Balancing interests in stepfamilies: *droit de dévolution* and *bijleving* (Southern Low Countries, 16th–18th centuries)

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I. Introduction

The legal history of the blended family in the early modern period is that of the stepfamily that was formed after remarriage of a widow or widower. According to canon law, a marriage could only be dissolved by death. This regime lasted from about the end of the twelfth until approximately the end of the eighteenth century. A divorce of some kind was known in canon law, but it was only a separation preserving the *vinculum matrimonii*. In case of violence or dissipation by the husband for example, the wife could obtain formal approval from an ecclesiastical court to live separately and to split up the matrimonial community of property, but thereafter both spouses were still married and they had to remain faithful.[92] As a result, in the mentioned period, questions as to ownership rights in subsequent marriages were closely related to the law of succession, since a second or third marriage was only possible after the death of a spouse.

From the sixteenth to the eighteenth centuries, legal discussions with regard to stepfamilies mostly concerned the relation between children of a former marriage and the new spouse of their parent by remarriage. The balance of interests between those parties was particularly urgent with regard to immovable properties, and much more than it is today. The reason for this relates to the importance of land and houses, which constituted family estates. Immovable assets could be acquired only after long-term saving, often throughout several generations. Therefore, it was expected that they remained within the kin, and that members of the family did not sell them, or alienate them in some other way.

[92] For the practice of divorce in ecclesiastical courts in France and the Low Countries, see LEFEBVRE-TEILLARD, *Les officialités*, p. 179–206, and VLEESCHOUWERS-VAN MELKEBEEK, 'Marital Breakdown', p. 81–89. See also, for a consideration of the results in these publications from a wider geographical perspective, Ch. DONAHUE, *Law, Marriage*, p. 521–561.

The idea that immovable property should stay within the family was less strict concerning land and houses that were acquired during marriage. Spouses could buy a house or a parcel of land together: it was then considered as jointly owned, and as belonging to the matrimonial community of property. Such communal immovable property was regarded as belonging to the two families of husband and wife together, and therefore primarily to the descendants of the spouses, *ie* their communal (legitimate) children. When a marriage ended at the death of one of the spouses, the matrimonial community of property was as a principle divided into two parts: one share was for the surviving spouse, and the other one for the heirs of the deceased, which were his or her children.

However, such a clear-cut solution was not always preferable. In many cases, there was only one house, which was the household dwelling, making up the nearly entire matrimonial community of property. In that case, distributing the communal property would entail that this house had to be sold, which would be detrimental to all parties involved. For a surviving spouse, this was not an interesting option, since it would deprive him or her from a place to live. For the heirs of the deceased, selling the only house of the family was not compatible with the strong conviction that immovable property should stay within the kin. But, on the other hand, if the dwelling was not sold, and if the surviving spouse continued to inhabit it, his or her second marriage brought about an immediate danger of a transfer of that house to another family, which was that of the new partner. Therefore, legal rules protected the interests of both the surviving spouse and the descendants in this respect.

II. *Droit de dévolution* (Duchy of Brabant)[93]

In many parts of the Duchy of Brabant an arrangement applied that was called *droit de dévolution*.[94] It was set in motion when one of two spouses having communal children died. Thereupon, the patrimonial household was continued by fiction of law. There was no distribution of the inheritance, and the matrimonial community was by and large maintained.

The German term *Verfangenschaft*, which was a synonym of *droit de dévolution*, is a clear expression of this idea:[95] the effects of the household were "blocked", *verfangen*, in order to protect the interests of the children of the marriage that had ended, thus preventing that the surviving spouse would alienate assets of the inheritance estate, and also those belonging to the half of the matrimonial community that he or she was entitled to.[96] The distribution of the inheritance of the deceased parent, and of the matrimonial community of property, was postponed until the death of the widowed parent.

It is remarkable that this *droit de dévolution* affected all immovable property, not only the land and houses that were personal property of the deceased (and thus being a part of the inheritance estate), but also all immovable property that had been acquired by both spouses during marriage (which belonged to the matrimonial community of property), and even the land and houses of which the surviving parent was the only owner.[97] The latter can be explained by the fact that personally owned immovable properties had often come from the kin, and that such goods were supposed to go to the descendants as well.

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93 For the medieval history of this arrangement, see GODDING, *Le droit privé*, p. 270–272 (nos 481–484); IMBERT, 'Le droit de dévolution', p. 207–239; ROES, *Het naaste bloed*, p. 79–88. The *droit de dévolution* is an important element in theories regarding different regional groups of inheritance law. See JACOB, *Les époux, le seigneur et la cité*, p. 39–46; YVER, 'Les deux groupes', p. 209–210.

94 This notion was not mentioned in texts of local law of the mentioned principality. It seems that the term was first used with regard to the inheritance of monarchs (as in "acquired by war or devolution"), and that it received its meaning of *Verfangenschaft* only in 1667 through the claims made by the French king Louis XIV on the Low Countries, as allegedly belonging to the inheritance of his wife Maria Theresa of Spain. Her father, the Spanish king Philip IV, had no sons out of his first marriage (in which Maria Theresa was born), married again and then had a son, the later Charles II. Louis XIV claimed that the Southern Low Countries, on the basis of its law of succession, were inherited by his wife, even though she had formally renounced her share in the inheritance of her father. See, with regard to these arguments, DHONDT, 'Entre droit privé et droit international'. The 'Belgian' jurist Pieter Stockmans responded to those claims with a legal treatise on the subject, in which he labelled the Brabantine *Verfangenschaft* as "*droit de dévolution*". See STOCKMANS, *Tractatus de jure devolutionis*.

95 GANGHOFFER, 'Les régimes matrimoniaux', p. 270, footnote 8.

96 *Coutumes de Befferen et de Putte*, p. 510 (ch. 4, s. 3(2)–6(2)); *Coutumes de la ville de Louvain*, p. 132–134 (ch. 14, s. 11). The surviving spouse could according to the law of Louvain and Aarschot only rent out immovable assets that were under *droit de dévolution* for a maximum period of three years. See *Coutumes de la ville de Aerschot*, p. 18 (s. 52); *Coutumes de la ville de Louvain*, p. 106 (ch. 11, s. 3). The law of Louvain referred to is written in a 1622 law book, which contains many older rules. The mentioned laws of Aarschot and of Befferen date from the middle of the sixteenth century.

97 *Eg Coutumes de Befferen et de Putte*, p. 510 (ch. 4, s. 4(2)).

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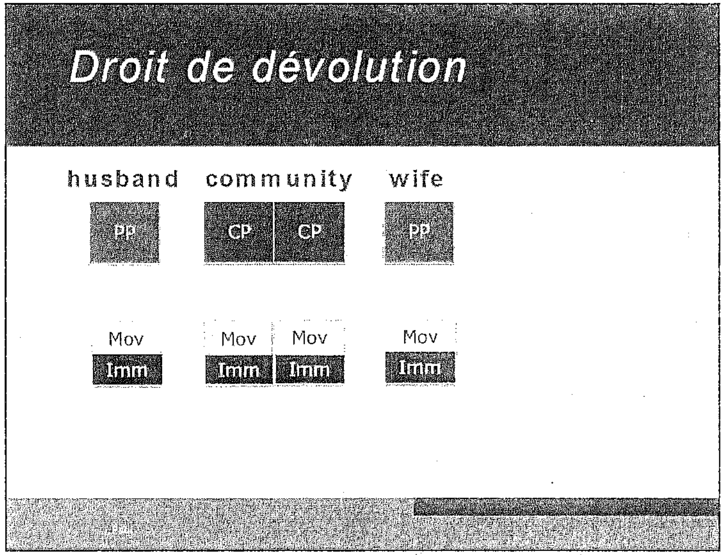
Furthermore, the *droit de dévolution* was a trust-like arrangement. The surviving spouse had to administer the "blocked" immovable assets for his or her children, which were also his or her heirs.[98]

The widowed parent was compensated for the fact that he or she could no longer sell his or her own immovable goods with the ownership of all movables of the household, [99] and with rights of use on all 'locked' immovable property.[100] This ensured that the surviving spouse could remain in the communal house until his or her death.



[98] This was a general rule for *tochtenaers* (see hereafter). See *Coutumes de la ville de Aerschot*, p. 38–40 (s. 113); *Coutumes de la ville de Louvain*, p. 122 (ch. 13, s. 1).
[99] *Coutumes de la ville de Louvain*, p. 118 (ch. 12, s. 14). It seems that the widow or widower could sell such movables, if he or she wanted to.
[100] *Coutumes de la ville de Louvain*, p. 116–118 (ch. 12, s. 13).

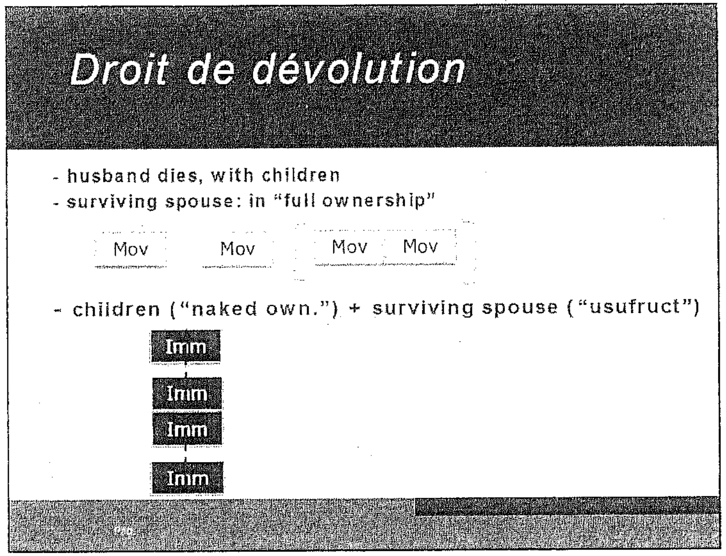


Fig. 1: The functioning of *droit de devolution*. PP stands for "personal property", CP for "communal property". "Mov" refers to "movables" and "Imm" to "immovable property".

The rights of use of the widowed spouse, on the immovable properties of the household, have often been labelled as usufruct, and as a counterpart of an alleged "nude ownership" of the children. In fact, in sixteenth- and early seventeenth-century Brabant, the mentioned rights of use were still commonly called *tocht*, which was not entirely comparable with usufruct.[101] Usufruct (*ususfructus*) and "nude ownership" (*nuda proprietas*) were notions of Roman law, which were not identical with the Brabantine concepts. In Brabant, a distinction was made between *erftocht* and *lijftocht*. *Erftocht* related to those immovable assets which the widow or widower had had in ownership before the death of his or her spouse. *Lijftocht* concerned those assets that he or she had acquired in use through this death: they encompassed the immovable assets that had been personal property of the deceased, and also those lots of land and houses that had been bought during marriage by the couple, in joint ownership.[102] If all communal children that were protected through the

[101] An exception was the 1546 law book of Jodoigne, which labelled the surviving spouse as "*usufructuaire*". See *Coutumes de la ville de Louvain*, p. 671 (ch. 3, s. 1).
[102] Godding, *Le droit privé*, p. 270 (no 481).

droit de dévolution died before the surviving spouse, the latter regained his or her ownership of the assets that were under *erftocht*.[103]

Moreover, in the sixteenth and early seventeenth centuries, the real rights of children on those immovable assets under *droit de dévolution* were usually not labelled "nude ownership". Instead, the heirs were always called owners.[104] Ownership rights were thus not split up under the arrangement of *droit de dévolution*, but rather they were subjected to conditions. The descendants became entitled owners by law, but they could not use their rights against the interests of their surviving parent.

Relevant in this respect was another Brabantine distinction, between "full" *tocht* and *naeckte tocht* (nude *tocht*). The "full" *tocht* entailed absolute restrictions for the owners of the assets under *tocht*, or their representatives, to alienate or mortgage them. By contrast, *naecte tocht* merely imposed an obligation to preserve an actual right of use, and did not exclude sale or hypothecation of the goods under use.[105] The law of the small city of Aarschot expressly provided that the widower was a *naeckt tochtenaer* for those immovable assets of which he had been owner up until the death of his wife. It seems that in that case the widower could, by delegation of his children-heirs, sell or mortgage the immovable assets under *naeckte tocht*, if only the widower remained in use of those goods.[106] In Louvain, the widow or widower was *naeckt tochtenaer* if no communal children were alive at the death of his or her spouse, which was when the heirs of the deceased were only parents and/or brothers and sisters.[107] *Naeckte tocht* thus encompassed more

[103] *Coutumes de la ville de Aerschot*, p. 40 (s. 119).
[104] *Coutumes de la ville de Louvain*, p. 132–134 (ch. 14, s. 11).
[105] Godding considered *erftocht* and "full" *tocht* as being the same, but in Aarschot and Louvain *erftocht* could be "naked". See GODDING, *Le droit privé*, p. 358 (no 639). Admittedly, in the later sixteenth and early seventeenth century *erftocht* was often used in the meaning of "full" *tocht*. See for example, the 1611 feudal law book of the County of Mechelen: *Coutumes de Befferen et de Putte*, p. 542–544 (ch. 3, s. 4), and also the 1570 law book of Tienen: *Coutumes de la ville de Louvain*, p. 730 (ch. 12, s. 2). See for the distinction, as to rights of sale and mortgage regarding assets under "naked" and "full" *tocht* (here also called *erftocht*), *Coutumes de la ville de Louvain*, p. 126–128 (ch. 13, s. 14). The notions of *erftocht* and "full" *tocht* had probably been blended together in the course of the sixteenth century, even though some rules in later periods still reflected the older distinctions.
[106] *Coutumes de la ville de Aerschot*, p. 42 (s. 124).
[107] *Coutumes de la ville de Louvain*, p. 130–132 (ch. 14, s. 9). See also footnote 5, as for the right to rent out immovable property under *dévolution*.

rights on the affected property than an arrangement of "full" *tocht*, even though it remained "blocked" because its use could not be relinquished.

In 1667, Pierre Stockmans only spoke of *erftocht* and (full) property when analysing *droit de dévolution*. When trying to subsume the Brabantine concepts under learned terminology, he labelled the rights of use of the surviving spouse as *usufructus causalis*. With that term, he expressed the idea that the widowed partner exerted rights of use that were linked to ownership, because – in Stockmans' view – the surviving spouse had rights that were strongly intertwined with the right of ownership, albeit under a prohibition to mortgage and alienate.[108]

Stockmans had no eye for the older nuances regarding *lijftocht* and *naeckte tocht*. Yet, he was quite right in his opinion that the children were (full) "owners".[109] It was indeed only hesitantly, over the course of the seventeenth century, that new compilations of law in the Southern Low Countries started using the notion of "*naeckte proprieteijt*" ("nude ownership").[110] As was mentioned, before that time, the heirs of the deceased parent were labelled owners without reservations. Only in law books and legal doctrine of the later seventeenth and of the eighteenth century, it became common to refer to *(erf)tocht* with the notion of *ususfructus*, and as a result, more older nuances were lost.[111]

According to Stockmans, the *droit de dévolution* entailed a priority rule of succession for children from a first marriage over children from a subsequent marriage, with regard to the inheritance of immovable property that had come under the *tocht* of the surviving spouse.[112] In spite of Stockmans' determination, this was not general practice. In sixteenth- and early seventeenth-century Louvain and Aarschot, for example, this principle only applied for the widower. If a widow remarried, her legitimate children out of a second or subsequent marriage inherited equal shares of the immovable property that was under *erftocht* because of an earlier widowed marriage. By contrast, if a man outlived

[108] STOCKMANS, *Tractatus de jure devolutionis*, vol. 1, p. 1–7.
[109] *Ibid.*, p. 5.
[110] This concept was mentioned in the 1611 feudal law book of the County of Mechelen: *Coutumes de Befferen et de Putte*, p. 544 (ch. 3, s. 8). This was also explicit in the law book of the city of Diest dating from 1662. See *Coutumes de la ville de Louvain*, p. 360 (ch. 2, s. 1)
[111] In that period, some lawyers criticized the then common blending of the notions of *ususfructus* and *erftocht* in compilations of local law. See DE WYNANTS, *Remarques*, p. 243.
[112] STOCKMANS, *Tractatus de jure devolutionis*, vol. 1, p. 6 (no 9).

his marriage, and his immovable goods were locked under *tocht*, the latter were reserved for the communal children from that marriage. Any other children, from a subsequent marriage, were excluded from inheriting those assets.[113] The idea behind these rules was that the kin in the male line was considered stronger than the kin of the mother.

Even though it is clear that *droit de dévolution* allowed for differences in its concrete form, it was an arrangement with a common core that was known in many parts of Brabant. The shared characteristics related to rights of use for the surviving spouse on all immovable property of the household, which he or she had to maintain in order to protect the interests of communal children.

III. *Bijleving* (County of Flanders)[114]

The Flemish *bijleving* was slightly different from *droit de dévolution*. This had much to do with another approach towards partners of members of the kin. In the later middle ages, the systems of inheritance law that were in use in the Dutch-speaking Flemish countryside (Flanders *flamingant*) generally attached more weight to the rights of the descendants (*lignage*) than to those of the surviving spouse. The latter was generally given a right of use (*bijleving*) on a share of the immovable assets that had been personal property of the deceased, and – sometimes, depending from the area – on a part of half of the communally acquired immovable property, which were the so-called *conquesten*. By contrast, in Brabant, rights of use were given on all immovable property that was found in the household. [115] This also resulted from the fact that *bijleving* was regarded as a privilege for the surviving spouse. It was rooted in the medieval *douaire coutumier*, which provided a survivor's pension for the widow. In the early sixteenth century, this rationale was still clear in the fact that *bijlevinge* was granted even if all communal children had

[113] *Coutumes de la ville de Aerschot*, p. 42 (s. 123–124); *Coutumes de la ville de Louvain*, p. 134 (ch. 14, s. 12–13). In contrast to the law of Aarschot, the law of Louvain provided that the equal shares for children of a widow also applied for immovable property belonging to the matrimonial community of property, of the former marriage.

[114] For the earlier medieval history of this arrangement, see Godding, *Le droit privé*, p. 272–275 (nos 485–487), and Meijers, *Het Oost-Vlaamsche erfrecht*, p. 44–49.

[115] On the differences in attention that was paid to the *lignage* over the *ménage* in Flanders, in comparison to Brabant in the later middle ages, see Yver, 'Les deux groupes', p. 220, and following Yver, Godding, 'Le droit au service', p. 32–33 and Jacob, *Les époux*, p. 41.

died,[116] whereas the *droit de dévolution* clearly depended on the living and surviving of the marital issue.

In the sixteenth century, in the area of present-day province of oriental Flanders, which was under the influence of the law of the city of Ghent, and also in the region of Courtrai, the rights of the surviving spouse were not seriously challenged by these underlying ideas. In those territories, the widowed parent was granted rights of use on the *conquesten*.[117] In some districts of these areas, only a part of the *conquesten* was given in *bijleving*,[118] but with regard to a communal dwelling being a *conquest*, this had the same result as rights of use on all *conquesten*. After all, if the surviving spouse was given even a small share of *bijleving* on a house, it could not be sold and his or her rights of occupancy remained safe. These rules were thus very similar to the Brabantine *droit de dévolution*. A minor difference was that in oriental Flanders only half of the personally owned immovable properties were given in ownership to the widow or widower,[119] whereas in Brabant rights of use were granted on the totality. Also, the movables of the household were divided between the heirs and the surviving spouse, and the latter was not granted ownership of the totality of them,[120] as was the case in Brabant. The differences with the Brabantine rules were nonetheless limited, since in many cases, the communal dwelling was a *conquest*, which made that the surviving parent was duly protected.

In the coastal regions of the County of Flanders (*ie* in the districts of Cassel-Ambacht, Franc of Bruges, Veurne-Ambacht and the casselry of Ieper), the kin of the deceased spouse retained rights that were more considerable. The same rules applied as in oriental Flanders, with one major exception. In the coastal areas, the surviving partner was less well off because full ownership rights on the *conquesten* were given to the heirs of the deceased in their entirety, and the widowed parent was not given a right of use.[121] In theory, a widowed parent could thus be evicted out of the family home by his own children.

[116] Meijers, *Het Oost-Vlaamsche erfrecht*, p. 46–47.

[117] *Costumen Ghent*, p. 182 (ch. 25, s. 9); *Costumen Aelst*, p. 138 (ch. 20, s. 9).

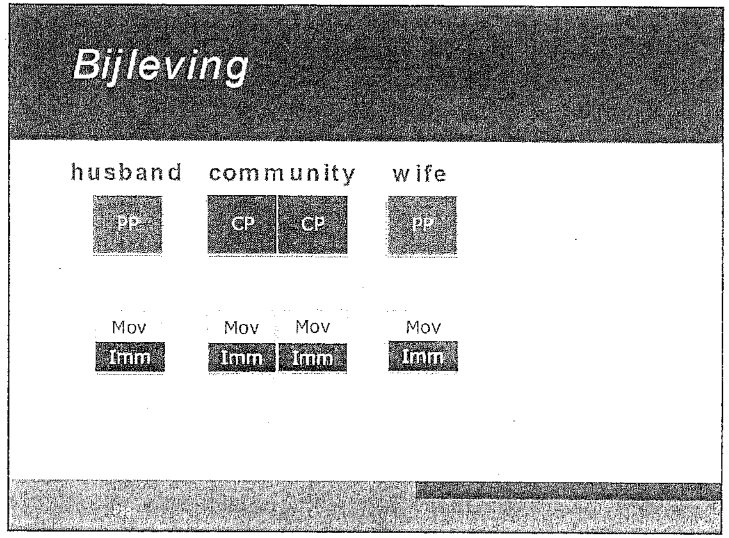
[118] Meijers, *Het Oost-Vlaamsche erfrecht*, p. 44–49.

[119] *Costumen Aelst*, p. 135 (ch. 20, s. 2). See also Godding, *Le droit privé*, p. 311–312 (no 552).

[120] *Costumen Ghent*, p. 180 (ch. 25, s. 4).

[121] Godding, *Le droit privé*, p. 272–275 (nos 485–487) and p. 311 (no 552).

However, in those coastal territories, if the communal children were minors, the surviving widow or widower was under the arrangement of *houdenisse*. In that case, the minors formally inherited the *conquesten* as owners, but their rights of ownership could not be exerted for as long as they did not reach the age of majority, or marry before that age. *Houdenisse* was a form of guardianship by the surviving parent, which was nonetheless supervised over by the government of the locality, and it lasted as long as the descendants were minors.[122] During the *houdenisse*, the surviving parent could not alienate goods belonging to the minors, and was held to administer them. Fundamental differences with guardianship were that the parent under *houdenisse* could make use of the estate of the minors, and that profits were also for that parent.[123] As *houder*, the widowed spouse could thus remain in the household dwelling, even if that house was a *conquest*. *Houdenisse* was therefore an important measure, supplementing the legal position of the surviving spouse. It was often applied, also because in the sixteenth and seventeenth centuries, the age of legal majority had been raised to twenty-five.[124]



[122] GILISSEN, 'De houdenisse', p. 346–402.
[123] *Costumen Ghent*, p. 133 (ch. 22, s. 5); GILISSEN, 'De houdenisse', p. 371–375.
[124] GILISSEN, 'Puissance paternelle', p. 20–28 and p. 29–34.

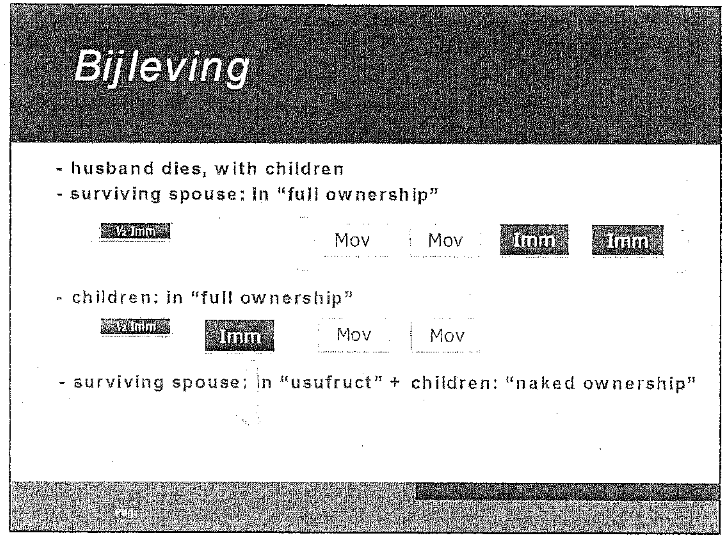


Fig. 2: Overview of *bijleving*. With regard to the abbreviations, see the inscription at fig. 1. As to the terms of "full ownership", "usufruct" and "naked ownership", the same *caveats* apply as with respect to *droit de dévolution*. The arrow reflects the difference between coastal and oriental Flanders as to the fate of immovable *conquesten*.

As was the case for *droit de dévolution*, under *bijleving* the distribution of (parts of) the inheritance of the first deceased parent was postponed until the death of the surviving spouse. Another similarity with *droit de dévolution* concerned the trust-like features, in the *houdenisse* by the widowed parent. In coastal Flanders, only when all children had reached the age of majority, a surviving spouse could be locked out of a communal family dwelling, being a *conquest*, and this was different from what was known in Brabant and also in oriental Flanders. However, in the 1600s, such a situation, with an age of majority set at twenty-five, an average age at first marriage of approximately twenty-five for women and about twenty-seven for men, and a life expectancy of approximately forty,[125] was rather rare. Even with a slow rising life expectancy during the eighteenth century, the chances that all communal children married or became twenty-five before the passing away of the surviving parent, and then decided to cash in on their share in the inheritance of their parent, were small.

[125] VANDENBROEKE, 'Karakteristieken', p. 249–290 and VANDENBROEKE, 'Overzicht', p. 302.

IV. Conclusion

Considering all this, it is fair to say that in the early modern period differences between Brabant and Flanders with regard to the position of widowed spouses were rather minimal. Yet, similar principles and ideas were legally construed with other concepts. Whereas in Brabant *droit de dévolution* was a trust-like administration of immovable asets for the benefit of the children-heirs, in Flanders *bijleving* was more explicitly considered as a privilege for the surviving spouse. Because in Brabant the *droit de dévolution* was very broad, in case of minority of communal children guardianship by the widow or widower did not add very much to that arrangement. By contrast, in Flanders, continued parental authority and guidance, which were called *houdenisse*, was a separate arrangement, and because of the generally restricted patrimonial rights of surviving spouses according to the law of succession, *houdenisse* could develop into a safety net in that respect. In a widowed household with minors, the rights of the living parent were stretched, in order to safeguard the household dwelling. In the later middle ages, the idea of *lignage*, according to which more rights had been attributed to the kin than to the widowed spouse, had definitely been stronger in Flanders than in Brabant. In the early modern period, few relics of these differences remained, and all in all similarities were great.

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Spouses and children in competition: inheritance law in the 18th- and 19th-century Austrian codification process

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I. Introduction

Until the eighteenth century, Austria was a conglomerate of many different territories that had become part of the Habsburg properties over the centuries. Some of them belonged to the Holy Roman Empire, some not. For the Habsburg dynasty it became more and more important to tie these territories together more closely in order to avoid the loss of different parts and to be able to rule them more centrally – a characteristic feature of the time. The measures undertaken ranged from basic laws, as for example the Pragmatic Sanction of 1713 that declared the Habsburg lands undividable, continued in the proclamation of the Austrian Empire in 1804 against the background of the Napoleonic wars, up to the more specific attempt to unify the territories through a shared private law – at least for all hereditary lands, as each of them had preserved its own land laws and town statutes dating back to the territories' own traditions up to this point.

This process of codification started in the 1750s and proceeded up to 1811, resulting in the Austrian Civil Code ("*Allgemeines Bürgerliches Gesetzbuch*" – ABGB). As mentioned above, the codification process involved the so-called hereditary lands – these were the old medieval territories including the archduchy of Austria with Styria, Carinthia, Carniola, the Tyrol, Further Austria ("*Vorderösterreich*") in the West and finally the Bohemian lands (as Bohemia was changed into a hereditary monarchy during the Thirty Years' War). The land laws and town statutes of these territories served as a starting point for the compilation commission that was appointed in 1753. Its task was to collect and compare the different laws and customs in order to create a new law book that would be valid for all of these territories.[126] The first draft – the *Codex Theresianus* – was finished in 1766, but was considered too extensive and detailed to become applicable as law. So the discussion and revision went on resulting in a draft written by Bernhard Horten in the 1780s. Out of this draft, the "Inheritance Patent" of Joseph II came into being

[126] SCHENNACH, 'Gleichförmigkeit der Länderrechte'.