SUPREME COURT OF LOUISIANA

No. 96-C-0732
consolidated with
No. 96-C-0741

Helena Babin Kennedy

Versus

James Kennedy

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
SECOND CIRCUIT, PARISH OF CLAIBORNE, STATE OF LOUISIANA

BLEICH, Justice*

This case involves a conflict between the usufructuary and the naked owner of 143 acres of North Louisiana timberland. We are called upon to determine the nature and extent of the usufructuary's rights under LSA-C.C. art. 562 to harvest the timber from previously unexploited forest land. We hold that a usufructuary may not clear cut previously unfarmed timberlands, but may institute a program of periodic selective cutting of the timber.

FACTS

Walter Kennedy died in 1988, leaving a usufruct over 143 acres of land to his wife, plaintiff Helena Babin Kennedy, and the naked ownership of the land to his cousin, defendant James Kennedy. In April, 1993, Mrs. Kennedy informed James Kennedy of her intent to clear cut all of the standing timber on the 143-acre tract. At the time of trial, the value of the timber on the tract was estimated at $2,200-$2,500 per acre, and the value of the land itself, without trees or planted seedlings, was estimated

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* Victory, J., not on panel. Rule IV, Part 2, § 3.

to range from $200-$300 per acre. James Kennedy opposed the plan. Mrs. Kennedy brought an action for court approval to clear cut the tract in October 1993.

According to James Kennedy's recollection at trial, about 65-70 acres of the tract were at one time farmed for cotton, but the tract had not been cultivated since the mid-1930's. He said that there had not been a major cut on the land since the late 1930's or early 1940's. Occasional "bug cuts" had been made to remove trees infested with pine beetles, and one harvest of pine trees for poles was made in the late 1970's, when the market was extremely favorable. At the time of Walter Kennedy's death, no management plan to harvest the timber was in effect. The tract was covered with loblolly pine trees, and increasingly, several species of less valuable hardwood trees.

Mrs. Kennedy's experts, Freshwater and Peters, surveyed the land to analyze the varieties, number, age and size of the timber. Mr. Freshwater concluded that all of the land should be clear cut and planted with improved seedlings. Because much of the timber had already reached full maturity, little or no additional growth would occur if the stand were merely thinned or selectively cut. Moreover, the number of hardwoods on the land was increasing and would eventually replace the pines. Because these hardwoods produce less valuable lumber than the loblolly pines, a clear cut would have the advantage of eliminating these undesirable species. He also testified that there is currently a good lumber market, and excellent prices could be obtained by harvesting all of the timber now.

Mr. Peters divided the land into a 113-acre tract of trees that were 60-75 years old, and a 30-acre parcel of 45-50 year-old trees. Mr. Peters recommended a clear cut of the 113 acres because maximum growth had been reached and hardwoods had begun to replace the pine. However, he found that the 30-acre tract would be amenable to

selective cutting, because the trees still had growth potential and because it was still predominantly covered in pine.

Both Peters and Freshwater recommended that any clear cut areas be replanted with genetically improved hybrid pine seedlings, to be purchased by Mrs. Kennedy. The replanted trees would produce no merchantable timber for approximately the first 15 years. They would produce only less valuable pulpwood and chipping saw wood in years 15-30. The seedlings would need to grow 30-40 years to produce more valuable sawlogs comparable to the trees on the property at the time of the creation of the usufruct.

James Kennedy's forestry experts, Wade and Patterson, recommended instituting a program of selective cutting of trees with a diameter greater than 22 inches breast high, as well as certain diseased and deformed trees. This would leave some trees for reproduction. Although they agreed that the trees were close to full maturity at 60-70 years of age, they felt that there was some room for growth that would occur if the trees were thinned. Other advantages cited for selective cutting as opposed to clear cutting the timber were aesthetic value, wildlife protection, prevention of erosion, and testimony that fire, disease, and insects would have a less devastating effect upon uneven-aged, mixed timber than upon an even-aged all pine stand.

The trial court approved the timber management plan proposed by Mrs. Kennedy's expert, Mr. Peters, to selectively cut the 30-acre parcel and clear cut the 113 acres. The court of appeal affirmed as to the 30-acre tract, but ordered all cutting operations on the 113-acre parcel to cease, and ordered any proceeds therefrom to be returned to the naked owner. Kennedy v. Kennedy, 27,810 (La. App. 2d Cir. 2/6/96); 668 So.2d 485.

LAW AND ANALYSIS

The Civil Code establishes a balance between the rights and responsibilities of the usufructuary of land and those of the naked owner. The usufructuary has the right to the use of the thing and all fruits of the thing subject to the usufruct. LSA-C.C. arts. 539, 550. The obligations of the usufructuary are to preserve the substance of the land, to use it as a prudent administrator, and to deliver it to the owner at the termination of the usufruct. LSA-C.C. art. 539. The naked owner has the right to dispose of, alienate, or encumber the property, but must not interfere with the usufructuary's enjoyment of the thing. LSA-C.C. arts. 603, 605. Full ownership of the land is restored to the naked owner at the termination of the usufruct. LSA-C.C. art. 628.

The Civil Code provides that the usufructuary is entitled to all fruits, but not the products of the thing subject to the usufruct. LSA-C.C. arts. 488, 550. Fruits are defined as "things that are produced by or derived from another thing without diminution of its substance." LSA-C.C. art. 551. Products, on the other hand, are things that are derived from the land as a result of diminution of its substance. LSA-C.C. art. 488. The comments to Article 551 acknowledge the ambiguous status of trees in usufruct:

> Trees are born and reborn of the soil, but they are ordinarily considered to be capital assets rather than fruits on account of their slow growth and high value. See Harang v. Bowie Lumber Co., 145 La. 96, 81 So. 769 (1919). However, trees in a tree farm or in a regularly exploited forest may be regarded as fruits, because they are produced according to the destination of the property and without diminution of its substance. See Yiannopoulos, Personal Servitudes § 27 (1968).

LSA-C.C. art. 551, comment (b).

In Succession of Doll v. Doll, 593 So. 2d 1239 (La. 1992), this Court considered the issue of whether revenues derived from the sale of timber constitute fruits of an immovable for purposes of a collation action. The Court focused on Article 551 and

comment (b) thereto, and concluded that if the property in question was a "tree farm" then revenues from the sale of timber constituted a fruit of an immovable.

The land in Doll had been previously unexploited, and was not originally planted for the purpose of farming timber. Defendant purchased the land from her father before his death, and had selectively thinned and sold timber from the land. Id. at 1248. The Court considered whether the land should be defined according to its nature at the time the growth ensued, or according to the character of the cutting operations. The Court affirmed the court of appeal finding that the property was a tree farm, explaining as follows:

> From the foregoing we determine designation as a "tree farm" is premised upon the existence of management techniques aimed at securing continuous production of timber, a conclusion which comports with the principle of article 551 and comment b thereto. It is clear a tree farm can not be defined by reference to its character at the time of the growth, but rather by the land's ability, through proper management techniques such as selective thinnings and plantings, to provide sustained yields. The timber sales at issue here were nothing more than selective thinnings intended to spur a fruitful and continuous yield over a prolonged stretch of time. . . . Accordingly, the revenues derived from the timber sales constitute a fruit.

Id. at 1249-50.

If we apply the reasoning of Doll in the usufructuary context, it would appear that if the land is cultivated as a "tree farm," then the timber derived therefrom may be considered fruits, which belong to the usufructuary. See also IP Timberlands Operating Co. v. Denmiss Corp., 93-1637 (La. App. 1st Cir. 5/23/95); 657 So.2d 282, 293, writ denied, 95-1958 (La. 10/27/95); 661 So.2d 1348; 3 Planiol et Ripert, Traite pratique de droit civil francais 256, 770 (2d ed. Picard 1952). If, however, the property is cut without opportunity for sustained regrowth, then the proceeds must be characterized as a product, to which the usufructuary is not entitled. Myers v. Colfax Timber Co., 93-1315 (La. App. 3d Cir. 5/4/94); 640 So.2d 513, 520.

The inquiry does not end with the characterization of the land as a tree farm, however, because more specific codal provisions exist to explain the status of trees in usufruct. LSA-C.C. art. 560 covers the treatment of "trees" by the usufructuary. Article 560 provides that "[t]he usufructuary may cut trees growing on the land of which he has the usufruct . . . but only for his use or for the improvement or cultivation of the land." The usufructuary's right to "trees" from land in usufruct is thus quite limited. If, however, the property can be characterized as "timberlands," then the usufructuary is granted much broader management power. LSA-C.C. art. 562 governs the rights of usufructuaries to timberlands:

> 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.

The substance of Articles 560 and 562 was formerly contained in Article 551, which remained substantively the same from 1825 until the 1976 revision:

> The usufructuary has a right to draw all the profits which are usually produced by the thing subject to the usufruct.
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> Accordingly, he may cut trees on the land of which he has the usufruct, take from it earth, stones, sand and other materials, but for his use only, and for the amelioration and cultivation of the land, provided he act in that respect as a prudent administrator, and without abusing this right.

Article 551 thus limited the right of the usufructuary to the bulk of the standing timber upon the land. The 1808 Code had broadly allowed the usufructuary to "cut trees on land of which he has the usufruct, dig stones, sand and other materials both for his use and for sale provided that he act in these respects as a prudent father, and so as that the inheritance [estate] be not thereby rendered entirely barren or useless." The redactors explained the 1825 change as follows: "We have thought that the power given to the usufructuary to sell the wood or earth at his pleasure might be ruinous to the owner and we have thought proper to limit his rights in this respect to what might be necessary for

his own use and for that of the property." 1 La. Legal Archives, Projet of the Civil Code of 1825, p.52 (1937) (emphasis supplied). See Yiannopoulos, Personal Servitudes § 58, pp.122-23, n.5 (3d ed. 1989).

The 1976 Code separated the concept of "timber" from "trees" and established Articles 560 and 562 to govern the two types of things subject to usufruct. The legislature failed to define "timberlands" but defined "timber" in Comment (c) to Article 562 as "trees which, if cut, would produce lumber for building or manufacturing purposes. This includes any trees that could be cut for economic gain, such as pulp wood, pines, hardwoods or building lumber."

We see no reason to treat the 30-acre parcel of 45-50 year old trees differently from the 113-acre parcel of trees aged 60-75 years for purposes of deciding whether they constitute timberlands. Neither parcel has been farmed for timber in the past, yet both are possessed of mature forests capable of producing valuable saw timber. The land is capable of producing commercial quantities of lumber, and timber has at times been sold from the land. The forestry experts who testified at trial referred to the 143-acre tract of pine and hardwood trees as timberlands. Mr. Freshwater defined timberlands as "land with or without timber capable of growing timber in commercial quantities," while Mr. Peters defined timberlands as "land that's capable of producing commercial forest products." We conclude that all of the 143 acres at issue in this case may be characterized as "timberlands" subject to Article 562. The usufructuary therefore has a right to harvest the timber as a "prudent administrator" in accordance with Article 562.

The usufructuary's rights in relation to the naked owner are limited. To hold otherwise would allow ruin to occur to the property in violation of the fiduciary relationship of prudent management. Consistent with the Civil Code policy toward the

usufruct/naked owner relationship in general, Article 562 was intended to take into account the interests of both the usufructuary and the naked owner. The comments to Article 562 provide as follows:

> Timber operations by the usufructuary should not deplete the substance of the land. Modern techniques of regulated felling insure continuous production of timber and improvement of its quality. The 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.

LSA-C.C. art. 562, Comment (d).

> Society has an interest in the continuous productivity of timberlands, the naked owner has an interest in the maintenance of crafts and skills organized around timber exploitation, and the usufructuary has an interest in the security of a regular income.

LSA-C.C. art. 562, Comment (b).

The requirement that the usufructuary preserve the substance of the property does not bar all initiative to alter the use of the property, however. The usufructuary may make improvements and alterations on the property at his cost with the consent of the naked owner, or failing consent, with court approval. LSA-C.C. art. 558. The 1976 Code revision changed the law to allow the usufructuary to make the "improvements or alterations that a prudent administrator would make, even if they change the destination of the property, provided, however, that they do not change its substance." Yiannopoulos, Personal Servitudes § 128, p. 259 (3d ed. 1989); LSA-C.C. art. 558. Thus, even if the property has not previously been farmed for timber, the institution of farming operations on the land is permissible. Accordingly, Mrs. Kennedy may institute a program of selectively thinning and selling the timber on the land, so as to properly manage the wealth of standing timber, without depleting the substance of the land as a forest.

DECREE

The judgment of the court of appeal is affirmed as to the 30-acre portion of land on which selective cutting operations were allowed. The court of appeal is reversed as to the 113-acre tract. The proceeds from the 113-acre tract should be allocated to Mrs. Kennedy insofar as they may be considered fruits flowing from an appropriate selective cutting plan, and to Mr. Kennedy insofar as they constitute products resulting from clear cutting operations exceeding the management plan proposed by Mr. Kennedy's experts. The case is remanded to the trial court for a determination of the amounts Mrs. Kennedy should receive in accordance with the selective cutting plan proposed by James Kennedy's forest management experts.

AFFIRMED in part, REVERSED in part, and REMANDED.