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Considerable confusion has followed the decision of the Louisiana Supreme Court in *Succession of Lauga*,[1] which held the Louisiana Legislature's recent attempts to revise the forced heirship provisions of the Louisiana Civil Code unconstitutional.[2] Much of this confusion has arisen from the ancillary effects of *Lauga* and its companion case, *Succession of Terry*,[3] reviving Louisiana Civil Code article 1752, which the legislature had sought to expressly repeal in 1990 as part of its forced heirship revision.[4] Perhaps the most puzzling aspect of the *Lauga* and *Terry* decisions concerns the ability of a testator, who is survived by descendants of a prior marriage, either (1) to confirm by testament the usufruct authorized by Louisiana Civil Code article 890 with respect to his interest in community property or (2) to bequeath the usufruct authorized by that article with respect to his separate property.[5] The scope of the testator's authority to confirm or grant such a usufruct is of significant moment to members of the bar engaged in

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1. 624 So. 2d 1156 (La. 1993).
2. 1990 La. Acts No. 147; 1989 La. Acts No. 788.
3. 624 So. 2d 1201 (La. 1993).
4. La. Civ. Code art. 1752 (1870) provides:

   A man or woman who contracts a second or subsequent marriage, having a child or children by a former marriage, can give to his wife, or she to her husband, either by donation inter vivos or by last will and testament, in full ownership or in usufruct, all of that portion of his estate, or her estate, as the case may be, that he or she could legally give to a stranger.
5. La. Civ. Code art. 890 provides:

   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 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.

   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.

Louisiana estate planning, particularly in light of the analysis employed by the Louisiana Fifth Circuit Court of Appeal in *Succession of Suggs*.[6]

The decedent in *Suggs* was survived by his wife and six children, three by his marriage to the surviving spouse and three by a prior marriage. Because the decedent and his surviving spouse had entered into a prenuptial agreement establishing a separate property regime, the decedent's entire estate consisted of separate property. In his will, the decedent bequeathed most of the disposable portion of his estate to his wife. He also granted her the usufruct over the forced portion, the naked ownership of which he left in trust for the benefit of his six surviving children, each of whom was designated as the principal beneficiary of a separate trust. The decedent named his wife as income beneficiary and trustee of each trust and granted to her, as trustee, broad powers over the trust corpus without the necessity of furnishing security.[7]

The children of the decedent's prior marriage filed a declaratory judgment action in which they claimed the legacy to their step-mother, as usufructuary, was excessive and impinged upon their legitime. The *Suggs* court, therefore, was faced with the novel issue of how to resolve the apparent conflict between Louisiana Civil Code article 1752, which sets forth certain rules governing the extent to which one spouse may make a gift or bequest to the other when the donor has children of a prior marriage, and Article 890, which sets forth the rules governing the legal usufruct of a surviving spouse.[8]

Because the testator in *Suggs* owned only separate property, the court's analysis focused on the second and third paragraphs of Article 890, which provide:

> 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.
>
> A usufruct authorized by this Article is to be treated as a legal usufruct and is not an impingement upon legitime.[9]

The court compared these provisions with those of Article 1752:

> A man or woman who contracts a second or subsequent marriage, having a child or children by a former marriage, can give to his wife, or

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6. 612 So. 2d 297 (La. App. 5th Cir. 1992). The court's analysis in *Suggs* would be moot had Act 147 of the 1990 Louisiana Legislature been able to withstand scrutiny under the Louisiana Constitution, because that act would have expressly repealed Article 1752 in its entirety. But see Succession of Becker, No. 91-17708 (La. Dist. Ct. Orl. April 20, 1994), in which the court reached a different result than the *Suggs* court and concluded that Article 1752 does not limit the scope of the Article 890 usufruct. The *Becker* decision is pending now before the Louisiana Fourth Circuit Court of Appeal.

7. *Suggs*, 612 So. 2d at 298.

8. The issue before the *Suggs* court was limited to the proper statutory construction of La. Civ. Code arts. 890 and 1752. No constitutional issue was raised. *See* Succession of Lauga, 624 So. 2d 1156, 1167 (La. 1993).

9. La. Civ. Code art. 890.

> she to her husband, either by donation inter vivos or by last will and testament, in full property or in usufruct, all of that portion of his estate, or her estate, as the case may be, that he or she could legally give to a stranger.[10]

The court then sought to reconcile "the apparently conflicting provisions" of these two articles in the following terms:

> A plain reading of the articles indicates that a decedent may leave a usufruct over the forced portion of his estate to the surviving spouse of his first marriage, but if there are children of a first marriage, he cannot give such a usufruct to the surviving spouse of a second or subsequent marriage.[11]

Finding that "the provisions of Article 890 are not contrary to or irreconcilable with the provisions of Article 1752," the court invoked the rule of statutory construction which dictates that, whenever possible, effect should be given to all provisions of law regarding the same subject matter.[12] The court thus rejected the surviving spouse's argument that the enactment of Louisiana Civil Code article 890 in effect repealed Article 1752.[13]

Unfortunately, while the analysis applied by the *Suggs* court avoided a construction which would have treated either article as mere surplusage, it did so at the expense of the clearest expression of legislative intent regarding the scope of the Article 890 usufruct.[14] Further, the *Suggs* analysis would preclude the availability of the unlimited federal estate tax marital deduction with respect to that portion of the decedent's estate which represents the legitime of heirs who are issue of a prior marriage.[15]

This article questions the soundness of the *Suggs* analysis and proposes two complementary theories which lead to the conclusion that Article 1752 was rendered moot as long ago as 1916 and that it was repealed by implication

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10. La. Civ. Code art. 1752 (1870).

11. *Suggs*, 612 So. 2d at 298. Apparently, because the children who brought the declaratory judgment action in *Suggs* were legitimate issue of the decedent's prior marriage, the court did not address the effect which its decision might have on the legitime of any illegitimate issue.

12. *Id.*

13. *Id.* at 299.

14. *See infra* notes 44-51 and accompanying text.

15. To be eligible for the election to claim the federal estate tax marital deduction under § 2056(b)(7) of the Internal Revenue Code of 1986, as amended (the "I.R.C."), the decedent's surviving spouse must have a "qualifying income interest for life." The decedent's surviving spouse has such an interest if he or she is entitled to all of the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and no person has a power to appoint any part of the property to any person other than the surviving spouse. I.R.C. § 2056(b)(7)(B)(ii) (1988). The marital deduction also would be denied with respect to that portion of the decedent's estate which represents the legitime of the decedent's illegitimate issue, if the *Suggs* analysis were to extend that far.

through the 1981 and 1982 legislative acts affecting Article 916 and its successor, Article 890. The proposed analysis would also sustain the tax consequences which practitioners generally expect to arise from any testamentary confirmation or granting of a usufruct established for the lifetime of a surviving spouse.[16]

I. THE TWO MISSING LINKS IN THE *SUGGS* ANALYSIS

As noted above, the *Suggs* court attempted to resolve the apparent conflict between Articles 890 and 1752 of the Louisiana Civil Code by applying Article 1752 as a *limitation* upon the scope of the usufruct otherwise authorized by Article 890.[17] In effect, the court concluded that Article 1752 prohibited the decedent from granting to his surviving spouse a usufruct over that portion of his separate property which constituted the legitime of his children by a prior marriage.[18] Although the *Suggs* analysis gave effect to the established principle of statutory construction that laws regarding the same subject matter generally should be construed so as to render them consistent, it ignored the significance of Article 1752's historical development as well as the consequences which flow as a matter of law from the characterization of the Article 890 usufruct as legal in nature. A perpetuation of the *Suggs* analysis also would defeat the express legislative intent underlying the 1981 and 1982 legislative acts which extended the scope of the surviving spouse's usufruct.[19]

A. A Statutory and Historical Analysis of Louisiana Civil Code Articles 890 and 1752

A statutory and an historical analysis of Louisiana Civil Code articles 890 and 1752 reveals two significant facts which, together, lead to the conclusion that Article 1752 does not constrict the scope of the Article 890 usufruct. First, a

16. Many practitioners had assumed that a testator had the power to confirm (with respect to community property) or to grant by testament (with respect to separate property) an Article 890 usufruct for the lifetime of the surviving spouse over all of his interest in property, whether community or separate, and irrespective of whether he had descendants of a prior marriage. Similarly, many also had assumed that an income interest for the lifetime of the surviving spouse in a trust containing the legitime of the decedent's forced heirs, whether or not of the marriage to his surviving spouse, was also possible under Louisiana law. The *Suggs* analysis would preclude any such lifetime usufruct or income interest with respect to the portion of the decedent's estate which constitutes the legitime of descendants not of the marriage between the deceased and the surviving spouse, and would preclude, to that extent, eligibility for the unlimited federal estate tax marital deduction. I.R.C. § 2056(b)(7)(B)(ii) (1988). *See supra* note 15.

17. Succession of Suggs, 612 So. 2d 297, 298 (La. App. 5th Cir. 1992).

18. The natural extension of the *Suggs* analysis would lead to the proscription of the Article 890 usufruct, even with respect to community property. See the hypothetical situation discussed *infra* notes 22-25 and accompanying text.

19. *See infra* notes 44-51 and accompanying text.

statutory analysis reveals that these articles deal with different areas of the law which, under the *Suggs* view, would interact in a most perplexing way. Second, a review of the respective histories of Articles 890 and 1752 reveals that Article 1752 was rendered moot as long ago as 1916. Finally, these combined analyses lead to the conclusion that Article 1752 was implicitly repealed by the enactment of Article 890 in 1981.

1. Statutory Analysis

A simple analysis of the codal scheme itself reveals that the *Suggs* court erroneously construed Article 1752 as imposing a limitation on the scope of the Article 890 usufruct. It is significant that, while both Articles 890 and 1752 are found in Book III of the Louisiana Civil Code, which deals with the different modes of acquiring ownership of things, they are set forth in different titles dealing with distinct areas of the law. Article 890 is set forth as a part of Title I, Chapter 2, dealing with *intestate* successions. Article 1752, on the other hand, is set forth in Title II, Chapter 9, which sets forth the rules governing *donations* between married persons. Thus, in contrast with Article 890, Article 1752 applies only to *donations*, which do not arise by operation of law, but which are *conventional* and therefore are subject to restrictions designed to further society's interest in protecting the legitime of a testator's children by a prior marriage.[20]

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20. Of course, this discussion is limited to usufructs which are created by testament (a donation *mortis causa*, which is a conventional act). The authors thus admit this statement, at least to some extent, begs the question. Nevertheless, the fact that the codal authority for such a usufruct is set forth in the provisions of the Louisiana Civil Code dealing with *intestacy* speaks volumes. Admittedly, it is anomalous that a *legal* usufruct may be created in certain cases only by way of a *conventional act* (one might infer that much of the confusion inherent in the *Suggs* analysis stemmed from that which surrounds the blending of these legal and contractual concepts). *See infra* notes 26-43 and accompanying text (regarding the history of Louisiana Civil Code articles 890 and 1752) and *infra* notes 52-63 (regarding the consequences which attend the characterization of an Article 890 usufruct as one arising by operation of law). Further, the security provided in the last paragraph of Article 890 and in La. Code Civ. P. art. 3154.1 arguably protects society's interests concerning the conventional transmission of wealth. In this vein, it is interesting to note the *Suggs* court's assertion that its construction would promote the policy of protecting the children of a first marriage from effectively being disinherited in favor of a spouse of a second or subsequent marriage. *Suggs*, 612 So. 2d at 298. This conclusion ignores the fact that the fourth paragraph of Article 890 and Article 3154.1 of the Louisiana Code of Civil Procedure provide a sure-fire means for heirs who are not children of the marriage between the deceased and the surviving spouse to protect their interests from waste. Article 3154.1, as originally enacted by Act 919 of 1981, and its accompanying comment provide as follows:

> Art. 3154.1. Request by naked owners other than children of the marriage for security from surviving spouse
>
> If the former community or separate property of a decedent is burdened with a usufruct in favor of his surviving spouse, successors to that property, other than children of the decedent's marriage with the survivor, may request security in accordance with the preceding article in an amount determined by the court as adequate to protect the petitioners' interest.

The codal scheme itself thus clearly indicates that Articles 890 and 1752 deal with two separate, albeit somewhat related, areas of the law. While Article 890 is included among the provisions of the Louisiana Civil Code which provide for the *legal* regime for succession to a decedent's property, Article 1752 was included among the provisions which set forth the rules governing the decedent's right *to arrange for his own* succession.[21] Thus, Article 1752 was included among the rules that to further society's interests in the transmission of wealth, set *limits* upon a person's right to dispose of his property by either donation *inter vivos* or *mortis causa*. Accordingly, and contrary to the *Suggs* conclusion, Article 1752 should have no bearing upon the legal regime of which the Article 890 usufruct is an integral component.

A simple example illustrates that, by superimposing the rules of Article 1752 over those of Article 890, the *Suggs* analysis is in direct conflict with the codal scheme and in effect would *reverse* the natural ordering of the law and provide *greater* rights under the laws of *intestacy* than are available under the law governing *testamentary* dispositions.[22] Consider the following hypothetical situation. H was formerly married to W-1 but was married to W-2 at the time of his death. H is survived only by W-2 and C, his child from the prior marriage. Assuming H died intestate (and without sufficient separate property to satisfy C's legitime), his property would devolve as follows: C would inherit H's separate property in full ownership; C also would inherit the naked ownership of H's one-half interest in the community property, subject to W-2's usufruct under Article 890.[23] While this result would obtain by operation of law in an intestate setting, the *Suggs* analysis would compel a different conclusion had H sought the same result by testament. Under that analysis, W-2's usufruct would constitute an impingement upon C's legitime. Accordingly, C would have the option, set forth in Louisiana Civil Code article 1499, either to accept H's one-half interest in the community subject to the usufruct, or to

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Comment

This article is intended to provide a procedure for the request for security by naked owners of community property other than children of the marriage with the survivor, or by naked owners of separate property, as against the surviving spouse.

La. Code Civ. P. art. 3154.1 & cmt.

21. Professor Yiannopoulos recognized this distinction, noting:

The usufruct of the surviving spouse under Article 890 of the Louisiana Civil Code *attaches by operation of law* to the share of the deceased spouse in the community of acquets and gains in case of *intestacy*, that is when the deceased ". . . shall not have disposed by testament of his share in the community."

A.N. Yiannopoulos, Personal Servitudes § 192, at 387, in 3 Louisiana Civil Law Treatise (3d ed. 1989) (first emphasis added) (quoting La. Civ. Code art. 890).

22. This example illustrates the unavoidable conflict between Articles 890 and 1752 which the *Suggs* analysis not only fails to resolve, but actually accentuates. See *infra* notes 44-51 and accompanying text for a discussion concerning the implicit repeal of Article 1752 by the enactment of Article 890.

23. This usufruct would terminate upon W-2's remarriage, at which time C would become full owner. See the first paragraph of La. Civ. Code art. 890.

relinquish to W-2 the disposable portion of H's estate.[24] The Article 1499 option would not arise in the intestate setting, however, simply because the application of that option turns upon the existence of a *donation* by the decedent, whether *inter vivos* or *mortis causa*. Thus the *Suggs* analysis, by giving to a legatee under a will an option not otherwise available to an heir under the law, would deny the testator the right to do what the law itself would dictate in the absence of any contrary expression of his will.[25] This would produce an odd result, indeed, given the theory behind the law of intestacy as an inferential grafting into the law of the presumed will of those who die intestate. The *Suggs* analysis is perplexing and problematic in this sense.

2. Historical Analysis

An historical analysis of Articles 890 and 1752 confirms the deduction that Article 1752 does not limit the scope of the Article 890 usufruct. According to Louisiana Civil Code article 1746:

> One of the married couple may, either by marriage contract or during the marriage, give to the other, in full property, all that he or she might give to a stranger.[26]

This general rule, however, is subject to certain exceptions which restrict a spouse's right to alienate his patrimony. One example of these restrictive provisions is Article 1752, which, as originally enacted, provided that a person with children by a former marriage could give to his present spouse only the usufruct of a child's share, limited to one-fifth of the donor's estate.[27] Article 1752 was amended in 1882 to permit one spouse to give to the other, in full

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24. La. Civ. Code art. 1499 provides:

> If the disposition made by donation *inter vivos* or *mortis causa*, be of a usufruct, or of an annuity, the value of which exceeds the disposable portion, the forced heirs have the option, either to execute the disposition or to abandon to the donee the ownership of such portion of the estate as the donor had a right to dispose of.

Although a literal reading of Article 1499 would restrict the availability of this option to circumstances where the complaining heir is able to establish that the usufruct is of greater value than the disposable portion, it has been suggested by French commentators and by courts construing the provisions of the Code Civil which correspond to Article 1499, that the option is available without regard to the usufruct's value. *See* A.N. Yiannopoulos, *Property, The Work of the Louisiana Appellate Courts for the 1972-1973 Term*, 34 La. L. Rev. 207, 215 n.46 (1974), and the authorities cited therein.

25. This inconsistency could be avoided only by extending application of the *Suggs* analysis to the intestate setting. Such an extension, however, would conflict with the clear import of Article 890.

26. La. Civ. Code art. 1746.

27. La. Civ. Code art. 1752 (1870), as originally enacted, provided:

> A man or a woman, who contracts a second or subsequent marriage, having children by a former one, can give to his wife, or she to her husband, only the least child's portion, and that only as a usufruct; and in no case shall the portion, of which the donee is to have the usufruct, exceed the fifth part of the donor's estate.

property or in usufruct, one-third of his or her property.[28] Article 1752 was last amended in 1916 to provide that a spouse who has children by a prior marriage may give to his or her present spouse "in full ownership or in usufruct, all of that portion of his [or her] estate . . . that he or she could legally give to a stranger."[29]

Professor Lazarus described the changing effect of Article 1752 in these terms:

> [I]nstead of being governed by article 1493 of the Civil Code, the disposable quantum was subject to the limitations of article 1752, so that where the donor or testator having children by a former marriage made a donation in favor of his wife, the donation could, at the option of the children, be reduced to one-third of the donor's property either in full ownership or in usufruct. The 1916 amendment of article 1752 which increased the disposable quantum to the portion which can legally be given to a stranger, has now eliminated the problem in this respect, but only as to the *quantum*. The article still provides that this disposable portion can be given only in "full property or in usufruct."[30]

Professor Lazarus went on to suggest that, in lieu of the Article 1499 option to reduce a disposition to a surviving spouse in usufruct over the legitime, children of a prior marriage might be able to insist on a reduction of the disposition either to the disposable portion in full ownership or to a usufruct *on that portion*. The Louisiana Supreme Court rejected this possibility in *Succession of Hyde*,[31] however, and described the language "in full property or in usufruct" as merely "a remnant of the legislation as first enacted, and is now apparently inconsequential for it merely gives the donor the right of doing what he has the faculty of doing anyhow, that is, disposing of the disposable portion in any manner he sees fit."[32] By emphasizing that the "in full property or in usufruct" language of

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28. La. Civ. Code art. 1752 (1870), as amended by 1882 La. Acts No. 13, provided:
> A man or a woman, who contracts a second or subsequent marriage, having children by a former one, can give to his wife, or she to her husband either by donation or by last will and testament, in full property, or in usufruct, not exceeding one-third of his or her property.

29. La. Civ. Code art. 1752 (1870), as amended by 1916 La. Acts No. 16, provided:
> A man or woman who contracts a second or subsequent marriage, having a child or children by a former marriage, can give to his wife, or she to her husband, either by donation inter vivos or by last will and testament, in full ownership or in usufruct, all of that portion of his estate, or her estate, as the case may be, that he or she could legally give to a stranger.

30. Carlos E. Lazarus, *Successions and Donations, The Work of the Louisiana Appellate Courts for the 1962-1963 Term*, 24 La. L. Rev. 184, 188-89 (1964).

31. 292 So. 2d 693 (La. 1974).

32. *Id.* at 695. It is interesting to note that the court cited Professor Lazarus in support of this conclusion. *See* Carlos E. Lazarus, *Successions and Donations, The Work of the Louisiana Appellate Courts for the 1967-1968 Term*, 29 La. L. Rev. 193, 197 n.17 (1969). This work indicates that

Article 1752 merely restates the alternative natures of ownership which may be *conveyed*, the rationale underlying the *Hyde* decision arguably supports the theory that Article 1752 applies only to set the bounds within which *conventional* acts may be confected, and does *not* affect rights which arise or are deemed to arise *by operation of law*.[33] The *Hyde* analysis is significant in this respect because of the statutory structure within which the legislature placed Articles 890 and 1752. As noted above, Article 890 is included among the Louisiana Civil Code provisions dealing with intestacy, while Article 1752 was set forth as a part of the rules governing conventional acts.[34]

This historical analysis of Article 1752 suggests that the 1916 amendment effected a mere incorporation by reference of the restrictions set forth in the disposable portion rules of Article 1493. Prior to this amendment, Article 1752 imposed conditions on the right of a spouse with children by a prior marriage to dispose of property which were *more restrictive* than those set forth in Article 1493. As amended, however, Article 1752 was completely subsumed by Article 1493, without which it no longer has any independent significance.

A review of the chronological development of Article 890 completes the analysis. Article 890 is the successor to Article 916, which, as set forth in the Louisiana Civil Code of 1870, provided:

> 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,

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Professor Lazarus had come to recognize the hollow ring to Article 1752 as amended in 1916:

> As last amended by La. Acts 1916, No. 116, article 1752 *increases* the disposable portion under such circumstances to the portion that can be legally given to a stranger, which portion can be given either "in full property or in usufruct." This phrase is a remnant of the legislation as first enacted, and is now apparently inconsequential for it merely gives the donor the right of what he has the faculty of doing anyhow, that is, of disposing of the disposable portion in any manner he sees fit. *It is evident, therefore, that it no longer makes any difference whether the donor has children by a prior marriage, or whether the disposition is made to a spouse or to a stranger. The disposable portion will always be the same in all cases and is limited only by the provisions of articles 1493 and 1494.*

Id. (emphasis added).

33. This analysis finds support in Professor Yiannopoulos' historical review of Article 1752:

> In its pre-1916 version, article 1752 contained a rule for the determination of the disposable portion, in perfect ownership or in usufruct, without reference to any other articles in the Code. Today, however, article 1752 declares that the testator may give to his spouse of a second marriage the same portion of his property that he may give to a stranger. . . . If the disposition is in perfect ownership, its validity and effect will have to be determined in the light of article 1493; and if the disposition is in usufruct, its validity and effect will have to be determined in the light of the option granted to forced heirs by article 1499.

A.N. Yiannopoulos, *Testamentary Dispositions in Favor of the Surviving Spouse and the Legitime of Descendants*, 28 La. L. Rev. 509, 528-29 (1968). *See also* Yiannopoulos, *supra* note 24, at 207, 213, 214, and *infra* text accompanying notes 52-63.

34. *See supra* notes 20-25 and accompanying text.

> the survivor shall hold [in] 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.[35]

Article 916 thus established a legal usufruct over so much of the decedent's share of the community as was inherited by issue of the marriage between the decedent and his surviving spouse. The 1870 version of Article 916 remained intact until 1975, when it was amended to authorize the testator to confirm the Article 916 usufruct for the life of the surviving spouse and to provide that a usufruct so confirmed would not be an impingement upon the legitime. Article 916, as amended in 1975, thus read as follows:

> 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 [in] 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, 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 upon the legitime.[36]

Article 916 was again amended in 1979, when the legislature first authorized a testator to grant in favor of his surviving spouse a usufruct over his separate property without thereby impinging upon the legitime:

> 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 [in] 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, 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 upon the legitime.

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35. La. Civ. Code art. 916 (1870). This 1870 version of Article 916 was taken nearly verbatim from the original version as enacted by Act 152 of 1844.

36. La. Civ. Code art. 916 (1870), as amended by 1975 La. Acts No. 680, § 1.

> 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.[37]

The 1979 version of Article 916 authorized the testator to grant a usufruct in favor of his surviving spouse, both over his share of the community and over his separate property. The usufruct so authorized, however, was limited to the portion of such property that was inherited by issue of the marriage between the testator and the spouse in whose favor the usufruct was created. The 1979 version of Article 916 did *not* authorize the testator to grant such a usufruct over property which would be inherited by children of a *prior* marriage.

A testator was first authorized to grant, in favor of his surviving spouse, a usufruct over all or any part of his interest in community property, without regard to whether it would be inherited by issue of his last marriage, in 1981, when the legislature replaced Article 916 with Article 890.

The original version of Article 890 authorized a testator to confirm for the life of his surviving spouse (or for a shorter period) the usufruct authorized by that article over his entire interest in community property.[38] While the first paragraph specifically referred to the confirmation of the legal usufruct in favor of the surviving spouse "over so much of [the testator's share of community property] as may be inherited by the [testator's] descendants," the second paragraph authorized the testator to grant a testamentary usufruct only "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."[39] Thus, unlike the second paragraph, the first paragraph did not expressly limit the testator's

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37. La. Civ. Code art. 916 (1870), as amended by 1979 La. Acts No. 678, § 1.

38. Article 890, as originally enacted by Act 919 of 1981, provided as follows:

> 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 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.
>
> 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.

La. Civ. Code art. 890, as originally enacted by 1981 La. Acts No. 919, § 1.

39. *Id.*

authority to confirm a usufruct over his interest in community property to that portion "as may be inherited by issue of the marriage with the survivor."[40] Accordingly, the phrase "over so much of that share as may be inherited by the descendants" appearing in the first paragraph may reasonably be interpreted as referring to all the testator's descendants without regard to whether they were issue of his last marriage.[41]

Act 445 of 1982 amended the second paragraph of Article 890 to read as follows:

> 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.[42]

In particular, the 1982 amendment to Article 890 specifically excised the language appearing in the second paragraph of the prior version which, by implication, had denied the testator authority to grant a testamentary usufruct over his separate property that would be inherited by descendants of a prior marriage. The deletion, in 1982, of this restrictive language strongly suggests the legislature's intent to extend the availability of the Article 890 usufruct to all of a testator's separate property without regard to whether it would be inherited (1) by issue of the marriage between the deceased and the surviving spouse, (2) by issue of a prior marriage, or (3) by illegitimates.

This historical review indicates that no conflict existed between the scope of the surviving spouse's usufruct under former Louisiana Civil Code article 916 and the rights of children from the testator's prior marriage under Article 1752 until 1981, when Article 916 was replaced by the more expansive Article 890. While former Article 916 set forth a testator's right to dispose of his property in usufruct to his surviving spouse, his right to do so was limited to the portion of his estate *which would be inherited by issue of the marriage with that spouse*. This was consistent with Article 1752, which by 1916 had been reduced to a mere expression of Article 916's negative implication—a testator could *not* confirm or grant a usufruct in favor of his surviving spouse over the legitime of children who were *not* issue of the marriage. The potential conflict regarding the scope of the surviving spouse's usufruct thus arose upon the enactment of Article 890, which could be construed as having extended the usufruct to the legitime of the testator's children by a prior marriage.[43] That the *Suggs* court sought to avoid this apparent conflict by disregarding the most recent expression of legislative will, the enactment of Article 890, is peculiar. In effect, the court breathed new life into Article 1752, which the legislature had emasculated in 1916. From this review of the histories

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40. *Id.*

41. *Id.*

42. La. Civ. Code art. 890, as amended by 1982 La. Acts No. 445, § 1.

43. Regarding the legislative history of the 1981 act, see *infra* notes 47-51 and accompanying text.

of Article 916, its successor, Article 890, and Article 1752, the authors suggest that the 1981 and 1982 legislative acts, by which Article 890 was enacted and amended, completed the implied repeal of the theretofore superfluous Article 1752.

3. Implied Repeal of Article 1752

In finding no conflict between Articles 890 and 1752, the *Suggs* court interpreted Article 890 as affecting the interests of a testator's descendants by a prior marriage only to the extent those interests were part of the disposable portion. In effect, the court interpreted the words "usufruct authorized by this article," appearing in the third and fourth paragraphs of Article 890, as excluding the legitime of children by a prior marriage. The *Suggs* court thereby gave full effect to the literal provisions of Article 1752 and, although limiting the effect of the third and fourth paragraphs of Article 890, avoided treating them as surplusage. The third paragraph of Article 890 thus would be limited under the *Suggs* analysis to the legitime of issue of the marriage between the deceased and the surviving spouse and of illegitimate issue. The fourth paragraph would apply only to a bequest in naked ownership of all or a part of the disposable portion in favor of an issue of a prior marriage.

The *Suggs* analysis is valid only if, when enacting Article 890, the legislature intended that Article 1752 operate as a limitation on the availability of the surviving spouse's usufruct.[44] The legislative history of Article 890, however, does not indicate any such intent.[45] In fact, the legislative history of Act 919 of 1981 and Act 445 of 1982 indicates just the opposite.[46] A review of this legislative history thus compels the conclusion that the enactment of Article 890 effected the total eclipse of Article 1752.

The literal language of Articles 890 and 1752 may be viewed as being in conflict if the legislature intended the Article 890 usufruct to apply to the legitime of children by a prior marriage.[47] That the legislature intended the usufruct to extend this far is clear from one of the official comments to the original version of Article 890, which provided as follows:

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44. The *Suggs* court stated that "[t]here is nothing in the language of Article 890 to indicate such intent [to repeal Article 1752 by enactment of Article 890]." Succession of Suggs, 612 So. 2d 297, 299 (La. App. 5th Cir. 1992). Aside from examining the language of Articles 1752 and 890, the *Suggs* opinion contains no analysis of the legislative history or the legislative intent regarding such articles.

45. Nor, as noted above, does an analysis of the chronologies of Articles 890 and 1752 indicate any such intent.

46. *See infra* notes 47-51 and accompanying text.

47. It is well-settled that, in interpreting statutes, courts "should construe an enactment to give effect to the true legislative intent." Bonnett v. Karst, 261 La. 850, 892, 261 So. 2d 589, 605 (1972). *Accord* G.I. Joe, Inc. v. Chevron U.S.A., Inc., 561 So. 2d 62, 65 (La. 1990); *In re* Bruno, 388 So. 2d 784, 786 (La. 1980); Smith v. Flournoy, 238 La. 432, 446-47, 115 So. 2d 809, 814 (1959); Thigpen v. Boswell, 465 So. 2d 865, 867 (La. App. 2d Cir. 1985); Franco v. Kar Products, Inc., 409 So. 2d 1238, 1244 (La. App. 4th Cir. 1982).

> (a) This article includes some aspects of Article 916 of the Civil Code of 1870 *but changes the law. It extends the usufruct of the surviving spouse to all former community property of the deceased, regardless of whether the descendants who succeed to the property are issue of the marriage with the survivor or not.* It makes no change in the present law with reference to the usufruct over separate property, which permits a testator to grant a usufruct to the surviving spouse over so much of the *separate* property *as may be inherited by issue of the marriage with the survivor.*[48]

This comment constitutes strong evidence of the legislature's specific intent that the Article 890 usufruct be available even with respect to the inheritance over which the Article 1752 proscription previously may have extended. It is, therefore, clear from this comment that the legislature *did not intend* Article 1752 to limit the usufruct authorized by Article 890. Further, when considered together with the 1982 amendment to Article 890, one may infer from the 1981 comment that the legislature intended to authorize a testator to grant, in favor of his surviving spouse, a usufruct over all or part of his *separate* property and to permit the usufruct so created to burden the legitime of all of the testator's descendants, regardless of whether they were issue of his last marriage. Thus, taken together, the 1981 comment and the 1982 amendment suggest the legislature's intent that the Article 890 usufruct be available with respect to *all* of the decedent's property, whether community or separate, and that Article 890 override the limitations which otherwise would be imposed under Article 1752. Under this interpretation, the words "usufruct authorized by this article" appearing in the third and fourth paragraphs of Article 890 would include a usufruct which encumbers the legitime of heirs who are not children of the marriage between the deceased and his surviving spouse.[49]

The *Suggs* court suggested the enactment of Act 147 of 1990 (later declared unconstitutional in its entirety in *Lauga*), which contained an express repeal of

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48. La. Civ. Code art. 890 cmt. (a) (emphasis added).

49. Louisiana courts have long recognized that reporter's comments and various other provisions included in legislative enactments, although not part of the law, are properly considered for purposes of interpreting statutes so as to determine legislative intent. For example, in Robinson v. North Am. Royalties, Inc., 463 So. 2d 1384, 1388 (La. App. 3d Cir.), *modified*, 470 So. 2d 112 (1985) (*per curiam*), the court was "compelled to look to the [official reporter's] comment for insight as to the legislature's intent in enacting Article 128 [of the Mineral Code]." Likewise, in Thigpen v. Boswell, 465 So. 2d 865, 867 (La. App. 2d Cir. 1985), in interpreting Articles 180-184 of the Mineral Code, the court was guided by the reporter's comments and declared that "[r]eason dictates that we interpret the statute in the manner that effectuates the legislature's intent . . . ." *Accord* Exchange Oil & Gas Corp. v. Great Am. Exploration Corp., 789 F.2d 1161, 1163 (5th Cir. 1986); Emmons v. Agricultural Ins. Co., 245 La. 411, 422 n.5, 158 So. 2d 594, 598 n.5 (1963); State v. Daniels, 236 La. 998, 1006 n.3, 109 So. 2d 896, 898 n.3 (1958), *overruled on other grounds by* State v. Gatlin, 241 La. 321, 129 So. 2d 4 (1961). Thus, although § 5 of Act 919 of 1981 provides that "[t]he article headnotes and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act," those headnotes and comments nevertheless reflect the legislative intent underlying the scope and effect of the Article 890 usufruct.

Article 1752, was evidence that the legislature had not previously intended to repeal Article 1752. This conclusion ignores the manifest legislative intent set forth in the 1981 revision comment as well as the common legislative practice of repealing so-called "deadwood" provisions, *i.e.*, statutory provisions which are archaic or obsolete but which have not been expressly repealed. Legislative bodies, from time to time, enact legislation which renders earlier statutes archaic or obsolete and later return to expressly repeal the affected provisions.[50] Further, section 8 of Act 919 of 1981, in providing "[a]ll laws or parts of laws in conflict herewith are hereby repealed," strongly suggests that the legislature (1) made no serious attempt to review every pre-existing statutory provision of Louisiana law for consistency with its legislative intent, (2) realized that other previously enacted statutes might well be in conflict with the extensive statutory revisions made by Act 919,[51] and (3) intended that any and all such previously enacted statutes be repealed to the extent they were inconsistent with the provisions of Act 919. When read in conjunction with the official comment to the original version of Article 890 as enacted in 1981, this provision alone indicates, at least with respect to the testator's interest in community property, the legislature's intent to repeal Article 1752. From this, it is only logical to conclude that the 1982 amendment completed the expression of this intent to effect the total eclipse of Article 1752.

B. Characterization of the Article 890 Usufruct as Legal Versus Testamentary

The error in *Suggs* can also be identified with the court's failure to consider the classification of the Article 890 usufruct as *legal* in nature, as opposed to *conventional*.[52] According to Louisiana Civil Code article 544:

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50. *See, e.g.*, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976).

51. The preamble to Act 919 of 1981 reveals the comprehensive nature of the revisions made by that act, *viz.*:

> To revise, amend, and reenact the Preliminary Title and Chapters 1, 2, and 3 of Title I of Book III of the Louisiana Civil Code of 1870, containing Article 870 through and including Article 933, relative to kinds of succession and intestate succession, substituting a new preliminary title and Chapters 1 through 3, to consist of Articles 870 through 902; to provide for general principles; to provide for the different sorts of successions and successors; to provide for the privilege of representation; to provide the rules of intestate succession to community and separate property, including the usufruct rights of a surviving spouse; to provide for the rights of the state in default of heirs; to amend and reenact Article 3556(8) of the Louisiana Civil Code of 1870; to enact Article 3154.1 of the Louisiana Code of Civil Procedure providing for the rights of certain naked owners of property burdened with the surviving spouse's usufruct to request security; to repeal all other laws or parts of laws in conflict with this Act; to provide that the article headnotes and the comments included in this Act are not to be considered as part of the proposed law; to provide for the severability of the provisions of this Act; to provide that the provisions of this Act shall prevail over the conflicting provisions of other acts passed during the 1981 Regular Session; to provide the effective date of this Act.

52. A usufruct created by testament constitutes a conventional usufruct. *See infra* note 56 and authorities cited therein. The consequences which attend the characterization of a usufruct as legal

> Usufruct may be established by a juridical act either *inter vivos* or *mortis causa*, or by operation of law. The usufruct created by juridical act is called conventional; the usufruct created by operation of law is called legal.[53]

It has long been established that any usufruct authorized by Article 890 is deemed to arise *by operation of law*.[54] This is equally true whether the Article 890 usufruct arises in the intestate setting, is confirmed by testament (in the case of the testator's interest in community property), or is created by testament (in the case of the testator's separate property).[55] The purposes of this usufruct support its characterization as a right arising by operation of law. According to Professor Yiannopoulos: "The purposes of the usufruct of the surviving spouse, ever since its introduction into Louisiana law by Act No. 152 of 1844, have been to secure means of sustenance for the surviving spouse and to prevent partition or liquidation of the community to the prejudice of that spouse."[56]

These stated purposes are equally valid regardless of whether the decedent's estate is composed of community or separate property or whether he is survived by children of the marriage with his surviving spouse, by children of a prior marriage, by illegitimates, or by any combination thereof.[57]

The first paragraph of Article 890 creates a legal usufruct in favor of the surviving spouse only with respect to the decedent's interest in *community*

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or conventional are significantly different. For example, the legal nature of the Article 890 usufruct (1) results in its termination upon the surviving spouse's remarriage (unless confirmed by testament for life or a shorter period), (2) prevents it from being subject to Louisiana inheritance taxes, (3) relieves the usufructuary from the obligation to provide security—unless the naked owners are not children of the marriage, and (4) prevents it from being treated as an impingement upon the legitime of forced heirs. Essentially the opposite is true with respect to conventional usufructs. See Yiannopoulos, *supra* note 21, § 194, at 391-95, and authorities cited therein.

53. The comments accompanying the 1976 revision to Article 544 further provide:

> Conventional usufructs are of two kinds: either contractual, created by inter vivos juridical act, or testamentary, created by mortis causa juridical act. Legal usufructs may be of various kinds. In Louisiana . . . the surviving spouse has the usufruct of one-half of the community property inherited by issue of the marriage . . . .

La. Civ. Code art. 544 cmt. (b).

54. *See, e.g.*, Succession of Steen, 508 So. 2d 1377 (La. 1987); Succession of Waldron, 323 So. 2d 434 (La. 1975); Succession of Chauvin, 260 La. 828, 257 So. 2d 422 (1972); Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957); Succession of McCarthy, 583 So. 2d 140 (La. App. 1st Cir. 1991); Darby v. Rozas, 580 So. 2d 984 (La. App. 3d Cir. 1991); Succession of Daly v. McNamara, 515 So. 2d 661 (La. App. 3d Cir. 1987). This is clear from the face of Article 890, the third paragraph of which provides: "A usufruct authorized by this Article is to be treated as a legal usufruct and is not an impingement upon legitime."

55. *See* cases cited *supra* note 54.

56. Yiannopoulos, *supra* note 21, § 189, at 381.

57. In fact, it is reasonable to assume children of a prior marriage would be more likely to seek a partition than children of the marriage with the surviving spouse because they would not have the same allegiance or loyalty to the surviving spouse who is not their parent. The purpose of the usufruct thus may be seen as having even greater validity in this setting.

property and provides that this usufruct will terminate when the survivor remarries. Nevertheless, that paragraph expressly authorizes a testator to *confirm* the Article 890 usufruct *for life*. Further, the second paragraph of Article 890 expressly provides that a testator may *grant* to his surviving spouse a usufruct over his *separate* property. The third paragraph provides that a usufruct authorized by Article 890, though created or confirmed by testament, is *deemed* to be a *legal* usufruct. Article 890 thus reflects a clear legislative intent to allow a testator to reach the same result regarding his separate property as would obtain by operation of law with respect to his interest in community property, and to permit the surviving spouse's usufruct over property of either character to continue for her lifetime, should the testator so desire. For example, if no community exists because the spouses have contractually agreed to dispense with the community property regime, or if the community is insignificant and the testator has substantial separate property, the testator may grant a usufruct over his separate property in order to enable his spouse to maintain her standard of living without being concerned about the claims of forced heirs.[58] Those claims can be avoided, however, only by characterizing the usufruct as legal. Thus, while it may appear somewhat anomalous that the law in certain circumstances accommodates the creation of a *legal* usufruct only by an *act of donation mortis causa*, which is a *conventional* act,[59] it is this characterization which gives effect to a testator's intent to provide for his surviving spouse for as long as he wishes, unimpeded by the claims of forced heirs. The *Suggs* construction of Article 1752 begins to unravel when the Article 890 usufruct is viewed from this perspective.

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58. The same would be true in the case of a testamentary confirmation of the Article 890 usufruct which attaches to the decedent's interest in community property.

59. Professor Yiannopoulos recognizes this anomaly: "Without such a *testamentary* disposition, however, there can be no *legal* usufruct over separate property." Yiannopoulos, *supra* note 21, § 189, at 382-83 (emphasis added).

> The distinction between legal usufruct and testamentary usufruct has been blurred in Louisiana by the doctrine of *confirmation* of the legal usufruct by will. According to the jurisprudence interpreting Article 916 of the Louisiana Civil Code of 1870, a testamentary disposition that was not adverse to the interests of the surviving spouse did not defeat the legal usufruct under that article. Such a disposition merely confirmed the legal usufruct. The doctrine of confirmation of the legal usufruct by testament had no statutory foundation until the 1975 amendment to Article 916 of the Civil Code. Nevertheless, it became deeply imbedded in Louisiana law because it favors strongly the interests of the surviving spouse. In effect, this doctrine allows the surviving spouse in community to cumulate rights granted to him directly by law and those given by the will of the deceased spouse. This doctrine is now a part of the statutory scheme of Article 890 of the Louisiana Civil Code.

Id. § 194, at 392.

> Question has arisen whether the confirmation of the legal usufruct by testament affects the nature of the usufruct and converts it into testamentary. According to well-settled Louisiana jurisprudence, when the legal usufruct is confirmed by testament it remains legal for purposes of taxation, giving of security, and forced heirship.

Id. § 195, at 395.

As noted in detail above, Article 1752 essentially represents a mere limited restatement of Article 1493, which defines the disposable portion of one's estate. Article 1752 simply has no significance apart from Article 1493. Because the express language of Article 890 excepts a usufruct created under that article from the rules of Article 1493 (i.e., by characterizing the usufruct as legal and by expressly stating it will not be an impingement on the legitime), any usufruct that is either created or authorized by Article 890 will, by definition, be free of the restrictions imposed by Article 1752.[60]

This result finds support in Professor Yiannopoulos' analysis of the legal nature of an Article 890 usufruct:

> When the testator gives to the surviving spouse his entire estate in full ownership, the disposition impinges on the legitime of his descendants and must be reduced. *The disposition, however, is not adverse to the interests of the surviving spouse and does not defeat the legal usufruct.* . . .
>
> . . . [The usufruct created in *Winsberg*] *attached by operation of law; hence, it was not an impingement on the legitime* of the children.
>
> Winsberg continues to be relevant for the interpretation of Article 890 of the Louisiana Civil Code and the reduction of excessive donations in favor of the surviving spouse.[61]

He further noted, with respect to an Article 890 usufruct over the forced portion, that:

> In contrast with 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, whether consisting of community property, of 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 a usufruct authorized by Article 890 of the Louisiana Civil Code and is to be treated as a legal usufruct.[62]

Implicit in Professor Yiannopoulos' analysis is the conclusion that the restrictions imposed by Article 1752 are *subject to* the rights of a surviving spouse with respect to an Article 890 usufruct. This conclusion follows because the surviving spouse whose bequest has been reduced to the disposable portion receives the Article 890 legal usufruct even with respect to the legitime. Accordingly, even a forced heir's action for reduction under Article 1502 would

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60. *See* Yiannopoulos, *supra* note 21, §197, at 400 n.9 (stating that Article 1499 does not apply to an Article 890 usufruct "because the burden on the legitime is permitted by Article 890 of the same Code").

61. *Id.* § 196, at 397-98 (footnote omitted) (emphasis added).

62. *Id.* § 197, at 399 (footnotes omitted) (emphasis added).

be subject to the surviving spouse's usufruct.[63] This analysis clearly precludes any action by which children of the marriage between the decedent and his surviving spouse might seek to reduce the Article 890 usufruct over either community or separate property. The same result should obtain in the case of an action for reduction brought by children of a prior marriage to enforce the restrictions set forth in Article 1752. Because an action based upon a violation of Article 1752 may be construed only with reference to the rights of forced heirs in general under Article 1493, it is clear that Article 890, which is an essential element of the Article 1493 definition of the disposable portion, by implication also qualifies the scope of the rights afforded by Article 1752. One simply struggles in vain for a reason to restrict this analysis to an action for reduction brought by children of the marriage.

II. CONCLUSION

The analysis applied by the *Suggs* court disregards both the nature of the Article 890 usufruct and the legislative and judicial history behind that article and Article 1752. The analysis suggested here, which incorporates these factors, compels a contrary conclusion and, coincidentally, reaffirms the availability of the federal estate tax marital deduction regarding both (1) a testamentary confirmation for life of the usufruct established by the first paragraph of Article 890 and (2) a testamentary granting of the usufruct authorized by the second paragraph of that article, irrespective of whether the property so affected may constitute the legitime of the testator's descendants by a prior marriage.

63. It is significant to note that the rights of reduction with which forced heirs are possessed are set forth in Book III, Title II of the Louisiana Civil Code, dealing with donations *inter vivos* and *mortis causa*; they are not contained within Book III, Title I, dealing with intestate successions, as is Article 890. Louisiana Civil Code article 1502 provides, in pertinent part: "Any disposal of property . . . exceeding the *quantum* of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that *quantum*."