



# Happily Ever After: Eliminating the 890 Usufruct to Protect the Blended Family

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#### INTRODUCTION

Cinderella lived happily ever after,<sup>1</sup> but what became of her wicked stepmother, the Lady Drizella Trumaine?<sup>2</sup> Imagine that this classic tale was set in Louisiana and that in the years following Cinderella's storybook wedding, Cinderella's father and Drizella spent the remainder of their lives together. Though they were happy, they were not particularly wealthy, and Cinderella's father never drafted a will. When Cinderella's father died, Louisiana law granted Drizella an interest in his share of the marital property in the form of a usufruct.<sup>3</sup> However, although Drizella was relieved to learn that she would be permitted to use and enjoy her husband's property in the years following his death, she was dismayed when she learned that Louisiana law also granted Cinderella an interest in the same

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1. CHARLES PERRAULT, PERRAULT'S FAIRY TALES 56 (A. E. Johnson trans., 2004).

2. CINDERELLA (Walt Disney Animation Studios 1950).

3. See LA. CIV. CODE art. 890 (2014) (providing that upon a spouse's death, the surviving spouse receives a usufruct over the deceased spouse's one-half interest in community property).

property, effectively forcing Drizella to share her former husband's property with her ungrateful stepdaughter.<sup>4</sup>

One might imagine that this sharing of interests would not be the most optimal arrangement, considering that the two did not have the most natural and affectionate relationship.<sup>5</sup> Drizella's interest only allows her the right to use the property and collect its fruits.<sup>6</sup> Consequently, she may encounter financial difficulties if the property does not generate income in the form of civil fruits—like rents or dividends—because she is precluded from selling the property to create liquid income. Given the tumultuous relationship between Cinderella and her wicked stepmother, Cinderella would feel no duty to come to Drizella's aid. Indeed, Cinderella's contempt for Drizella might only be exacerbated by a legal scheme that effectively deprives her of any right to her father's estate while her stepmother is still living and unmarried.<sup>7</sup> Louisiana's default inheritance regime, designed both to approximate the will of the decedent and provide for those left behind, serves no one in this blended family.

A decedent who dies intestate—without a will—necessarily does not express desires regarding the property left behind. Instead, intestacy law imposes a “statutory will” on the decedent.<sup>8</sup> Many states have had to rethink traditional intestacy rules to address the new social phenomenon of intestate succession involving a stepparent and a decedent's children,<sup>9</sup> referred to in this Comment

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4. See A. N. YIANNOPOULOS, PERSONAL SERVITUDES § 7:5, in 3 LOUISIANA CIVIL LAW TREATISE 438 (5th ed. 2011) (explaining that “[t]he naked ownership of the share of the deceased spouse devolves to his descendants by intestacy and the surviving spouse obtains a legal usufruct over that share”).

5. See discussion *infra* Part I.B.

6. As a usufructuary, Drizella would only be entitled to use and enjoy the property as well as receive any civil or natural fruits from the property. YIANNOPOULOS, *supra* note 4, § 2:2, at 111. The right to dispose or otherwise alienate the property resides with the naked owner alone—in this case, Cinderella. See *id.* § 5:3, at 341. For more on the governing features of the usufruct, see *infra* Part II.A.2.

7. See *infra* Part II.A.2 (explaining that the legal scheme that arises by operation of law terminates upon the earlier of death or remarriage of the surviving spouse).

8. Jennifer R. Boone Hargis, Note, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOBAL STUD. L. REV. 447, 449 (2003). See also Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1 (2000) (describing a “statutory will” as one in which “the government, rather than the individual, determines the dispositive terms”).

9. See, e.g., Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE

as the “Cinderella Problem.”<sup>10</sup> Louisiana Civil Code provisions governing intestacy were made with “the family of the Civil Code”<sup>11</sup> in mind: a traditional, nuclear family that has become increasingly rare in modern society.<sup>12</sup> An artifact from a departed era during which the traditional, nuclear family was bound by lifelong affection, Louisiana’s “statutory will” is out of sync with the modern family. Today, more than one-third of all Americans are members of stepfamilies,<sup>13</sup> 18% of American adults have a living stepparent,<sup>14</sup> and most Americans die without wills.<sup>15</sup> With a divorce and remarriage rate higher than the national average,<sup>16</sup>

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ROCK L. REV. 631, 635 (1995); Hargis, *supra* note 8, at 447–48; Andrew L. Noble, Note, *Intestate Succession for Stepchildren in Pennsylvania: A Proposal for Reform*, 64 U. PITT. L. REV. 835, 835 (2003).

10. The author is grateful to Professor Andrea B. Carroll for suggesting this appellation.

11. Kathryn Venturatos Lorio, *The Changing Concept of Family and Its Effect on Louisiana Succession Law*, 63 LA. L. REV. 1161, 1161 (2003) (quoting MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 15 (1981)).

12. *Id.* at 1164.

13. Noble, *supra* note 9, at 835.

14. PEW RESEARCH CTR., *A PORTRAIT OF STEPFAMILIES* (2011) [hereinafter *A PORTRAIT OF STEPFAMILIES*], available at <http://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies> [<http://perma.cc/8MAG-NUBK>] (archived Mar. 4, 2014).

15. Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 172 (2006). Nearly 2.5 million Americans die each year, and many die without a will, subjecting themselves to the laws of intestacy. Deborah L. Jacobs, *The Real Estate-Planning Crisis Isn't About Taxes*, FORBES (June 27, 2012, 6:00 PM), available at <http://www.forbes.com/forbes/2012/0716/investing-esate-tax-congress-rites-of-passage.html> [<http://perma.cc/UZH6-RL4E>] (archived Mar. 4, 2014) (explaining that a 2011 Associated Press survey showed 64% of baby boomers did not have a will). See also Hargis, *supra* note 8, at 449–50 (demonstrating the vast effects of intestacy law, given that nearly half of the U.S. population dies without a will); Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 649 (2002) (explaining that in spite of the many options available regarding the distribution of their property, many people die intestate); Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In]security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 350 (1999) (showing the importance of intestacy rules, given that the majority of people die intestate); John W. Fisher, II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems*, 93 W. VA. L. REV. 61, 72 (1990) (citing empirical studies that show more people die intestate than testate).

16. See PEW RESEARCH CTR., *MARRIAGE AND DIVORCE: A 50 STATE TOUR* (2009) [hereinafter *MARRIAGE AND DIVORCE: A 50 STATE TOUR*], available at <http://www.pewsocialtrends.org/2009/10/15/marriages-and-divorce-a-50-state-tour> [<http://perma.cc/5454-KGBZ>] (archived Mar. 4, 2014).

Louisiana must do more to balance the competing interests of a blended family in intestacy.

Because Louisiana law fails to adequately address the combination of the stepfamily and intestacy, Louisiana law allows for the dynamic between Cinderella and Drizella to exist to their mutual detriment. Louisiana's failure to address the needs of the stepfamily in intestacy is made even more apparent by the fact that other jurisdictions—both civil and common law—addressed stepfamily inheritance long ago.<sup>17</sup> Louisiana should follow in the footsteps of its sister states and of France, its civilian predecessor, to better address the Cinderella Problem, recalibrating intestacy laws with today's blended family in mind and preventing injustices like those suffered by Cinderella and Drizella from befalling others.

Accordingly, this Comment considers the failure of Louisiana's current succession law in the context of the stepfamily. Part I of this Comment discusses the theories underlying succession law, highlighting the role of these theories in intestacy and arguing that they require a careful balancing of the interests of the children and the surviving spouse of the decedent. Part I also details the societal evolution of the family from nuclear to blended, illustrating how the implementation of the theories of succession has become even more problematic. Next, Part II overviews the approach taken by Louisiana to the stepfamily in intestacy, both in the past and in the present, and demonstrates that Louisiana's current approach is inadequate in several critical respects. Part III then evaluates the merits of approaches to the Cinderella Problem taken by France and other jurisdictions. Finally, in order to solve the predicament facing Cinderella and Drizella, Part IV proposes that a lump-sum-plus-a-fraction, rather than a usufruct, be allotted to Drizella. A revision of Civil Code article 890 in the context of the stepfamily is long overdue; Louisiana needs to do more for Cinderella and Drizella.

### I. SUCCESSION THEORIES AND THE STEPFAMILY

The solution to the current Louisiana regime requires a sensitive balancing of both Cinderella and Drizella's interests. An understanding of the competing interests at play requires a working knowledge of the theories underlying succession law generally. The description of the prevalent succession theories is followed by a Section discussing the blended family, providing a synopsis of the blended family in America today, and illustrating the complex interests involved when the succession theories and the stepfamily are simultaneously considered.

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17. See *infra* Part III.

*A. The Theories Underlying Succession Law*

Succession law governs the distribution of a decedent's property upon death.<sup>18</sup> A succession is either testate, occurring when a decedent dies with a valid will, or intestate, occurring when a decedent dies without a will.<sup>19</sup> Many theories underlie intestacy provisions;<sup>20</sup> however, two theories are more commonly applied: the natural duty theory and the presumed will theory.<sup>21</sup>

*1. The Natural Duty Theory*

The natural duty theory relies upon societal views about what a decedent "ought" to do.<sup>22</sup> This approach to intestacy does not necessarily reflect how the decedent would want property distributed upon death but rather how property should be distributed upon death in order to further the goals of society.<sup>23</sup> Academics argue that a decedent's natural duty to dependent family members is germane to intestacy, given that an underlying concern in any succession scheme is "justice and fairness" for the decedent's successors.<sup>24</sup>

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18. See LA. CIV. CODE art. 871 (2014).

19. DENNIS R. HOWER & PETER KAHN, WILLS, TRUSTS, AND ESTATE ADMINISTRATION 6 (7th ed. 2012).

20. Scalise, *supra* note 15, at 176 n.19. Intestacy statutes vary widely from state to state. Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 322 (1978).

21. See Scalise, *supra* note 15, at 173. These two theories were considered as "primary considerations" at the turn of the 20th century and even as far back as Roman times. See *id.* at 174. Professor Scalise explains that these are not the only theories underlying succession law. *Id.* at 176 n.19. Though the presumed will and natural duty theories are the most influential in the United States, he explains, others do exist. *Id.* For instance, Roman succession law was premised on the goal of the continuance of families into the next generation after the head of the family died. *Id.* Another goal of American succession law is the recognition and support furthering the family unit. This is seen throughout intestacy statutes in various states. In every intestate succession scheme, the decedent's family is the recipient of the decedent's property. Hargis, *supra* note 8, at 452.

22. Scalise, *supra* note 15, at 173–75.

23. See KATHRYN VENTURATOS LORIO, SUCCESSIONS AND DONATIONS § 2:1, in 10 LOUISIANA CIVIL LAW TREATISE 16 (2d ed. 2009).

24. Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other Than Surviving Spouses*, 46 HASTINGS L.J. 941, 947 (1995).

*a. The Natural Duty to the Decedent's Children*

Historically, the natural duty theory supported the devolution of a decedent's property to relatives who needed it most—minor children.<sup>25</sup> Academics argued that children were entitled to their intestate inheritance based on their parents' natural duty to “preserve what they had begotten.”<sup>26</sup> Without their parents' assistance, most minor children would be inadequately supported, thus relying on the State for support.<sup>27</sup>

*b. The Natural Duty to the Decedent's Surviving Spouse*

However, minor children may not be the only relatives in need of financial assistance upon the death of the decedent. The surviving spouse may also require support.<sup>28</sup> If beyond the age to rejoin the workforce, the surviving spouse could be economically destitute.<sup>29</sup> Government assistance through social security benefits can make a difference, but alone it is not enough, as these payments are barely above the poverty level.<sup>30</sup> Together, these facts suggest that the surviving spouse could be in need of assistance. Therefore, in compliance with the natural duty theory, default intestacy provisions should consider the potentially destabilized position of the surviving spouse.

Thus, under the natural duty theory, a duty of support is warranted to both the surviving spouse and the decedent's children upon the decedent's death. Neither should inherit to the complete detriment of the other; instead, striking a balance between the interests of the surviving spouse and the decedent's children should be the ultimate goal.

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25. 1 THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 413 (Christopher Berry Gray ed., 1999).

26. *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 207 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

27. See Steve Hargreaves, *Deadbeat Parents Cost Taxpayers \$53 Billion*, CNNMONEY (Nov. 5, 2012, 5:42 AM), <http://money.cnn.com/2012/11/05/news/economy/unpaid-child-support/index.html> [<http://perma.cc/DV74-KPA3>] (archived Mar. 4, 2014) (explaining that in 2009, the federal government paid out \$53 billion for public assistance because parents neglected to financially support their children).

28. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 33 (1994).

29. Only 13% of surviving spouses ages 65 and older report income from earnings. *Id.* at 31. For more on the economic position of the surviving spouse, see *id.* at 38–40 (detailing the predicament a surviving spouse could be in when facing the real-world, modern costs of growing old).

30. *Id.* at 32.



## 2. *The Presumed Will Theory*

The role of intestacy with respect to a decedent's children and surviving spouse becomes more complex when one considers the presumed will theory of intestate succession. Unlike the natural duty theory, the presumed will theory focuses on the supposed desires of the decedent in the distribution of the estate.<sup>31</sup> According to this theory, state legislatures draft statutes based on how the average person would dispose of property upon death.<sup>32</sup> Given the difficulty in determining a person's presumed desires without a will, policymakers look to the distribution patterns of testate decedents for insight.<sup>33</sup> Studies have shown that most people of modest means, even people with children from a prior marriage, leave their entire estates to their surviving spouses.<sup>34</sup>

When the presumed will and natural duty theories are viewed in tandem, as they should be in the formulation of any intestacy regime, it is apparent that while the needs of both the spouse and the children should be taken into account, the State ought to ensure that a significant portion of the decedent's property devolves to the surviving spouse in the absence of a will.

### *B. The Complications of the Stepfamily*

A change in the construct of the family over the last several decades has rendered the balancing of a decedent's natural duty and presumed will in intestate succession even more problematic. Given

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31. Scalise, *supra* note 15, at 173. Around since the 17th century, the presumed will theory is not a modern approach to the fashioning of intestacy provisions. *Id.* at 174. In the 19th century, French Civil Code redactors stated, "The legislation on successions is the presumed testament of every person who dies without having validly expressed a different will." *Id.* Conforming with this theory, the redactors created legislation that "dictate[d] as the deceased himself would have dictated at the last instant of his life, if he had been able and willing to express himself." *Id.*

32. Daniel H. O'Connell & Richard W. Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 209 (1972). Given that it is impossible to create a statute that comports with every decedent's presumed will in every situation, it is impossible to carry out the presumed will of the decedent in each specific instance. Gary, *supra* note 14, at 646.

33. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.2 (1999) (listing empirical studies); see also MARY ANN GLENDON, STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE 282 (1977) (discussing the desires of the average American spouse in determining how to distribute his or her property).

34. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.2 (1999); see also GLENDON, *supra* note 33, at 282.

that the United States has developed one of the highest divorce and remarriage rates in the Western world,<sup>35</sup> gone are the days of the “Cleaver” family norm.<sup>36</sup> With more than four in ten Americans reporting they have at least one step-relative,<sup>37</sup> the American family is not what it used to be.<sup>38</sup>

### 1. *The Blended Family*

Today, divorce and remarriage are common experiences in the lives of Americans,<sup>39</sup> causing a dramatic change in the structure of the American family.<sup>40</sup> The traditional nuclear family consisting of

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35. Belinda Luscombe, *Who Needs Marriage? A Changing Institution*, TIME (Nov. 18, 2010), <http://www.time.com/time/magazine/article/0,9171,2032116-1,00.html> [<http://perma.cc/78JR-JEZU>] (archived Mar. 4, 2014). See also Pat Wingert, *Americans Have Highest Divorce, Remarriage Rate*, NEWSWEEK (Aug. 14, 2009, 8:00 PM), <http://www.thedailybeast.com/newsweek/2009/08/14/americans-marry-too-much.html> [<http://perma.cc/8M6S-JAJZ>] (archived Mar. 4, 2014) (showing how the American divorce rate is higher than other countries' divorce rates).

36. “Leave it To Beaver” was a mid-century American television show that depicted the “typical” American family consisting of a mother, father and two kids” and was “a favorite stereotype of the nuclear family.” Gary, *supra* note 8, at 4 n.14 (explaining that the “Cleaver family” is no longer the norm in America).

37. A PORTRAIT OF STEPFAMILIES, *supra* note 14. See also Engel, *supra* note 15, at 343 (explaining that children today are more likely to live with stepparents and half-siblings than biological parents and siblings); Noble, *supra* note 9, at 835 (citing data showing that one-third of all Americans are members of stepfamilies).

38. Noble, *supra* note 9, at 835. See also Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1493 (2000) (explaining that the structure of American families has changed dramatically in recent decades); PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 16 (2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [<http://perma.cc/M7EG-J332>] (archived Mar. 4, 2014) (demonstrating that although America had a higher marriage rate than the European Union, America's divorce rate was higher than that of the European Union).

39. Engel, *supra* note 15, at 319. In 1997, 50% of all marriages were likely to end in divorce. Lorio, *supra* note 11, at 1164. In nearly one-half of all marriages today, at least one of the spouses has been married once before. *Id.* For a detailed discussion of changes in family throughout the 19th, 20th, and 21st centuries, see *id.* See also 5 EXPLORING THE LAW OF SUCCESSION: STUDIES NATIONAL, HISTORICAL AND COMPARATIVE 7 (Kenneth G. C. Reid, Marius J. de Waal & Reinhard Zimmermann eds., 2007) (explaining that this “redefinition” of the family has been taking place as a result of social developments).

40. This change in the family construct can be attributed to easier divorce laws and the now commonplace notion of “serial polygamy.” Lorio, *supra* note 11, at 1177–78. Professor Lorio coined the term “serial polygamy” from Harry D. Krause and David D. Meyer's *What Family for the 21st Century?*. See Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101, 103 (2002) (“[W]ithout calling it by that name, modern divorce law and

the breadwinning husband, the stay-at-home wife, and their two children exists today but in much lower numbers than in the past.<sup>41</sup> Moreover, most divorced people remarry, creating blended stepfamilies.<sup>42</sup> With the modern divorce rate nearly twice the rate of that of the 1950s,<sup>43</sup> it is estimated that there are more stepfamilies than nuclear families in the United States today.<sup>44</sup> U.S. Census Bureau data shows that in 2004, 12% of women and 13% of men had married twice.<sup>45</sup> Three percent of both men and women had been married three or more times.<sup>46</sup>

Additionally, according to data from the U.S. Census Bureau, most spouses that remarry already have children.<sup>47</sup> Remarriages are

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practice have resulted in a sort of legitimization of polygamy by way of legalizing multiple, successive marriages or relationships of persons who have continuing legal, financial and social ties to prior partners and children.”). Additionally, with the advent of “no-fault divorce,” the decision to divorce became unilateral, and mutual consent to divorce was no longer necessary. David Milstead, *As Two-Income Family Model Matures, Divorce Rate Falls*, CNBC (May 7, 2012, 9:33 AM), [http://www.cnbc.com/id/46797203/As\\_Two\\_Income\\_Family\\_Model\\_Matures\\_Divorce\\_Rate\\_Falls](http://www.cnbc.com/id/46797203/As_Two_Income_Family_Model_Matures_Divorce_Rate_Falls) [<http://perma.cc/EZK6-6H2G>] (archived Mar. 4, 2014). Also, economic changes facilitated the ease of divorce. *Id.* With wives transitioning from stay-at-home mothers to career women in the 1960s and 1970s, women’s new income made it possible for them to separate from their husbands more easily. *Id.*

41. Holob, *supra* note 38, at 1493. See also E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1094 (1999) (explaining “traditional families” have become increasingly less typical in recent years).

42. Lorio, *supra* note 11, at 1164.

43. KRISTEN CELLELO, A HISTORY OF MARRIAGE AND DIVORCE IN THE TWENTIETH-CENTURY UNITED STATES: MAKING MARRIAGE WORK 4 (2009).

44. Janice Van Dyck, *In Praise of Stepfamilies*, BLOG (Aug. 11, 2011, 1:19 PM), [http://www.huffingtonpost.com/janice-van-dyck/in-praise-of-stepfamilies\\_b\\_920688.html](http://www.huffingtonpost.com/janice-van-dyck/in-praise-of-stepfamilies_b_920688.html) [<http://perma.cc/5VB3-V2HB>] (archived Mar. 4, 2014).

45. Press Release, The U.S. Census Bureau, Most People Make Only One Trip Down the Aisle, But First Marriages Shorter (Sept. 19, 2007), available at <http://www.prnewswire.com/news-releases/most-people-make-only-one-trip-down-the-aisle-but-first-marriages-shorter-census-bureau-reports-58151357.html> [<http://perma.cc/5Z3D-HAFB>] (archived Mar. 4, 2014).

46. *Id.* The remarriage rate after divorce tends to be higher for men than for women, with more than half of the men who have ever been divorced currently remarried. *Id.* This number is based on adults ages 25 and older. *Id.*

47. Rose M. Kreider, United States Census Bureau, Presentation at the American Sociological Association annual meeting: Remarriage in the United States (Aug. 10–14, 2006), available at <http://www.census.gov/hhes/socdemo/marriage/data/sipp/us-remarriage-poster.pdf> [<http://perma.cc/E2X4-6T26>] (archived Mar. 4, 2014). Additionally, researchers predict that more than half of all women in the United States will become stepmothers upon remarriage. Wednesday Martin, *Let’s Stop Expecting Sandra Bullock to Be a Stepmartyr*, HUFFINGTON POST ENT. (Mar. 24, 2010, 1:41 PM), <http://www.huffingtonpost.com/wednesday-martin/lets-stop->

often “fragile” and “unstable,”<sup>48</sup> characteristics that have been shown to negatively affect the children involved.<sup>49</sup> With a divorce and remarriage rate higher than the national average, Louisiana should be particularly attentive to the increased complications of the stepfamily in intestacy.<sup>50</sup>

## *2. The Complications of the Blended Family Exacerbated in Intestate Succession*

Certain factors exacerbate the complications experienced by stepfamilies in intestate successions. Such factors include unnatural ties, passive neglect, and conflicting loyalties. An analysis of these factors shows that Louisiana’s current law, article 890, is wholly inadequate when dealing with the stepfamily in intestacy.

### *a. Unnatural Ties*

Stepparents face a myriad of complexities in their relationships with their new family members, not the least of which is learning how to love another person’s child.<sup>51</sup> Unlike the biological relationship between a parent and child, the relationship between a stepparent and stepchild is fixed through remarriage.<sup>52</sup> Upon remarriage, spouses step into an awkward “family dance,” requiring each new spouse to determine the dynamic of his or her relationship with his or her spouse, the spouse’s children, and often the children’s other biological parent.<sup>53</sup> Additionally, the stepparent could face the primitive emotion of suspicion of the child.<sup>54</sup> Not

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expecting-sandr\_b\_510813.html [http://perma.cc/6Y55-PCEN] (archived Mar. 4, 2014). See also David G. Schramm & Francesca Adler-Baeder, *Marital Quality for Men and Women in Stepfamilies: Examining the Role of Economic Pressure, Common Stressors and Stepfamily-Specific Stressors*, 33 J. FAM. ISSUES 1373, 1374 (2012) (estimating that 65% of those who remarry will bring a child from a previous relationship, thus creating a stepfamily).

48. Lorio, *supra* note 11 at 1178.

49. See Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What’s Become of Disinheriton, and the Unfinished Business of the Stepparent Usufruct*, 60 LA. L. REV. 637, 661–62 (2000).

50. See MARRIAGE AND DIVORCE: A 50 STATE TOUR, *supra* note 16.

51. Patricia Hart, *On Becoming a Good Enough Stepmother*, 37 CLINICAL SOC. WORK J. 128, 129 (2009).

52. Spaht, *supra* note 49, at 666.

53. Hart, *supra* note 51, at 129.

54. *Id.*

surprisingly, only 20% of stepchildren report to have a good relationship with their stepparents.<sup>55</sup>

According to experts, the problems plaguing Cinderella and Drizella may not be limited to the world of fairy tales but rather are rooted in fact. In particular, social scientists “agree that families with a full-time stepmother do worse than families with a stepfather.”<sup>56</sup> This may be a result of the stepmother inherently being more difficult or perhaps because tensions between the stepmother and the biological mother cause more complications.<sup>57</sup> Presumably, the unnatural ties between step-relatives are likely to persist after the decedent’s passing.<sup>58</sup>

*b. Uncomfortable Conversations and Passive Neglect*

In addition to unnatural ties, stepfamilies face other complications.<sup>59</sup> According to one academic, “Stepfamilies face complex emotional issues as they sort out and create family relationships.”<sup>60</sup> Given these complex and new interaction patterns, stepfamilies avoid necessary discussions. Conversations about money are a source of discourse in first marriages,<sup>61</sup> but given the layer of complex emotional issues that is added to the blended family, these conversations only become more complicated in the stepfamily context.<sup>62</sup> For similar reasons, stepfamilies avoid discussion of inheritance because “stating inheritance rights in a

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55. Joanne Richard, *The Challenges of Stepkids*, LIFEWISE PARENTING (June 9, 2011, 6:20 AM), <http://lifewise.canoe.ca/Parenting/2011/05/04/18103011.html> [<http://perma.cc/3T2U-SEHB>] (archived Mar. 4, 2014). See also *infra* notes 67–72 and accompanying text (explaining the “conflicting loyalties” that may exist within the blended family).

56. Spaht, *supra* note 49, at 664. Further, statistics show that a wife will likely outlive her husband, making it statistically more likely that the surviving spouse will be female, leading to the Cinderella Problem. See Kreider, *supra* note 48.

57. Spaht, *supra* note 49, at 665.

58. In cases where a decedent dies with a will, one-third of all will contests relate to issues of divorce and remarriage. Lorio, *supra* note 11, at 1181. Studies show that these contests are brought by disgruntled natural children and stepchildren of the deceased. *Id.*

59. See generally Engel, *supra* note 15.

60. Gary, *supra* note 15, at 650.

61. See Alex Veiga, *Divorce Causes: How To Avoid Money Problems In Your Marriage*, HUFFINGTON POST (May 16, 2012, 1:33 PM), [http://www.huffingtonpost.com/2012/05/16/avoiding-marriages-no-1-p\\_n\\_1521232.html](http://www.huffingtonpost.com/2012/05/16/avoiding-marriages-no-1-p_n_1521232.html) [<http://perma.cc/6GNG-A6A5>] (archived Mar. 4, 2014) (describing “[m]oney problems” as the number one reason marriages end in divorce).

62. See Engel, *supra* note 15, at 317 (explaining that the topic of money in a remarriage has been listed as one of the largest sources of difficulty in remarriages).

legal document may raise issues that stepparents and their spouses would rather avoid.”<sup>63</sup> Scholars have coined this phenomenon as “passive neglect.”<sup>64</sup>

Evading this discussion, remarried spouses often fail to make a will.<sup>65</sup> Avoiding uncomfortable inheritance discussions, however, can lead to a bombshell for the intestate successor’s blended family because intestacy statutes are patterned after the traditional family.<sup>66</sup>

### *c. Conflicting Loyalties*

When the decedent is the spouse with children from a prior marriage, the surviving spouse may face “conflicting loyalties.”<sup>67</sup> When spouses remarry at a later age, their adult children likely feel entitled to their share of inheritance from their natural parent.<sup>68</sup> These conflicting loyalties can cause “steam to rise” when a decedent dies intestate after multiple spouses, children, and stepchildren are thrown into the mix.<sup>69</sup>

Further, these issues are not rare.<sup>70</sup> Pew Research data confirms the complications resulting from the unnatural ties between stepparents and stepchildren.<sup>71</sup> According to a recent study, only 62% of stepparents say they would feel obligated to their grown stepchildren, compared with 78% of people who would feel obligated to their grown natural children.<sup>72</sup> This variance between the views of stepparents and natural parents regarding their duty to children is intensified in intestacy.

Thus, the complications of the blended family impact intestacy policy in several fundamental ways. The increased prevalence of stepfamilies requires a legislative response to the complications that result. Because most people who are remarried fail to make a will,<sup>73</sup> state legislatures must enact intestacy legislation that accounts for

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63. Gary, *supra* note 15, at 650.

64. Engel, *supra* note 15, at 343.

65. Surveys indicate that few people choose to have intestacy statutes govern the distribution of property upon their death. Gary, *supra* note 15, at 650.

66. Engel, *supra* note 15, at 343.

67. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.2 (1999).

68. Jane Bryant Quinn, *Financial Planning: Wills and Other Ways*, NEWSWEEK (Oct. 12, 2007, 10:11 AM), <http://www.thedailybeast.com/newsweek/2007/10/12/financial-planning-wills-and-other-ways.html> [<http://perma.cc/9S25-58UF>] (archived Mar. 4, 2014).

69. *Id.*

70. See A PORTRAIT OF STEPFAMILIES, *supra* note 14.

71. *Id.*

72. *Id.*

73. See *supra* Part I.B.2.b.

the blended family's unique dynamic. Additionally, given the unnatural ties and conflicting loyalties that plague the stepfamily relationship, state legislatures ought to create laws that minimize the ways in which the intestacy regime might exacerbate potential conflicts within the stepfamily.

## II. LOUISIANA'S DEFICIENT TREATMENT OF THE STEPFAMILY IN INTESTACY

Viewed in tandem, the natural duty and presumed will theories suggest that both the children and the surviving spouse should be provided for upon a decedent's death, with an emphasis on the preservation of the surviving spouse. The complications posed by the stepfamily indicate that an ideal intestacy regime would apportion the property in such a way that litigation and family discord are minimized, both in terms of the amount of property that each party receives and the extent to which the division of property requires the parties to interact with one another. In light of these considerations, however, Louisiana's treatment of the stepfamily in intestacy fails in several critical respects.

### A. *The 890 Usufruct*

The modern rights of the surviving spouse in intestacy are the byproduct of an evolution of the surviving spouse's historical position in Louisiana intestacy law.<sup>74</sup> A review of the evolution of the mechanisms at play in intestacy law illustrates the shortfalls of the current approach and the need for further legislative action for the blended family in intestacy.

#### 1. *The Historical Approach*

The intestate rights of a surviving spouse were historically much more limited than they are today.<sup>75</sup> Until 1870, upon a decedent's intestate death, the community property acquired during a marriage was given to the decedent's legal heirs, not the surviving spouse.<sup>76</sup> With the creation of article 915 of the Civil Code of 1870, the surviving spouse received a usufruct over the decedent's half of the

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74. See Lorio, *supra* note 11, at 1161–66 (giving an overview of the evolution of the position of the surviving spouse under Louisiana law).

75. A widow was not an intestate heir except in the absence of descendants, ascendants, or collaterals. *Id.* at 1162 (citing LA. CIV. CODE art. 45 (1808)). The widow was, however, protected by the provisions of community property law and the marital portion. *Id.* at 1162–63 (citing LA. CIV. CODE arts. 55, 63 (1808)).

76. See LORIO, *supra* note 23, § 2:15, at 40.

community property for life.<sup>77</sup> Still today, a surviving spouse is granted a spousal usufruct over the decedent's share of community property.<sup>78</sup> The usufruct enables the surviving spouse to take a limited interest in the decedent's share, rather than outright ownership.<sup>79</sup> The creation of the spousal usufruct in intestacy thus represents the beginning of an improvement of the surviving spouse's position.<sup>80</sup>

The introduction of the spousal usufruct was seen primarily as a balance between the needs and interests of the surviving spouse and those of the decedent's children, who were all classified as forced heirs at the time.<sup>81</sup> This balance of interests was initially accomplished because the provision was drafted with a certain type of family in mind—one where marriages were for life and children were born of that marriage.<sup>82</sup> The balance was also achieved because the spousal usufruct affected only the decedent's share of community property and therefore did not at all affect the decedent's children's "unfettered use and disposal" of their deceased parent's separate property.<sup>83</sup> Additionally, the termination of the usufruct upon the remarriage of the surviving spouse protected the decedent's children from the influence of the surviving spouse's

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77. *Id.* § 2:15, at 41.

78. LA. CIV. CODE art. 890 (2014).

79. *See id.* art. 477.

80. The spousal usufruct was introduced in Louisiana in Act 152 of 1844. The Act provided:

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That in all cases hereafter, when either husband or wife shall die, leaving no ascendants or descendants, and without having disposed by last will and testament, of his or her share in the community property, such share shall be held by the survivor in *usufruct* during his or her natural life.

Section 2. *Be it further enacted, &c.* That in all cases when the predeceased husband or wife shall 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 said community property as may be inherited by such issue: *Provided,* however, that such *usufruct* shall cease whenever the survivor shall enter into a second marriage.

Act No. 152, 1844 La. Acts 99. Only implemented in the Code of 1870, the usufruct of the surviving spouse was not included in the Civil Codes of 1808 or 1825. LORIO, *supra* note 23, § 2:15, at 40.

81. Lorio, *supra* note 11, at 1165. *See also* A. N. Yiannopoulos, *Of Legal Usufruct, The Surviving Spouse, and Article 890 of the Louisiana Civil Code: Heyday for Estate Planning*, 49 LA. L. REV. 803, 803 (1989).

82. Lorio, *supra* note 11, at 1163.

83. *Id.* at 1165.



new partner.<sup>84</sup> Overall, the decedent's children and the surviving spouse of the "family of the Civil Code" were well provided for. Many Louisianans were content with the intestacy scheme in place and chose not to make a will, opting instead for the default provisions to control.<sup>85</sup>

Importantly, the Cinderella Problem was entirely avoided when the spousal usufruct was first introduced. The eligible property to be held in usufruct was limited to the property that was inherited by a child of the marriage between the decedent and the surviving spouse.<sup>86</sup> A stepparent was therefore never afforded a right of usufruct over a stepchild's inheritance.<sup>87</sup> This did not mean, however, that the law effectively met the needs of the spouse and children in a blended family—although the children retained their right to inherit, the surviving spouse was effectively denied rights to the estate as a result of the surviving spouse's relationship to them.

In 1981, to rectify the perceived injustice that befell a surviving spouse who was also a stepparent of the decedent's children, the Louisiana Legislature reformed the law to extend the spousal usufruct to all spouses, regardless of the existence of a blended family.<sup>88</sup> Although the law as revised significantly advanced the rights of the surviving spouse, the Cinderella Problem emerged, and the potential for new conflicts was born.<sup>89</sup> The myopic legislation merely extended rights—formulated for the traditional nuclear family—to stepparents and did nothing to address the complications of the stepfamily. Thirty years after taking an initial step in the right direction, Louisiana needs to modernize the law applicable to the stepfamily in intestacy.

## 2. *The 890 Usufruct Today*

Today, the spousal usufruct is found in Civil Code article 890.<sup>90</sup> The characterization of the spouse's right as one in usufruct rather than full ownership imposes a limitation on the power of the spouse with respect to the property and brings with it significant complications. An overview of the features governing the usufruct is

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84. *Id.*

85. Yiannopoulos, *supra* note 81, at 804.

86. *See, e.g.*, Succession of Emonot, 33 So. 368 (La. 1902). *See also* Succession of Williams, 127 So. 615 (La. 1930). Today, "issue of the marriage" has been held to mean any descendant in the direct descending line, including grandchildren and adopted children. *See* LORIO, *supra* note 23, § 2:16, at 54.

87. Lorio, *supra* note 11, at 1165.

88. Act No. 911 § 1, 1981 La. Acts 2050.

89. *Id.*

90. LA. CIV. CODE art. 890 (2014).

required to illustrate the usufruct's grave inadequacies when implemented in the context of intestacy and the blended family.

First, a usufruct is a real right of limited duration.<sup>91</sup> The person who holds the usufruct, the "usufructuary," receives the right to use and enjoy the property.<sup>92</sup> The person who holds the right of disposition is known as the "naked owner."<sup>93</sup> The usufructuary is responsible for what are considered "ordinary repairs," while the naked owner is responsible for "extraordinary repairs."<sup>94</sup>

The timing of the termination of the right varies with the type of usufruct at issue, and the law provides that the 890 usufruct terminates upon the death or remarriage of the surviving spouse.<sup>95</sup> At termination of the 890 usufruct, the naked owners—the decedent's children—receive the usufructuary's rights of use and enjoyment, in addition to their own rights of *abusus*, and thus enjoy full ownership.<sup>96</sup> Importantly, the surviving spouse receives a limited right that cannot be passed on to his or her own successors.<sup>97</sup>

The precise obligations of the usufructuary depend upon whether the property subject to the usufruct is classified as consumable or nonconsumable.<sup>98</sup> With respect to nonconsumables—things that "may be enjoyed without alteration of [their] substance,"<sup>99</sup>—such as land, houses, shares of stock, furniture, and vehicles,<sup>100</sup> the

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91. *Id.* art. 535.

92. *See* YIANNOPOULOS, *supra* note 4, § 2:2, at 111.

93. *See id.* § 1:31, at 83–84.

94. LA. CIV. CODE art. 577 (2014). For a detailed discussion on expenses, see *infra* Part II.B.1.e.

95. Art. 890. The Civil Code defines a "usufruct" as a real right of limited duration whose features vary with the type of thing to which it is subject. *Id.* art. 535. This feature is unlike full ownership, which lasts in perpetuity. *See id.* art. 477 cmt. b. A usufruct can terminate in a variety of ways: upon the death of the usufructuary, at another time determined by law, or at a time stipulated by the parties. *Id.* art. 607. The 890 usufruct is one such example of when the law provides that a usufruct can terminate before the death of usufructuary: the article provides that the usufruct will terminate either at the death or remarriage of the spouse. *Id.* art. 890.

96. *See* YIANNOPOULOS, *supra* note 4, § 7:5, at 438.

97. *See id.* § 7:5, at 438–39.

98. The Louisiana Civil Code defines "consumable things" as "those that cannot be used without being expended or consumed, or without their substance being changed, such as money, harvested agricultural products, stocks of merchandise, foodstuffs, and beverages." LA. CIV. CODE art. 536 (2014). The Louisiana Civil Code defines "nonconsumable things" as "those that may be enjoyed without alteration of their substance, although their substance may be diminished or deteriorated naturally by time or by the use to which they are applied, such as lands, houses, shares of stock, animals, furniture, and vehicles." *Id.* art. 537.

99. *Id.* art. 537.

100. *Id.*

usufructuary is limited to the mere use and enjoyment of the property—the usufructuary has no right to dispose of it.<sup>101</sup> Additionally, the usufructuary is bound to care for things subject to the usufruct as a “prudent administrator.”<sup>102</sup>

The usufructuary has different rights with respect to consumable things.<sup>103</sup> The Code defines “consumable things” as things that cannot be used without being expended or consumed, such as money.<sup>104</sup> When a usufructuary holds a usufruct over a consumable thing, the usufructuary becomes the owner of it.<sup>105</sup> With this ownership, the usufructuary has the right to dispose of the thing.<sup>106</sup> The ownership requirement is necessary in this instance because a consumable thing is, by its nature, disposed of through use.<sup>107</sup> Upon the termination of a usufruct of a consumable thing, the usufructuary is obligated to either pay the naked owner the value the thing had at the commencement of the usufruct or deliver to the naked owner things of the same quantity or quality.<sup>108</sup>

### *B. The Inadequacies of the 890 Usufruct*

When the Legislature extended the spousal usufruct to the blended family in intestacy, more problems were created than were

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101. See *id.* art. 539.

102. YIANNOPOULOS, *supra* note 4, § 4:18, at 291. This standard is delineated from the comments to article 576. Comment (b) to article 576 provides, in pertinent part:

The expressions “prudent owner” and “prudent administrator” in the Louisiana Civil Code of 1870, and the corresponding *bon père de famille* in the French Civil Code, reflect the notion of *homo diligens et studiosus paterfamilias* of the Roman law. Thus, the usufructuary is liable even for slight fault, namely, he must exercise the diligence that an attentive and careful man exercises in the management of his own affairs.

LA. CIV. CODE art. 576 cmt. b (2014). Other standards restrict the actions of the usufructuary. One such standard is embodied in Civil Code article 558, which includes the usufructuary’s restriction on the improvements he or she can make. Additionally, under the Code, the usufructuary is allowed to lease and encumber his or her right. *Id.* art. 567.

103. See LA. CIV. CODE art. 538 (2014).

104. *Id.* art. 536.

105. Louisiana Civil Code article 538 provides:

If the things subject to the usufruct are consumables, the usufructuary becomes owner of them. He may consume, alienate, or encumber them as he sees fit. At the termination of the usufruct he is bound either to pay to the naked owner the value that the things had at the commencement of the usufruct or to deliver to him things of the same quantity and quality.

*Id.* art. 538.

106. See YIANNOPOULOS, *supra* note 4, § 1:3, at 9.

107. See *id.* § 1:3, at 8.

108. *Id.*

solved. Features of the 890 usufruct do little to cater to the potential acrimonious relationships within the blended family and additionally fail to promote either of the predominant succession theories.

*1. The Inadequacies vis-à-vis the Stepfamily*

What follows is a delineation of the features of the usufruct that render it a poor mechanism to be implemented in the context of intestacy and the blended family. These include the nature of the usufruct itself, the prudent administrator standard, the power of the usufructuary to dispose of consumable things, the concept of security, and the concept of expenses.

*a. The Nature of the Usufruct: The Sharing of Attributes of Ownership*

As explained above, a usufruct is an example of a dismemberment of full ownership whereby the usufructuary receives the rights of use and enjoyment of the thing held in usufruct and the naked owner retains the right to dispose of the thing.<sup>109</sup> These separate rights of the usufructuary and naked owner are shared over the same property contemporaneously.<sup>110</sup> Thus, under article 890, the surviving spouse receives the usufruct over the decedent's one-half share of community property, while the decedent's children receive naked ownership over the same share.<sup>111</sup> Given the potential acrimony within blended families, forcing the surviving spouse and the decedent's children to concurrently exercise their interests in the same property allows for the exacerbation of any rancorous dynamics within the stepfamily that predate the decedent's death. Thus, the inherent sharing of interests that underlies the nature of the usufruct may become the source for more discord in a blended family.

*b. The Prudent Administrator Standard*

Additionally, the standard governing the usufructuary's actions vis-à-vis the property—the prudent administrator standard<sup>112</sup>—is potentially another source of enmity. While the term “prudent

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109. See *supra* Part II.A.2.

110. See YIANNOPOULOS, *supra* note 4, § 1:1, at 2–5.

111. See LA. CIV. CODE art. 890 (2014).

112. See YIANNOPOULOS, *supra* note 4, § 4:14, at 285–87 (discussing the “usufructuary as prudent administrator”).

administrator” is interpreted by various examples in the Civil Code, the standard still remains fairly imprecise and does not provide much guidance for what a usufructuary can and cannot do.<sup>113</sup> This vague standard has been clarified through jurisprudential examples, defining the prudent administrator standard as requiring “the diligence that an attentive and careful man commonly exercises in the management of his own affairs”; however, even this definition is disturbing because it provides no guidelines for the usufructuary and its violation is determined by the courts as a question of fact.<sup>114</sup> In the absence of precise statutory contours, the interpretation of the standard is susceptible to inconsistent and subjective judicial interpretation.

This loose standard has unique and unnecessary repercussions for the stepfamily and intestacy. For example, if Drizella holds a usufruct over a nonconsumable, she can do anything to the detriment of Cinderella, so long as she abides by this loose standard. Contrarily, Drizella might take certain actions believing that she is acting within the confines of the prudent administrator standard, just to find out in later litigation that she was not. Given the difficulty in determining what Drizella is permitted to do within the prudent administrator standard, Drizella could be chilled in her use of the property or could incur significant legal expenses in hiring an attorney to counsel her with respect to her use of the assets. The unclear definition lends itself to disagreement, which if escalated to litigation, would result in significant costs to both the surviving spouse and the children. Default intestacy provisions should not provide a forum for additional disagreement between Drizella and Cinderella.

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113. One example of the prudent administrator standard is embodied in Civil Code article 597, which provides: “The usufructuary who loses a predial servitude by nonuse or who permits a servitude to be acquired on the property by prescription is responsible to the naked owner.” LA. CIV. CODE art. 597 (2014). Another example of the prudent administrator is embodied in Civil Code article 598, which provides:

If, during the existence of the usufruct, a third person encroaches on the immovable property or violates in any other way the rights of the naked owner, the usufructuary must inform the naked owner. When he fails to do so, he shall be answerable for the damages that the naked owner may suffer.

*Id.* art. 598.

114. YIANNOPOULOS, *supra* note 4, § 4:14, at 286.

*c. The Power of the Usufructuary to Dispose of a Consumable Thing*

When the 890 usufruct is applied to a consumable thing,<sup>115</sup> the surviving spouse receives ownership over the consumable thing, and upon termination, the surviving spouse has to either pay the value that the thing had at the commencement of the usufruct to the decedent's children or deliver to them things of the same quantity or quality.<sup>116</sup>

This setup could prove troublesome in the context of the stepfamily and intestacy where a stepmother has no regard for the decedent's children's eventual rights as naked owners. For example, assume Drizella receives a usufruct over the decedent's share of cash or bank accounts formerly owned by the spouses as community property, essentially assuming "ownership" over the funds. She can do what she wants with the cash or bank accounts during the usufruct; however, at the termination of the usufruct, she is required to pay Cinderella, the naked owner, the value that the cash had at the usufruct's commencement.<sup>117</sup> If the usufruct terminates by Drizella's remarriage, then she will be required to make an accounting and repay Cinderella within the parameters set by the Code.<sup>118</sup> If, however, the usufruct terminates as a result of Drizella's death, the amount owed to Cinderella becomes an estate debt enforceable against Drizella's universal successors.<sup>119</sup> Because the usufruct of consumables affords the surviving spouse considerably more freedom in disposing of the assets subject to the usufruct, the potential for abuse is great. Drizella could dispose of valuable consumable assets—including, for example, cash, jewelry, or other personal items—and fail to reserve sufficient assets to account for the value of the consumables at the usufruct's termination. If all or a significant portion of the decedent's estate is made up of consumable property, then it is quite possible for Drizella to use the entirety of the estate for her own support and enjoyment and die insolvent, thereby leaving Cinderella with no recourse. Given that so few people report to have a good relationship with their stepparents,<sup>120</sup> this scenario could be significantly exacerbated in the context of the stepfamily and intestacy.

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115. See *supra* notes 104–108 and accompanying text.

116. See YIANNPOULOS, *supra* note 4, § 1:3, at 8.

117. See LA. CIV. CODE art. 538 (2014).

118. See *id.*

119. See YIANNPOULOS, *supra* note 4, § 4:33, at 322–23.

120. See Richard, *supra* note 55.

*d. Security*

The Legislature has enacted provisions that prevent the surviving spouse from completely expending or damaging a thing held in usufruct without recourse. Civil Code article 571 obligates the usufructuary to give security to the naked owner in order to ensure that the usufructuary abides by the prudent administrator standard.<sup>121</sup> Security also protects the children from the possibility that the usufructuary will not have sufficient assets to account for the value of consumable things disposed of during the usufruct.<sup>122</sup> While the Code dispenses with the requirement of posting security in certain family relationships,<sup>123</sup> security is owed by a spouse with an 890 usufruct when the naked owners are the surviving spouse's stepchildren.<sup>124</sup> This is not surprising. Cognizant of the increased potential for abuse or waste that is seen in the Cinderella Problem, the Legislature required that security be posted to protect the children.<sup>125</sup>

Unfortunately, this security may be inadequate. First, although the Code requires that the security be in the amount of the "total value of the property subject to the usufruct," courts actually retain significant discretion in determining an appropriate amount, though the emphasis is on maintaining the protection of the naked owner.<sup>126</sup> Specifically, the court "may increase or reduce the amount of the security, upon proper showing, but the amount shall not be less than the value of the movables subject to the usufruct."<sup>127</sup> Moreover, the

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121. See Louisiana Civil Code article 571, which provides:

The usufructuary shall give security that he will use the property subject to the usufruct as a prudent administrator and that he will faithfully fulfill all the obligations imposed on him by law or by the act that established the usufruct unless security is dispensed with. If security is required, the court may order that it be provided in accordance with law.

LA. CIV. CODE art. 571 (2014).

122. See *id.*; see also YIANNOPOULOS, *supra* note 4, § 4:7, at 266–69.

123. Another example of when security is dispensed with is under the parental usufruct created in Louisiana Civil Code article 223.

124. LORIO, *supra* note 23, at § 2:16, at 57.

125. See LA. CIV. CODE art. 1514 cmt. c (2014) ("The legislature made a policy decision that children of a prior marriage and illegitimate children are entitled to greater protection than are children of the marriage, or, in other words, to treat a surviving spouse who is the parent of the naked owner different from a surviving spouse who is not the parent of the naked owner.").

126. The Louisiana Civil Code provides that "[t]he security shall be in the amount of the total value of the property subject to the usufruct. The court may increase or reduce the amount of the security, on proper showing, but the amount shall not be less than the value of the movables subject to the usufruct." *Id.* art. 572.

127. *Id.*

Code does not specify what type of security is required, which allows courts to infer that any type of security is permissible.<sup>128</sup> Confirming this inference, the Legislature enacted a provision describing the types of security that are permissible under the 890 usufruct:

If security is owed to the naked owner by the usufructuary who is the surviving spouse, the court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.<sup>129</sup>

This addition complicates the security requirement for a surviving spouse with the curious reference to “notes” and “other documents.”<sup>130</sup> The Legislature has not explained what these requirements mean, nor have the courts.

The ambiguities that result from “security” being poorly defined may lead to more disagreement between Drizella and Cinderella. For example, Drizella may simply sign an unsecured promissory note as security, effectively promising to perform an obligation that she is already legally bound to perform. Moreover, because “other documents” is not defined in the Louisiana Revised Statutes, it could be *any* type of document, and this may allow Drizella to post illusory security. Hence, as it stands now, Drizella could abide by this statute but substantively circumvent the security requirement, leaving Cinderella without recourse. This potential for circumvention undermines the policy behind the security requirement, which is to hold Drizella accountable for her use and enjoyment when the naked owners are not her children, subverting the sought-after balancing of interests between Drizella and Cinderella.

#### *e. Expenses*

One final source of confusion and potential discord is the Code’s requirement that the usufructuary pay various expenses of the usufruct.<sup>131</sup> The Code distinguishes between ordinary repairs and extraordinary repairs, explaining that “[e]xtraordinary repairs are those for the reconstruction of the whole or of a substantial part

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128. *See id.*

129. LA. REV. STAT. ANN. § 9:1202 (2008). This provision applies only when the usufructuary is not the natural parent of the naked owners. *See* art. 1514.

130. § 9:1202.

131. *See* LA. CIV. CODE art. 581 (2014) (“The usufructuary is answerable for all expenses that become necessary for the preservation and use of the property after the commencement of the usufruct.”).



of the property subject to the usufruct. All others are ordinary repairs.”<sup>132</sup> The distinction between what is considered extraordinary and what is considered ordinary, however, is not so simply drawn in real life.<sup>133</sup> The lack of clarity as to which expenses the usufructuary and naked owner are obligated to pay adds another level of uncertainty and discord in the context of the stepfamily and intestacy. For example, without a clear definition of what constitutes an “ordinary expense,” Drizella may refuse to pay any expenses, arguing that all expenses of the property are “extraordinary” and thus Cinderella’s responsibility. The only mechanism that might end the bickering would be litigation, which is expensive and requires a delay in the determination of certain expenses, potentially allowing for the property to fall into significant disrepair.<sup>134</sup>

## *2. The Inadequacies of the 890 Usufruct vis-à-vis the Theories of Succession*

Given that the current intestacy scheme is inadequate in the context of the stepfamily, a new, modernized approach to the blended family in intestacy must be taken. However, to ameliorate the present scheme, one must return to the beginning and reconsider the theories underlying intestacy.

### *a. The Shortfalls of the 890 Usufruct Under the Natural Duty Theory*

The 890 usufruct is incompatible with the decedent’s natural duty to both his or her children and the natural duty to his or her

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132. *Id.* art. 578.

133. For an example of this difficulty in distinguishing between ordinary and extraordinary repairs, see *Succession of Crain*, 450 So. 2d 1374 (La. Ct. App. 1984).

134. One Louisiana case, for example, shows the consequences of failing to distinguish between what was classified as ordinary expenses and what was classified as extraordinary expenses. In *Succession of Crain*, a stepmother held a legal usufruct over a piece of property. *Id.* When the property fell into disrepair, a dispute arose between the usufructuary stepmother and the naked-owner stepchildren. *Id.* at 1375. The First Circuit held that ordinary repairs on the property consisted of the reparation of leak spots, the removal of mold throughout the house that resulted from water leaks, and the replacement of windows, among others. *Id.* at 1376. Extraordinary repairs, which were the responsibility of the naked owners, included the reparation of the dock, the boat slip, and the roof. *Id.* The First Circuit did not articulate a standard in distinguishing between the expenses but rather merely provided an arbitrary list of what was ordinary and what was extraordinary. *Id.*

spouse.<sup>135</sup> Louisiana must reevaluate the current 890 usufruct scheme if the natural duty theory is a genuine goal of intestate succession in Louisiana.

*i. The Natural Duty to the Decedent's Children*

If the decedent's natural duty is toward his or her children, the 890 usufruct only has the potential to conflict with the interests of the children. While the decedent's children would be granted the interest of disposition, and thus would be able to sell the property, it would be difficult to sell a property burdened with a usufruct.<sup>136</sup> In the case where a decedent is survived by a much younger spouse who is closer in age to his or her children, the surviving spouse could outlive the children, thus depriving them of various rights in their parent's community property.<sup>137</sup>

*ii. The Natural Duty to the Surviving Spouse*

The 890 usufruct in the context of the stepfamily also does not comport with the decedent's natural duty toward his or her surviving spouse. Given that an elderly surviving spouse is normally not economically self-sufficient,<sup>138</sup> the usufruct does not ensure Drizella's economic stability because she is only able to sell her rights under the usufruct, which are not as valuable as full ownership.<sup>139</sup> Additionally, ordinary expenses over a large piece of property could be cost-prohibitive, and if Drizella has nothing other than a usufruct over a home and even a small amount of cash, she cannot be expected to tend to her duties as usufructuary and survive day-to-day.

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135. See *supra* Part I.A.1.

136. When selling a property burdened with a usufruct, one is selling only the right to dispose of the property, not the right to use and enjoy the property, which belongs to someone else. Thus, the sale of property subject to a usufruct is not as valuable as the sale of property in full ownership.

137. The modern phenomenon of people living longer makes this scenario of a decedent's child dying before receiving full ownership even more probable. The average life expectancy for women is 77.3 years, compared with only 71.2 for men. TABLE 2: AVERAGE LIFE EXPECTANCY AT BIRTH BY STATE FOR 2000 AND RATIO OF ESTIMATES, available at [wonder.cdc.gov/WONDER/help/populations/population-projections/MethodsTable2.xls](http://wonder.cdc.gov/WONDER/help/populations/population-projections/MethodsTable2.xls).

138. See discussion *supra* Part I.A.1.b.

139. Alienation of property in full ownership is necessarily more valuable than the alienation of a usufruct over that same property because with full ownership, there exists no dismemberment of ownership.

*b. The Shortfalls of the Presumed Will Theory*

If the presumed will theory is a viable goal in Louisiana succession law, then the 890 usufruct fails the stepfamily in this regard as well.<sup>140</sup> No parent desires complex stepfamily dynamics to be under even more strain after his or her death. Also, the evolution that took place in the spousal usufruct over the centuries shows that spouses want their surviving spouses to be well taken care of.<sup>141</sup> Although the Louisiana Legislature took steps toward improving the position of the surviving spouse in intestacy, more should be done to protect the interests of both Drizella and Cinderella. Louisiana's current intestacy scheme for the stepfamily is clearly broken, and its remedy requires us to look elsewhere for inspiration.

### III. OTHER APPROACHES TO THE CINDERELLA PROBLEM

Parts I and II of this Comment explored the theories underlying succession law and the phenomenon of the blended family and subsequently illustrated the deficiencies of Louisiana law in the face of these two concepts. Given the shortfalls of Louisiana's approach to the Cinderella Problem, it is necessary to look to other jurisdictions for guidance. With increased divorce rates around the world,<sup>142</sup> the complications stemming from the blended family in intestacy exist everywhere.<sup>143</sup> Similarly, the improvement in the position of the surviving spouse in intestacy was not just limited to Louisiana, and varying approaches to the Cinderella Problem exist.<sup>144</sup> With some more successful at ensuring the balancing of

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140. See *supra* Part I.A.2.

141. See discussion *supra* Part II.A.1.

142. See Mark Dummett, *Not So Happily Ever After as Indian Divorce Rate Doubles*, BBC NEWS, S. ASIA (Dec. 31, 2010, 6:31 PM), <http://www.bbc.co.uk/news/world-south-asia-12094360> [<http://perma.cc/4HRF-MGHE>] (archived Mar. 4, 2014) (explaining the Indian divorce rate has increased by 100% in five years); *Divorce Rate: How Well Do You Know International Divorce Rates?*, HUFF POST DIVORCE (June 1, 2012, 2:06 PM), [http://www.huffingtonpost.com/2012/06/01/divorce-rate-how-well-do- n\\_1562900.html#slide=1043117](http://www.huffingtonpost.com/2012/06/01/divorce-rate-how-well-do- n_1562900.html#slide=1043117) [<http://perma.cc/DA9P-M94U>] (archived Mar. 4, 2014) (explaining that in 2010, the United Kingdom's divorce rate rose for the first time in a decade; the Chinese government, in efforts to combat the rising divorce rate, instituted a program for adults to write love letters upon their marriage to be delivered seven years later; the Japanese divorce rate doubled "and then some" between 1985 and 2000; Russia has the highest divorce rate in the world).

143. See KARL HEINZ NEUMAYER, ET AL., *INTESTATE SUCCESSION*, in 5 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 104-61 (2007) (demonstrating the varying approaches to the surviving spouse in intestate succession in jurisdictions across the world).

144. See *id.*

interests between the stepparent and children than others, a discussion of several approaches and their respective merits is helpful in assembling Louisiana's solution for Drizella and Cinderella.

*A. The Civilian Approach: What Has France Done?*

Considering intestacy to be the fundamental method of inheritance, the redactors of the French Civil Code placed great importance on intestacy provisions and considered "testamentary inheritance somewhat of a gloss" on intestate inheritance.<sup>145</sup> French academics note that intestate succession is itself testamentary in spirit, following the decedent's presumed will whenever possible.<sup>146</sup>

Historically, the "*conjoint survivant*," or the surviving spouse, was not at the top of the list when it came to inheritance.<sup>147</sup> Placing the rights of the surviving spouse barely before the rights of the State,<sup>148</sup> the Code Napoléon originally positioned the surviving spouse behind all other relatives capable of inheriting.<sup>149</sup> With the rationale that the surviving spouse was not a blood relative of the deceased, the French Civil Code continued the deeply rooted historical objective of keeping a decedent's patrimony within his or her bloodline to ensure the growth and development of the estate.<sup>150</sup> The distribution therefore favored the distribution of the estate to those with interests resulting from "*lignage*" rather than those resulting from "*marriage*."<sup>151</sup>

The low position of the surviving spouse in the context of intestate succession was considered by academics as insufficient.<sup>152</sup> Until a recent revision of the intestacy provisions, the surviving spouse was considered the "*parent pauvre*," or the "poor parent," as a result of the surviving spouse's unfavorable position.<sup>153</sup> Nevertheless,

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145. HENRY DYSON, FRENCH PROPERTY AND INHERITANCE LAW: PRINCIPLES AND PRACTICE 273 (2003).

146. See AUBRY & RAU, DROIT CIVIL FRANÇAIS § 588, in 4 CIVIL LAW TRANSLATIONS 2 (Carlos E. Lazarus trans., 6th ed. 1971).

147. See *id.* § 604.

148. See *id.*

149. See Lorio, *supra* note 11, at 1179. The surviving spouse was behind any relative up to the 12th degree for inheritance. See DYSON, *supra* note 145, at 274.

150. See *Le Conjoint Successible*, COMITÉ DÉPARTEMENTAL D'INFORMATION ET D'ACTION EN FAVEUR DES PERSONNES AGÉES 5 (Apr. 17, 2008), [http://www.ciapa.com/LE\\_CIAPA/Dossier\\_Cptes\\_Rendus/080417\\_Le\\_conjoint\\_successible.pdf](http://www.ciapa.com/LE_CIAPA/Dossier_Cptes_Rendus/080417_Le_conjoint_successible.pdf) [<http://perma.cc/3MTG-MR4N>] (archived Mar. 4, 2014).

151. See *id.*

152. See AUBRY & RAU, *supra* note 146, § 588.

153. DOMINIQUE DE LEGGE & JACQUES MÉZARD, LA LOI SUR LES DROITS DU CONJOINT SURVIVANT : UNE LOI ÉQUILBRÉE, À L'EFFICACITÉ RECONNUE 7 (2011),

similar to Louisiana, the surviving spouse's position in France improved when 19th century lawmakers gave surviving spouses the right to receive a usufruct over one-third of the decedent's property when he or she died intestate.<sup>154</sup>

Though the surviving spouse's position progressively improved over the 20th century, the improvement was not enough.<sup>155</sup> With the increase in diversity of family composition, namely the stepfamily, the French intestacy legislation became out of sync with the construct of French families.<sup>156</sup> Also, the undesirable position of the surviving spouse was exacerbated by the French population's increasing life expectancy.<sup>157</sup> On the need for repositioning the surviving spouse in response to these sociological and economic changes, one French politician declared:

The surviving spouse is no longer considered a stranger that the family must defend against, but rather a co-founder of the family. The marriage is no longer considered as an institution with the goal of continuing on the family wealth, but rather as the consecration of two wills for emotional reasons rather than economic.<sup>158</sup>

These sociological and economic evolutions contributed to the need to recalibrate the relationship between the surviving spouse and the decedent's children in the context of intestacy.<sup>159</sup> In 2001, the French Legislature responded to the sociological and economic changes and elevated the surviving spouse's position by enacting French Civil Code article 757. The article provides:

Where a predeceased spouse leaves children or descendants, the surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses and the ownership of the quarter in the presence of one or several children who are not born from both spouses.<sup>160</sup>

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[http://www.senat.fr/rap/r10-476/r10-476\\_mono.html](http://www.senat.fr/rap/r10-476/r10-476_mono.html) [http://perma.cc/T3FU-GKJ7] (archived Mar. 4, 2014).

154. See *Le Conjoint Successible*, *supra* note 150.

155. See DE LEGGE & MÉZARD, *supra* note 153.

156. See *id.*

157. See *id.*

158. *Id.*

159. See DYSON, *supra* note 145, at 274.

160. CODE CIVIL [C. CIV.] art. 757 (Fr.).

The provision directly addresses the Cinderella Problem. It provides that if the decedent's children are not also the surviving spouse's children, then the spouse does not have the option to take the usufruct but instead must take one-fourth ownership of the decedent's property. Thus, there is no opportunity for the surviving spouse to hold a usufruct with the decedent's children as naked owners.<sup>161</sup> Giving the surviving spouse no option other than one-fourth ownership, the French Legislature reasoned that this rule is to prevent a surviving spouse from "paralyzing" the interests of the parties.<sup>162</sup>

Given the comparable societal changes in Louisiana, Professor Kathryn V. Lorio has advocated that Louisiana should look to its "precursor," France, for help in fashioning a response to the changing societal values regarding stepfamilies.<sup>163</sup> Though not recommending that Louisiana follow France "blindly," Professor Lorio suggests that adopting a similar scheme may be appropriate.<sup>164</sup>

Adopting the one-fourth fractional approach taken by the French, rather than the usufruct, however, would not best comport with either the natural duty or presumed will theories—both of which should inform legislation affecting intestate succession.<sup>165</sup> First, the French fractional approach does not align with the presumed will of the American decedent because most modern studies and surveys show that Americans would like their estates to completely devolve to their surviving spouses, even when children also survive them.<sup>166</sup> Adopting the French approach would reverse Louisiana's trend of honoring the presumed will of the decedent, evidenced by its expansion of the spousal usufruct over the centuries.<sup>167</sup> Further, the fractional approach does not best comport with the natural duty theory because the provision does not adequately provide for the decedent's natural duty to ensure his or her surviving spouse's economic welfare in the case of a small estate.<sup>168</sup>

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161. See DYSON, *supra* note 145, at 275.

162. *Id.*

163. Lorio, *supra* note 11, at 1180.

164. *Id.*

165. See generally discussion *supra* Part I.A.

166. One example of these studies is the "Dunham study." The Dunham study reviewed 22 estates with decedents survived by a spouse plus children and 6 estates in which the decedent was survived only by a spouse. Fisher & Curnutte, *supra* note 15, at 74. Out of the 28 estates, 27 of the decedents left 100% of their estates to their surviving spouses, and all of the decedents with children left their entire estates to their surviving spouses. *Id.*

167. See discussion *supra* Part II.A.1.

168. See generally discussion *infra* Part IV.

*B. The United States*

With most people dying intestate, there is no area of American private law that concerns the public interest more than intestate succession.<sup>169</sup> Each state approaches the problem of intestacy differently. Significantly, several states have done away with common law schemes that grant the surviving spouse a mere interest in the decedent's estate, which are analogous to the usufruct and known as "dower."<sup>170</sup> In its place, these states have implemented provisions modeled after the Uniform Probate Code.<sup>171</sup>

*1. The Original Uniform Probate Code*

The Original Uniform Probate Code (Original UPC) was promulgated by the National Conference of Commissioners on Uniform State Laws (the Commission) in the 1960s.<sup>172</sup> Today, 15 states have implemented the Original UPC or portions of it.<sup>173</sup> The Commission drafted statutes that comported with the presumed will theory.<sup>174</sup> The drafters wanted a code that would "provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law."<sup>175</sup> Under the Original UPC, when a decedent died intestate leaving "surviving [children] one or more of whom are not [children] of the surviving spouse," then the surviving spouse was entitled to one-half of the intestate estate.<sup>176</sup> This

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169. Lomenzo, *supra* note 24, at 941.

170. See discussion *infra* Part III.B.3.

171. See, e.g., ALASKA STAT. ANN. § 13.06.005 (Westlaw 2014); COLO. REV. STAT. ANN. § 15-11-102 (Westlaw 2014). Both Alaska and Colorado abolished dower and adopted legislation modeled after the UPC.

172. Fellows et al., *supra* note 20, at 323. For a detailed history of the UPC, see Averill & Brantley, *supra* note 9, at 635.

173. Sharla K. Raab, *A Comparative Analysis Between the Uniform Probate Code and Michigan's Estates and Protected Individuals Code*, 79 U. DET. MERCY L. REV. 593, 595 (2002).

174. Spitko, *supra* note 41, at 1070. See also Waggoner, *supra* note 28, at 71 (theorizing that the "predominant consideration" behind intestacy provisions is the decedent's intent).

175. Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 929 (1992) (quoting UPC art. II, pt. 1 gen. cmt. (1969)) (internal quotation marks omitted). The drafters looked to trends in the desires of people dying testate as expressed in the wills they created to determine how an intestate decedent would want property distributed upon death.

*Id.*

176. UPC § 2-102 (1969).

fractional distribution between the spouse and the decedent's children was known as the "straight-fractional-share approach."<sup>177</sup>

Academics have argued that despite the Commission's efforts, this uniform law has in actuality failed to comport with the presumed will theory.<sup>178</sup> Indeed, Professor Lawrence Waggoner, Director of Research and Chief Reporter for the UPC, conceded that the Original UPC's straight-fractional-share approach was flawed.<sup>179</sup> Its primary deficiency was that it sacrificed "the surviving spouse's economic security in the smaller to modest estates in order to preserve inheritance expectations of adult children who, unlike the surviving spouse, are in the labor market and not forced to rely for subsistence on capital-generated income."<sup>180</sup> For example, if the decedent's estate totaled \$50,000, then the surviving spouse would only inherit \$25,000 under the straight-fractional-share approach, which may be an insufficient amount to ensure his or her continued economic stability.

## 2. *The Revised Uniform Probate Code*

Promulgated in 1990, the Revised Uniform Probate Code (Revised UPC) attempted to ameliorate the problems resulting from the Original UPC and reform the Original UPC in light of data showing the high numbers of people dying intestate.<sup>181</sup> In addition, the Commission also considered the multi-marriage phenomenon in American society in which many American families have both biological children and stepchildren.<sup>182</sup> Incorporating these facts and circumstances, the Revised UPC reflects an effort to achieve fairness in the distribution of assets when a decedent dies intestate.<sup>183</sup>

By enacting what is known as a "lump-sum-plus-a-fraction approach," the Commission was able to account for societal changes and further underlying theories and goals. In addressing the Cinderella Problem, section 2-102(4) of the Revised UPC provides that the surviving spouse will receive "[t]he first \$100,000, plus one-half of any balance of the intestate estate, if one or more of the

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177. Waggoner, *supra* note 28, at 38.

178. *Id.*

179. *Id.*

180. *Id.*

181. Engel, *supra* note 15, at 351. *See also* Fisher & Curnutte, *supra* note 15, at 63.

182. Engel, *supra* note 15, at 351.

183. Fisher & Curnutte, *supra* note 15, at 63.



decedent's surviving descendants are not [children] of the surviving spouse."<sup>184</sup>

This lump-sum-plus-a-fractional approach better serves the stepfamily dilemma of balancing the interests of the surviving spouse and the stepchildren.<sup>185</sup> Academics argue that the fractional pattern of distribution only provides the surviving spouse with "enough capital to generate an adequate stream of income" when the

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184. Revised UPC § 2-102 provides:

The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(A) no descendant or parent of the decedent survives the decedent; or

(B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [\$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [\$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) The first [\$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not lineal descendants of the surviving spouse.

The Revised UPC also includes a separate provision for community property states: section 2-102(A). Revised UPC § 2-102(A) provides:

(a) The intestate share of a surviving spouse in separate property is:

1. The entire estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

2. The first \$200,000, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent.

3. The first \$150,000, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent.

4. The first \$100,000, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

(b) The one-half of community property belonging to the decedent passes to the surviving spouse as the intestate share.

The model statute provides that the decedent's one-half share of the community property will pass to the surviving spouse; however, most community property states have not enacted this provision. The community property states that have enacted the Revised UPC, for example Alaska, have enacted the regular version section 2-102 of the Revised UPC rather than the specific community property provision. *See* ALASKA STAT. ANN. § 13.12.102 (Westlaw 2014).

185. *See* Waggoner, *supra* note 28, at 39.

estate contains significant assets.<sup>186</sup> For example, under the original UPC, in an intestate estate totaling \$30,000, a fractional one-half share allots the surviving spouse only \$15,000.<sup>187</sup> By comparison, under the lump-sum-plus-a-fraction approach, the surviving spouse would receive the full amount of the estate.<sup>188</sup>

This approach corresponds with the wealth of the estate in the blended family make-up.<sup>189</sup> In the quintessential estate—one of modest value—this approach would strengthen the position of the surviving spouse by giving the surviving spouse all of the assets.<sup>190</sup> Academics opine that in small estates, it is more important to ensure the economic security of the surviving spouse than it is to “satisfy[] the inheritance expectations of the decedent’s adult children.”<sup>191</sup> This conclusion reflects a careful balancing of interests under the natural duty approach. This provision would also work in larger estates because a decedent would likely feel that giving some of his or her estate to his or her children would not drastically affect or reduce the surviving spouse’s economic security.<sup>192</sup> Thus, the lump-sum-plus-a-fraction approach better comports with the presumed will theory, ensuring the economic stability and comfort of Drizella as best the decedent’s estate can.

### *3. The Influence of the Uniform Probate Code in the United States*

Both the Original UPC and Revised UPC have had a major influence on the intestacy policies adopted by states.<sup>193</sup> Prior to the adoption of some version of the UPC, many states included the concept of dower in their intestacy provisions.<sup>194</sup> “Dower” is an ancient common law concept dating back to the Middle Ages with principles paralleling that of a usufruct.<sup>195</sup> Defined as “a life estate in

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186. *Id.* at 34.

187. *Id.*

188. *See* UPC § 2-102(4) (2006).

189. Waggoner, *supra* note 28, at 34.

190. *Id.*

191. *Id.* at 39.

192. *Id.*

193. *See infra* notes 204–210 and accompanying text.

194. *See* for example, ALASKA STAT. ANN. § 13.06.005 (Westlaw 2014), which adopted the UPC and abolished dower.

195. The origins of dower are so ancient that neither Coke nor Blackstone were able to trace it. It was recognized in the Magna Carta in 1215, and Lord Bacon was heard to speak in mid-17th century of “life, liberty and dower.” Barbara Ann Kulzer, *Property and the Family: Spousal Protection*, 4 RUTGERS-CAM L.J. 195, 199 n.21 (1973) (quoting *Skovborg v. Smith*, 9 N.J. Super. 389, 74 A.2d 910 (Ch.

one-third of all lands in which her deceased husband was seized of an estate of inheritance at any time during the marriage,”<sup>196</sup> dower began as a wedding gift and ultimately ripened into a right.<sup>197</sup> The principles embodied in dower are similar to those of a usufruct in two fundamental ways: (1) both schemes grant the surviving spouse an interest rather than full, outright ownership and (2) this interest terminates upon the death of the wife or, in the case of the usufruct, upon the death of the usufructuary.<sup>198</sup>

In the United States, dower was once very common in most states’ intestacy provisions,<sup>199</sup> however, in the modern era it has been abolished in nearly all states.<sup>200</sup> The abolition of dower demonstrates an effort to move toward more modern regimes<sup>201</sup> that give the surviving spouse an outright ownership interest in the estate.<sup>202</sup> Among the states that have abolished dower and implemented the Revised UPC are Alaska,<sup>203</sup> Colorado,<sup>204</sup> Michigan,<sup>205</sup> Montana,<sup>206</sup>

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Div. 1950)). For a more detailed history and evolution of dower, see *Skovborg*, 74 A.2d at 911.

196. William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1045 (1966). See also GLENDON, *supra* note 33, at 283 (defining “dower” as “a fixed property interest which attaches upon marriage to the real property of the husband in favor of the wife. In many state dower laws have now been made applicable to both husband and wife. The wife becomes entitled to life-time possessory rights only if she survives her husband and *vice versa*.”).

197. Kulzer, *supra* note 195, at 198.

198. See discussion *supra* Part II.A.

199. Dower, a common law concept, only took root in common law states. It did not take root in community property states, which implemented forms of Spanish and French law for spousal protection. Kulzer, *supra* note 195, at 196–97.

200. States where dower has not been abolished include Arkansas, ARK. CODE ANN. § 28-11-301 (Westlaw 2014), Kentucky, KY. REV. STAT. ANN. § 392.020 (Westlaw 2014), and Ohio, OHIO REV. CODE ANN. § 2103.02 (Westlaw 2014).

201. Christopher A. Richardson, *Dower—An Old Law with New Headaches*, NAT’L L. REV., Jul. 27, 2012, <http://www.natlawreview.com/article/dower-old-law-new-headaches> [<http://perma.cc/5F9L-ASBV>] (archived Mar. 4, 2014).

202. Windsor D. Calkins & C. Montee Kennedy, *Protection of the Surviving Spouse: The Demise of Dower and Curtesy and the New Oregon Probate Code*, 6 WILLIAMETTE L.J. 449, 449 (1970). See also Kulzer, *supra* note 195, at 196 (explaining many states have abolished dower and substituted the forced or indefeasible share).

203. Alaska has abolished dower and adopted the Revised UPC. See ALASKA STAT. ANN. § 13.06.005 (Westlaw 2014).

204. Colorado has abolished dower, see COLO. REV. STAT. ANN. § 15-11-112 (Westlaw 2014), and adopted the Revised UPC, see *id.* § 15-11-102.

205. Michigan has abolished dower in community property, see MICH. COMP. LAWS ANN. § 557.214 (Westlaw 2014), and adopted the Revised UPC, see *id.* § 700.2102.

206. Montana has abolished dower, see MONT. CODE ANN. § 72-2-122 (Westlaw 2014), and adopted the Revised UPC, see *id.* § 72-2-112.

and North Dakota.<sup>207</sup> Some states have abolished dower and implemented the Original UPC,<sup>208</sup> and several other states have abolished dower and implemented provisions roughly based on the Original UPC.<sup>209</sup> This retreat from dower can be attributed to the complications that it brings. These complications include: the inalienability of the property that is burdened with this right and the practical ineffectiveness of the regime when the deceased owns little or no property<sup>210</sup>—the same problems experienced by usufructuaries and naked owners in Louisiana.<sup>211</sup>

Ultimately, the concept of splitting ownership between members of a stepfamily under article 890 should be abolished. Instead, the surviving spouse should get a certain portion of the estate in full ownership. Full ownership would ensure the surviving spouse is better provided for because the surviving spouse has a full ownership interest, rather than sharing partial ownership with the stepchildren.

The abolition of dower in the United States in favor of a full ownership interest demonstrates the evolution of the surviving spouse's position in the context of intestacy, and it is a model that should be followed in Louisiana by transforming the usufruct interest into a full ownership interest. The natural duty theory in favor of the surviving spouse is carried out with this granting of full ownership because the surviving spouse is able to sell or do as he or she wants with the given property. The goals behind the presumed will theory are furthered because the decedent usually desires the entire estate to devolve to the surviving spouse upon death. Thus following with the trend of other states, Louisiana should provide a full ownership interest to Drizella.

#### IV. SOLUTION: ADOPTING THE LUMP-SUM-PLUS-A-FRACTION APPROACH

The evolution of the spousal usufruct in Louisiana was a result of the heightened value that Louisiana began to place on ensuring

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207. North Dakota has abolished dower, *see* N.D. CENT. CODE ANN. § 14-07-09 (Westlaw 2014), and adopted the Revised UPC, *see id.* § 30.1-04-02.

208. Some of these states include Idaho, IDAHO CODE ANN. § 32-914 (Westlaw 2014), Maine, ME. REV. STAT. ANN. tit. 18-A, § 2-113 (Westlaw 2014), Nebraska, NEB. REV. STAT. § 30-104 (Westlaw 2014), and New Hampshire, N.H. REV. STAT. ANN. § 560:3 (Westlaw 2014).

209. Some of these states include Alabama, ALA. CODE § 43-8-57 (Westlaw 2014), Florida, FLA. STAT. § 732.111 (Westlaw 2014), Maryland, MD. CODE ANN., EST. & TRUSTS, § 3-202 (Westlaw 2014), and Missouri, MO. REV. STAT. § 474.110 (Westlaw 2014).

210. GLENDON, *supra* note 33, at 283.

211. *See generally* discussion *supra* Part II.B.

the economic security of the surviving spouse upon the death of the spouse.<sup>212</sup> Over time, this spousal usufruct was extended to stepparents, demonstrating again the increased value placed on the surviving spouse.<sup>213</sup> These legislative changes demonstrate a material shift in the way that Louisiana views intestate succession, culminating in an emphasis on maintenance of the surviving spouse.<sup>214</sup> In response to these societal changes, Louisiana must further improve the provisions governing the blended family in intestate succession. The optimal approach would be for Louisiana to follow the model of the Revised UPC's lump-sum-plus-a-fraction approach and give the surviving spouse the right to receive the first \$100,000 of the estate plus one-half of the remaining share of the estate.<sup>215</sup>

Thus, for example, assume Cinderella's father and Drizella had accumulated \$500,000 during their marriage. When her husband dies, Drizella would receive the first \$100,000 plus half of the remaining community property: \$200,000. Accordingly, Cinderella would receive the remaining \$200,000 of the estate plus *all* of her father's separate property.<sup>216</sup> This approach better comports with both the natural duty and presumed will theories. First, this solution comports with the natural duty theory because the surviving spouse is better provided for than with the current 890 usufruct. Receiving outright ownership, the surviving spouse is not required to share interests in property with the decedent's children. The potential for any discord associated with this sharing—payment of expenses and maintenance—is thus eliminated. Secondly, the presumed will theory is furthered because the surviving spouse receives portions of the decedent's property in full ownership, rather than a mere interest. Further, given that most decedents want their surviving spouses to receive their property upon their death, the presumed will

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212. See discussion *supra* Part II.A.1.

213. See discussion *supra* Part II.A.

214. See *generally* discussion *supra* Part I.A. At the same time, the forced heirship doctrine was greatly reduced. Today, forced heirship is only applicable to children 23 years and under and incapable adults. LA. CIV. CODE art. 1493 (2014). For more on the history of forced heirship in Louisiana, see *generally* LORIO, *supra* note 23, § 10:1–10.3, at 295–314.

215. Of course, if the decedent were to die survived by forced heirs in addition to the surviving spouse, the right of the forced heirs to the legitime would take precedence over the inheritance rights of the surviving spouse. In such a case, the share of the surviving spouse would be reduced to the extent necessary to satisfy the forced portion of the estate. This solution does not advocate overriding the principles of forced heirship. In the rare event forced heirs are present, their rights would take priority over those of the surviving spouse.

216. Under Louisiana law, upon a decedent's intestate death, his or her children receive all of the decedent's *separate* property. See LORIO, *supra* note 23.

theory is also better served under this example than under the current intestacy scheme.<sup>217</sup>

Though granting full ownership rather than a mere interest in the decedent's community property is a significant change from the current approach, states across the country have taken this route over the last few decades by abolishing dower in favor of full ownership, thus proving that it would not be difficult for Louisiana to adopt a similar system. Louisiana should not be reluctant to adopt a non-civilian scheme given that France successfully adopted an approach advocating for full ownership rather than a usufruct.<sup>218</sup> Following in the footsteps of other states that have abolished dower in favor of a full ownership interest and also following in the footsteps of France, Louisiana should eliminate the usufruct interest and instead replace it with a full ownership interest in the first \$100,000 and one-half of the remaining community property. In light of the evolution of the family that has taken place over the centuries, Louisiana should adopt the lump-sum-plus-a-fraction approach so the stepmother can live happily ever after too.

#### CONCLUSION

Given the modern prevalence of remarriage and the high rate of people dying without wills, Louisiana must do more for Drizella and Cinderella in intestacy than the 890 usufruct currently allows. Increasing the opportunity for conflict and the likelihood of litigation, the 890 usufruct is inherently unworkable in the context of the stepfamily and intestacy. Looking to France and other states, Louisiana has an opportunity to learn from the approaches of other jurisdictions. Allowing for full ownership over a portion, rather than a mere interest in the decedent's share of the community property, the lump-sum-plus-a-fraction approach would decrease the problems currently faced by stepfamilies in intestacy. Implementing this approach in Louisiana would ensure that Cinderella and Drizella can both live happily ever after.

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217. *See supra* Part I.A.2.

218. *See supra* Part III.A.

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