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WILLS—BEQUEST TO WIFE AND CHILDREN—DE FACTO WIFE AND ILLEGITIMATE CHILDREN.—The question to be decided in *Re Herlichka*¹ was whether a will which gave property to the testator's "wife" and "children" should be interpreted as benefiting the testator's lawful wife and legitimate children or his *de facto* wife and illegitimate children.

Stanley Herlichka died in 1967. At the time of his death he was married to Audrey Herlichka, and he had two legitimate children of that marriage. He had been separated from Audrey and the children for eleven years before his death. During that period he had been living as husband and wife with Phyllis McKenna, and he had three illegitimate children of that union.

Stanley Herlichka left a will in which his estate was given to trustees to hold upon the following trusts:

1. "To deliver to my wife, Phyllis Herlichka, all articles of personal, domestic and household use or ornament . . .";
2. "To hold whatever house and property I may own and be using as a home at the time of my death as a home for my wife during her lifetime . . .";
3. "Upon the death of my wife", to add the house or its proceeds to the residue of the estate;

* J. D. Finch, of the Faculty of Law, University of Liverpool.

¹ [1969] 1 O.R. 724, (1969), 3 D.L.R. (3d) 700.

4. To invest the residue of the estate "and pay the net income derived therefrom to or for my wife during her lifetime, provided that during such time my said Trustees shall pay to or use for the benefit of each child of mine who is wholly dependent upon my said wife for support . . . such amount of the said income as my said Trustees may in their uncontrolled discretion deem advisable";
5. "Upon the death of . . . my said wife, . . . to hold whatever house and property I may own and be using as a home at the time of my death as a home for my children until there is no longer a child of mine living and under the age of twenty-one . . .";
6. Upon the death of my wife, to divide the residue in equal shares per stirpes among those of my children then living, or "the issue of each child of mine who shall predecease the survivor of me and my wife."²

The trustees applied to the Ontario High Court for directions as to the meaning of these provisions. Osler J. decided that the reference to "wife", "child" and "children", wherever they occurred in the will, referred exclusively to the lawful wife Audrey and the legitimate children. The *de facto* wife Phyllis and the illegitimate children were excluded from any benefit under the will. Even the bequest of articles of personal, domestic and household use or ornament, which was expressly "to my wife, Phyllis Herlichka", was interpreted as a bequest to Audrey.

Osler J. was able to reach this result by the application of two rules of construction: (1) that the *prima facie* meaning of "wife" is lawful wife, and (2) that the *prima facie* meaning of "child" is legitimate child. He first considered the gifts to the children in the last clauses of the will, and he pointed out that the terms "child" and "children" indicated, *prima facie*, legitimate children. He then considered the gifts to the wife in the earlier clauses, and he pointed out that the term "wife" indicated, *prima facie*, the lawful wife. These *prima facie* meanings all favoured Audrey and the legitimate children. But what of the explicit naming of Phyllis in the first clause? This "single phrase", he held, did not carry "sufficient weight to persuade me that the testator's intention when drawing his will was to benefit Phyllis McKenna or her children at all, let alone to benefit them to the exclusion of his legitimate children".³

This reasoning involves reading the testator's language backwards. If the clauses of the will are read in the order in which they were written a different conclusion seems inevitable. The bequest "to my wife Phyllis Herlichka" occurs in the first disposi-

² The description of the last clause in the judge's opinion (*ibid.*, at p. 727 (O.R.), 703 (D.L.R.)) is incomplete. I have supplied the omission by conjecture from the tenor of the rest of the opinion. The clauses are set out in the order in which they appear in the will, but the numbering of the clauses has been supplied by me.

³ *Supra*, footnote 1, at pp. 730 (O.R.), 706 (D.L.R.).

tive clause. It plainly indicates Phyllis, the *de facto* wife. References to "my wife" or "my said wife" in the immediately succeeding provisions surely refer to the same person. The first reference to a "child" or "children" is in the clause providing power to maintain "each child of mine who is wholly dependent upon my said wife for support". Only Phyllis' children could possibly be indicated here, and the references to a child or children in the immediately succeeding clauses surely mean the same children.

So much is clear—to me at least—from the face of the will. The court of construction is of course also permitted to "sit in the testator's armchair", and to examine the circumstances in which the testator was situated at the time when he made the will. These circumstances were recited by Osler J. in his judgment, but he did not seem to find them helpful. In fact the "armchair evidence" strongly reinforced the view that the testator's references to his wife and children were references to Phyllis and Phyllis' children. The will was made in May 1965. At that time nine years had elapsed since the testator had deserted Audrey. During that period he had never seen Audrey or her children.⁴ He had been living as husband and wife with Phyllis, and he had had three children of that union. Even if he had not referred to "my wife, Phyllis Herlichka" in the first dispositive clause, these facts would suggest that references to his wife in 1965 are more likely to refer to Phyllis, his current *de facto* wife, than to Audrey whom he had abandoned nine years earlier. Furthermore, the bequest of the contents of the testator's house to his wife, and the direction to hold the house as a home for his wife, and after her death for his children, is a reference to the house in which Phyllis and her children will actually be living at the time of his death. It would be very strange if he intended them to vacate their home at the time of his death and make way for Audrey and her children to move in.

For these reasons it is submitted that *Re Herlichka* was wrongly decided.⁵ With respect to the dispositions in favour of the

⁴ He visited Audrey and her children several times before he died, but these visits commenced in May 1966, a year after the will was made, and therefore shed no light on the interpretation of the will: see *supra*, footnote 1, at pp. 725 (O.R.), 701 (D.L.R.); compare pp. 730 (O.R.), 706 (D.L.R.) where Osler J. says that "several visits had been paid", implying that the visits had been paid before the date of the will — which is incorrect. Apparently the only connection between the testator and Audrey in the nine years prior to the will was a court order obtained in 1959 by Audrey against him for the support of her children.

⁵ Osler J. may have been moved partly by sympathy for the lawful wife and legitimate children, who had been abandoned by the testator. But they would be entitled to apply under the Dependents' Relief Act, R.S.O., 1960, c. 104, now R.S.O., 1970, c. 126, assuming s. 9 does not apply, for provision out of the estate. The *de facto* wife and illegitimate children have no such right: see s. 1(b) of the Act and Macdonnell and Sheard, *Probate Practice* (1953), p. 95.

wife, the intention to benefit Phyllis seems to me to be so clear that the case can be dismissed as one in which a single judge misread a particular will.⁶ With respect to the dispositions in favour of the children, however, more needs to be said to justify criticism of the decision.

The authority upon which Osler J. principally relied was a dictum of Lord Cairns in *Hill v. Crook*⁷:

And what appears to me to be the principle which may fairly be extracted from the cases upon the subject is this—the term “children” in a will *prima facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take.

But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take the bequest

The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term “children” not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children

In a recent article in the *Law Quarterly Review* Dr. J. H. C. Morris asserted that “Lord Cairns’ two exceptions to the rule are the only exceptions to the rule, and that, however probable it may be that the testator intended illegitimate children to take, they will not do so unless they can bring their case within one or other of the exceptions”.⁸ According to this point of view, the meaning of the term “children” is not to be ascertained in accordance with the ordinary rules of construction. The armchair evidence which would normally be available to shed light on the meaning of testamentary language is available only to show that it was impossible from the circumstances of the parties that any legitimate children could take. Apart from this special case, the claim of illegitimate children must be established from the face of the will itself, no matter how probable it is from the surround-

⁶ Later on I criticize the rule of construction that “children” means legitimate children. I do not here criticize the rule that “wife” means lawful wife. This latter rule, bearing in mind that it should give way to indications of a contrary intent (see, e.g., *Marks v. Marks* (1908), 40 S.C.R. 210), seems to me to be more defensible than the rule concerning children. It is of course arguable that the courts should not start with any *prima facie* meaning in the case of everyday words (see the differing views on this question in *Perrin v. Morgan*, [1943] A.C. 399), but it is not my purpose in this note to enter that debate.

⁷ (1873), L.R. 6 H.L. 265, at pp. 282-283.

⁸ Palm-tree Justice in the Court of Appeal (1966), 82 L.Q.Rev. 196, at p. 197.

ing circumstances that the testator intended to benefit illegitimate children.

Does *Hill v. Crook* bear out this harsh and inflexible doctrine? In *Hill v. Crook* the testator bequeathed property to "the children or child of my said daughter Mary Crook". Another clause referred to "my son-in-law, John Crook". Another clause referred to Mary Crook as "the wife of the said John Crook". At the time when the will was made Mary Crook was invalidly married to John Crook, who was her deceased sister's husband. She had had two children of that union, who by the law of that time were illegitimate, and she was pregnant with a third child, which was born after the date of the will and was also illegitimate.⁹ The testator knew all these facts.

The strict reading of Lord Cairns' dictum would exclude the evidence of the testator's knowledge of the state of the family at the time of the will, for it did not establish the "impossibility" of Mary having legitimate children.¹⁰ And yet Lord Cairns himself regarded the armchair evidence as admissible and relevant. He said: "In order to interpret the words of the will, it is always not only allowable, but it is the duty of the Court to obtain, the knowledge which the testator had of the state of his family."¹¹ A reading of the whole of Lord Cairns' speech makes clear that he did not intend his earlier dictum to be read as an exhaustive definition of the only two occasions when illegitimate children could take under a bequest to children.¹² The other members of the House, Lords Chelmsford and Colonsay, also relied on the armchair evidence.¹³ They did not approve or repeat the theory that there were only two exceptions to the rule that "children" means legitimate children. The actual decision in the case was unanimous *in favour of* the illegitimate children.

The fact is that the decision in *Hill v. Crook* was a benevolent one. Far from laying down strict rules designed to exclude illegitimate children, the House of Lords refused to follow earlier cases in which such rules had been laid down.¹⁴ Instead, their Lordships

⁹ It seems that this child did not join in the proceedings, so that the House of Lords did not have to decide whether an illegitimate child born after the date of the will could take: *infra*, footnote 20. *Contra*, 3 Jarman on Wills (8th ed., 1951), p. 1771, but see *Hill v. Crook*, *supra*, footnote 7, at pp. 285-286, per Lord Cairns.

¹⁰ Mary was obviously still capable of child-bearing because she was pregnant at the time of the will. Lord Cairns in *Hill v. Crook* conceded that "there was no reason why legitimate children might not take under the bequest of this will": *supra*, footnote 7, at p. 283.

¹¹ *Supra*, footnote 7, at p. 283.

¹² His reasoning appears more clearly from the penultimate paragraph of his opinion: *ibid.*, at p. 285.

¹³ *Ibid.*, at pp. 277 (Lord Chelmsford), 281 (Lord Colonsay).

¹⁴ See the account of the history of the law in Jarman, *op. cit.*, footnote 9, p. 1761.

decided that the ordinary "dictionary" principle was applicable to the term "children". Its *prima facie* meaning was confined to legitimate children, but if the testator's intention to include illegitimate children was clear from his language read in the light of the surrounding circumstances, then the court's duty was to accept his dictionary and to interpret his language as he intended it.

After *Hill v. Crook* the strict approach to "children" lingered on in that the courts occasionally insisted upon very clear indications of an intention to benefit illegitimate children.¹⁵ Some courts required that the inclusion of illegitimate children appear by "necessary implication", which had been defined by Lord Eldon as "so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed".¹⁶ This test sounds more severe than it is in actual application to the general run of cases. Jarman's conclusion is that "'necessary implication' at the present day, would appear to mean little more than construction (with the aid, if necessary, of extrinsic evidence), as opposed to conjecture".¹⁷ This certainly seems to me to be an accurate statement of the Canadian caselaw outside British Columbia.¹⁸

In British Columbia a new development occurred in 1950 when *Re Hogbin*¹⁹ was decided. In that case a testatrix had bequeathed the income of her residuary estate to her daughter Barbara, with remainder to Barbara's "children" or "child". Barbara died two years after the testatrix, having had one illegitimate child. Was the illegitimate child entitled to the residuary estate? There was nothing in the will to throw light on the meaning of the terms "children" or "child". Nor did the armchair evidence offer any guidance. The illegitimate child had in fact been born after the date of the will. In these circumstances the orthodox answer was clear. There was nothing to rebut the *prima facie* meaning of the term "child", which therefore excluded the illegitimate child.²⁰ Nevertheless, Manson J. in the Supreme Court of

¹⁵ *In re Dicker*, [1947] 1 Ch. 248, criticized in a note (1947), 63 L.Q. Rev. 149, is an extreme example; cf. note, (1949), 65 L.Q. Rev. 8.

¹⁶ *Wilkinson v. Adam* (1813), 1 V. and B. 422, at p. 466, 35 E.R. 163, at p. 180; quoted with approval by Lord Chelmsford in *Hill v. Crook*, *supra*, footnote 7, at p. 277.

¹⁷ Jarman, *op. cit.*, footnote 9, at p. 1755.

¹⁸ The only cases concerning illegitimate children (as opposed to adopted children and stepchildren) which I have been able to find are *Lobb v. Lobb* (1910), 21 O.L.R. 262, aff'd 22 O.L.R. 15; *Re Seibel*, [1925] 4 D.L.R. 923; *Re Millar*, [1937] 3 D.L.R. 234, aff'd [1938] 1 D.L.R. 65; *Re Brand* (1957), 7 D.L.R. (2d) 579. In addition, of course, there is *Re Herlichka* itself and the British Columbia cases cited, *infra*, footnotes 19 and 24.

¹⁹ [1950] 3 D.L.R. 843.

²⁰ The fact that the child was born after the date of the will, and therefore could not have been personally in the contemplation of the testatrix, would have strongly reinforced the *prima facie* meaning. At one

British Columbia held that the illegitimate child was entitled to the residuary estate. He held that the rule which restricted the *prima facie* meaning of the word "child" so as to exclude illegitimate children was a judge-made rule of public policy which no longer prevailed in British Columbia. It no longer prevailed because the public policy of the province, as evidenced by its statutes, was uniformly in the direction of removing the disabilities which attached to illegitimacy. This was so even in 1928 when this will had been made, for at that time the province had enacted statutes providing for the maintenance of illegitimate children, legitimating illegitimate children whose parents subsequently inter-married and permitting illegitimate children to inherit from their mother on intestacy. In these circumstances it was reasonable to presume that a testatrix in British Columbia would use the word "child" in its "ordinary meaning" as including an illegitimate child.

After 1950 several provinces, including British Columbia, amended their Wills Acts to give statutory force to the *Hogbin* rule.²¹ British Columbia's amendment, which was made in 1960, consisted of a new section in these terms:²²

31. In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother.

This provision applied only to wills made after 1960.²³ For wills made before 1960 the question whether *Hogbin* was rightly decided was still open.

Since 1960 the courts of British Columbia have had to decide three cases concerning wills made before 1960 in which the question has been whether an illegitimate child was included in the description "child", "children" or "issue".²⁴ In two of the cases the illegitimate child was born after the date of the will; and in none of the cases were there indications on the face of the will or in the surrounding circumstances which clearly indicated the illegitimate child.²⁵ In each of the three cases the decision

time the courts would not allow gifts to future illegitimate children at all, on grounds of public policy; see *Hill v. Crook*, *supra*, footnote 7, at p. 278, per Lord Chelmsford. This strict view has been relaxed, but the old law lingers on as a reinforcement of the *prima facie* meaning: see Jarman, *op. cit.*, footnote 9, pp. 1773-1783; *Re Millar*, [1937] 3 D.L.R. 234, *aff'd* [1938] 1 D.L.R. 65.

²¹ Alberta, S.A., 1960, c. 118, s. 34; British Columbia, S.B.C., 1960, c. 62, s. 31; Manitoba, S.M., 1964 (1st Sess.), c. 57, s. 34; New Brunswick, S.N.B., 1959, c. 15, s. 33; Saskatchewan, S.S., 1971, c. 67, s. 3. The U.K. has enacted a similar rule: Family Law Reform Act 1969, part II.

²² S.B.C., 1960, c. 62, s. 31; now R.S.B.C., 1960, c. 408, s. 31.

²³ *Ibid.*, s. 47.

²⁴ *Re Hervey* (1960), 30 D.L.R. (2d) 615; *Re Stevenson* (1966), 66 D.L.R. (2d) 717; *Re Dunsmuir* (1968), 67 D.L.R. (2d) 227; see also *Re Simpson Estate* (1969), 70 W.W.R. 626, 630, where these cases are approved.

²⁵ In *Re Hervey*, *supra*, footnote 24, where the illegitimate child was

was in favour of the illegitimate child, and the reasoning in *Re Hogbin* was expressly approved.

The result is that there are now four Canadian cases which decide that "children" *prima facie* includes illegitimate children as well as legitimate children. Admittedly the decisions are all at first instance. Admittedly they all come out of one province. And admittedly there are a few Canadian cases applying the old rule.²⁶ But the new rule has the overwhelming advantage that it will produce better and fairer results in the interpretation of wills. Attitudes to illegitimacy have changed. We no longer attempt to visit the sins of the fathers on the children. We no longer believe that recognition of the claims of illegitimate children will encourage immorality.²⁷ We are even becoming unsure of what we mean by "sin" and "immorality". And these changes are abundantly reflected in the statutes of every jurisdiction which provide for the support of illegitimate children, which legitimate many children who would have been illegitimate fifty years ago, and which place illegitimate children for many purposes on an equal footing with legitimate children.

Dr. J. H. C. Morris, in the article referred to earlier, concedes these points, but argues that the courts are powerless to change their rules of construction; to do so would be to usurp "the function of the legislature", and (apparently just as bad) would "require the rewriting of the whole of the chapters on gifts to children in the textbooks on wills".²⁸ But surely all but the most ardent advocates of the declaratory theory of the judicial function would allow the courts the power to acknowledge that the *prima facie* meaning of an ordinary word may change with the times. We are, after all, dealing only with a rule of construction. The new *prima facie* meaning would still give way to indications in the will itself or the circumstances surrounding its execution that the testator did indeed intend to exclude illegitimate children. The hard fact is that the decisions denying recovery to illegitimate children, and the textbook accounts of the law, have utterly failed to convince testators that when they use the term "children" they must use it in the sense of legitimate

born before the date of the will, the only armchair evidence was that the testator recognized the illegitimate child of his sister as his nephew, and was on affectionate terms with him. Whittaker J. (at p. 617) seemed to think that this would have been sufficient to satisfy the old rule in *Hill v. Crook*, but this is dubious. In *Re Stevenson, supra*, footnote 24, and *Re Dunsmuir, supra*, footnote 24, the illegitimate child was born after the date of the will, and the rule in *Hill v. Crook*, no matter how generously interpreted, could not possibly have sustained the decision: see *supra*, footnote 20.

²⁶ Cases cited, *supra*, footnote 18.

²⁷ *Cf. Sydall v. Castings Ltd.*, [1966] 3 All E.R. 770, at pp. 772-773, per Lord Denning, M.R.

²⁸ *Op. cit.*, footnote 8, at p. 202.

children. Instead they persist in using the term in its more usual sense.²⁹ The time has come for Canadian courts "to hoist the white flag".³⁰

P. W. HOGG*

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²⁹ As is pointed out in a note, (1947), 63 L.Q. Rev. 149, the testator who writes his own will is unaware of the rules of construction; the testator who has his will professionally drawn is also unaware of the rules of construction and for that reason may not disclose to his solicitor that some or all of his intended beneficiaries are illegitimate.

³⁰ *Re Jennings*, [1930] Ir. R. 196, at p. 200, per Meredith J. speaking of the judicial interpretation of the word "money"; quoted in *Re Hogbin*, *supra*, footnote 19, at p. 848.

Since writing this comment, I have been informed by counsel for the Official Guardian, who represented the illegitimate children in the proceedings, that no appeal was taken from Osler J.'s decision because a settlement was arranged in which the estate was shared by both families.

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¹ *Re Baden's Deed Trusts, Baden v. Smith*, [1967] 3 All E.R. 159, [1967] 1 W.L.R. 1457 (Ch. D.), [1969] 1 All E.R. 1016, [1969] 2 Ch. 388, [1969] 3 W.L.R. 12 (C.A.); *sub nom. McPhail v. Doulton*, [1970] 2 All E.R. 228, [1971] A.C. 424, [1970] 2 W.L.R. 1110 (H.L.); *Re Baden's Deed Trusts (No. 2), Baden v. Smith*, [1971] 3 All E.R. 985 (Ch. D.); *The Times*, March 27th, 1972 (C.A.).