SUPREME COURT OF LOUISIANA

No. 96-C-0732

HELENA BABIN KENNEDY

versus

JAMES KENNEDY

consolidated with

No. 96-C-0741

HELENA BABIN KENNEDY

versus

JAMES KENNEDY

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

KIMBALL, J., Dissenting.

I respectfully dissent.

After surveying the applicable Civil Code articles, the majority concludes "even if the property has not previously been farmed for timber, the institution of farming operations on the land is permissible." *Ante* at 8. This, of course, is exactly what the usufructuary, Mrs. Kennedy, did. The majority also concludes that the entire 143 acre tract is "timberlands," and acknowledges that Mrs. Kennedy has a right to harvest the timber as a "prudent administrator" in accordance with La. C.C. art. 562. *Ante* at 7. The majority then ignores the factual findings of the trial court that, in this case, "prudent administration" of the 113 acre tract requires clear cutting of the tract and concludes, without finding the trial court manifestly erroneous as to those factual findings, that "Mrs. Kennedy may institute a program of selective thinning and selling the timber on the land, so as to *properly manage* the wealth of standing timber...." *Ante* at 9 (emphasis added). If the tract constitutes "timberlands," the usufructuary has a right to cut timber so long as it is done as a "prudent administrator," and the usufructuary has a trial court determination made on the basis of expert testimony that clear cutting 113 acres of the tract and selectively cutting 30 acres of the tract in fact constitutes "prudent administration," is not a reversal of the trial court's decision nothing more than

an improper substitution of judgment? In my view, there is no basis for reversing the trial court's factual findings in this matter. Furthermore, as even the majority opinion, when reduced to syllogistic form, demonstrates, the trial court's factual findings were made under a correct analysis of the law. As such, there was no legal or factual basis for the court of appeal to reverse the trial court's ruling in this matter with regard to the 113 acre tract, and this Court simply compounds the error by failing to reinstate the trial court's ruling.

As is clear from both the plain language of La. C.C. art. 562 and the history of the drafting of that article, the "open mines" doctrine was specifically rejected and, in its place, a "prudent administrator" standard incorporated when La. C.C. art. 562 was adopted. In this regard, the initial draft of La. C.C. art. 562 by the Louisiana Law Institute stated:

> If the usufruct includes lands that were *regularly exploited for timber* at the time of the creation of the usufruct, and if there is no provision concerning the use and enjoyment of the landowner's rights in timber, the usufructuary is entitled to continue the operations of the owner; but he has no right to commence timber operations without the consent of the naked owner. (Emphasis added).

At the time this draft version of La. C.C. art. 562 was pending, the comments to La. C.C. art. 560 were apparently drafted by the Law Institute. Paragraph (b) of those comments reflects the language used in this original version of La. C.C. art. 562, stating:

> For the usufructuary's right to *continue the timber operations of the owner*, and to treat as fruits the products of a *regularly exploited forest*, see Article 562, *infra*; Yiannopoulas, Personal Servitudes § 27 (1968). (Emphasis added).

However, the Law Institute then substantially changed La. C.C. art. 562, rejecting the "open mines" doctrine which had been continued in the original draft and from which the comments to La. C.C. art. 560 had been drawn. In its revised form, that enacted by the Legislature, La. C.C. art. 562 now states:

> When the usufruct includes timberlands, the usufructuary is bound to manage them as a prudent administrator. The proceeds of timber operations that are derived from proper management of timberlands belong to the usufructuary.

Unfortunately, the Law Institute failed to revise the comments to La. C.C. art. 560 to reflect the revision of La. C.C. art. 562. However, the comments to the revised and subsequently enacted version of La. C.C. art. 562 make it abundantly clear that the "open mines" doctrine has been rejected and, in its place, the right of the usufructuary to conduct timber operations on all usufructs of

timberlands, so long as such operations are conducted as a "prudent administrator," has been established. In this regard, Comment (a) to La. C.C. art. 562 states: "This article is new. It establishes the duty of the usufructuary to manage timberlands as a prudent administrator and his right to the proceeds of certain timber operations." Comment (b) further notes "the usufructuary is bound to manage timberlands as a prudent administrator and is entitled to the proceeds of timber operations that derive from a proper management of timberlands...," and Comment (d) states "[t]he interests of the naked owner are protected by the prohibition of waste and by the obligations of the usufructuary to act as a prudent administrator and to preserve the substance of the property subject to the usufruct." The majority unfortunately ignores the genesis of La. C.C. art. 562 and its comments. However, the fact that certain comments in the Code were not altered to reflect the change in La. C.C. art. 562 should not defeat the intended change in the law.

In the instant case, Mr. Kennedy left his wife a usufruct of these timberlands, presumably to secure her future. Mrs. Kennedy, acting as a prudent administrator in conformance with the Code, followed the considered recommendation of two foresters that prudent administration of these lands requires clear cutting the 113 acre tract and selectively cutting the 30 acre tract. In this regard, the expert's plan, adopted by the trial court, requires that drainage areas be left uncut to prevent erosion and that the 113 acre tract be prepared for planting and replanted with pine trees after cutting. Such measures, part of a "prudent administration" by the usufructuary of these timberlands, will insure that the substance of the property is preserved and that the naked owner's interest in the land is protected. There is, therefore, no basis in law or fact for the court of appeal's reversal of the trial court's ruling as to the 113 acre tract or the majority's decision ignoring the trial court's ruling as to the 113 acre tract.

Because the majority's decision in this matter defeats both the intent of the grantor and of La. C.C. art. 562, I respectfully dissent.