A Simple Legacy: "To My Children"

The Second of Two Parts

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Introduction

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INTRODUCTION

We have seen [1] that article 980 gives to the term "children" a special legal meaning encompassing both children in the first degree and descendants of deceased children in the first degree.

This special meaning is not of public order. The testator always remains free to use the term "children" to connote only descendants in the first degree. Article 872 C.C. recognizes this testamentary freedom when it states,

> "The rules concerning legacies and the presumptions of the testator's intention, *as well as the meaning ascribed to certain terms*, give way to the formal or ortherwise sufficient expression of such intention, given in another sense or with a view to different effects." [2]

and article 980 also recognizes that the term "children" can mean descendants in the first degree if such is the testator's intention,

> "... the terms *children* or *grandchildren*, made use of without qualification ... apply to all the descendants."

However, before a legacy to "children" will be limited to descendants in the first degree, tangible evidence of qualification or of restrictive intent must be found within the four corners of the will. Article 980 *does* create a legal presumption favouring the extended legal meaning of the term "children" which cannot be summarily brushed aside.

By presuming the term "children" to include all descendants, but by allowing the testator to use the term to benefit only descendants in the first degree, the law has opened a Pandora's Box of interpretive difficulties. What meaning are we to give the term in such legacies as "to my surviving children", "to my beloved children", "to my three children", or in such a legacy as "income to my children until the youngest child reaches 21 years when the property shall devolve in ownership to my children then surviving" ? Are we to favour the presumed legal meaning, or are we to find that the testator intended to benefit descendants in the first degree ? What criteria are we to employ in determining when the legal presumption of article 980 has been overcome ?

In this article, we will examine the courts' attitudes to such legacies and attempt to determine whether any meaningful rules of construction can be formulated. In so doing we will adopt a two-fold approach.

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[1] Daniel N. Mettarlin, "*A Simple Legacy: 'To my Children'*" Part First, (1966) 12 McGill Law Journal, p. 65.

[2] 872 C.C. (emphasis added).

First, we will examine the words and phrases which testators commonly use to modify and accompany the term "children", and attempt to formulate rules of construction as to when such accompanying words will be deemed words of qualification. In so doing we will study such legacies as "to my surviving children", "to my three children", "to my beloved children", "to the children born of my marriage with Dame X", and "to the children of my children, that is to say to my grandchildren", all of which have received judicial consideration.

Second, expanding our horizons, we will examine the will as a whole, and attempt to determine whether from the *legal nature* of the bequest to "children" (that is, whether the legacy to "children" is a usufruct, a substitution, or a legacy by way of trust) or whether from the nature of certain types of testamentary schemes (particularly where property is passed to several generations as in a legacy of "income to children, ownership to grandchildren", or "income to such of my children as shall be living from time to time during the duration of this trust, and on its termination, ownership to my grandchildren") meaningful rules of interpretation can be devised ?

Chapter I

LIMITATION BY WORDS OF ACCOMPANIMENT

1. The unclear wording of article 980.

The English and French versions of article 980 conflict. In English the article reads,

> "...the terms *children* or *grandchildren*, made use of *without qualification*... apply to all the descendants..."[3]

However, the French version states,

> "...le terme *enfants* ou *petits-enfants*, *employé seul*... s'applique à tous les descendants..."[4]

The French terminology, "employé seul", suggests that any accompanying adjective or phrase, no matter how innocuous, no matter what its purpose, will limit the term "children", simply because such adjective was used together with the term "children". On this view

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[3] Emphasis added for the expression "without qualification".
[4] Emphasis added for the expression "employé seul".

even a legacy to "my beloved children" would exclude grandchildren, because the term "children" was not "employé seul".

However, the English phrase, "made use of without qualification", rejects restriction by the mere fact of accompaniment. It suggests that only accompanying adjectives or phrases which demonstrate an intent to restrict the degree of the descendants will be words of qualification.

The English version of article 980 is more compatible with ancient law than is the French version.[5] It is also more compatible with common sense. Our courts have long recognized its claim to primacy,

> "... il faut que le testateur ait exprimé en termes clairs et précis pour ôter au mot *enfants* cette signification que lui donne expressément la loi."[6]
>
> "I think there can be no doubt that the English version gives the real spirit and meaning of the law... The word *seul*, in the French version, must mean what the English version means by saying *without qualification* and that would bring it into line with the immediately preceding art. 979, the English version of which reads: 'The term *family* when it is not limited, applies...' There the French version is 'Le terme *famille* non limité...'"[7]

and with the Supreme Court decision of *Bernard* v. *Amyot-Forget*[8] there can no longer be any doubt that it alone represents the law.

Thus before an accompanying adjective or phrase will "qualify" the term "children", it must convey a sense of restriction in degree;[9] it is not enough that a phrase or adjective simply modify or be used together with the term "children", as in a legacy "to my beloved children".[9a]

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[5] Furgole, *Traité des Testaments*, (Paris 1779), v. 2, p. 415, No. 126, "J'estime néanmoins que cette extension devroit cesser, si le testateur s'étoit servi d'une expression qui limitât la condition aux enfans au premier degré..."

[6] *Marcotte* v. *Noël* (1880) 6 Q.L.R. 245 h.n.. This statement has been quoted with approval many times, most recently in *Bernard* v. *Amyot-Forget* [1952] B.R. 89 at 97 (Barclay J. dissenting).

[7] *Drouin* v. *Hénault* (1939) 67 B.R. 101 at pp. 111-112 (Barclay J.). Barclay J. also states at pp. 113-114, "The qualification to which art. 980 refers is a qualification as to degree".

[8] [1953] 1 S.C.R. 82.

[9] The Codifiers have been extremely inconsistent in their terminology. We have seen that in article 979 they use the expression "when not limited" whereas in article 980 they use the expressions "employé seul" and "made use of without qualification". In their comments on articles 977 and 980 they use yet another phrase "without other designation"; *Reports of the Codifiers*, Fifth Report, p. 199. Whether the Codifiers intended any subtle distinctions by these differences, or simply had a literary preference for synonyms is of course impossible to determine.

[9a] "The addition of an adjective... to express endearment... would not... [have] a qualified effect": *Drouin* v. *Hénault* (1939) 67 B.R. 101 at 109 (Walsh J.).

2. Words of Qualification.

The most obvious method of qualifying the term "children" is to leave property to "children *in the first degree*".

A second method, less obvious logically, but of equal legal efficacy, is to name the children. A legacy "to my children John and Henry" will be restricted to the two named persons. Neither the descendants of John or Henry will inherit upon the death of their progenitor. Such was the ancient law,[10] and our Code offers no innovation.[11]

> "... in the present case there is a strong qualification of the word "enfants" — namely, the words which relate it in terms to the named children, ..."

However, aside from naming the children or describing their degree, what other phrases will limit the term ?

Comtois suggests that no others will,[12] but this view, considering the jurisprudence, is too limited. While it is true that the courts have held that numbering the "children", as in a legacy "to my eight children in equal shares" will not restrict the term,[13] expres-

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[10] Ricard, *Traité des Donations entre-vifs et testamentaires*, éd. Bergier (Riom, 1783), v. 2, p. 387, n. 663 :

> « ... les fidéicommis se font ordinairement de deux manières : ou le testateur appelle nominativement à la succession ... certaines personnes ... ou bien la substitution est faite avec des termes collectifs ... Au premier cas, et quand les substitués sont tous nommés ... il n'y a point lieu à la représentation, parce que le testateur n'a dirigé nominativement sa disposition, qu'aux personnes qu'il a nommées et ainsi l'une des personnes étant décédée ... la substitution demeure absolument caduque pour lui et pour ses successeurs ... »

See also D'Aguesseau, *Questions concernant les substitutions avec les réponses de tous les parlemens et cours souveraines*, (Toulouse 1770), pp. 301 ff.

[11] If the "children" are benefited by name, and then described again simply as "children" without repetition of name, the second use of the term "children", although not qualified will be limited to descendants in the first degree, if the court considers the second and unqualified use of the term "children" as a shorthand reference to the previously named children. This obvious point was made in *Meincke* v. *Brown* [1958] S.C. 293 at 297,

> « Dans la première partie de cette clause, la testatrice a désigné ses légataires universels avec un soin tout particulier et de manière à écarter toute ambignïté possible. »

and in *Auger* v. *Beaudry* [1920] A.C. 1010 at 1015,

[12] R. Comtois, "*Le sens du terme 'enfants' dans les dispositions à titre gratuit*", (1964) 14 *Thémis* 37 at pp. 40-41.

[13] *Plouffe* v. *Lapierre* (1917) 52 S.C. 151; *Meincke* v. *Brown* [1958] S.C. 293 at 297 seems to approve this decision.

sions such as "to my surviving grandchildren",[14] and to "enfants leur vie durant" [15] have been held to exclude remote descendants. It has also been suggested that a legacy "to my children only",[16] and a legacy "to all my children except John" [17] should exclude grandchildren.

However, the courts have allowed grandchildren to inherit a legacy "to the children born of my marriage with Dame X",[18] and have permitted great-grandchildren to inherit a legacy "to the children of my children, that is to say, to my grandchildren".[19]

Thus we are faced with a series of inconsistent and confusing decisions whereby a legacy to chidren described by name is restricted, but not a legacy to children described by number; whereby a legacy "to my surviving children" is restricted but not one to "the children born of my marriage with Dame X".

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[14] *Drouin* v. *Hénault* (1939) 67 B.R. 101; *contra*, however, *Glackemeyer* v. *Le maire, les conseillers et citoyens de la Cité de Québec* (1861) 11 L.C.R. 18 and Sirois, "Question et Réponse Institution. — *Le mot 'enfants nés de notre mariage', comprend-il les petits enfants ?*" 30 R. du N. 1 at 5.

[15] *Préfontaine* v. *Dillon* (1922) 33 B.R. 314 (Lamothe C.J.; p. 318).

[16] Rand, J., in *Bernard* v. *Amyot-Forget* [1953] 1 S.C.R. 82 at 88; see also *David et Autres* [1963] S.C. 305 at 317 (commenting on *Castonguay* v. *Beaudry* (1860) 1 R.L. 93).

[17] *Plouffe* v. *Lapierre* (1917) 52 S.C. 151; *Meredith* v. *Meredith* (1939) 66 B.R. 572 at pp. 574-5. The suggestion that such a legacy as "to all my children except John" should exclude grandchildren is largely dependent for validity on the acceptance of the theory that article 980 is based on the rules of intestacy. (c.f. Daniel N. Mettarlin, *op. cit.*, 65 at 70 ff. and 86 ff.). On this theory the exclusion of a child from the inheritance would be evidence of a desire not to follow the rules of intestacy, and hence the term "children" would revert to its normal meaning. However, if the Furgolian system is adopted, the legacy in question should include grandchildren. (See D.N. Mettarlin, *op. cit.*, 65 at pp. 97 ff.)

[18] *Marcotte* v. *Noël* (1880) 6 Q.L.R. 245; *Beaudin* v. *Beaudin* (1927) 65 S.C. 517; see also the cases cited by Comtois, *op. cit.* 37 at pp. 39-40. Guyot in his work, *Répertoire universel et raisonné de jurisprudence*, (Paris 1784) v. 6, p. 723, quotes an ancient decision in the opposite sense. Notary Turgeon has quoted this ancient decision with approval and suggested that a legacy "to the children born of my marriage with Dame X" should be limited; H. Turgeon, "*Substitution — sens du mot 'enfants'*", 55 R. du N. 111 at pp. 120-121. However, the decision quoted by Guyot is isolated, and is in conflict with the weight of ancient doctrine. *Marcotte* v. *Noël* and the other cases in the same vein should be considered as validly decided; see also Barclay, J. (dissenting) in *Bernard* v. *Amyot-Forget* [1952] B.R. 89 at 97, and Sirois, *op. cit.*, 1 at 11.

[19] *Bernard* v. *Amyot-Forget* [1953] 1 S.C.R. 82.

Evidently we are in need of a theory to explain this conflicting and confusing jurisprudence, and to provide a guide for future prediction.

Given the vagaries of human expression and the eccentricities of draftsmanship, no mathematical formula will ever be devised to catalogue all possible accompanying expressions as "qualifying" or "non-qualifying".

Perhaps the only solution is to throw up one's hands, admit this is a question in which there is no philosophy, and anxiously await the courts quickly cataloguing the most common expressions as "qualifying" or "non-qualifying". On this view, we would trust entirely to the intuition and common sense of our judges, and will know that a word is qualifying simply because our courts have said so in the past.

However, such a solution runs contrary to the law's policy of narrowing uncertainty. Consequently, various authors and judges have suggested several theories to explain the jurisprudence and to provide a framework for prediction.

After analyzing these theories the reader may well be reminded of Lord Eldon's comment on the dispute as to which of several theological doctrines was closest to the original tenets of the founding principles of the Secession Church's Associates Synod,

> "...I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they [the doctrines of the secessionists] have, or have not, deviated from them; and I have made the attempt to understand it, till I find it, at least, on my part to be quite hopeless... [A]fter racking my mind again and again upon the subject, I really do not know what more to make of it".[20]

Nevertheless some general theory is necessary to at least determine which criteria the courts should adopt, and which they should reject, in determining whether a phrase will be qualifying or not.

3. Theories of Qualification — A study in Scholasticism.

In ordinary parlance one does not speak of "children" and expect the listener to imagine grandchildren. Nor does one refer "to my three children" or "to the children born to Jane and me" and expect the listener to exclaim, "Ah, I see you are speaking of the children of your predeceased children".

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[20] 2 Bligh 529; 4 Eng. Rep. 435 (H.L. 1820) (Scot).

Yet article 980 states that the term "children ... app[lies] to all the descendants". Obviously some explanation of what the Codifiers intended is in order.

a) **The Descriptive Theory.**

It can be argued that when the Codifiers state in article 980, that the term "children ... app[lies] to all descendants" their intention was to create a legal fiction that the testator who uses the term "children" has in mind and is describing all his descendants and not simply those in the first degree. Or as Comtois puts it,

> "... [art. 980] crée une présomption d'intention: en employant le mot *enfants*, le disposant a voulu référer aux descendants".[21]

Draftsmen and legislators are notoriously free to stipulate special meanings for words. In article 980, it can be argued that the Codifiers, desirous of achieving an equitable distribution of property within a family have exercised this freedom, and stated that a testator who uses the term "children" will be presumed to be referring to all his descendants. Borrowing from Alice in Wonderland the Codifiers have decided that our legislature cannot be deemed to be less omnipotent than Humpty Dumpty who stated, "When *I* use a word, it means just what I choose it to mean - neither more nor less".[22]

In a simple legacy to "children", then, according to this theory, we must assume that the testator had in mind all his descendants. However in such legacies as "to my two children", "to my children John and Henry" and "to my children in the first degree" such an assumption is not possible. In these latter legacies the testator has clearly demonstrated that he was thinking of his descendants

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[21] Comtois, *op cit.*, p. 37.

[22] Actually the testator should not be presumed to have in mind all descendants, but only a picture of descendants of a deceased child in the first degree inheriting in the latter's place. As Furgole has indicated, "le mot *enfans* comprend ... tous les descendans,... lorsqu'ils sont à la place de ceux du premier degré de génération, qui sont décédés" (Furgole, *op. cit.*, v. 2, p. 413, no. 125). Thus one could conclude that the proper legal definition of the term "children" should not be "descendants", but "children in the first degree, and failing a child in the first degree, the descendants of such deceased child in the first degree". From this modified view of the definition of the term "children", one can conclude, that to qualify the term "children", the testator must demonstrate, not that he was thinking of his descendants in the first degree, but that he was thinking of excluding the descendants of a deceased child in the first degree. This later criterion will be discussed under the Exclusionary Theory of qualification. (See p. 251, *infra*).

in the first degree. If we adopt this theory we should acknowledge that in such legacies the testator has overcome the presumption of article 980 and qualified the term "children".

Unfortunately this theory, although reasonable, cannot be accepted.

First, it is contradicted by that segment of the jurisprudence which has held that to number children is not to limit them.

Second, the theory is of little practical use. It does not explain the rest of the jurisprudence, nor does it provide a predictive model which can effectively catalogue the yet unlitigated phrases. For example, how can we say with any conviction that a legacy to "my beloved children" or a legacy "to the children born to Jane and myself" was meant to include all the testator's descendants (as held in *Marcotte* v. *Noël*[23]), whereas a legacy to "my surviving children" indicates that the testator clearly had in mind only descendants in the first degree (as held in *Drouin* v. *Hénault*[24]). Obviously we cannot. It is evident that this theory is a poor and confusing guide. We must search elsewhere for a meaningful theory.

b) **The Substitutional Theory.**

Several judges have formulated a more mechanical test to determine when words of accompaniment should be deemed to be words of qualification. These judges have suggested that since in law the term "children" is synonymous with the term "descendants", it would be a proper method of interpretation to substitute the term "descendants" for the term "children", (and the term "descendants other than those in the first degree" for the term "grandchildren") and so read legacies to "children" and "grandchildren" as if the testator had originally used the terms "descendants" and "descendants other than those in the first degree", instead of the terms he did use.

Applying this substitutionary method, a legacy "to my children John and Henry" will be interpreted as if the testator had left the property "to my descendants John and Henry", and so be limited; similarly a legacy "to my three children" will be interpreted "to my three descendants", and likewise be restricted. A legacy "to my surviving children", however, will read "to my surviving descendants", and so include grandchildren; and a legacy "to the children of my

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[23] *Marcotte* v. *Noël* (1880) 6 Q.L.R. 245.
[24] *Drouin* v. *Hénault* (1939) 67 B.R. 101.

children that is to say to my grandchildren" will become a bequest "to the descendants of my descendants, that is to say to my descendants other than those in the first degree", and so include great-grandchildren.

This substitutionary method has received some judicial support. In the Supreme Court of Canada Rinfret C.J., and Taschereau J., both approved it;[25] and Barclay J. in *Drouin* v. *Hénault* likewise advocated its adoption,

> "... I consider that art. 980 contains a general rule as to what the word *grandchildren* without qualification *means*, that is, it is equivalent to *descendants*. If to that collective expression *descendants* we add the word *surviving*, is it not merely a condition upon which that collective group is to receive the benefit of the disposition, and not restricting the degree of the descendants who are to receive ?"[26]

There are, however, serious difficulties with this substitutionary method. First, it is sanctioned neither by the history nor by the wording of article 980 which states not that the term "children" *means* descendants, but that the term *applies* to descendants. Second, this system is too rigorous and inflexible; it creates an automatic rule with automatic results which can in many instances frustrate the testator's true intentions. Automatism in this area is no virtue. Third, the system produces results contrary to the jurisprudence. It leads to a limitation of a legacy "to my eight children" whereas the jurisprudence has held otherwise; it results in a legacy "to my surviving children" not being limited, whereas *Drouin* v. *Hénault*[27] has held the opposite. These difficulties seem to warrant a rejection of this method. The author would agree with the conclusion of Marchand J. in *Charette* v. *Lapierre*,

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[25] [1953] 1 S.C.R. 82. Note that Rinfret C.J. and Taschereau J. both suggested that the proper substitutional synonym for the term "grandchildren" should be "descendants" rather than "descendants other than those in the first degree", probably on the view that article 980 C.C. states that "the terms *children* or *grandchildren*... apply to all the descendants". If one substitutes the term "descendants" for the term "grandchildren" the legacy litigated in *Bernard* v. *Amyot-Forget*, namely, "to the children of my children, that is to say to my grandchildren" would read "to the descendants of my descendants, that is to say to my descendants", and obviously be limited. However, the author would suggest that the expression "descendants other than those in the first degree" would be a more fitting substitutional synonym for the expression "grandchildren", than the term "descendants". If the substitution the author suggests is made, then the legacy in *Bernard* v. *Amyot-Forget* would read "to the descendants of my descendants, that is to say, to my descendants other than those in the first degree", and so not imply a desire to exclude great-grandchildren.

[26] (1939) 67 B.R. 101 at 114 (emphasis added for the word "means").

[27] *Ibid.*

"Je ne puis voir la légalité de remplacer les termes 'enfants' et 'petits-enfants' par le terme 'descendants" et de faire dire au testateur: 'Je lègue des biens en usufruit à mes descendants et en propriété à mes descendants".[28]

c) The Exclusionary Theory.

The obvious purpose of article 980 is to prevent the disinheritance and possible impoverishment of the families of deceased children under certain circumstances.

The difficulties lie in attempting to determine under what circumstances the law permits such families to be disinherited.

The traditional theories have suggested that grandchildren be excluded from legacies to "children", if it can be shown that the testator was thinking of and referring to his descendants in the first degree when he used the term "children".

These theories, as we have seen, do not adequately explain the jurisprudence, nor do they provide a meaningful basis for prediction. Their most serious failing, however, is that they permit the disinheritance and possible impoverishment of whole branches of the testator's family in instances where this was not his intention at all.

The fact that a testator may have been thinking of his descendants in the first degree when he drafted his will does not mean that he wished to exclude the descendants of a child in the first degree who might predecease him.

The testator who leaves property to his "two children" has failed to state what is to happen should a child in the first degree predecease him. If asked, he might state that he intended the share of a predeceased child in the first degree to accrue to the surviving child in the first degree; or he might state that he had intended the predeceased child's share to devolve to the deceased's family. It is also possible he might state that he did not realize that a child might predecease him, and therefore had unfortunately failed to draft a proper will.

In any event what he did intend, or what he would have intended, had he directed his mind to the problem, is not evident from the wording he did use. Nevertheless one point is evident. Many a tes-

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[28] *Charette* v. *Lapierre*, [1953] B.R. 687 at 699. Note that Marchand J. suggests that the proper substitution for the term grandchildren is "descendants" rather than "descendants other than those in the first degree". The author has earlier indicated his disapproval of this type of substitution. (See footnote 25, *supra*).

tator who leaves property to "my two children" or to "the children born to Jane and myself" had no intention of disinheriting the family of a predeceased child.

The "descriptive" and "substitutional" theories, if adopted, would encourage a disinheritance and possible impoverishment of whole branches of the testator's family in the situations outlined above, where such might not have been the testator's intention at all; and they will do so on evidence that is less than conclusive.

A proper theory of qualification should not arrive at these results. To this author, a proper theory of qualification should demand evidence that the testator intended to exclude a deceased child's family before disinheriting them. It should ensure that if there is any doubt as to whether the testator directed his mind to the question of who was to inherit a predeceased child's share, the law's desire to encourage family equality should prevail. While in certain cases such an interpretation may violate the testator's true intentions, it is more in keeping with the spirit of article 980 that, in cases of doubt, families of deceased children be provided for rather than disinherited.

Certainly such a conclusion seems consonant with the wishes of most testators.

If a person were to confide to us in ordinary conversation that he intended to leave his property to his "two children" we would be strongly inclined to inquire what would happen if no children were to survive him, and on hearing his answer, to ask what would happen if only one child survived him. While it is possible he might state, "I thought I had pretty clearly indicated that only children in the first degree are to inherit", it is more probable that he would say, "I hadn't considered the possibility of a child predeceasing me. Of course in such circumstances I would like to see that my child's children are provided for".

It is this latter answer that article 980 should presume.

Thus, to this author, before a legacy to "children" should be restricted to descendants in the first degree, the testator should demonstrate by specific wording that he was aware of the fact that a child might predecease him, and that he wished to exclude the deceased child's children in such event.[29]

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[29] Of course if article 980 is deemed introductive of the rules of intestacy to wills one could phrase this proposition in another way. One could state that the testator should demonstrate some intention to exclude the equality which the laws of intestacy wish to achieve.

This approach I have termed the Exclusionary Theory.

The Exclusionary Theory would ensure that legacies such as "to my two children", "to the children born to Jane and myself" and "to the children of my children, that is to say to my grandchildren" will not be limited. In none of these legacies has the testator given any indication what should happen should a child predecease him. Indeed he has not even indicated that he was aware of the fact that a child might predecease him. Faced only with non-conclusive doubts whether the testator wished to exclude grandchildren on the death of a child, or whether he even foresaw the problem, and armed with a presumption of law which encourages an equitable distribution of property among families, we should opt for the extended meaning.

Nevertheless this theory does present certain difficulties.

First, a legacy "to my children in the first degree" indicates no awareness of the fact that a child in the first degree might predecease the testator. Yet not even the most foolhardy jurist would suggest that such a legacy should include grandchildren. One could formulate a theory of implied intent to exclude grandchildren, but once one admits implied exclusion one rides an unruly horse; why then would a legacy "to the children born to Jane and me" not also *imply* exclusion of grandchildren ? All one can say is that the express mention of the degree of the "children" who are to inherit should restrict legacies to "children", without further evidence of any awareness of predecease on the part of the testator.[30]

Second, there is the difficulty of determining to what extent obvious concern with the death of a child coupled only with an implied exclusion of grandchildren should qualify the term. In a legacy to "my surviving children" the term "surviving" clearly indicates that the testator realized a child might predecease him and strongly suggests that he wished to exclude the deceased child's children in such event. However the testator's failure to expressly state that he wished to exclude grandchildren is troublesome. It can be argued that in legacies such as "to my surviving children" and "to my children with accretion in favour of the survivors", the testator intended the legal meaning of the term "children" to prevail, and in-

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[30] Of course legacies to named children must also be restricted to descendants in the first degree (see page 245, *supra*). However, the restriction of children by naming them is not an exception to the Exclusionary theory. Article 980 only applies to legacies to children not described by name. The question of whether grandchildren could inherit legacies to "children" only arose at ancient law when the "children" were not named.

tended accretion to occur only if a child in the first degree die *without leaving children;* otherwise he would have expressly excluded grandchildren. In other words, accretion would only take place amongst those persons legally defined as "children". On this view the above legacies would be interpreted as follows :

> to my children in the first degree. If a child in the first degree dies with children the legal meaning of the term "children" will ensure that his children inherit in his place. However if a child in the first degree dies without children his share will accrue to the remaining "children" (as defined in article 980).

Such an interpretation is logical although it runs contrary to the holding in *Drouin* v. *Hénault.*[31] However, *Drouin* v. *Hénault* may have to be reconsidered in view of the fact that the main reasoning on which it was based has since been rejected by the Supreme Court of Canada in *Bernard* v. *Amyot-Forget.*[32]

Since the term "children" can have two meanings, we are in need of some criteria other than intuition to decide which meaning is to apply.

A theory which encourages equality of division whenever possible, and prevents the disinheritance of the families of deceased children when there is no evidence that the testator did not intend otherwise is a theory which our courts should look upon with favour.

It is difficult to find a theory of qualification which can speak for the silent testator, and which does so in a manner at once reliable, harmonious with the spirit of article 980 C.C., and beneficial to the family as a social institution. The Exclusionary Theory best fulfills these requirements.

While this theory cannot provide an automatic rule of interpretation, no automatic rule will ever be possible or indeed desirable. The vagaries of human expression will always leave some legacies in doubt.[32a]

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[31] *Drouin* v. *Hénault* (1939) 67 B.R. 101.

[32] [1953] 1 S.C.R. 82. The decision in *Drouin* v. *Hénault, supra,* was reached almost solely on the reasoning that the term "surviving" had to be given some meaning, and that the only effective meaning it could have would be that of qualification. The Supreme Court of Canada, in *Bernard* v. *Amyot, supra,* reached the conclusion that a word should not be held to be qualifying simply because it would otherwise be redundant. It would seem therefore that there are grounds for reconsidering the decision reached in *Drouin* v. *Hénault.*

[32a] For example, the theory really cannot catalogue a legacy "to my children only" which Rand, J. has suggested should be restricted (*Bernard* v. *Amyot-Forget* [1953] 1 S.C.R. 82 at 88). One might also argue that the theory does not

However, it is necessary to formulate some theory to limit the areas of uncertainty as much as possible and the Exclusionary Theory seems to accomplish this result.

Thus the author would suggest that to restrict a legacy to "children" the testator must either name the children, describe them as being of a certain degree, or indicate that he was aware of the fact that a child might predecease him and intended to exclude grandchildren in such event.

d) Words of Equivocation and Words of Tautology.

We have suggested various theories which the courts might adopt to determine when words should be qualifying, and when not. We have also shown that each theory has a penumbral area where analysis leaves off and intuition begins. Determining whether an accompany-

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properly catalogue a legacy "to the children born immediately of my marriage with Dame X". Most persons would deem such a legacy to be restricted, and this was the conclusion reached by Furgole, (Furgole, *op. cit.*, v. 2, p. 415, no. 125). The Exclusionary Theory, however, would suggest that such a legacy should not be restricted. It is evident that the testator who leaves property "to the children immediately born of my marriage with Dame X" has not indicated what he would wish to happen should a child "immediately born" of his marriage predecease him. Since such a legacy contains no evidence that the testator was aware of the fact that a child might predecease him, and contains no indication what the testator would have wished to happen in such event, the Exclusionary Theory would conclude that such a legacy should not be limited. From the point of view of the Exclusionary Theory there is no more evidence of desire to exclude grandchildren in a legacy "to the children *born immediately of my marriage* with Dame X", than there is to exclude grandchildren in a legacy "to my *three* children"; in both legacies, while the emphasized words demonstrate that the testator was thinking of his descendants in the first degree, they do not demonstrate that he intended to disinherit grandchildren on the death of a child — the latter, of course, being the criterion demanded by the Exclusionary Theory to permit qualification. The author would favour the result reached by the Exclusionary Theory since he favours its adoption. However, such a result, it must be admitted, would run contrary to the reactions of most will interpreters, and is in conflict with Furgole's opinion, *supra*.

The above legacies severely test the validity of the Exclusionary Theory. However, they are extremely rare, and the author does not consider the Exclusionary Theory a failure, because it cannot unfailingly catalogue with mathematical certainty every bizarre expression that every draftsman, well learned in the law or not, may use.

No theory could ever accomplish this result. The value of the Exclusionary Theory is that it catalogues the most common accompanying expressions in a manner consonant with the wishes of most testators, and in a manner beneficial to the family as a social institution.

ing word is one of "equivocation" or "tautology" will provide an additional interpretive tool which may occasionally be employed to complement the foregoing theories and to narrow their respective penumbral areas.

i) Words of "Equivocation".

Words of "equivocation" are words which possess a clear purpose other than qualification, but suggest possible restrictive intent as well. For example in a legacy to "the children born of my wife Jane and myself" the expression "born of my wife Jane and myself" has the obvious paramount purpose of limiting the beneficiaries to those of a certain marriage,[33] but further suggests limitative intent as well. In a legacy "to my wife and then to such of my children as survive her" the expression "to such of my children as survive her" has the obvious object of indicating which of several persons (the testator or his wife) the beneficiaries must survive to inherit, but also indicates possible restrictive intent.

It is the author's view that words which are equivocally qualifying at best should not be held to be qualifying at all. If words of accompaniment which suggest a possible intent to exclude grandchildren can be found to possess an obvious purpose other than qualification they should be endowed only with this other purpose. The testator who wishes to overcome a presumption of law should not equivocate; he should leave no doubt as to his intentions.

ii) Words of "Tautology".

Words of "tautology", in contrast to words of "equivocation", are words which suggest a possible limitative intent but otherwise have no alternate purpose. The court must find that these words have been added for no purpose at all, or the court must endow them with the only possible or effective purpose they can have — namely, that of qualification.

Some judges have suggested that if a word suggests qualification and can have no other possible purpose it should be given a qualifying effect. If such was not the testator's intention they ask, why was the word added ?

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[33] *Beaudin* v. *Beaudin* (1927) 65 S.C. 517 at 519.

In *Drouin* v. *Hénault* [34] the testator left his property to his sons and daughter, and on the death of the survivor to his "surviving grandchildren". The majority of the court found the expression "surviving" to be redundant in view of the fact that the law itself makes survivorship a condition of inheritance, without the necessity of a testamentary provision to that effect (901 C.C.). The court, faced with the expression "surviving", which strongly suggested limitation, and which, if not deemed to be qualifying would have no effective meaning, adjudged the term "surviving" to be restrictive in intent.

> "Since the... word [surviving] was used, some effect must be given to it; the intention of the testator was to establish a limitation... he went beyond the Code (980), qualified and restricted the class of grandchildren to those surviving...
>
> ...If it was the testator's intention to provide for ... [great-grandchildren] why refer to *surviving grandchildren* or *descendants*? And why a special provision to exclude non-survivors? The law attends by itself to these (901 C.C.)." [35]

In *Bernard* v. *Amyot-Forget,* the testator bequeathed his property "aux enfants... de mes enfants, c'est-à-dire à mes petits-enfants".[36]

The Quebec Court of Appeal held that the phrase "c'est-à-dire à mes petits-enfants" had been added to the expression "enfants de mes enfants" to restrict the legacy to descendants in the second degree; otherwise, the Court suggested, the expression would have no effective purpose.

> "It appears to me that unless these words be so read they simply repeat what has already been said, in which case they add nothing and are quite useless. If, on the other hand, they were inserted for a purpose, then the only apparent purpose is the qualification of 'enfants de mes enfants'. If they are susceptible of these two meanings they must be interpreted in such a way as to give them an effect. This, as I understand it, is the rule of C.C. 1014 which applies to wills..." [37]

However the Supreme Court of Canada reversed the Court of Appeal and permitted great-grandchildren to share in the legacy. Rand J. stated,

> "No doubt we endeavour to give all words in an instrument effective meaning; but tautology is too universal a weakness or, as sometimes, strength, to give rise to a rule of interpretation that controls what would otherwise be the proper construction of the language used".[38]

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[34] *Drouin* v. *Hénault* (1939) 67 B.R. 101.
[35] *Ibid.*, at p. 109.
[36] [1952] B.R. 89.
[37] [1952] B.R. 89 at 95.
[38] [1953] 1 S.C.R. 82 at 89.

Rand's views echoed those of Barclay J. (dissenting) in the Court of Appeal,

> "... the mere fact that it may be tautological is not sufficient to change the legal meaning of the words".[39]

Thus the Supreme Court opted for the view that words of accompaniment should not be deemed qualifying simply because they would otherwise be repetitive or redundant.

The decision of the Supreme Court is wise. The fact that a testator has chosen to accompany the term "children" with a phrase of no effective meaning is no reason to overcome a legal presumption and disinherit and possibly impoverish a branch of a family. The fact that the testator was dealing with the question of survivorship even though unnecessarily, does not mean that he was attempting to limit beneficiaries to descendants in the first degree. The fact that a draftsman, for reasons best known to himself, has chosen to repeat the law on a subject, or emphasize a point by repetition, is no reason to obviate the legal meaning of the term "children".

Barclay J. in a well-reasoned dissent *in Drouin* v. *Hénault* [39a] provides an excellent summation of the case against limitation by tautology,

> "It is argued that the word *surviving* is superfluous... that would not be a sufficient reason for taking the word *grandchildren* out of the ordinary rule imposed by art. 980. The qualification to which art. 980 refers is a qualification as to degree, and I cannot see that the use of the word *surviving* of necessity clearly means a qualification of degree. If there be any doubt in the matter, I would resolve that doubt against the contention of the respondents, upon whom lay the burden of proof".

GENERAL CONCLUSION

In this chapter the author has indicated various theories of qualification of which the preferable one is the Exclusionary Theory.

There is no doubt that the draftsman who uses the term "children" should clearly indicate what degree of descendant he is referring to.

For the interpreter, however, faced with a legacy to "children" accompanied by words of modification, the author would like to suggest the following framework for interpretation :

1. Legacies to named children, or children described as being "of the first degree" should always be interpreted restrictively.

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[39] [1952] B.R. 89 at 99.
[39a] (1939) 67 B.R. 101 at pp. 113-114.

2. All other words of accompaniment, before being held to be qualifying, should demonstrate in some fashion that the testator realized a child could predecease him and that he intended in such event to exclude the children of such predeceased child.

3. In cases where there is reasonable doubt as to whether the testator intended to exclude grandchildren, if the word in question has a definite effect other than that of qualification it should be given this alternative effect solely; moreover no word should be deemed qualifying simply because it would otherwise be tautological.

Chapter 2.

LIMITATION BY TESTAMENTARY SCHEME.

1. The Complex Will.

We have hitherto been dealing with the question of which accompanying words will qualify the term "children".

However, a legacy to "children" may be qualified even though the term "children" is used alone, unaccompanied by any expression. Such qualifications will occur in the "complex will" where property is kept in the family, often for generations, through usufructs, liferents, substitutions, and trusts, bequeathed to "children", "grandchildren" and "issue".

Suppose a legacy of "usufruct to my children, ownership to Charity". What is the meaning of the term "children" in such a legacy ? Can grandchildren share in the usufruct to "children" in virtue of article 980, and if so for how long ? Is there any rule of law that the extended meaning of "children" does not apply to usufructs ? Similarly suppose a legacy of "income to my children until the youngest child is 21 years, when the property will belong in ownership to my children then surviving". Can the descendants of a child who predeceases the testator share in the income until the youngest child reaches 21 years of age ? Suppose a child survives the testator but dies before the youngest child is 21, will such deceased child's children be able to enjoy part of the revenues until the youngest child becomes 21 ? What does the expression "youngest child" mean; would this meaning differ in a legacy of "my farm to my youngest child" ? Lastly, suppose a substitution of "my property

to my children for 20 years and then to my grandchildren". Can a grandchild share in the legacy to "children" or does the use of the term "grandchildren" preclude this result ?

It is evident that in the complex will, because of the very nature of the bequests and of the legal institutions created, and because of the constant use of the terms "children" and "grandchildren" to describe the beneficiaries, an unreflective application of article 980 is extremely difficult.

Can any rules of construction be formulated to determine when the extended meaning of the term "children" should apply to such legacies ? Can we state that the extended meaning of the term should apply only in legacies of absolute ownership to "children" and not in legacies of less than absolute ownership to "children", such as usufructs and the like ? Can we state that once a child has enjoyed his legacy and then died, his descendants will be unable to continue his enjoyment on the theory that article 980 only permits descendants of children who die *prior to receiving* a legacy to step into their parents' shoes ? Can we formulate a theory to the effect that the term "grandchildren" will qualify the term "children" in such legacies as "usufruct to my children, ownership to my grandchildren" ?

It is to these questions I should now like to turn; first, by examining what answers the doctrine and the jurisprudence have given, and second, (since the answers are few and the field uncharted) by offering certain suggestions as to how the courts might consider these problems in the future.

2. Can descendants of "children" who have received their legacy inherit a legacy to "children" in virtue of article 980 ?

Suppose a testator leaves his property to trustees with instructions to pay the income to his "children" until the youngest child is 21 years, and then to deliver the property in ownership to charity. Further suppose that the testator is survived by three children in the first degree who enjoy the revenues for several years, and then one of such children dies prior to the time fixed for the delivery of the property to charity, leaving a son. Can the son continue to enjoy his father's share of the revenues in virtue of the bequest to "children", until the youngest child is 21 ?

The answer is no, and the reason is to be found in that part of article 980 which states,

> "... the terms *children* or *grandchildren*, made use of without qualification ... apply to all the descendants,... *without the effect of extending to more than one degree* according to the terms of the act".[40]

a) **The unfortunate term "degree".**

The statement that "the term children... app[lies] to all the descendants,... without the effect of extending to more than one degree" could, *ex facie*, mean that only grandchildren, but not great-grandchildren or more remote descendants, can inherit a legacy to "children". In other words, the term "degree" could mean a branch in genealogical descent, a generation. The term is used in this sense in many areas of the Civil Code. Article 615 C.C. states,

> "Proximity of relationship is determined by the number of generations, *each generation forming a degree*".[41]

and article 978 C.C. indicates,

> "La prohibition d'aliéner hors de la famille,... n'empêche pas l'aliénation... en faveur de *ceux de la famille qui sont en degré plus éloigné*". (The English translation for the emphasized phrase is, "the more distant members of the family").[42]

However, this is not the meaning of the term "degree" as used in article 980 C.C.

The term "degree" has two legal meanings. In article 615 C.C. the term is used in one sense. However, in article 980 C.C. the term is used in the sense of its other meaning.

"Degree" as used in article 980 has the same meaning as when used in article 932 C.C. Article 932 C.C. states,

> "Substitutions created by will or by gifts *inter vivos* cannot extend to more than two degrees exclusive of the institute".[43]

"Degree" as used in article 932 C.C. is a technical expression used only in the substitution; it refers to the number of substitutes it is possible to have in a substitution. Thus when article 932 C.C. states that "Substitutions... cannot extend to more than two degrees" the article means that one cannot have a substitution with more

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[40] Emphasis added for the expression "without the effect of extending to more than one degree".

[41] Emphasis added for the expression "each generation forming a degree".

[42] Emphasis added.

[43] See also 927 C.C. "... When there are several *degrees* in the substitution ..." (emphasis added).

than two substitutes. The article does not mean that the substitution is limited to two generations.

> "Qu'entend-on par *degré* ? Les auteurs répondent que c'est la place occupée par le substitué. En d'autres termes, chaque tête de substitué forme un degré. On ne compte jamais le grevé'".[44]

Although article 932 C.C. is expressly concerned only with substitutions, the jurisprudence and the doctrine have applied the article to usufructs and to trusts; in so doing they have had to expand the meaning of the term "degree" to make it relevent to legacies other than substitutions. The expression "two degrees" in Article 932 C.C. has come to refer to the number of beneficiaries whom the law permits to successively enjoy property in virtue of any legacy, before the property must vest in absolute ownership.

Thus in regard to trusts the courts have stated,

> "The policy of the law upon which the rule in regard to substitutions enunciated in art. 932 C.C. is based, would seem to require that a similar restriction should be placed upon such a *fiducie* or trust as that with which we are now dealing. By the application of such a rule, the beneficiary who, if the duration of the trust were unlimited, would actually come into the enjoyment of a portion of the revenue after two other beneficiaries had successively received revenue derived from the same fund or property, would become the absolute owner of that part of such fund or property, from which the portion of revenue, which he would otherwise enjoy, would be derived." [45]

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[44] P.B. Mignault, *Le Droit Civil Canadien,* (Montreal 1901), v. 5, p. 24; c.f. also Thevenot d'Essaule, *Traité des Substitutions fidéicommissaires,* ed. Mathieu (Montreal 1888), p. 116, nos. 347-8. "Le *degré,* en matière de substitution, est la *place* occupée par le substitué... Quand il y a une personne substituée au substitué, il y a deux degrés; puisqu'il y a *deux places* destinées successivement à chacun de ces deux substitués"; c.f. also C.-H. Lalonde, *Traité de Droit Civil de Québec* (Montreal 1958), v. 6, p. 111. Another way to define the term "degree" is to state that it refers to the number of transmissions it is possible to have in a substitution. A substitution of one degree has one substitute and hence one transmission (from the institute to the substitute); a substitution of two degrees has two substitutes and hence two transmissions (from the institute to the first substitute and then to the second substitute). Thus Marcadé defines "degree" as "l'obligation... de rendre"; Marcadé, *Explication théorique et pratique du Code Civil,* (Paris 1873), v. 4, p. 160, 7th ed., and Dubé, *Droit Civil Succession,* (Quebec n.d. privately printed) p. 226 states, "Ce n'est pas le degré de parenté qui détermine le nombre de substitutions *mais plutôt le nombre de transmissions* d'un grevé à un autre". However, in view of the wording of article 932 C.C., the more technically correct definition is that of Mignault and d'Essaule.

[45] *Masson* v. *Masson* (1913) 47 S.C.R. 42 at 90; c.f. also M. Faribault, *Traité Théorique et Pratique de la Fiducie,* (Montréal 1966), p. 190 ff., no. 173.

Similarly ancient doctrine held that one could not have more than two usufructuaries before the property vested in absolute ownership in the naked owner;[46] to permit more usufructuries it was argued would violate the principles of article 932 C.C. which should apply to all legacies as a rule of public order.

Assuming then that the term "degree" has the same meaning in article 980 as in article 932 C.C., what exactly does article 980 mean when it states "the term *children* ... app[lies] to all the descendants... *without the effect of extending to more than one degree*" ?[47]

Much light is thrown on this question by the French version of article 980. In French the article reads,

> "... le terme *enfants*, ... s'applique à tous les descendants ... sans gradualité".

The expression "gradualité" is a technical expression applicable to the law of substitutions. One of the traditional divisions of substitutions is the one which divides all substitutions into "simple substitutions" and "gradual substitutions". A simple substitution is a substitution of one degree; that is, one in which there is only one substitute. A legacy "to X and then to his children" would be a simple substitution. A gradual substitution, in contrast, is one of more than one degree. A gradual substitution is one "to X and then his children and then to their children".

> "Les substitutions se divisent encore en *simples* et *graduelles*. Les premières sont celles qui n'ont qu'un degré: Ainsi le testateur donne à Pierre et il le charge de rendre à ses enfants.
>
> Les secondes sont celles qui ont plus d'un degré, par exemple, le testateur, après avoir donné à Pierre et l'avoir chargé de rendre à ses enfants, ordonne à ces derniers de restituer la chose à leurs enfants. Une substitution graduelle ne peut, dans notre droit, s'étendre à plus de deux degrés outre l'institué (art. 932)."[48]

Thevenot d'Essaule, whom the Codifiers cite as one of the "sources" of article 980, is quite clear on this point,[49]

> "La substitution est graduelle, quand le testateur ... a substitué PLUSIEURS PERSONNES LES UNES AUX AUTRES, pour recueillir successivement, ..."

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[46] Pothier, *Oeuvres de Pothier*, (Paris, 1861), v. 8, p. 532, no. 223, ed. Bugnet; F. Bourjon, *Le droit commun de la France et la Coutume de Paris* (Paris, 1770), v. 2, p. 185, no 24; Lamothe, C.J., in *Préfontaine* v. *Dillon* (1922) 33 B.R. 314 at 320, agrees with this view; but see however Dorion, J. (*dubitante*) at pp. 326-7 of the same case.

[47] Emphasis added.

[48] Mignault, *op. cit.*, v. 5, p. 4.

[49] D'Essaule, *op. cit.*, p. 115, no. 344 (quoting Ricard). See also Pothier, *op. cit.*, v. 8, p.456, no. 5, and Bourjon, *op. cit.*, v. 2, p. 169, no. 1.

Once we understand the term "gradualité" article 980 begins to make sense. What the article is saying is that in a "simple substitution", for example, "to X and then to his children", the fact that the term "children... app[lies] to all the descendants" does not mean that the substitution should be interpreted to read, "to X and then to his children and then to their children". The extended meaning given to the term "children" by law, does not permit us to create extra degrees in substitutions to "children"; or put differently, to turn simple substitutions into gradual ones.

> "La substitution étant faite au profit des enfants ou descendants... ne forme pas une substitution graduelle".[50]

When article 980 states that a legacy to "children" does not permit "graduality", is the article only making a statement applicable to the substitution, or does the prohibition of graduality apply to other legacies as well ?

In the author's opinion, just as the term "degree" has been extended in article 932 C.C. to apply to all legacies, so the terms "degree" and "gradualité" in article 980 must be given a broader meaning. There is little doubt that the presumption against graduality stipulated in article 980 will apply to all legacies whether substitutions, usufructs, bequests of absolute ownership, or attributions of benefits from trust funds. The presumption will prevent the meaning of the term "children" being extended *in any legacy* whether substitution, usufruct or trust, and so will prevent the descendants of a "child" who has *received* his legacy from inheriting in the child's place *after* the child's death.

b) The Presumption against Graduality.

The early law of substitutions was often a battle between those who wished to keep valuable property in their family for generations (so ensuring its prestige and power) and between the courts (moved

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[50] Bourjon, *op. cit.*, v. 2, p. 169, no. 3; the connection between the expressive and clear term "gradualité" and its translation, the more obscure "the effect of extending to more than one degree", can be seen in the following section subheading of Pothier (Pothier, *op. cit.*, v. 8, p. 469):

> "Art. 111. — Des termes qui expriment ou non qu'une substitution est graduelle, et quand doit-on supposer un degré de substitution qui n'est pas exprimé ?"

Obviously the Codifiers should have translated the expression "gradualité" to mean "...without the effect of implying an additional degree in a substitution".

by reasons of public policy), and the descendants (desirous of raising money on the security of the family property) who wished to encourage commerciality.[51]

It was long controverted whether legacies such as "to X, his heirs, and his assigns", or "to X and his descendants" or "to X and his heirs" created substitutions with X as institute and the heirs or descendants as substitutes, or whether such legacies should considered as simple legacies in absolute ownership, the first two to X, and the third to X and his descendants in joint absolute ownership. The doctrine unanimously agreed that legacies "to X, his heirs and assigns" and "to X and his descendants" would be legacies of absolute

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[51] It is traditional to view the problem of the commerciality of property as a class struggle in which the aristocracy and the rising middle class (abetted by the spendthrift descendants of the nobility) battled over the amount of land which could be put on the market, with the king lurking in the background hoping to destroy the power of the aristocracy. This view from the point of view of the development of the law of substitutions is too superficial. See A. W. B. Simpson, *An Introduction to the History of the Land Law*, (Oxford 1961) pp. 195 ff. The desire to protect and aggrandize a family is a common human trait which occurs not only in feudalistic society. Parents in any society wish to keep valuable assets in their family and similarly wish to prevent spendthrifts or incompetent family members from having the power to sell land. It is doubtful if the opinion of an author or the decision of a judge relating to the law of substitutions could be deduced conclusively from the fact that the judge or author was a member of the middle class or a member of the aristocracy.

A judge or author who was a supporter of the king's party or a proponent of the commerciality of land would in certain areas be hostile to the substitution. However in other areas moved by a desire to be consistent with the principles of Roman law (which were favourable to the substitution) and by a desire to give effect to the reasonable desires of testators to protect their families, (a desire which judges or authors as fathers would surely recognize and approve), judges and authors might favour interpretations which would restrict the commerciality of land. However it is evident that a policy hostile to the creation of substitutions by implication had begun to spread throughout French doctrine even before d'Aguesseau used the maxim "les fidéicommis ne présume pas" as one of the cornerstones of the *Ordonnance des Substitutions.*

[52] D'Essaule, *op. cit.*, p. 72, nos. 202 and 205; Pothier, *op. cit.*, v. 8, p. 468, no. 44. While ancient doctrine agreed that a legacy "to X and his descendants" did not create a fiduciary substitution, there was some controversy as to whether the legacy should be deemed to belong to X in absolute ownership, with his descendants being considered as vulgar substitutes, or whether the legacy should be deemed a joint legacy of absolute ownership, one-half to X and one-half to his descendants. Montvalon, *Traité des Succcssions*, (Paris 1786), v. 2, pp. 123 ff., and Despeisses, *Oeuvres*, (Toulouse 1778), v. 2, p. 73, n. 20, both stated that X should be the absolute owner and the descendants only vulgar substitutes. However, d'Essaule and Pothier stated that the descendants should be considered joint absolute owners with X.

ownership,[52] but the effect of a legacy "to X and his heirs" remained controverted.[53]

However, whatever early doubts may have existed as to whether a legacy to "descendants" or "enfants" should be deemed creative of a substitution with the descendants who survived the testator as institutes and their descendants as substitutes, were quickly dispelled, and it was agreed that a legacy to "enfants" or "descendants" vested in absolute ownership in those descendants who survived the testator.

> "...la vocation collective des enfans n'en forme qu'un seul, qui est rempli et évacué par le premier qui recueille,..."[54]

These victories for the commerciality of property were translated into the rule, "Le fidéicommis ne se présume pas". The testator who wished to create a substitution in favour of his family was compelled to be explicit; to create a substitution he would have to leave his property "to my descendants and *then* to their descendants".

An identical question, which, for some reason was treated by the doctrine as creating a separate problem, was the question of whether the testator in a substitution "to X and then to his descendants" intended to create a "simple" substitution of one degree or, a "gradual" substitution, in which, the descendants who survived X were obliged to deliver the property on their death to their descendants. Oddly, while there was no doubt that a simple legacy to "descendants" did not create a substitution there was some controversy whether a substitution to "descendants" implied a continuous substitution.

However, again French law opted for the commerciality of property.

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[53] D'Essaule, *op. cit.*, p. 72, no. 204, stated, "...si je dis, *j'institue un tel* ET SES HERITIERS, il y aura fidéicommis au profit des héritiers", whereas Pothier indicated, (Pothier, *op. cit.*, v. 8, p. 468, no. 43) "Lorsqu'on donne et lègue quelque chose à quelqu'un, *et à ses hoirs*, ces termes, *et à ses hoirs*, n'expriment aucune substitution". Montvalon, *op. cit.*, pp. 123 ff., agreed with Pothier as *apparently* did Bourjon (Bourjon, *op. cit.*, v. 2, p. 165, no. 57); It is not quite clear whether Bourjon is referring to a legacy to "X, his heirs and assigus" only, or to "X *and* his heirs and assigns" as well). In Quebec, the case of *Phillips* v. *Bain* (1886) M.L.R. 2 S.C. 300 has held that a legacy to "X and his heirs" created a fiduciary substitution with X as institute and his heirs as substitutes.

[54] Furgole, *op. cit.*, v. 2, p. 412, no. 125.

Thus Bourjon stated,

> "La substitution étant faite au profit des enfans ou descendans... ne forme par une substitution graduelle."[55]

and Pothier indicated,

> " On ne doit supposer qu'une substitution est graduelle, que lorsqu'il y a des termes qui expriment qu'elle l'est... celles qui sont faites *au profit d'une famille, d'une postérité*... ne do[ivent] point passer pour une substitution graduelle, mais pour une substitution simple qui est consommée, lorsque ceux de la famille qui se sont trouvés les plus proches lors de l'ouverture, l'ont une fois recueillie. C'est l'avis de Ricard... qui, quoique contraire à l'avis commun des anciens docteurs, me paraît le mieux fondé... on ne doit point supposer plusieurs degrés dans une substitution,... par cela seul qu'il est fait à une famille en termes collectifs."[56]

This rule was referred to by d'Essaule as the presumption against graduality.[56a]

Thus under French law the use of the term "children" was neither presumptive of graduality nor creative of a substitution.

Our law does not innovate in this respect. Although article 980 speaks only of the presumption against extending an existing substitution,[57] there is no doubt that our law prohibits a simple legacy to "children" from being transmogrified into a substitution.[58]

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[55] Bourjon, *op. cit.*, v. 2, p. 169, no. 3.

[56] Pothier, *op. cit.*, v. 8, pp. 469-70, nos. 47-49; c.f. also Furgole, *op. cit.*, v. 2, p. 413, no. 125, "... la valeur et la signification du mot *enfans*... est collectif de tous les degrés de génération, pour ne produire néanmoins qu'un seul et unique degré de fidéicommis".

[56a] D'Essaule, *op. cit.*, p. 118, no. 357. "... la gradualité ne peut plus s'admettre sans une preuve certaine et proprement dite".

[57] Thus in commenting on article 977 C.C., (which corresponds to article 233 of the Codifiers Reports) the Codifiers state, "... article 233 in particular is partly designed to prevent *substitutions* from being extended by mere implication" (emphasis added). *Reports of the Codifiers*, Fifth Report, (Quebec 1865), p. 199.

[58] We have seen that a distinction can be drawn between the question of whether the term "children" in a simple legacy to "children" is creative of a substitution, and between the question of whether the nomination of "children" as substitutes in a substitution is presumptive of a gradual substitution. Article 980 only prohibits graduality; however there is no doubt that it cannot be argued that the Codifiers by only expressly prohibiting graduality in article 980, intended article 980, by implication, to permit the term "children" when used in a simple legacy to be creative of a substitution. Such an interpretation would repeal centuries of legal experience by mere conjecture, and establish an unreal distinction between creating a substitution, and extending an existing one.

The purpose of article 980 is to permit representation, not to create transmission. [59]

In view of the fact that article 980 speaks only of prohibiting the extension of substitutions, it becomes an extremely difficult question as to whether the presumption against graduality should apply only to substitutions, or whether it should be extended by analogy to usufructs, bequests of revenue, attributions from trust funds, institutions under substitutions, and the like.

To this author, there is no doubt, that the presumption is not to be limited to substitutions. The presumption should prevent the descendants of a child who has received *any legacy* (whether a legacy in absolute ownership, or a usufruct, or a life-rent, or an institution under a substitution, or an attribution of benefits from a trust) from enjoying the legacy *after* the child has died.[60] On this view, in a legacy of "usufruct to my children for 20 years [or for their lifetimes] and ownership to charity" the children of a "child" who survived the testator, enjoyed the revenues for several years, but died prior to the expiry of the 20 year period should be unable to share in the usufruct.[61]

Ancient French law did not analyse with any degree of intensity the relationship of usufructs and life-rents to wills; in the few cases it did so, it applied the general principles of substitutions, such as the rule against having more than three successive interests in property (932 C.C.). There is little doubt that once a usufruct has been extinguished article 980, in spirit, would prevent a court

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[59] By representation I mean the right of descendants to step into the shoes of their parent either because article 980 introduces the rules of intestacy to wills, or is based on the Furgolian system (c.f. D. N. Mettarlin, *op. cit.*, 60 at pp. 70 ff. and at pp. 97 ff.).

[60] Some basis for this view may be found in article 977 C.C. which uses the term "gradualité" to apply to the institute under a substitution,

"La prohibition d'aliéner, ... ne s'étend, à moins d'expressions qui indiquent la gradualité, qu'à ceux auxquels elle est adressée; ceux de la famille qui recueillent après eux n'y sont pas assujettis.

Si cette prohibition d'aliéner n'est adressée à personne en particulier, elle est, ... réputée adressée seulement à celui qui est gratifié le premier" ("gradualité" is translated in the English version of this article by the expression "extend to others".

[61] An argument can be made that a person bequeathed a usufruct for 20 years has not received his legacy if he dies prior to the expiry of the 20 year period. However, once a person accepts a bequest he is deemed by law to have received the legacy even though he does not enjoy it for its full duration. There is a distinction between *receiving* a legacy and *enjoying* a legacy.

finding a new usufruct or a substitution of the old one in favour of the descendants.[62] Just as the term "degree" in article 932 C.C. has been extended in meaning to prevent more than three successive beneficiaries inheriting any legacy, so too the term "degree" in article 980 should be extended to prevent successive enjoyment of any legacy to "children" without express command. This view has been adopted by Dorion J. (Allard J. concurring) in *Préfontaine* v. *Dillon*;[63] and the general introductory language of the article 980 suggests that the codifiers did not intend to create one rule for substitutions and another rule for all legacies other than substitutions.

Furgole makes this quite clear when he states,

> "...le mot *enfans*, comprend...tous les descendants, à quelque degré qu'ils soient, lorsqu'ils *sont à la place* de ceux du premier degré de génération, qui sont décédés *sans avoir recueilli*".[64]

The purpose of article 980 is to permit representation not transmission. To create a new usufruct or trust in favour of a child's children after the death of a "child", the testator must expressly so provide.

Therefore, just as the term "children" does not create a substitution or extend an existing one, so the term should not enable a person who received a usufruct or any other legacy, and then died, to pass on the enjoyment to his descendants, on the theory that the term "children" permits the creation of a new legacy or a substitution of the old one in the descendants' favour.

Article 980 only permits descendants to inherit in default of a child, not after him.

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[62] The jurisprudence and doctrine have divided on the question of whether it is possible to have a substitution of a usufruct. While some Quebec judges have seen no objection to its validity, it has been argued that a usufruct is by nature unable to extend beyond the life of a person and is extinguished by his death; if the testator orders a usufructury on his death to hand over the property to another person who is then to enjoy the usufruct, this second usufruct it is argued is a new usufruct rather than a substitution of the old one. C.f. d'Essaule, *op. cit.*, p. 46, nos. 117-118 and Proudhon, *Traité des droits d'usufruit*, (Dijon 1856), 2nd ed., v. 1, p. 517 ff. Proudhon suggests that a substitution of a usufruct created for a period certain (such as a usufruct for five years) is possible, but that a usufruct created for life cannot be substituted.

[63] (1922) 33 B.R. 314 at 325 ff.

[64] Furgole, *op. cit.*, v. 2, p. 413, no. 125 (emphasis added).

c) **The Strength of the Presumption against Graduality.**

While article 977 copies the old law, and clearly and expressly creates a presumption against graduality,

> "La prohibition d'aliéner... ne s'étend, à moins d'expressions qui indiquent la gradualité, qu'à ceux auxquels elle est adressée;..."

article 980 is more equivocal in its exclusion of graduality.

Article 980, instead of stating that the term "children" will not permit graduality without clear testamentary command, simply states that graduality will or will not occur, "according to the terms of the act". Moreover, while the Codifiers in discussing article 977 state that it is "intended to prevent substitutions from being extended by mere implication to subsequent degrees" [65] they make no such statement for article 980 C.C.

Thus it can be argued that article 980 C.C. creates no presumption against graduality but allows the courts to examine each particular will with an open mind. However, this author suggests that article 980 intended no breach with ancient law on so important and so well settled a question, and that article 980 does create a presumption against graduality. We have indicated at great length that in ancient law a substitution to "children" did not permit graduality. The Codifiers state in regard to Article 980 that "the rules adopted are regarded... as actual law".[66] The actual law prior to 1867 presumed against graduality [67] and obviously the Codifiers intended no innovation.

To this author Article 980 C.C. clearly suggests that there must be some term or expression in the document creating the legacy, which permits graduality. If there is none, the extended meaning of the term "children" will not permit the descendants of a child who received his share to inherit after his death.

d) **Jurisprudence.**

There is but one case that deals with the problem of graduality, namely *Préfontaine* v. *Dillon*. The testator therein left a life-rent to his daughters "leur vie durant... et au décès respectif de chacune d'elles,... *à leurs enfants*". After making various other bequests he

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[65] *Reports of the Codifiers*, Fifth Report, p. 199.

[66] *Ibid.*, p. 199.

[67] Bourjon, *op. cit.*, v. 2, p. 170, nos. 4 and 5; Ricard, *op. cit.*, p. 336 ff., nos. 512 ff. [see also p. 369].

bequeathed the residue of the revenues of his estate, in the same manner, namely, to his daughters for life, and "après leur décès respectif *à leur enfants*". The ownership of the estate was bequeathed to his great-grandchildren.

The testator's daughters survived him and enjoyed both the life rent and the general revenues for several years. Then one daughter died, leaving children, who continued to receive and enjoy both the life rent and the general revenues. However, one of these grandchildren in turn died leaving children, and raising the question as to whether the testator's great-grandchildren could receive the life-rent and the general revenues the grandchildren had already enjoyed in virtue of the legacy to the testator's daughters' "children".

Justice Dorion (Justice Allard concurring) stated that in regard to the life rent,[68]

> "Il ne peut pas être question de descendants ici, puisqu'il s'agit d'une rente viagère léguée aux petits-enfants, et que les petits-enfants *ont recueilli le legs.* Leurs descendants ne peuvent donc pas recueillir ce legs à leur place, ou par représentation, même si l'expression 'petits-enfants' voulait dire descendants."

As to the general revenues he found that these did belong to the great-grandchildren, not because the great-grandchildren were included in the legacy of the revenues under the term "children", but because they were the owners of the property.

However, Justices Lamothe (C.J.) and Martin, while disposing of the life rent and general revenues in the same manner as Dorion J., disagreed with him entirely on the question of article 980; Chief Justice Lamothe stated that the great-grandchildren were entitled to the general revenues not because they were owners, but in virtue of article 980,

> "Les mots 'enfants nés et à naître', dans cette clause, comprennent-ils les petits-enfants ? L'art. 980 C. civ., entre ici en jeu... On n'a aucune raison juridique de mettre cet art. 980 C. civ., en oubli sur ce point."[69]

and Justice Martin agreed with him,

> "The general rule of interpretation of the word 'enfants' is contained in art. 980 C.C., that where the term is made use of without qualification... it applies to all descendants, and this rule applies whether it relates to a substitution, a gift or a legacy...
>
> As Ricard points out, it is as if the testator had used the word 'descendants'... I do not find in the will of the testator any manifest intention, express or im-

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[68] *Préfontaine* v. *Dillon* (1922) 33 B.R. 314 at 327 (emphasis added).
[69] *Préfontaine* v. *Dillon, loc. cit.*, at p. 319.

plied, to give another meaning to the word 'enfant' than that contained in our Code..."[70]

Oddly in the case of *Charette* v. *Lapierre*[71] which concerned the right of grandchildren to take after their parent had enjoyed his legacy under the general term "children", the problem was not discussed at all.

e) Conclusion and drafting suggestions.

Article 980, in this author's opinion, lays down the rule that in any legacy to "children", the descendants of a deceased child can inherit only *in default* of their parent receiving his legacy, *not after* he has received it. This presumption against graduality should apply whether the legacy to "children" is one of absolute ownership, or one of a limited interest granted for life, or for any other period.

Thus in a legacy "to my children for five years and then to X", or "income to my children until the youngest child is 21, when the principal shall vest in ownership in my children then living", if a child in the first degree dies after having accepted the legacy but before the period of distribution, his descendants will be unable to step into his shoes in virtue of article 980.[72] In such instance the

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[70] *Préfontaine* v. *Dillon, loc. cit.*, at p. 323. However, Justice Martin went on to state that "... the testator did not intend to exclude his great-grandchildren from any participation in the revenues of this estate of which they own the capital..." It is unclear whether the basis of his decision is the ownership of the great-grandchildren or their inclusion in the legacy of the revenues under article 980 C.C. Oddly both Justices Martin and Lamothe held that the life-rent did not pass to the great-grandchildren because of its nature "viagère" and because of the qualifying expression "leur vie durant". It is difficult to understand why Justices Martin and Lamothe distinguished between the usufruct and the life-rent and why the term "la vie durant" which merely redundantly suggests that the life-rent is to be for life should make any difference unless the expression "la vie durant" is regarded as being a phrase of qualification for some reason.

[71] [1953] B.R. 687.

[72] A distinction must be drawn between "receiving" a legacy and "enjoying" a legacy. In a substitution "to my children for 5 years, and then to X", once a child accepts his legacy, he has *received* it, even should he not *enjoy* it for the full 5 year period. In such a case the presumption against graduality would prevent a new substitution in favour of his children. In the legacy "to my children for 5 years, and then to X", upon the death of a child after 3 years, the substitution of such child's share would either open in favour of X, or the child's heirs would continue his enjoyment for a further 2 year period, dependent on whether the court found the substitution to be pure or conditional (for the distinction

income may pass to the testator's heirs, or to the heirs of the deceased child, or may accrue to the surviving co-legatees, or may devolve to the owners of the property, dependent on how the court

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between pure and conditional substitutions see d'Essaule, *op. cit.*, pp. 102 ff. nos. 280 ff. and pp. 104 ff., nos. 300 ff.). However, there is no doubt that the court could not find a transmission or a new substitution in favour of the child's children. Similarly in a usufruct to "children for 5 years" once the child has accepted his legacy he has received the usufruct. Should he die prior to the expiry of the 5 year period, the court should find no new usufruct in favour of his children, but should find, either that the naked owner may take possession of the child's share, or that the usufruct should pass to the other usufructuries by way of accretion.

There is one difficulty with this conclusion in regard to usufructs. If a legacy is not received, it of course, lapses. In the cases where accretion is possible there can be no accretion once a legacy has been received (a concept similar to the presumption against graduality in that it prevents a legacy to "A and B" from being interpreted as a substitution with "A" and "B" as institutes and the survivor as the substitute). Thus article 868 C.C. states, "Accretion takes place... in the case of *lapsed legacies*" (Emphasis added). However, doubt has been expressed as to whether in the case of the usufruct, accretion may take place in favour of the co-usufructuries upon the death of a usufructury even *after* the deceased usufructury had received his legacy. In Roman law the usufruct was an exception to the principal "No accretion without lapse". Thus in Roman law if the testator left a legacy of "usufruct to A and B, with ownership to charity" and if "A" survived the testator, received the revenues for a period of time, and then died, accretion would take place in favour of "B" even though "A" had received his legacy and there was therefore, no lapse.

Apparently the ancient French authors never settled the question of whether the usufruct was an exception to the general rule that accrual could not occur without lapse.

The case of *Fraser* v. *Fraser* (1907) 16 B.R. 304, has raised the question of whether in our law the condition of lapse enacted in Article 868 C.C. applies to all legacies, or whether the usufruct is exempted from the condition of lapse. If the usufruct is an exception to the condition of lapse demanded in article 868 C.C., then it can be argued that the usufruct should be an exception to the presumption against graduality stipulated in article 980 C.C. However, this possible analogy is without foundation. It is difficult to imagine a court interpreting a legacy of "usufruct to children, ownership to grandchildren" or "usufruct to children, ownership to charity" so as to allow grandchildren to share in the usufruct after the death of a child who had enjoyed his legacy.

An interesting question also arises in regard to such legacies as "to my trustees to pay so much or all of the net income as they deem wise to such one or more or all of my children as may be living from time to time during the existence of this trust".

When is a child deemed to have received the legacy of income bequeathed to him ? Is it when the trustees accept the trust, or when the child receives an income payment ? Or is each income payment to be considered as a separate and complete legacy, independent from the other income payments and fulfilled completely upon payment ? On this latter view, the beneficiaries who could share an income pay-

interprets the bequest, but it will not pass to the descendants of a deceased child in virtue of article 980 C.C.[73]

How strong a presumption against graduality the codifiers intended, in view of the hesitant language of article 980, as compared with the strong direction of article 979, is uncertain; however, in view of the history of the problem, the general presumption of law favouring early vesting, and the natural presumption that substitutions or new usufructs should not be easily inferred, it appears that there must be some strong suggestion in the wording of the legacy to permit graduality.

The draftsman who wishes to introduce graduality to a legacy to "children" cannot of course rely on "strong" suggestions. It is his duty to be explicit.

Many draftsmen who wish the descendants of children who have received their legacies and then died to inherit a legacy to "children" often execute their clauses in the following manner:

"Income to such of my children [or issue] as may be living from time to time during the duration of this trust".

Since article 980 creates a presumption that descendants of a deceased child cannot inherit a legacy to "children" if the child has *received* his legacy, it can be argued that the only remote descendants who can inherit such legacies would be those whose parents predeceased the testator. Or put differently , the presumption against graduality might encourage an interpretation that the legacy "to such of my children as may be living from time to time" means, "to such of my children as survive me and as may be living from time to time". On such a view, the words from "time to time" would be

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ment to "children" would be determined at the time of each income payment and would have to be differently determined for each income payment. Thus the fact that a "child" had received one income payment would not mean that he had received the next income payment which would be a separate and independent legacy. On this view the term "children" would be a shifting class of persons to be determined upon each payment of income. The author does not favour this latter view. See *infra* p. 305 ff.

[73] If the legacy were deemed to be a substitution the property would pass to the substitute if the court deemed the legacy to be a pure substitution (see d'Essaule, *op. cit.*, p. 148, no. 494) or to the institute's heirs if the court considered the substitution to be conditional. If the legacy were deemed a usufruct, it would either be deemed extinguished, in which case the naked owner would enjoy the revenues, or it would be held that the revenues would accrue to the co-usufructuaries of the deceased child; Miguault, *op. cit.*, v. 2, p. 628; Mazeaud, *Leçons de Droit Civil*, (Paris, 1956) v. 2, p. 1275, no. 1649.

interpreted as having been added to provide for accretion among those descendants who survived the testator rather than to include persons who were not entitled to inherit upon the testator's death.

To avoid any doubt the testator should be specific; if he wishes to include the descendants of children who die after him he will find it prudent to state so expressly. The author would like to suggest the following clause,

Income to such of my issue as may be living from time to time during the existence of this trust. The issue entitled to an income distribution hereunder shall be those as defined below in Article Blank of this Will[74] and shall, for greater certainty but without prejudice to the generality of the foregoing, include issue living at the time of the income distribution in question, even though such issue are descendants of issue who accepted, or accepted and received benefits hereunder, but who died prior to the time of the income distribution in question.

3. Will the term "children" be limited by the fact that the legacy to the "children" is not one of absolute ownership ?

Suppose a testator leaves the usufruct of his property to his "children" and the ownership to charity.

We have noted in the previous section that the presumption against graduality will prevent the descendants of a child who received his share of the usufruct and then died, from inheriting in the deceased child's place. However, what if a child in the first degree did not receive the legacy at all, but predeceased the testator ? Would the descendants of such *predeceased* child be able to inherit in his place in virtue of the fact that article 980 states that the term "children... app[lies] to all the descendants", or is there any presumption of law which prevents the legal meaning of "children" from applying to usufructs and to other legacies of less than absolute ownership ?

This problem is not, of course, limited only to legacies of less than absolute ownership to "children" in which the presumption against graduality applies.

Thus suppose a legacy of "income to such of my children as may be living from time to time during the existence of this trust with

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[74] See D. N. Mettarlin, *op. cit.*, 65 at p. 120 for a suggested clause defining the term "issue".

ownership to charity". Will the extended meaning of the term "children" be applicable, assuming that if it were applicable, the court would conclude that the presumption against graduality had been overcome and that, therefore, the descendants of children who received income could share in the bequest of income ? Or, can we state that the term "children" in such a legacy will be limited to descendants in the first degree because the extended meaning of the term "children" is only properly applicable to legacies of absolute ownership ?

At first blush there appears to be no reason why the extended meaning of "children" should not apply to usufructs, life-rents, trusts or any other kind of legacy. Article 980 states that the legal meaning of the term "children" applies to "legacies in general" without excepting usufructs or other legacies of less than absolute ownership. There are no conclusive precedents in ancient French law for so limiting such legacies; and indeed the few ancient authors who did discuss the problem did suggest that the extended meaning of the term "children" should apply to legacies of less than absolute ownership. Moreover article 980 in suggesting that graduality can occur in legacies to "children" certainly envisages the application of the extended meaning of "children" to legacies of less than absolute ownership.

However, in the case of *Auger* v. *Beaudry*, the Privy Council stated,

> "... it is ... impossible to say that the word [children] is intended to mean the families of the children when the gift that follows is a gift for life, wholly inapplicable if the word included descendants."[75]

This view was supported somewhat by Lamothe, C.J. and by Martin, J. in *Préfontaine* v. *Dillon*.[76] Justices Lamothe and Martin both suggested that "une rente viagère" bequeathed to "children", "leur vie durant", would not include grandchildren. However, the basis of their reasoning is difficult to follow since the same judges found that a usufruct to "children" would include grandchildren.[77]

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[75] 1920 [A.C.] 1010 at 1015.

[76] (1922) 33 B.R. 314 (Lamothe C.J. at pp. 318-319 and Martin, J. at pp. 323-5). These judges of course only discussed whether the descendants of a child who *received* a life-rent could inherit after their parent's death. However, since they both held that the descendants could inherit a usufruct after their parent had received it, in virtue of the term "children", their objection to the descendants inheriting the life-rent seems based not on the fact that the "child" had already received the legacy but on the ground that article 980 does not apply to life-rents; see pp. 270 ff. *supra*, for a discussion of this case.

Why a life-rent to "children" would be limited, but not a usufruct, was not explained.

However, in the case of *Charette* v. *Lapierre*[78] (also dealing with a usufruct to "children" "leur vie durant") although the court did not explicitly discuss the question of whether the extended meaning of "children" would apply in such a legacy it obviously assumed that it would. Barclay, J. in *Bernard* v. *Amyot-Forget* has also expressly stated that article 980 C.C. should apply to a usufruct, even one for life,

> "...I do not consider that the 4th paragraph which leaves a usufruct to 'les enfants issus de mon mariage avec ma dite épouse' obviously limits the usufruct to his own children."[79]

Ancient French law did not consider the problem explicitly. However, a few authors seem to have assumed that the extended meaning of the term "children" could be applied in legacies of less than absolute ownership. Thus Bourjon states,

> "Plusieurs substitués étant appelés conjointement pour jouir en même temps des biens substitués, par exemple, si un père substitue à son fils tous les enfans, petits-enfans de lui testateur, et qu'il ait porté ensuite la substitution plus loin, tous ces petits-enfans du testateur venant à recueillir la substitution, ne sont tous ensemble qu'un seul degré; ils sont tous conjointement appelés; ils ne forment donc tous que le premier degré; ce qui, par la même raison, *auroit lieu dans le cas même que des arrières-petits enfans*, par représentation de leur père, concourroient avec leurs oncles, pour recueillir l'effet et le bénéfice de la première ouverture d'une telle substitution; *c'est toujours premier degré*, nonobstant le nombre et la qualité ou proximité de ceux qui la recueillent."[80]

and Ricard does give an example in which the term "children" although used to describe the institutes in a substitution was deemed to include grandchildren.[81]

It can be argued that if article 980 does introduce the rules of abintestate successions to wills,[82] it does so only for legacies of absolute ownership which vest absolutely, as do the benefits of

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[77] Lamothe, C.J. seems to suggest that the words "leur vie durant" should be considered as words of qualification. Since these words were found in the life-rent and not in the usufruct, he declared the life-rent to be restricted, but not the usufruct. However, this proposition seems doubtful since it is in the nature of a usufruct or life-rent to be for the lifetime of the person benefited, and to simply express this nature by the term "leur vie durant" should not suggest qualification.

[78] [1953] B.R. 687.

[79] [1952] B.R. 89 at 97.

[80] Bourjon, *op. cit.*, v. 2, p. 188, no. 51 (emphasis added).

[81] Ricard, *op. cit.*, v. 2, p. 391, no. 690.

[82] D. N. Mettarlin, *op. cit.*, 65 at pp. 70 ff. and pp. 86 ff.

abintestate successions. The rules of intestacy, it can be argued, have no application in legacies such as usufructs, attributions of revenues from trust funds, institutions in substitutions, and other legacies which vest only for limited periods of time and are then extinguished or passed to other persons.

However, it is the author's view that no rule can be formulated to the effect that the extended meaning of "children" is to be applied only in legacies of absolute ownership. Article 980 draws no distinctions between legacies of absolute ownership, and legacies of usufruct and the like. The article expressly states that the extended meaning of "children" is to apply to "legacies in general" without exception. Moreover logically and equitably, it is difficult to understand why, if in legacies of absolute ownership, presumed familial affection will enable the descendants of a deceased child to inherit, the same familial affection should not apply to legacies of less than absolute ownership. The testator cannot be presumed to be less family minded in usufructs or trusts than in bequests of absolute ownership. Thus there appears to be no good reason why legacies of "income to my children for 20 years", or of "usufruct to my children until my youngest child reaches 21" should exclude grandchildren.

In fact no court or judge has gone so far as to suggest that article 980 should not apply to usufructs and the like. What has been suggested is that the article should never apply to legacies of less than absolute ownership which are bequeathed *"for life"*. This view, while agreeing that there is no rule against applying article 980 to such legacies as "income to my children for 10 years", or "income to my children until my youngest child is 21" does state that a "usufruct to my children for life" will never be able to include grandchildren. Thus the Privy Council in *Auger* v. *Beaudry* has stated that article 980 is "wholly inapplicable" in *"a gift for life"*,[83] and Lamothe, C.J. who favours this view, has stated,

> "Le surplus des revenues annuels est donné aux... 'enfants nés et à naître... comprennent-ils les petits-enfants ?' L'art. 980 C. civ., entre ici en jeu. Il ne s'agit pas d'une libéralité viagère."[84]

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[83] [1920] A.C. 1010 at p. 1015 (Emphasis added).

[84] *Préfontaine* v. *Dillon* (1922) 33 B.R. 314 at 319. Lamothe, C.J. in this case stated that a life-rent "à leurs enfants" could not include grandchildren because, "cette libéralité est 'viagère'" but found that a usnfruct "à leurs enfants" could include grandchildren on the grounds that Article 980 C.C. could apply since the usufruct was not "viagère". Actually Lamothe, C.J. is incorrect; the usnfruct was "viagère", as a reading of the will will indicate. (See record number 1430 of the Superior Court of Montreal). As indicated earlier, (*supra*, fns. 70 and 77), for this reason it is difficult to determine exactly what the *ratio decidendi* of Lamothe, C.J.'s judgment is.

Certainly a legacy of "usufruct for life to my children, ownership to charity" strongly suggests, that if a child predeceases the testator, his descendants should not enjoy the revenues during their lifetimes. However, the author suggests that grandchildren should not be excluded on the grounds that the legacy is "for life", but for other reasons which make the application of the extended meaning of "children", "wholly inapplicable" to such a legacy. These other reasons will be discussed in chapter 3.

For the moment suffice it to say that there is nothing illogical or arbitrary in principle in allowing grandchildren to enjoy legacies to "children for life" especially in view of the fact that the law presumes the term "children" to mean descendants. Some legacies to "children for life" should of course be limited; some should not. But the testator should not *a priori* be presumed to be less family minded in bequests granted "for life" than in bequests granted for other periods.

There is a compelling intuitive desire to restrict a legacy of "usufruct to my children for life, ownership to charity" to descendants in the first degree. However this desire should not lead us to the hasty conclusion that the legacy is to be limited because it is a "usufruct" or because it is bequeathed "for life".

Barclay J. (although by way of obiter dictum) in *Bernard* v. *Amyot-Forget* [85] has held that a legacy to "children for life" can include grandchildren.

> "...I do not consider that the 4th paragraph which leaves a usufruct to 'les enfants issus de mon mariage avec ma dite épouse' [leur vie durant] obviously limits the usufruct to his own children... 'il faut des termes clairs et précis pour ôter au mot *enfants*, cette signification que lui donne expressément la loi'".[86]

and we have already noted that Bourjon [87] and Ricard [88] also agreed that grandchildren could inherit a bequest to "children for life".

Indeed there are several legacies to "children for life" which do not instinctively lead to the conclusion that grandchildren should be excluded. For example in a legacy to "my children for life and on the death of the last child to my grandchildren" there is nothing illogical or arbitrary in applying article 980 and permitting grandchildren to share in the revenues prior to the death of the last child in the first degree.

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[85] [1952] B.R. 89.
[86] [1952] B.R. 89 at 97.
[87] Bourjon, *op. cit.*, v. 2, p. 188, no. 51.
[88] Ricard, *op. cit.*, v. 2, p. 391, no. 690.

Thus the author would strongly suggest that no rule can be formulated to the effect that the extended meaning of the term "children" cannot apply in legacies of less than absolute ownership whether bequeathed for life or for any other period of time.

In thus concluding, the author does not wish to suggest that a legacy of "usufruct to children, ownership to charity" will include grandchildren. Indeed, as will be seen, it will not. What is suggested, is that the term "children" is not to be limited simply because it is contained in a usufruct or a legacy "for life"; other grounds must be found. These grounds and the rules of construction which flow from them will be discussed in chapter 3.

4. Will the term "children" be limited if the testator provides for accretion among the "children" ?

Suppose a legacy "to my *children* for life [or for 20 years] *with accretion* in favour of the *surviving children*,[89] and on the death of the last child [or after the 20 year period] to charity". Does the provision for accretion among the testator's children prevent the descendants of a *predeceased* child from sharing either in the original legacy or in the accretion ? [89a]

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[89] Note that the expression "surviving children" may have two meanings. The phrase "surviving children" may be intended to describe only those "children" who survive the testator, or the phrase may be intended to describe those "children" who are surviving upon the death of each child who dies before the ultimate distribution of the property. On the first interpretation if the testator is survived by three children in the first degree who accept the legacy and then one child dies leaving children, the property would accrue only to those "children" who were living at the time of the testator's death, namely the two children in the first degree. If the second interpretation is adopted, the term "snrviving children" might include the grandchildren since they are among the "children" surviving upon the death of the child in the first degree. In the first case the class of persons who can inherit is closed upon the death of the testator and can never increase; it can decrease as the original members die. In the second case the class may always be increased to include descendants of deceased children. While both interpretations are linguistically sound, the presumption against graduality and the technical meaning of the term accretion (see fn. 89a *infra* and pp. 303 ff. *infra*) militate against the second interpretation.

[89a] "Accretion" is a word of many meanings. Properly speaking, there can be no accretion without lapse (except perhaps in the case of the usufruct; see fn. 72 *supra*). Thus article 868 C.C. states,

"Accretion takes place... in the case of lapsed legacies..."

However testators customarily order accretion in cases in which there is no

It should be emphasized that we are concerned here only with the descendants of a *predeceased* child. Should a child receive his legacy and then die before the delivery of the property to charity his descendants would be excluded in virtue of the presumption against graduality. The only question raised here is whether the provision for accretion prevents the descendants of a child who did not receive his legacy from stepping into his shoes in virtue of article 980 .

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lapse. Thus testators often leave property to "A, B, C, and D, with accretion in favour of the survivors, and on the death of the last one of them, to E".

The courts have suggested that there is nothing to prevent a testator from ordering accretion in these circumstances even though the accretion will be of a legacy which has not lapsed, but has been *received.*

> "Chez nous, l'extension du droit d'accroissement au delà des cas de caducité,... et son application aux cas où le legs a été recueilli, où le légataire en a déjà profité, ne seraient pas illicites,..." (*Barclay's Bank Ltd.* v. *Paton* (1934) 56 B.R. 481 at pp. 494-5, Rivard, J. dissenting).

> "Even if this be termed 'accretion', the result is the same in my opinion. It is quite true that the Civil Code, by article 868, provides specifically for accretion in the case of lapsed legacies; but I do not consider this to prohibit accretion in other cases, for accretion may result from the terms of the will itself. A testator is nowhere prohibited from making such a provision." (*Ibid.*, at p. 486 (Bond, J.)). See also *Bourgeau* v. *Bourgeau* [1934] S.C.R. 512 at 517.

However, the question arises whether the right of the survivors to inherit such legacies is, properly speaking, "accretion"?

The best view is that the use of the term "accretion" in these circumstances is improper, and that what the testator has really done by ordering accretion in favour of the co-legatees of *a person who has received his legacy* and then died, is to either,

a) create a substitution in favour of those to whom the legacy is to accrue

> "Chez nous, l'extension du droit d'accroissement au delà des cas du caducité... et son application aux cas où le legs a été recueilli,... ne seraient pas illicites, mais cette extension constituerait une substitution tacite. Elle serait légitime, mais il n'y aurait pas moins transmission de l'une à l'autre des instituées, et par conséquent degré de substitution." (*Barclay's Bank Ltd.* v. *Paton* (1934) 56 B.R. at pp. 494-5, Rivard, J. dissenting).

or,

b) create a class gift in which "A", "B", "C" and "D" form a "class" and in which the varying mutations within the class resulting from the death of the individual members of the class do not constitute transmissions, since the whole class itself forms one degree which is not used up until all the individuals in the group are dead.

> "'... plusieurs d'eux eussent succédé en concurrence comme une seule tête, auquel cas ne seront comptés que pour un seul degré'... dans le cas où un legs comportant substitution est fait conjointement à plusieurs personnes qui viennent en concurrence, toutes ces personnes, non seulement ne consti-

The concepts of accretion and of the vulgar substitution are mutually exclusive. If a testator leaves his property "to A and B", accretion will take place should either A or B fail to survive the testator. However, if the testator were to specifically state that if A did not survive him the property should pass to C, the vulgar substitution in favour of C would exclude accretion in B's favour.

Article 980 provides an institution similar to the vulgar substitution. The article states that in a legacy to "children", if a child in the first degree predeceases a testator, his share will accrue not to the surviving children in the first degree but will pass to the descendants of the deceased child. If then, the testator leaves his property to his "children" but states that accretion will take place, is he not attempting to avoid the vulgar substitution of article 980 ? Does not the fact that he has envisaged the death of a child and made provision for such event evidence an intent to exclude grand-

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tuent qu'un seul degré, aussi longtemps qu'elles jouissent concurremment des biens légués, mais que même si la part de l'un de ces légataires conjoints est transmise par décès aux autres légataires conjoints survivants, cette part est ainsi transmise au groupe survivant, sans que par cela soit constitué un nouveau degré de substitution pour ladite part ainsi transmise." (*Ibid.*, at p. 505 St. Germain dissenting).

"... I should say that transmission from this group is not piecemeal... but as a whole. In other words there is not a gradual substitution of the shares of individuals dying to the surviving members of that group, but a redistribution among the surviving members...

...the testator created a substitution of which a group of five individuals was named as institute,..." (*Ibid.*, at pp. 486-7),

Or, as McDougall, J. in *Tiffin* v. *Budyk* (1937) 75 S.C. 367 at 369 and at 371, states,

"...the bequest... to a class subsists as long as any member of the class subsists... The class does not die until every member thereof has disappeared. ...The testator... vests them as undivided owners of the entire legacy. It is then a matter of law that those who survive do not take under a fresh benefit, but the enjoyment given by the original bequest to them becomes merely enlarged."

It would appear from the holdings in *Barclay's Bank Ltd.* v. *Paton, supra,* and *Tiffin* v. *Budyk, supra,* that the courts will view a legacy in which accretion is ordered to take place after one of the co-legatees has received his bequest, as a class legacy, rather than as a bequest in which the testator has created a series of substitutions. The wise draftsman should avoid the use of the term "accretion" when he wishes to benefit a group of surviving co-legatees, after the death of one of the co-legatees who has received a share in the bequest, and then died. He should either expressly create a class gift, or expressly create a series of substitutions. He should not leave any doubt as to which of these two institutions he wishes to create by using the equivocal term "accretion".

children ? Does not article 980 C.C. apply only when the testator has made no contrary provision for the death of a child ?

This view is certainly supported by *Drouin* v. *Hénault* [90] which held that a legacy to "surviving grandchildren" should be limited. If a legacy to "surviving grandchildren" is to be limited, it would appear that a legacy to "my children for 20 years with accretion in favour of the survivors and then to charity" should also be limited. However, while this argument appears convincing a strong argument can be made for the proposition that a provision for accretion should create no presumption that the testator intended to exclude the application of article 980 C.C.

A testator who leaves property to "children", and orders accretion to take place, certainly raises the question whether the accretion is to occur if a child dies leaving children, or, whether the accretion is to occur, only if a child dies without leaving children.

If the testator were to leave the income of his property to "my descendants", and then provide for accretion among them, there could be no suggestion that the children of a predeceased child could not inherit the legacy or participate in the accrual. Since the term "children" is by law assumed to mean descendants, a provision for accretion among "children" should have no more effect than a provision for accretion among descendants. To argue otherwise is to forget the legal meaning of the term.

In view of the statement that the term "children ... app[lies] to all the descendants" cannot one argue that a testator who leaves property to "children" and provides for accretion among them, intends the term "children" to have its legal meaning and only intends accretion to occur if a child in the first degree dies without children ?

If a testator were to leave his property to his "children", and then to state that if no "children" survived him, the property was to pass to X, we would not exclude grandchildren from such a legacy. Consequently if a testator leaves property to his "children, with accretion among them" cannot one argue that the testator did not wish to exclude grandchildren, but only wished to provide for accretion in favour of the remaining family branches if a child died without children ? Certainly if we argue that the testator is fully cognizant of the legal meaning of the term "children", such an interpretation is reasonable. Article 980 C.C. on this view, would write into every legacy to "children" the tacit condition that before a legacy to a

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[90] (1939) 67 B.R. 101.

"child" will lapse or accrue, the child must have died without any descendants.

This reasoning strikes at the holding of *Drouin* v. *Hénault*,[91] which held that the term "surviving" would be a word of qualification. However, it should be realized that the term "surviving" was held to be limitative by a strongly divided court largely on the grounds that the term would otherwise be tautological. Since the Supreme Court has since rejected the concept that a phrase should be limiting simply because it would otherwise be tautological,[92] it is possible that *Drouin* v. *Hénault* may be reconsidered or severely limited in scope.

Moreover if the testator had left his property "to such of my children as may be living from time to time during this trust" there would be a strong inclination to include grandchildren. Is not a legacy "to my children with accretion in favour of the survivors" sufficiently similar to lead to the same conclusion ?

In this author's opinion a provision for accretion among "children" should not create any presumption that the testator did not intend the legal meaning of the term "children" to apply.

In thus concluding the author does not wish to argue that legacies such as "usufruct to children, with accretion in favour of the survivors, ownership to charity" should include grandchildren.

What is suggested is that if such a legacy is to be limited, it must be on the basis of rules of construction other than the incorrect suggestion that a provision for accretion qualifies the term. These rules will be discussed in Chapter 3.

5. Will the term "children" be limited by the fact that it is used not in a disposition but to denote time of division ?

a) The problem.

Thus far we have been considering the term "children" as used to describe the beneficiaries of a legacy. However, the term "children" can be used in a will other than to describe beneficiaries. Suppose a testator leaves his property to X but provides that if X dies *without*

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[91] (1939) 67 B.R. 101.

[92] *Bernard* v. *Amyot-Forget* [1953] 1 S.C.R. 82; see pp. 256 ff. *supra.*

[93] Article 936 C.C. states, "Children who are not called to the substitution, but are merely named in the condition without being charged to deliver over to others, are not deemed to be included in the disposition".

"children" the property is to pass to Y. In this legacy the "children" are not legatees.[93] However, article 980 makes it quite clear that in this case the term "children" will have the extended meaning of descendants, such that if X dies survived by only a great-grandchild, Y will not inherit,

> "the terms *children* or *grandchildren* made use of without qualification *either in the disposition or in the condition* apply to all the descendants".[94]

In this respect article 980 follows the ancient law.[95] Thus a legacy such as,

> "income to my children until the youngest child is 21 when the principal shall belong to my children",

should be interpreted in view of article 980 as,

> "income to my descendants until the youngest descendant is 21 when the principal will belong to my descendants",

and a legacy such as,

> "income to my children living at the time of my death and upon the death of my last surviving child the principal shall belong to my grandchildren",

would mean by the same interpretation,

> "income to my descendants who are living at the time of my death, and upon the death of the last descendant who is living at the time of my death, to my descendants then surviving".

There is, however, something disturbing about these two interpretations; in the first case does the testator really intend to keep the property from his children until the youngest grandchild is 21, or in the second case does he intend one grandchild to enjoy the entire property until his death to the exclusion of the testator's other family branches ?

b) The Jurisprudence.

The only case dealing with the problem is *Trahan* v. *Cardinal*.[96] The testatrix therein left her property as follows:

> "I give and bequeath to all my *children*... all my goods,... to be divided between them in equal portions,... but to take possession only at the age of majority of the *eldest of my said children*, up to which date my property will remain in the hands and under the administration of my testamentary executrix,..."

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[94] Emphasis added for the expression "either in the disposition or in the condition".

[95] Furgole, *op. cit.*, v. 2, pp. 409-410, no. 123; even after 1747 the term children when used in the condition included grandchildren; c.f. Pothier, *op. cit.*, v. 8, p. 477, no. 66.

[96] (1913) 43 S.C. 144.

Only one grandchild survived the testatrix, all her children in the first degree having predeceased her. At the time the will was executed only one child in the first degree (the parent of the testatrix's surviving grandchild) was living; that child died before the testatrix but *after* attaining the age of 21, leaving the said grandchild surviving her. It was agreed by the parties that the grandchild would inherit. The only question was whether the executrix could continue in office until the grandchild was 21; in other words, whether the expression "eldest of my children" could include grandchildren. The Court held, over-ruling the lower court, that the adjective "eldest", qualified the term "children", and that the grandchild was the absolute owner free of the testatrix's administration. Oddly, this conclusion meant that the term "children" when used in the disposition "to all my *children*" and when used in establishing the date for dividing the property ("when the eldest of *my children* reaches 21") had different meanings.

c) The Ancient Law.

The view that the expression "eldest" should qualify the term "child", appears contrary to a long historical tradition. The term "eldest child" has an ancient lineage. Primogeniture was, of course, intimately linked with feudalism, and when freedom of willing was introduced, the substitution "de l'aîné à l'aîné" became common in aristocratic France. "L'aîné" generally meant the first born, and failing him, his first born; as d'Essaule [97] put it, "aînesse de branche".

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[97] D'Essaule, *op. cit.*, pp. 306 ff., nos. 975 ff. The *Procureur de Paris*, however, suggests a somewhat more complicated system, d'Aguesseau; *op. cit.*, p. 303.

We have been concerned with the meaning of the term "*child*" in such expressions as "eldest child" or "youngest child". In such expressions, in addition to the meaning of the term "child" being in doubt the adjectives "eldest" and "youngest" themselves offer interpretive difficulties.

In *Trahan* v. *Cardinal* (1913) 43 S.C. 144, the court suggested that the term "eldest" meant the eldest "child" *living at the time the will was executed.* However, in *Reynar* v. *Reynar* (1932) 53 B.R. 338 (c.f. also (1931) 59 S.C. 311 and (1932) 70 S.C. 309) it was suggested that the term "eldest" referred to the eldest person *living at the time the will took effect.* Ancient law generally held that the term "youngest" meant *last-born* and the term "eldest" meant *first-born*; d'Essaule, *op. cit.*, pp. 306 ff., nos. 975 ff.

Thus the expression "youngest child" or "eldest child", may each have six possible meanings in view of the fact that the term "child" may mean "child in the first degree" or "descendant", and in view of the fact that the terms "youngest" and "eldest" each have three possible meanings.

The case of *Reynar* v. *Reynar supra*, suggests a further complication in that it states that all three meanings of the term "eldest" are valid, and that ancient

In the author's opinion d'Essaule's view should be adopted by our law. However, the author would draw the following distinction.

In the case of a *disposition* the testator should be presumed to have intended the expression "eldest child" to include grandchildren.[98] However, when the testator uses the expression to denote the *time of division,* he should be presumed to mean only children in the first degree. Archibald J., in *Trahan* v. *Cardinal* seems to approve this distinction,

> "In this instance, the words used are 'the eldest of my children', and they are used, not for the purpose of making a disposition, but for the purpose of establishing a date when the execution of the will will cease."[99]

The reason for this suggested distinction is the desire of the law to encourage the early vesting of property.

Civil law generally wishes to encourage the commerciality and best use of property by preventing its being tied up too long; in the case of doubt any interpretation which prevents property from being passed on to an extra generation or which prevents the divorce of the administration or enjoyment of property from ownership should be encouraged.[100] Thus the same spirit which prevents substitutions from being found by implication and which limits substitutions to two degrees, should find that the term "child" when used to indicate

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law created no presumption favouring any one meaning. According to *Reynar* v. *Reynar* each court is free to choose that meaning it finds most applicable to that particular will without being governed by any presumption of law. This view however appears to be erroneous.

In summary there are two problems involved in interpreting a legacy to "youngest child" or "eldest child",

a) whether the expression "child" includes descendants, and
b) whether the terms "youngest" or "eldest" means youngest or eldest at the time the will is executed or at the time the right opens or whether these phrases mean first or last born.

It is evident that the draftsman should use the expression "youngest child" or "eldest child" with the greatest of care. For the question of whether the expression "youngest grandchild" includes grandchildren born after the testator's death see *Prévost* v. *Fraser* [1957] S.C. 35.

[98] It may be argued that since primogeniture has been abolished by our law, a legacy to the eldest child should not include his eldest grandchild. However, such a view would be at variance with historical precedent. Primogeniture was abolished in France for the succession of non-feudal property yet even after such abolition, the term "eldest child" in non-feudal successions continued to mean eldest grandchild. Our law is historically bound to adopt the same view.

[99] (1913) 43 S.C. 144 at 147.

[100] Mignault, *op. cit.*, v. 2, p. 531.

the time of division or vesting, and especially when used in conjunction with such expressions as "eldest", "youngest" or "surviving", should be limited to descendants in the first degree.

Thus it is suggested that in a legacy,

> "to my children and upon the death of the surviving child [or eldest child] to my grandchildren".

the expression "surviving child" [or "eldest child"] be interpreted to mean child in the first degree.

It can, of course, be argued that the distinction suggested by the author between the term "child", when used in a disposition, and when used to denote the period when property is to vest is neither sanctioned by history (although there does not appear to be any historical precedent to the contrary) nor by the broad language of article 980. Further it can be argued that such an interpretation would often give the term "child" two different meanings in the same sentence, such that the above legacy would read,

> "to my descendants and upon the death of the surviving child in the first degree ownership to my descendants then living".[101]

However, it is suggested that neither of these reasons seems sufficient to over-turn what appears to be a rule of common sense, and of public policy. It should be noted that *Trahan* v. *Cardinal*,[102] found no difficulties in giving the term "children" two different meanings in the same legacy.

6. Will the term "children" be limited when used with such expressions as "grandchildren" or "issue" ?

Legacies such as "usufruct to my children, ownership to my grandchildren" and "income to my children until my youngest child is 21 when the property shall belong to my grandchildren" are common.[103] There is no doubt that the term "grandchildren" in such

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[101] It is, of course, possible to argue that if the term child when used in the time of division means child in first degree, this meaning should influence the term children when used throughout the rest of the will; however, such an interpretation would, in effect, mean that article 980 is not to apply to bequests of less than absolute ownership, since the division of a class gift to children in most cases will be ordered upon the death of one of its members, or upon one of its members reaching a certain age.

[102] (1913) 43 S.C. 144 at 147.

[103] The above legacies are merely illustrative examples of many kinds of similar legacies, such as "to my children, and then to their children", or "to my children, and then to their issue". The term "grandchildren" is used for brevity's sake as a synonym for such expressions as "children of children", and "issue".

legacies will include great-grandchildren.[104] However, does the use of the term "grandchildren" in these legacies mean that the term "children" is to be restricted to descendants in the first degree ? Can one formulate a general rule of construction that the use of the term "grandchildren" in such circumstances will qualify the term "children"?

Several judges have dealt with this question, but the matter has never been settled.

In *Charette* v. *Lapierre,* Marchand J. stated,

> "Les termes 'enfants' et 'petits-enfants' ne signifient pas seulement 'descendants' généralement. Par leur opposition et la distinction de l'objet des libéralités aux uns et aux autres, ils marquent des degrés différents de génération que le testateur a voulus, a marqués, et que nous devons respecter."[105]

However, in *Préfontaine* v. *Dillon,* Lamothe C.J. held,

> "L'appelant dit que le mot 'enfants' n'est pas employé seul, vu que le testament contient d'autres clauses quant aux petits-enfants et aux arrières-petits-enfants. L'argnment ne vaut pas, car la clause citée constitue un legs particulier distinct des autres, et que, dans ce leg, le mot 'enfants' est employé seul.[105a]

Barclay J. in *Bernard* v. *Amyot-Forget*[106] found no reason to restrict a usufruct to "enfants" to children in the first degree because the ownership of the property had been left to "petits-enfants"; and in the case of *Charette* v. *Lapierre,*[107] Barclay J. (McDougall J. concurring) suggested that the opposition of the terms "children" and "grandchildren" to describe the recipients of two different bequests was by itself an insufficient reason to restrict the term "children". Something more was necessary to indicate conclusively that when the testator "used the term 'children' in parts of his will, and grandchildren in another part he was indicating two different categories and had no intention of allowing the general rule to apply." The

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[104] *Bernard* v. *Amyot-Forget* [1953] 1 S.C.R. 82.

[105] [1953] B.R. 687 at 699.

[105a] (1922) 33 B.R. 314 at 318. The legacy in question was a life-rent to "enfants de mes enfants". However, the testator had bequeathed the ownership of the property subjected to the life-rent to his "arrières-petits-enfants". The legacies of the life-rent and of the ownership of the property were effected in different clauses. However, the fact that the legacies appear in different clauses is obviously not important. If the testator had left the life-rent to his grandchildren and the ownership to his great-grandchildren in the same sentence, Lamothe C.J., would obviously have come to the same conclusion.

[106] [1952] B.R. 89 at 97.

[107] [1953] B.R. 689 at 693-4.

"something more" was the fact that the testator ordered a by root division among the "grandchildren", and a division "in equal shares" among the "children".[108]

However, all these judicial statements are *obiter dicta*. One can only conclude that the question has not yet been judicially settled.

Once a testator makes specific provision for grandchildren it can be argued that he wishes his grandchildren to inherit only the particular legacy bequeathed to them, and only at the time it is bequeathed to them. If a testator leaves a legacy of 'income to my children for 20 years, with ownership to my grandchildren" it can be argued that he did not wish his grandchildren to receive any income for 20 years. If he had wished them to do so he would have so stated. Certainly it can be argued that when he wishes to benefit his grandchildren he knows how to do so. According to this view a testator who leaves one bequest to "children" and another to "grandchildren" does not wish grandchildren to inherit the bequest to the "children".

However, this argument fails to take into account the fact that testators fail to foresee the future. A testator who leaves property to "X and Y" obviously does not wish X to enjoy the whole bequest. Yet if Y predeceases the testator this is exactly what will happen. If Y predeceases the testator his undivided share must devolve to someone. Since the testator has given no indication to whom it is to devolve, the law is forced to step in and enact a rule as to its devolution. In such a case article 868 C.C. states that Y's share will pass to X. One must ask in such circumstances, not if the testator intented X to inherit a bequest given to "X and Y" but whether the testator intented X to inherit the bequest if Y died prior to inheriting.

Similarly, a testator who leaves property " to my children for 20 years and then to my grandchildren" has failed to make any provision as to what will happen if a child does not inherit his legacy. Article

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[108] The reasoning upon which Barclay, J. found the term "children" to be restricted, namely, that the legacy to "grandchildren" was to be divided "by root", and the legacy to "children" was to be divided "into equal shares", is not entirely convincing (see D. N. Mettarlin, *op. cit.*, 65, at pp. 120 ff. for the proposition that the division of a legacy to "children in equal shares" will not exclude grandchildren). It would seem, that Barclay, J. in this case, did place great importance upon the use of the term "grandchildren" indicating that the testator wished only descendants in the first degree to inherit a legacy to "children". Indeed on p. 693, Barclay, J. states "when he intends to gratify grandchildren he says so in specific terms".

980 C.C. states that if a child does not inherit his legacy, his descendants are to inherit in his place. Does the fact that the testator made no provision as to what is to happen if a child does not inherit his legacy, but does state that in 20 years the property is to pass to grandchildren mean that a child's family is to be deprived of all support for 20 years, and the legal meaning of the term "children" overcome ? Is this the testator's intention ? Or can it be said that the testator did not conceive of the possibility of a child's death, or provide for it, and that, therefore, the legal meaning of the term "children" should be applied ?

Certainly no logical deduction can be made that because the term "grandchildren" means descendants other than those in the first degree that the term "children" *must* mean descendants in the first degree. Certainly the fact that the testator bequeathed property to grandchildren does not mean that the term 'children" when used in a different bequest, to take effect at a different time, should have a different effect than the equitable effect given it by law.

Moreover, once we decide that article 980 C.C. is to apply to usufructs, life-rents, attributions of revenues from trust funds, and other bequests of less than absolute ownership, no other solution seems reasonable. The most common and indeed almost the only method of passing property to different generations successively is to leave property to "children" and then to "grandchildren", and so on. If the terms "grandchildren" or "children of my children" or "issue" will be automatically deemed to qualify the term "children", then article 980 C.C. will, for all practical purposes, cease to apply to legacies of other than absolute ownership, and the legal meaning of the term "children" will cease to have its equitable effects in such legacies.

As we have already noted Bourjon saw no difficulty in allowing great-grandchildren to inherit a legacy to "grandchildren", although the grandchildren were institutes and the great-grandchildren had been specifically given the property as substitutes,

> "... par exemple, si un père substitue à son fils tous les enfans, petits-enfans du testateur, et qu'il ait porté ensuite la substitution plus loin, tous les petits-enfans du testateur venant à recueillir la substitution, ne sont tous ensemble qu'un seul degré, ils sont tous conjointement appelés, ils ne forment donc tous que le premier degré; ce qui, par la même raison, *auroit lieu dans le cas même que des arrières-petits-enfans,* par représentation de leur père, concourroient avec leurs oncles, pour recueillir l'effet et le bénéfice de la première ouverture d'une telle substitution..."

Thus to this author it appears that no rule can be formulated, nor any presumption created, that the term "grandchildren" when used

in a dispositive provision together with the term "children" will qualify the latter term.

In so arguing it is not the author's intention to suggest that a legacy "to children and then to grandchildren" should not be restricted. As will be demonstrated such a legacy should be limited. What is suggested is that such restriction will have to be based on rules of construction other than the incorrect suggestion that the term "grandchildren" qualifies the term "children".

Chapter 3

THREE RULES OF INTERPRETATION

In the previous chapter we have dealt with the use of the term "children" in the "complex will" — that is, a will which passes property to various generations through the usufruct, the life-rent, the substitution and the trust.

We have indicated that there is nothing intrinsic in the nature of the complex will which should qualify the term "children". Neither the fact that the testator has bequeathed a legacy of less than absolute ownership, whether for life or for a period certain, to his "children", nor the fact that he has provided for accretion among them, nor the fact that he has indicated that on their death the property is to pass to "grandchildren", will limit the term. We have seen that the jurisprudence has wisely refused to adopt any rules based on the above criteria.

Does this mean that we must reach the unhappy conclusion that a testator who leaves property to "children" in most instances creates an uncertain will, or can meaningful rules of construction be formulated to determine when the presumption of article 980 should apply and when it should be rejected ?

It is the author's opinion that meaningful rules can be formulated.

It is true that the complex will raises many problems which cannot be solved with a book of mathematics and a slide rule; such legacies as "to my *children* for life with accretion in favour of the *surviving children* with ownership to my *grandchildren*", or "income to *children* until the youngest child attains the age of majority, when the property shall belong to my *children*" present difficult problems. However, these

problems do not entitle us to discard all attempts at rule formulation nor permit us to examine each will as a separate and independent curiosity which provides a pleasant diversion from the duties of legal analysis and precedent creation. Unfortunately, the courts have fallen victim to the siren call of the "testator's intention". Having wisely disregarded any suggestions that any criteria for limiting the term "children" may be found in the nature of the legacy or in the use of the terms "children", "grandchildren" or "issue" in the same will, they have carried this rejection to the opposite extreme and refused to formulate any guide lines at all as to how article 980 is to apply to the complex will.

Thus the few cases that do consider the complex will, instead of attempting to formulate rules for the application of article 980, abound with statements that the testator in this case "clearly intended article 980 to apply" or that he "definitely intended to include only descendants in the first degree"; but what the basis of such clarity is, is a secret to which we are not made privy.

This refusal of the courts to provide any guide-lines other than the "intention of the testator" has unfortunate results. Will interpretation must provide some certainty to society. The title examiner must be able to state who can deal with the property if its commerciality is not to be uselessly destroyed; the draftsman must be able to explain the testator's last wishes with some assurance that a thoughtful use of a common expression will lead to the desired result; and a solicitor must be able to reduce litigation to a minimum by advising his clients with some degree of prediction as to the outcome. Every will must not leave a flock of possible claimants born and unborn hovering over it. Even if a case does not provide perfect justice to the litigants involved, it will do more justice in the long run by providing certainty for the countless testators who will rely upon it in the future, and thus be able to leave their property as they intend, and by ensuring that the beneficiaries will not be plagued by easily avoidable litigation which diminishes the family patrimony. Certainly the courts should do something to diminish the "group of dissatisfied testators" who according to a late chancery judge, "wait on the other bank of the River Styx to receive the judicial personages who have misconstrued their wills".

The author would like to suggest that meaningful rules of interpretation can be formulated to determine the meaning of the term "children" when used in "complex" wills. These rules, however, should not be based on arbitrary categories but on the spirit and purpose of article 980.

1. The philosophy of article 980.

A society's laws of intestacy are intimately related to its social and economic goals, and its feelings of what is just. To certain societies the importance of the rules of intestacy is so great that these rules cannot be derogated from; in such societies freedom of willing is forbidden. Such was the case of early Roman law and European pre-feudalistic law. However, even when a society does not prohibit absolute freedom to will, it may restrict it. Today in most jurisdictions, "Family Maintenance Laws" or institutions such as "la réserve" prevent complete disinheritance of certain family members. Moreover, where freedom of willing, whether restricted or absolute is permitted, it is a common rule of testamentary interpretation that when doubt arises as to the meaning of a will, a construction which follows the rules of intestacy will be favoured.

The essence of our intestacy laws is to provide equality within the deceased's family; if the *de cujus* dies leaving children they will share equally; if one of these children predeceases him leaving children, such grandchildren of the *de cujus* will take their deceased parent's share. Article 980 imports this same equality to wills. For those who base articles 937 and 980 upon the rules of intestacy this point is obvious. However, for those who adopt the Furgolian system [109] it is arguable that article 980 C.C. is a simple definitional section, and that the court need only replace the term 'children" mechanistically with the term descendants, without regard to achieving equality among the testator's descendants.

However, the author disagrees with this latter view. Granting the validity of Furgole's theory, the above conclusion does not follow. The article is more than a dictionary for jurists. It is a legal institution whose purpose is to ensure that if a child dies without receiving the legacy intended for him, his family will take his share and inherit equally with the other families. Both its origins and its purpose suggest that the article is intended to achieve the equality which our intestacy laws regard as "fair" and which in case of doubt are to be applied to wills. It should be remembered, that until the mid-eighteenth century, the extended meaning of the term "children" was based on the theory that the term was introductive of the rules of intestacy to wills. It was only after a century of doctrine and jurisprudence had laid bare the fact that in the substitution the importation of the rules of intestacy would cause inequalities among the testator's family, that Guyot and Furgole suggested their theory

[109] D. N. Mettarlin, *op. cit.*, 65 at pp. 97 ff.

which resulted in greater familial equality in the substitution. Neither of these authors discussed the application of their theory to the problems of the "complex will"; and their view that grandchildren take in their own right should in no way detract from the main purpose of article 980, evident in its origins, to ensure a fair and equal sharing among descendants.

2. The difficulties of achieving the purpose of article 980 in the complex will.

In a simple legacy of absolute ownership to "children", it is a simple matter to achieve the equality of the intestate succession by permitting the descendants of a predeceased child to inherit in the latter's place. However, in legacies of less than absolute ownership "to children", contained within "the complex will", an unrestricted application of the extended meaning of "children" will often cause inequality rather than equality.

Take the following example. Suppose a testator leaves his property to "my children for life with accretion in favour of the surviving *children*, and on the death of the survivor to my *grandchildren* by roots". Let us assume that the term "children" is to be given its extended legal meaning. If a child in the first degree predeceases the testator, his children will take his share; however, if another child in the first degree dies after receiving the legacy bequeathed to him, his children will not be able to take his share in virtue of article 980 C.C., because of the presumption against graduality.

In this case, the application of article 980 C.C. creates an arbitrary distinction between families, based on the accident of the time of death. Moreover, in virtue of the provision for accretion the fortunate children of the predeceased child will, if the normal course of events occurs, eventually enjoy the entire property of the testator for their lifetimes, to the exclusion of the families of all the testator's children who died after the testator.

It is evident that in applying article 980 to the "complex will" we are in need of rules of construction to regulate its application.

3. Three suggested rules.

The author would like to suggest three rules of interpretation which he believes flow logically from the purposes of the article 980 C.C., and which provide a framework for analysis and prediction.

These rules are not put forth as inflexible axioms which will unravel the meaning of the term "children" in every will; rather

they are suggested as presumptions of meaning which should not be readily overcome. They will provide a logical framework whereby consistent and orderly solutions may be found. Their adoption should cause the uncertainty presently inherent in a legacy "to children" to be pushed from the standard will, where in a proper legal system no such uncertainty belongs, to the bizarre, the homemade, and the poorly drafted will which should be its only home.

The three rules which the author would like to put forth may be briefly stated as follows:

1. The presumption in favour of equality.
2. The presumption in favour of early vesting.
3. The presumption against graduality.

Rule One. *The presumption in favour of equality.*

As indicated earlier, the basic purpose of article 980 is to approximate and achieve the equality of the intestate succession, and ensure that a testator's family share equally, in the manner our intestacy laws consider "fair". Article 980 C.C. is more than a simple article of definition. It is a legal institution whose purpose is to ensure that should a testator fail to provide for the death of a child in the first degree, the deceased child's children will take their deceased parent's share, and so inherit equally with the other branches of the family.

It is suggested that if this familial equality can be achieved by giving the term "children" its extended meaning, the term "children" should always be given an extended meaning; if, however, because of the diverse provisions of the complex will the extended meaning results only in inequality, or *in fortuitously benefiting one family while disinheriting another,* then the natural meaning should be adopted. In other words the term "children" should be given its natural or technical meaning depending on which interpretation *leads to equality or avoids inequality* in a family. The application of this rule will be discussed below.

Rule Two. *The presumption in favour of early vesting.*

As indicated earlier,[110] the policy of our law is to encourage the commerciality of property by preventing its being tied up too long. When neither the technical nor the natural meaning of the term "children" will lead to a more equitable division among a family,

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[110] See p. 287 *supra.*

then that interpretation which prevents property being tied up too long should be favoured. Along these lines, when the term is used to denote the period when property is to vest or administration end, the natural meaning should prevail, since it will result in early vesting.

Rule Three. *The Presumption against graduality.*

This presumption has been discussed earlier at great length.[111] It prevents the descendants of a child who has received his legacy from inheriting in virtue of the term "children". Unlike the other two rules this rule is sanctioned by the express wording of article 980 C.C., so that if any conflict arises between the rules, this third rule must prevail.

It is this third rule which prevents the complex will from achieving the equality of the intestate succession, and which will often result in the meaning of *children* being limited to descendants in the first degree.

Let us take an example.

Suppose a legacy of "income to my children, with ownership to vest in them only when the youngest child attains the age of 21". Further suppose that one child in the first degree predeceases the testator leaving children and that one child in the first degree survives the testator, but dies before the ownership is to vest, (that is, before the youngest child is 21) leaving children. The presumption of equality suggests that the term children should mean descendants; each family would share the income equally until the time the ownership vests, and the perfect equality of the abintestate succession would be achieved.

However, the presumption against graduality prevents this result, and in view of its primacy there is no choice but to apply it.

Let us assume that the term "children" does mean descendants. If the presumption of graduality is to apply to this legacy, and it must, then of course the descendants of a child in the first degree who died after receiving his legacy will be unable to inherit the legacy of income to "children". However, since we have decided that the term "children" is to mean descendants, and since the presumption against graduality prevents this broader meaning from applying to the descendants of children who have received their legacies, the extended meaning will only permit the descendants of deceased

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[111] See pp. 264 ff. *supra.*

children who did not receive their legacies to inherit. However, if we permit the descendants of children who did not receive their legacies to inherit, in virtue of Article 980 C.C., but exclude the descendants of children who have received their legacies and then died, this will mean that not all the testator's familial descendants will share equally, but only the fortuitous descendants of a predeceased child who will share to the exclusion of the testator's other families. Moreover, should the testator have provided for accretion, the right of the descendants of a predeceased child to exclude the descendants of children who died after the testator could last a very long time.

Such a result violates the presumption in favour of equality, and it is evident that if the presumption in favour of equality and the presumption against graduality are both to be satisfied, the term "children" can only mean children in the first degree.

Article 980 states that "the terms *children* and *grandchildren*... apply to *all* the descendants";[112] the descendants of one child cannot be excluded while the descendants of another child inherit without violating the purposes of the article. It is as if the Codifiers had hearkened to the cry of d'Artagnan, "All for one, and one for all". Article 980 cannot permit some descendants to inherit and others to be excluded.

4. Examples of how these Rules may be applied.

A few examples drawn from customary legacies will explain how these three rules, the presumption of equality, the presumption of early vesting, and the presumption against graduality will apply.

Example A. Usufruct - no accretion

A Testator leaves a usufruct to his children with ownership to grandchildren.

We will assume that this legacy is interpreted to mean that each child is to enjoy a separate and equal share in the usufruct, and that on the death of a child *only the children of such child* and *not all* the testator's grandchildren are to enjoy the absolute ownership of such share.[113]

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[112] Emphasis added for the word "all".

[113] Another possible interpretation of this legacy would be that the usufruct is bequeathed to *all* the children and that on the death of a child the absolute ownership of his share will vest in *all* the testator's grandchildren. However, for the purposes of this example this possible meaning will be discarded. See D. N. Mettarlin, *op. cit.*, 65 at p. 104, fn. 89.

In such a legacy the application of the three rules can give the term "children" but one meaning, namely, descendants in the first degree.

If the term "children" is held to mean descendants in the first degree, whether a child in the first degree predeceases the testator, or survives the testator, and then dies, the absolute ownership of such child's share shall belong to his children. This will be so for every family. The equality of the intestate succession is thus achieved.

If, however, the term "children" is held to mean "all the descendants", and a child predeceases the testator, the usufruct will then pass to his children and the absolute ownership will only vest in great-grandchildren.[114] Certainly no greater equality among families is achieved by this result. All that is accomplished by giving the term "children" an extended meaning is to restrict the commerciality of the property for an extra generation.

In view of the fact that neither interpretation creates greater equality of division, the presumption in favour of early vesting should ensure that the term "children" in this instance will mean children in the first degree.

Example B. Substitution - no accretion

A testator leaves his property to his children, and then to his grandchildren by way of substitution.

The application of these three rules should result in the term "children" being limited to children in the first degree. If the term "children" means children in the first degree, all branches of the testator's family will benefit equally, whether a child in the first degree dies before or after receiving his legacy. However, by interpreting the term "children" to mean "all descendants" and so enabling the children of a predeceased child to inherit as institutes, and the great-grandchildren of the testator to inherit as substitutes, the cause of equality is not advanced. The only effect of giving the term "children" an extended meaning is to tie up the property unnecessarily for another generation, without achieving any greater equality of division.

Thus the presumption in favour of early vesting should limit the meaning of the term "children" in this legacy to children in the first degree.

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[114] If, of course, a child in the first degree enjoyed the usufruct and then died the absolute ownership would vest in the deceased child's children. The presumption against graduality would prevent any interpretation that a new usufruct had been created in favour of grandchildren.

Example C. - Substitution - with accretion.

A testator leaves his property to his children with accretion in favour of the surviving children, and then to his grandchildren by way of substitution.

Let us assume that the term "children" is to be given its extended meaning.

The presumption against graduality would, of course, prevent the children of the child who died after receiving his legacy from inheriting in the place of their deceased ancestor. If the extended meaning of the term were applied, the result would be, that if a child predeceased the testator, his children would inherit, whereas the families of children who died after the testator would not inherit; moreover, in view of the provision for accretion, the fortunate children of the predeceased child would enjoy the entire property for their lifetimes to the exclusion of the descendants of children who died after the testator. Indeed, these latter unfortunate grandchildren would not be able to inherit at all until after the death of the children of the predeceased child.

In this case the presumption in favour of equality combined with the presumption against graduality should prevent the term "children" from meaning anything other than children in the first degree.

Example D. Trust.

A testator leaves his property in trust to trustees to pay income to such of his children as are living from time to time during the existence of the trust, and when the youngest child is 21, to divide the property among his children in ownership.

As indicated earlier, the presumption favouring early vesting suggests that the term "youngest child" when used to denote the time of division should be interpreted to mean, "youngest child in the first degree".[115]

We have indicated that the fact that the testator intended the term "child" in the expression "youngest child" to mean "child in the first degree" does not mean that he intended the term "children", when used in the bequest of income, to mean "children in the first degree" [116] or, put differently, one should say that we cannot conclude that the testator intended to disinherit the families of the deceased children, from the fact that he ordered the trust to terminate when a child in the first degree reached the age of 21.

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[115] See pp. 287-8 *supra.*

[116] See p. 288 *supra.*

The statement that the income would belong to those children "as are living from time to time during the existence of the trust" could be regarded as an attempt to overcome the presumption against graduality. If this is so, and if the term "children" is given its extended meaning, then perfect equality of distribution will be achieved. Thus, if the court finds an intention to overcome the presumption against graduality, the term "children" should mean descendants. If, however, the court finds no intention to overcome the presumption against graduality, then, of course, the presumption in favour of equality would be violated if the term "children" were to be given its extended meaning. It is the author's view that the courts should find no intention to overcome the presumption against graduality in this legacy. The reasons for this opinion will be given on pp. 305-6 *infra*.

Example E. Provision for the death of a child without children.

The testator leaves his property:

(i) to his *children*, and on the death of a child, to such child's children, but

(ii) should a child die without children, such child's share shall belong to all the testator's *children then surviving* and then to their children.

The above will creates two substitutions: one if a child dies leaving children; one if he dies without leaving children. We have discussed the first substitution under Example B and concluded that the term "children" therein, should be limited to descendants in the first degree. However, in this Example E, if one child survives the testator, and then dies leaving children, and then a second child dies without children, the problem will arise whether the term "children then surviving" will include the children of the first deceased child.

It can be argued that the term "children", in the expression "children then surviving", has the same meaning as the term "children" when used in the first substitution, where it means descendants in the first degree.

However, an interpretation more in keeping with the spirit of the three rules would be that descendants of a deceased child can inherit under the expression "to my children then surviving". If we find that the term "children" in this expression has a different meaning than the term "children" when used in the first substitution, and if we find an intention on the part of the testator to overcome the presumption against graduality, there is no reason to exclude grandchildren from the legacy "to my children then surviving".

The presumption against graduality of course, only prevents the descendants of a child who has received a legacy from inheriting the *same legacy* after the deceased child. The presumption will not prevent the descendants of a deceased child inheriting a new and different legacy which is to take effect after his death. Thus, for example, in a legacy of "income to my children until the youngest child is twenty-one when the ownership shall belong to my children", the fact that a child has received income but died before the youngest child attains the age of twenty-one will not prevent the deceased child's children sharing in the legacy of ownership to "children" upon the youngest child reaching twenty-one. Similarly, in the legacy discussed above, namely,

i) to my *children* and on the death of a child to his children, but,

ii) should a child die without children, to my *children then surviving* and then to their children,

the fact that a child enjoyed the substitution to "children" in (*i*), and then died leaving children, will not prevent such deceased child's children enjoying the separate and new legacy "to the children then surviving" in (*ii*) which will come into effect only upon the death of a child. The grandchildren inherit the legacy "to my children then surviving" as a new bequest and not as a continuation of the old bequest "to my children".

Thus the author would conclude that the presumption against graduality should not prevent grandchildren from inheriting the legacy "to my children then surviving".

Another possible interpretation of this legacy and of the phrase "to my children then surviving" which is also based on the spirit of these three rules, would permit the descendants of the deceased child to inherit the share of an uncle and/or aunt who died without children, immediately upon the death of such uncle and/or aunt but as substitutes rather than as institutes; in other words, in the legacy "should a child die without children . . . to my children then surviving and then to their children", upon the death of a child in the first degree without children, the descendants of any other child then deceased would inherit the legacy "to my children then surviving and then to their children", not in virtue of the expression "children then surviving" but in virtue of the expression "and then to their children". On this latter interpretation, the legacy would read,

> to my children in the first degree and on the death of a child in the first degree to his children (of course, should a child in the first degree not survive me the property would immediately upon my death pass to his children

in virtue of Article 926),[118] but should a child in the first degree die without children, his share shall belong to my surviving children in the first degree, and on the death of a child in the first degree, to his children (but upon the death of a child in the first degree without children should another child in the first degree not be then surviving but have left children then surviving, his children shall immediately inherit, as substitutes, the share their parent would have inherited, in virtue of article 926).

While such an interpretation seems unreasonable at first blush, our reluctance to accept it is due only to our unwillingness to put aside the natural meaning of the term "children" and rigorously apply the legal meaning of the term so as to achieve the equality among families which is the purpose of article 980 C.C.

If we are unwilling to formulate any rules to interpret article 980 C.C., we will always be faced with the question whether the technical meaning of "children" or the "natural" meaning is to be preferred, with no rules for solution other than our own "feelings" in each particular will. We have suggested that the most appropriate manner of decision is to lay down certain rules based on the purposes of 980 C.C. If we do not adopt these rules, but give the term that meaning which happens to suit our linguistic fancy in each will, we will achieve neither justice nor certainty, but will continue to apply a "method" of interpretation whose only fruit has been that 100 years after the enactment of the Civil Code, the testator who uses the term "children" creates an uncertain will.

5. The presumption against graduality — the enemy of equality.

The application of these rules will prevent the extended meaning of "children" from applying to many legacies contained within the complex will.

The villain in the piece is the presumption against graduality. It is the rigorous application of this rule which will prevent grandchildren from inheriting income *in virtue of article 980 C.C.*,[119] in such legacies as "income to my children until the youngest child is twenty-one, when the property will belong in absolute ownership to my children", and "income to my children for twenty years, ownership to charity".

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[118] Article 926 C.C. "Fiduciary substitutions include vulgar substitutions without any expressions to that effect being necessary."

[119] The fact that grandchildren will be unable to inherit a legacy to "children" in virtue of article 980 C.C. does not necessarily mean they will be excluded from

a) The "new legacy".

There is one type of legacy in which the presumption against graduality will not apply, and in which grandchildren will be able to inherit income or property in virtue of the term "children", after their parent had previously received the same income or property in virtue of a legacy to "children". This will occur if the legacy to "children" under which the grandchildren inherit is deemed to be a new legacy which is independant of, and not a continuation of, the legacy to "children" under which their parent inherited.

Thus we have seen that in a legacy to,

i) my *children* and on the death of a child to his children, but

ii) should a child die without children to my *children then surviving* and then to their children"

the children of a deceased child will be able to inherit the legacy to the "children then surviving" in (ii) even though their parent had received and enjoyed benefits in virtue of the term "children" under (i), because the legacy to "children then surviving" in (ii) is a new legacy and not a continuation of the first legacy to "children" in (i). As we have seen, the presumption against graduality only prevents the descendants of a child who received a legacy from *continuing* the legacy after their parent's death; it does not prevent the descendants of a deceased child inheriting *another legacy* after his death.

However, the number of bequests in which the courts will be able to find the right of "children" to take after the death of a child to be in virtue of a new legacy to 'children" rather than in virtue of a continuation of the old one, are extremely rare. The rarity of such bequests may be seen from the following example.

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the legacy. They may be entitled to inherit in virtue of some other article of the Civil Code. Thus it is possible that in a legacy "to my children for ten years, ownership to charity" the children will be entitled to share in the income as heirs of a deceased child in virtue of article 963 C.C. (Article 963 C.C. states: "If, by reason of a pending condition or some other disposition of the will, the opening of the substitution do not take place immediately upon the death of the institute, his heirs and legatees continue, until the opening, to exercise his rights, and remain liable for his obligations".

However, this possibility is extremely unlikely. The courts have applied article 963 C.C. in only the rarest of circumstances. (Thus, see *Tiffin* v. *Budyk* (1937) 75 S.C. 367). In fact, if grandchildren cannot inherit a legacy to "children" in virtue of article 980 it is unlikely if any other article of our Code will permit them to inherit, except in the rarest of circumstances.

Suppose a legacy "to such of my children as may be living from time to time during the existence of this trust".

It is possible to argue that such a legacy contains a series of independant gifts, each of which opens upon the death of a child in the first degree during the existence of the trust. On this view, on the death of a child in the first degree, the right of the "children" previously enjoying income, to enjoy future income benefits will terminate, and a *new legacy* will open in favour of all the "children" living at the time of the death of the deceased child. The descendants of the deceased child in the first degree who had enjoyed the income will be able to inherit income after his death in virtue of the term "children", not on the grounds that they were continuing the enjoyment of their deceased parent or stepping into his shoes, but on the grounds that they were inheriting a new bequest which opened upon his death.

However such an interpretation cannot be accepted. Our law considers such legacies as "income to such of my children as may be living from time to time", "income to my children with accretion in favour of the survivors", and "income to my children until my youngest child reaches twenty-one years" to be bequests to a "class".[120] A bequest to a class consists not of a series of legacies each of which opens upon the death of each member of the class, but of one single legacy to a group of persons in which the members of the class entitled to inherit are determined upon the death of the testator. Each child who survives the testator and becomes a member of the class *receives* a legacy. On the death of a child the other members of the class do not receive a *new* legacy, but simply increase the size of the benefit which they have already received. On the death of a child the whole gift does not terminate, and a new class gift spring forth, but rather the gift to the class continues, although with a modified membership.

As McDougall J. states in *Tiffin* v. *Budyk*,[121]

> "It is then a matter of law that those who survive do not take under a fresh benefit, but the enjoyment given by the original bequest to them becomes merely enlarged.
>
> ...'there is no gradual substitution...'

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[120] *Paton* v. *Barclay's Bank Ltd.* (1934) 56 B.R. 481; *Tiffin* v. *Budyk* (1937) 75 S.C. 367.

[121] (1937) 75 S.C. 367 at 371 and at 372; in *Bourgeau* v. *Bourgeau* [1934] S.C.R. 512 at 517 the Supreme Court of Canada hit upon an extremely illuminating way of explaining the concept. The Court stated that in a legacy such as "to my children with accretion in favour of the survivors and then to X" each child would be burdened with a "condition résolutoire en faveur des colégataires".

> Any attempt to regard the substitution as opening in part upon the death of a member of the class: [and the author would add, any attempt to consider the legacy to the remaining members of the class as a new legacy] cannot recommend itself to the court as interpretative of the testator's wishes".

This view was confirmed by Bond J. in *Barclay's Bank Ltd.* v. *Paton,*

> "...I reach the conclusion that... the testator created a substitution of which a group of five individuals was named as institute... the gain to the diminishing number of survivors being merely an incident of that provision and not constituting a transmission from a deceased member of such group who had merely an undivided interest in the whole of the revenue for the period of her lifetime."[122]

Thus there is no doubt that in such legacies as "to my children until the youngest child is twenty-one, when the property shall belong to my children" and "to such of my children as may be living from time to time for twenty years" the presumption against graduality will prevent grandchildren from inheriting the bequests of income therein.

b) A modified view of the presumption against graduality.

Such a conclusion, however, seems to violate the spirit of article 980, and result in the disinheritance and possible impoverishment of the families of deceased children in circumstances where there is no evidence that the testator realized that a child might die prior to the termination of the legacy, or that the testator would have intended to disinherit grandchildren in such event.

It is possible, therefore, that the courts may, as a policy decision decide to moderate the ubiquity of the presumption against graduality and to state that it should apply only in certain types of legacies.

There are valid arguments in favour of applying the presumption against graduality only to certain types of legacies.

First, the ancient French authors only discussed the application of the presumption in regard to certain legacies — namely substitutions in which the "children" were the final substitutes, and legacies of absolute ownership to "children". The ancient French authors did not discuss at all to what extent, and in what manner, the presumption against graduality would apply to such legacies as "to my children for twenty years and then to their children" or "to my children until the youngest child is twenty-one, when the property shall belong to them in absolute ownership".

It is true that statements such as "enfans... forme... un seul [degré] qui est rempli et évacué par le premier *qui recueille,*[123] and "le

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[122] (1934) 56 B.R. 481 at 487.

mot enfans comprend . . . tous les descendans . . . lorsqu'ils sont à la place de ceux . . . qui sont décédés *sans avoir receuilli*",[124] suggest that the presumption against graduality applied to all legacies without exception. However, the silence of the ancient French authors in regard to the applicability of the presumption against graduality to certain legacies, does not entitle us to conclude that the ancient authors would have rigourously applied the presumption to those legacies which they did not discuss. It would appear that their silence does grant us some room for creativity, and does provide us with grounds for an honourable retreat from applying the presumption with unmitigated zeal.

Second, while the Codifiers in discussing article 977 C.C. state that the article was intended "in particular to prevent substitutions from being extended by mere implication to subsequent degrees" [125] they make no such statement in regard to article 980. Further, while they state that article 977 C.C. contradicts Roman law, which permitted graduality by implication, they do not indicate that article 980 C.C. contradicts Roman law. Moreover article 980 C.C. unlike article 977 C.C. does not expressly prohibit graduality, but simply states that it may or may not occur depending upon the terms of the legacy to "children".

These arguments can form the basis of an honourable retreat from an absolute presumption against graduality.

It is possible then, that the courts may decide to limit the applicability of the presumption to certain types of legacies only. To those legacies to which the presumption against graduality would not apply, the courts would then apply only the presumption in favour of equality and the presumption in favour of early vesting in interpreting the term "children".

The author would suggest that if the presumption against graduality is to be limited to certain legacies it should be done on the basis of the following two rules. Any justice achieved by modifying the rigour of the presumption will only be purchased at the price of some uncertainty. However, it is suggested that the following rules will minimize the resulting uncertainty.

First. In legacies for life and in legacies to a class in which the legacy to the class terminates on the death of all the members, the presumption against graduality should apply.

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[123] Furgole, *op. cit.*, v. 2, p. 412, no. 125 (emphasis added).
[124] *Ibid.*, p. 413, no. 125, (emphasis added).
[125] The *Codifier's Reports*, *op. cit.*, p. 199.

Second. However, in legacies to "children" for a period certain or in legacies to a class which terminate after a specific time (i.e. not upon the death of all its members), the presumption against graduality should not apply, and grandchildren should be able to inherit after their parent unless the presumption against early vesting is violated or unless the testator clearly indicates that he was perfectly aware of the fact that a child might die and that in such event he wished to exclude grandchildren.

Thus on this modified view, in legacies of "income to my children until the youngest child is twenty-one when the property shall belong to my children", or "income to my children for twenty years, ownership to charity", "income to such of my children as may be living from time to time during the existence of this trust" grandchildren should be able to share the income. Whereas in such legacies as "income to my children with accretion in favour of the survivors, ownership to grandchildren", they should be unable to do so.[120]

The author does not strongly favour a modification of the rigorous application of the presumption against graduality. However, if the courts do decide to modify the presumption and so permit the descendants of children who have received certain types of legacies to inherit after the death of their parent, so as to achieve equality of division, the above two rules would seem to accomplish this result in an orderly fashion.

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[120] Another possible theory upon which to base a modification of the presumption against graduality so as to permit a greater equality of distribution among families would be that the presumption against graduality would apply only to legacies in which the "children" had received the full benefits bequeathed them (whether or not they received the legacy) rather than to bequests in which the "children" received their legacies but died before enjoying all the benefits bequeathed to them. Thus in a legacy "to children for life" it would be argued that if a child died after accepting the bequest, the presumption against graduality would apply, since he had received the entire benefit bequeathed to him, — namely the right to enjoy the income for life; however, in a legacy of "income to my children for ten years" should a child die after receiving income for five years, the presumption against graduality would not be violated if his descendants inherited the income after him, since he did not receive the full benefit granted to him, namely the right to enjoy income for ten years. Of course, if such a theory was adopted question would arise as to what was the full benefit bequeathed to a child. Thus in a legacy of income "to my children with accretion in favour of the survivors, ownership to X" would the full benefit bequeathed to a child be the right to enjoy income for life, or the right to enjoy income for life, plus the right to share in the income of any child who died before him ? The author is of the opinion that this theory while logical cannot be accepted since ancient law quite clearly drew a distinction between receiving a legacy and receiving the benefits from or enjoying the legacy.

Chapter 4

INTENTION GATHERED FROM THE WILL AS A WHOLE

In Chapter 1 of this Second Part we have indicated that the term "children" may be qualified by the use of certain words to which the courts have given a restrictive meaning. In Chapter 3 we have suggested certain rules to determine when the term "children", when used in the "complex will" will be limited to the descendants in the first degree. However, will interpretation is not an exact science. Not every will may be interpreted by enumerating words of qualification or by formulating scientific rules of construction. Certain wills will always demand the common sense and the intuition of a judge; in these wills even if the testator does not qualify the term "children", or even if no rule of interpretation can be found to suggest a restrictive meaning, a court may still find the term "children" to mean descendants in the first degree. It may arrive at this result by examining the testator's intention as a whole and by considering a legacy to "children" in the context of his entire testamentary scheme,

> "... the paramount duty of the Courts in construing wills is to ascertain and give effect to the intention of the testator or testatrix, to be collected from the whole will, and not from any particular word or expression which may be contained in it."[127]

In the case of *Martin* v. *Lee*,[128] the testatrix left her property in ownership to her "children" without qualifying that term. However, she provided that if a "child" was under 21 her husband was to maintain, house and educate such child, and be his tutor. The court held that the testatrix could not expect or wish her husband to do the same for her grandchildren, and so interfere with their parents' control. The provision for tutorship indicated to the court that when the testatrix used the term "children", she had in mind only her children in the first degree.

In *Charette* v. *Lapierre* [129] the testator left the income from his property to his "children". However, in another section of his will he indicated that if a *daughter* entered a convent, she would lose her

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[127] *Martin* v. *Lee*, 11 L.C.R. 84 at 87; see also *Charette* v. *Lapierre* [1953] B.R. 687 at 692, "The will must be read as a whole" (Barclay, J.).

[128] *Martin* v. *Lee*, 11 L.C.R. 84.

[129] *Charette* v. *Lapierre* [1953] B.R. 687.

rights to the revenues.[130] Two judges held that the testator's specific concern with his daughters, and his failure to make any specific provision for his granddaughters indicated that he only intended daughters[131] to inherit the legacy. For this reason these judges concluded that the term "children" should be restricted to descendants in the first degree.[132] However, in *Marcotte* v. *Noël*,[133] although the testator left his property to his children in such proportions as his wife should appoint, with the stated wish (but not direction) that the property be divided equally among his sons and daughters, the court held that grandchildren could share, and that the testator's obvious preoccupation with his children in the first degree did not overcome the presumption of article 980 C.C.

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[130] The testator also provided that if a *daughter* married, her husband would have no control over her revenues, but failed to make any similar provision for his granddaughters.

[131] The term "daughter" can only mean daughter in the first degree, see D. N. Mettarlin, *op. cit.*, 65 at p. 132.

[132] To this author, the results arrived at in *Martin* v. *Lee*, *supra*, and *Charette* v. *Lapierre*, *supra*, do not flow from the wills therein considered with any irrefutable conclusiveness. The fact that the term children when used in one part of the will may mean children in the first degree, does not mean that it should have the same meaning when used in another part of the will. Article 980 C.C. is in some respects a definitional article, but it is more than that; it is a legal institution fulfilling the same function for the will, that representation fulfills in the intestate succession. If states how property will devolve if a child in the first degree dies without the testator having made provision for such death; it is as much a legal institution as accretion or lapse. The fact that the testator has used the term "children" in a non-dispositive part of the will should not overcome the presumption of article 980. Article 980 states that the term "children" made use of without qualification "in the *disposition*, or in the condition" means descendants; the article does not state that the term "children" *wherever* used in a will means descendants. If the term were used in the section appointing executors it would not mean that the descendants of a deceased child in the first degree would be executors; hence the fact that the testator may have used the term in a non-dispositive section of the will, such as in the appointment of a tutor, does not mean that the term when used in a dispositive provision should be limited to descendants in the first degree. In short, the fact that the testator in dealing with certain problems has made specific provisions for sons or daughters, or used the term "children" as meaning descendants in the first degree, does not mean that this meaning should prevail in regard to another problem, that is, whether or not the descendants of a deceased child should inherit his share. This is not to say that wills should not be interpreted and read as a whole; but the author would suggest that the equitable and substantive purposes of article 980 should not be lightly cast aside; too much should not be made of hints drawn from other provisions of the will.

[133] (1880) 6 Q.L.R. 245.

Some wills, such as those in *Martin* v. *Lee*, *Marcotte* v. *Noël*, and *Charette* v. *Lapierre* will always possess a hovering uncertainty which will never be solved by simply enumerating words of qualification, or enacting canons of construction. In such wills, "rules" of construction will be of little help. The decision in the last analysis will depend on the judge's intuition, his feeling of what the testator "was getting at", and the experiences and the prejudices he shares with his fellow men.

In these wills, testamentary interpretation will still remain an art, and the "intuitive" approach a necessity.

However, in many more areas than in the past, will interpretation must become a science. The courts have applied the "intuitive approach" to wills where it does not belong. The wills to which it can be properly applied are the limited few, the *causes d'espèces*. Most wills containing legacies "to children" fall into fairly standard categories. The court should interpret such standard wills by adopting a "rule-oriented approach", one which will achieve the equitable purposes of article 980 and, at the same time, provide order and certainty.

This article has been a plea for the adoption of the "rule-oriented approach" as against an "intuitive approach". The reason is that wills must be certain. Uncertain wills inhibit the commerciality of property, encourage litigation, and frustrate the will making process. However, most important, wills must be certain because the courts must keep faith with the countless testators who will draw their wills in the future. They must realize that a "system", which 100 years after Codification states that a testator who leaves his property to his children has created an uncertain will, is a poor judicial system. The courts must provide guidelines so that the draftsman may use certain expressions in full confidence that the results will be as desired. While a rule oriented system may disappoint the occasional testator who makes his own will, or the occasional draftsman who has not learned the rules, it will, in the long run, result in fewer misconstrued wills, and a greater measure of justice for those who leave their property based on such rules. Order in this area is the ally of justice, not its foe.

Thus if our decisions are not to be "one way excursions, good for this day and this trip only", and if order and justice are to prevail in the law of property and wills, the courts will have to analyze the philosophy, and the logic and the results of article 980 much more rigorously than in the past; they will have to relegate the "intuitive approach" to the *cause d'espèce*, and apply a rule-oriented analysis to the standard will.