouse inherits a usufruct of the deceased's share of the community not bequeathed to others until the earlier of death or remarriage. La. Civil Code article 890. This would be a legal usufruct. If the deceased spouse is survived by no descendants, parents, siblings, or descendants from siblings, the surviving spouse not judicially separated from the deceased shall inherit the deceased's separate property. La. Civil Code article 894.

In the event that a surviving spouse does not inherit property at least equal to the marital portion, then the surviving spouse can still claim the deficit. La. Civil Code article 2435.

3. Community Property

Louisiana is a community property state which means that if spouses do not contract to the contrary, property acquired during matrimony is governed by the Louisiana marital regime laws. Property of married persons is either community or separate. La. Civil Code article 2335. Each spouse owns a present undivided one-half interest in community property which may not be judicially partitioned prior to the termination of the community property regime. La. Civil Code article 2336. In addition, a spouse may not alienate or encumber his or her undivided interest in the community prior to its termination. La. Civil Code article 2337. However, community property may be voluntarily partitioned and become separate property of either spouse. La. Civil Code article 2336.

Community property comprises property acquired during the existence of the community through the effort, skill or industry of either spouse, property acquired with community things or partially with community and separate things, property donated to the spouses jointly, earnings from community and separate property, and damages awarded for loss or injury to community property together with all property not classified by law as separate property. La. Civil Code article 2338. Income generated on separate property becomes community property unless the spouse owner reserves such income as separate property in statutory approved forms. La. Civil Code article 2339. Although, things in the possession of a spouse are presumed to be community, the presumption may be refuted. La. Civil Code article 2340. In addition, property that is acquired during the existence of the community with separate funds may remain separate if certain procedures are properly followed. La. Civil Code article 2341. In addition, property donated solely to one spouse and inherited by one spouse is separate and not community property. La. Civil Code article 2341. It should also be noted that damages due to personal injuries sustained during matrimony by a spouse are separate property. La. Civil Code article 2344. However, the portion of damages attributable to expenses incurred by the community or in compensation or loss of community earnings is community property. La. Civil Code article 2344. Also, property acquired by a spouse prior to the establishment of the community regime remains separate property.

It is often difficult to prove the separate nature of property, particularly for earnings from separate property. Proving that property acquired during the existence of the community is separate property is usually accomplished through a declaration in the act of acquisition that the property is the separate property of the acquirer. La. Civil Code article 2342. However, that statement may be controverted by the other spouse as well as by forced heirs and creditors. La. Civil Code article 2342.

During the existence of the community property regime, one spouse may donate to the other spouse the donor's interest in community property. La. Civil Code article 2343. Such donation results in the donated property becoming the separate property of the donee. La. Civil Code article 2343.

Upon the death of a spouse, the community regime terminates and the surviving spouse is entitled to one-half of the net community property. La. Civil Code article 2356; 2369.2. Upon termination of the community, such as death, not only is the community dissolved, but either the decedent's succession or the surviving spouse may have a claim against the other for reimbursement. La. Civil Code article 2358. For example, if one spouse used community property to satisfy a separate obligation, then upon termination of the community, the other spouse is entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. La. Civil Code article 2364. In addition, if separate property has been used to satisfy a community obligation, then the provider of the separate property is also entitled to reimbursement for one-half of the amount or value that the property had at the time it was used. La. Civil Code article 2365. In addition, rights of reimbursement exist when property is used for the acquisition, use, improvement or benefit of either the community or separate property of a spouse. La. Civil Code article 2366; 2367.

4. Testamentary Rights

A contract between living persons pertaining to anyone's succession is null other than an antenuptial agreement. La. Civil Code article 1976.

5. Retirement Benefits

Congress has preempted the Louisiana community property laws by enacting the Employee Retirement Income Security Act of 1974 (ERISA). This preemption was upheld when the United States Supreme Court, in *Boggs v. Boggs*, 520 U.S. 833, 117 S.Ct. 1754 (1999), reversed the Fifth Circuit Court of Appeals. The Supreme Court in this case preempted a state law which allowed a non-participant spouse to transfer by testamentary instrument an interest in an undistributed pension plan.

Section 401(a)(11) of the Internal Revenue Code (IRC) states that, in general (naturally there are exceptions), a qualified retirement plan requires that the beneficiary provision must designate the surviving spouse as surviving beneficiary and require distributions to be in the form of a qualified joint and survivor annuity. Covered retirement plans include (i) a defined benefit plan, (ii) a defined contribution plan that is subject to minimum funding standards of IRC § 412, and (iii) certain other defined contribution plans. A profit sharing plan is not subject to these rules. However, special rules are applicable when a participant and a spouse are married for less than one year and the plan itself addresses such circumstance.

Notwithstanding the requirements for a joint and survivorship annuity, the plan participant, with written spousal consent, may alter the requirement for a joint and survivor annuity.

Assuming that the specific retirement plan authorizes an election out of the joint and survivorship annuity requirement, then such election may be made if the spouse of the participant consents in writing to such election, such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or consent of the spouse expressly permits such additional consents), and the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public. IRC § 417(a)(2).

To be effective, an election must be made within the defined applicable election period which, in the case of an election to waive the qualified joint and survivor annuity benefit, must be within the ninety day period ending on the annuity starting date, or in the case of an election to waive the qualified pre-retirement survivor annuity, the period which begins on the first day of the plan year in which the participant attains age 35 and ends on the date of the participant's death.

Naturally, the Internal Revenue Code defines what is a joint and survivorship annuity. IRC § 417(b)(1) states that it is an annuity for the life of the participant with a survivor annuity for the life of the spouse which is not less than fifty percent (and not greater than one hundred percent) of the amount which is payable during the joint lives of the participant and the spouse and which is the actuarial equivalent of a single annuity for the life of the participant.

A consensual waiver signed before marriage, such as in a premarital agreement, is not a valid consent. The possibility of problems that can arise if after marriage a spouse refuses to sign such a consent can be avoided by converting the retirement plan into an IRA prior to matrimony. In addition, the rights of a surviving spouse may differ somewhat depending upon the nature of the retirement plan. In particular, the right of a surviving spouse to military retirement benefits, state teacher retirement benefits, and of other state employees must be examined by analysis of particular statutes. This is a complex area and each type of plan needs to be reviewed separately.

La. R.S. 9:1426 provides:

- A. (1) If a recurring payment is being made from a public or private pension or retirement plan, an annuity policy or plan, an individual retirement account, a Keogh plan, a simplified employee plan, or any other similar retirement plan, to one partner or to both partners of a marriage, and the payment constitutes community property, and one spouse dies, the surviving spouse shall enjoy a legal usufruct over any portion of the continuing recurring payment which was the deceased spouse's share of their community property, provided the source of the benefit is due to payments made by or on behalf of the survivor.
- (2) This usufruct shall exist despite any provision to the contrary contained in a testament of the deceased spouse.
- B. The usufruct granted by this Section shall be treated as a legal usufruct and is not an impingement upon the legitime and a naked owner shall not have a right to demand security.

However, retirement plans subject to the Employment Retirement Income Security Act of 1974 are not subject to this statute as a result of the Bogggs case. However, there is some difference of opinion amongst practitioners as to whether this statute would impact IRA's. In addition, there are many questions as to the meaning of this statute. For example, is a distribution from an IRA a distribution only of income, or is it a distribution of income and principal? If it is a distribution of income, then the usufructuary probably does not have to account to the naked owner. However, if it includes a distribution of principal, then how must the usufructuary account to the naked owner? Is the usufructuary required to post a bond and/or invest the principal distribution in a safe investment?

6. Banking Rights

A bank may pay to the surviving spouse of a depositor a sum not to exceed \$10,000 out of a bank account in the name of the decedent without any court proceeding, and the bank is discharged for the amount paid. R.S.A.:1513. This statutory provision was enacted to protect financial institutions. The purpose of this statute is to protect banks and not to vary the substantive laws of inheritance or spousal rights. Presumably, the spouse must account for these funds during the succession administration.

B. Planning Considerations and Contractual Elements

There are a number of planning considerations available to alter and to minimize the rights of surviving spouses. In addition, certain methods are available to simultaneously protect the rights of others, such as children from former marriages. Tax opportunities must also be considered.

1. The Marital Portion

The marital portion, or any portion thereof, may be placed in trust so long as the net income accruing to the surviving spouse is payable to the surviving spouse not less than once each year; the surviving spouse's interest is subject to no other charges or conditions except that it may include spendthrift provisions; and the term does not exceed the life of the surviving spouse. La. R.S. 9:1851. The legislature, in its infinite wisdom, should have stopped after enacting this statute. However, it went further by enacting La. R.S. 9:1852 which, in effect, states that if the surviving spouse is left a life income interest in trust, then the trustee "may pay principal from the trust for support, maintenance, education, medical expenses, or welfare of the beneficiary" and upon the termination of the trust, the remaining assets must be delivered to the surviving spouse's heirs or legatees, as the case may be. It is submitted that this statute really makes no sense since it effectively precludes using a trust to satisfy the obligations of the marital portion statute if the decedent only wanted to grant the surviving spouse a life income interest in trust.

However, La. R.S. 9:1853 goes on to state that a usufruct in trust or an unconditional income interest in trust does in fact satisfy the marital portion. The writer sees no reason for the enactment of La. R.S. 9:1852 and 9:1853 since La. R.S. 9:1851 provides that the marital portion obligation may be satisfied through the vehicle of a trust.

There are two cogent reasons for burdening the marital portion with a trust. The first reason is that the decedent can choose the trustee, i.e., the manager of the trust assets. This could be a financial institution or family members of the decedent. By choosing the trustee, the decedent can, in effect, have substantial influence on the trust investments and also preclude the surviving spouse from wasting the trust assets since only the income is distributed to the surviving spouse. The trustee, as a prudent administrator, would be able to invest some of the assets in fixed income securities and some of the assets in growth or equity securities. By choosing the asset mix, the trustee has great discretion and his decisions, unless they cross the border of reasonableness, would probably be upheld by a court. The second reason for using a trust is that it can prevent the usufructuary from wasting the assets which would have otherwise been subject to

the usufruct. The trust also does away with the necessity of considering whether to request the usufructuary to post a bond or to make only safe investments.

Further, if the spouse receiving the marital portion is placed into possession of a fractional interest, such as one-fourth (albeit in usufruct), in numerous assets, the usufructuary would be in a position to veto decisions of the other joint owners. The use of a trust could prevent the usufructuary from vetoing decisions by the other owners. In fact, the co-owners could be designated as the trustees.

In addition, in the event that the decedent's estate is sufficiently large to be subjected to United States estate taxes, with the proper drafting of the marital portion trust, the portion of the decedent's assets utilized to fulfill the marital portion obligation can be freed from estate taxes at the time of the death of the first spouse. However, it would be subjected to estate taxes at the death of the surviving spouse. Nevertheless, since the marital portion is only available in favor of the spouse who dies poor, the likelihood is that the survivor's estate would be subject to no taxes; but, if any, at a much lower amount than would be imposed upon the estate of the first spouse to die, namely the richer spouse.

2. Matrimonial Agreement

Prior to matrimony, spouses may execute a matrimonial agreement that excludes the legal regime of community property. La. Civil Code article 2329. This vehicle is used frequently for second marriages, particularly when one or both of the spouses have children by prior marriage. In addition to being able to exclude the legal regime of community property by contract prior to marriage, such objective can also be reached after matrimony. La. Civil Code article 2329. However, except in the case of married couples residing in the state for less than a year, it is necessary to obtain a court order declaring that abolition of the community property regime serves the interests of both spouses and that both spouses understand the governing principles and rules of not being subjected to the laws of community property. La. Civil Code article 2329.

A provision in a marriage contract renouncing a spouse's marital portion rights is not enforceable since those rights cannot be renounced. La. Civil Code article 2330. A marriage contract can include many terms, even terms pertaining to support, divorce and separation. However, this is not a subject to be covered by this paper since this paper is limited to spousal rights at death.

A marriage contract can include provisions making inapplicable the laws of community property, or can include provisions declaring that some of the community property laws are applicable to a particular transaction, item or asset, but not others. For example, a marriage contract could state that wages and compensation for services rendered shall be community property but that investments made in the name of one spouse would not be community property. Such provisions, however, could cause a problem since questions could be raised as to whether investments were made with earnings and compensation for services and, therefore, each spouse may have an interest in the investment.

It is unusual for a couple, after being married for many years, to become separate in property and abolish the community property regime except if there is a concern about creditors. For example, if one of the spouses works in a high risk profession such as law or medicine, where they could be cast in judgment for a substantial sum, it may make sense to become separate in property and thereby insulate at least half of the family's assets from the lawyer or doctor's creditors.

3. Retirement Plans and IRA's

All distributions from retirement plans and IRA's are subject to income taxes. On the other hand, distributions from stocks and bonds are taxable income only to the extent that they are classified as interest or dividends, with the

exception that appreciation is taxed at capital gains rates when realized. This could result in a different net benefit to a spouse seeking the marital portion. One question that is raised is whether the distribution from an IRA to fulfill a marital portion obligation is a distribution of only the income and dividends earned on IRA assets, or is the distribution the required minimum distribution under the tax laws? If the distribution is a required minimum distribution under the tax laws, then it would include a distribution of principal as well as income and dividends. Another issue that is raised in connection therewith is what would be the surviving spouse's obligation upon termination if there is a usufruct. In the event that the distribution was one of income only (however that is defined), then the usufructuary would not owe a debt to the naked owner. On the other hand, if the distribution includes part principal and part interest, then an argument could be made that the usufructuary is indebted to the naked owner for the amount of the principal distribution. Another question that is raised is whether this problem can be adequately addressed by utilizing a trust to fulfill the marital portion obligation. If a trust is used and only requires the distribution of interest and dividends, then another question is raised - the applicability to the estate tax marital deduction.

4. Life, Endowment and Annuity Contracts

The proceeds and avails of a life insurance policy, endowment policy, and annuity contract are not subject to the claims of creditors, heirs and legatees, except for sums in excess of \$35,000 under contracts issued within nine months of a writ of seizure or bankruptcy proceeding. La. R.S. 22:912. Therefore, such investment vehicles are available to defeat the rights of surviving spouses.

(1) The Louisiana legislature did not amend the marital portion quantum when it revised its laws on forced heirship and substantially reduced the rights of children.

(2) Since this paper pertains to spousal rights in successions, it will not address rights during matrimony, such as rights of management of community property and the right to alienate, including the right to donate community property.

This paper is for general information purposes only. The writer is not responsible for the consequences of a particular transaction.