A Aristaire

1 Bernice’s case-in-chief

a Grammatical

1) Ordinary sense (plain meaning) .......................................................... 0.5 1 1.5
   * Conception now means “fertilization” ........................................ 1 1.5 2
   † Aristarian Dictionary ................................................................. 0.5 1

2) Technical sense .............................................................................. 0.5 1 1.5
   * In new legislation – APC art. 35 – legislature defines “conceived” as “merely fertilized” .......................................................... 1 1.5 2

b Logical

1) A pari .................................................................................................. 0.5 1 1.5
   * No significant difference between child that results from in vitro embryo implanted moments after father’s death and child that results from in vitro embryo implanted moments before father’s death; both are father’s flesh and blood . . . 1 1.5 2 2.5

2) Ad absurdum .................................................................................... 0.5 1 1.5
   * Given the close analogy between consented-to post- and pre-death implantees (see a pari), it would be absurd (Primeaux says “arbitrary”) to distinguish between them .
      † Both “wanted” by father ............................................................ 1 1.5
      † Both his “flesh and blood” ....................................................... 1 1.5

3) Ab auctoritate .................................................................................. 0.5 1 1.5
   * Doctrine (Simone Primeaux): a child who results from a posthumous implantation procedure should be deemed to have existed as of F’s death provided that (i) he was fertilized in vitro before F’s death, (ii) F gave M permission to implant the in vitro embryo after his death, and (iii) the lapse of time between F’s death and the implantation procedure is brief. .......................................................... 1 1.5 2 2.5 3

4) In pari materia .................................................................................. 0.5 1 1.5 2
   * ACC art. 953 should be interpreted in the light of APC art. 35 inasmuch as both concern the same subject matter .......................................................... 1 1.5 2
   * APC art. 35 uses the expression “conceived” in contrast to that of “implanted” . . .
      .......................................................... 1 1.5 2

5) A rubrica .......................................................................................... 0.5 1
   * “Unborn”, in contemporary language, would include “fertilized in vitro” . . . 0.5 1

c Historical

1) Source analysis .............................................................................. 0.5 1 1.5 2
   * ACC art. 953 was based on FCC art. 953 ........................................ 0.5 1
   * Recent interpretations of FCC art. 953 indicate that fertilization itself, without implantation, is sufficient for “existence” / “conception” .......................................................... 1 1.5 2
   † X (on behalf of Z) v. Y (1999) .......................................................... 0.5 1
   † VOCABULARIE JURIDIQUE (1985) .............................................. 0.5 1
   † Act No. 3 of Nov. 7, 2000 (?) ....................................................... 0.5 1

2) Legislative history (post hoc) .......................................................... 0.5 1 1.5 2
   * In new legislation – APC art. 35 – legislature defines “conceived” as “merely fertilized” .......................................................... 1 1.5 2
   * Severity of penalty suggests legislature thought of embryos as more than mere property .......................................................... 1 1.5 2

d Teleological ...................................................................................... 0.5 1 1.5 2
   * Purpose of the “exceptional” rule that extends capacity to inherit to the “unborn” is to assure that all those who are the “flesh and blood” of the de cujus get to share in his estate . . .
      .......................................................... 1 1.5 2
This purpose if reflected in fact that in ACC art. 953, the legislature extended inheritance rights to the entirety of those who, at that time, could possibly “exist” before birth, i.e., those in the womb.

That purpose would be furthered were one to accord capacity to inherit to posthumously implanted children: they are, too, their father’s “flesh and blood.”

Times have changed: advent of new assisted conception technologies that drafters of original ACC articles could not even have imagined; therefore, the original understanding of the legislation must be “updating” in the light of how a contemporary legislator would understand it.

In these times, people consider *in vitro* embryos to “exist” in some sense and, more importantly, think that, even when they aren’t implanted until after the father has died, the resulting children are still “his” and should share in his estate.

Evidence of this contemporary viewpoint

Recent legislation

- Aristaire: APC art. 35
- France: Act No. 3 of Nov. 7, 2000
- England: Act No. 3 of Nov. 7, 2000

Recent jurisprudence

- France: *X (on behalf of Z) v. Y* (1999)

Equity / free scientific research

- Wertungsjurisprudenz

Times have changed: advent of new assisted conception technologies that drafters of original ACC articles could not even have imagined; therefore, the legislation must not be “extended” to cover this case; instead, the court must devise an appropriate rule of its own.

In these times, people consider *in vitro* embryos to “exist” in some sense and, more importantly, think that, even when they aren’t implanted until after the father has died, the resulting children are still “his” and should share in his estate.

Evidence of this contemporary viewpoint

Recent legislation

- Aristaire: APC art. 35
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Recent jurisprudence

- France: *X (on behalf of Z) v. Y* (1999)

Of grammatical (ordinary sense) argument

1) Explication of argument

- When ACC arts. were adopted, “conceived” meant “fertilized and implanted”

- Aristarian Dictionary

2) Rebuttal of argument

- Meanings of terms can (and should) evolve as the culture evolves

Of logical arguments

1) *Ab autoritate* argument

a) Explication of argument
A (on behalf of C) v. B (Aris. Sup. Ct. 2000) .......................... 0.5 1
† “Unless and until an in vitro embryo is implanted in the mother, the supposed ‘child’ does not exist and, therefore, is not a person . . . .” . . . 1 1.5 2

b) Rebuttal of argument
* Distinguishable: issue involved there was “ripeness” of demand for child support; here, no such ripeness problem, for child has been implanted & born 1 1.5 2
* Decision is “wrong,” i.e., a misinterpretation .......................... 1 1.5 2
† Not absolutely binding, thanks to jurisprudence constante . . . . . 1 1.5 2

2) In pari materia argument .................................................. 0.5 1
a) Explication of argument
* ACC art. 953 should be interpreted in the light of ACC art. 954, inasmuch as both concern the same subject matter .......................... 1 1.5 2
* ACC art. 954 uses the expressions “conceived” and “in its mother’s womb” as equivalents .......................... 1 1.5 2

b) Rebuttal of argument
* Meanings of terms can (and should) evolve as the culture evolves . 0.5 1 1.5

3) Ad absurdum argument .................................................. 0.5 1
a) Explication of argument
* Bernice’s argument, if carried to its logical conclusion, would produce absurd results, namely, that children not born until decades or centuries after their fathers’ deaths could still qualify as his successors .......................... 1 1.5 2 2.5

b) Rebuttal of argument
* The problem of the supposed “absurd” case is not presented here; Bernice was conceived only year after her father’s death .......................... 1 1.5 2
* When such a case is presented, the courts can, by interpretation, deal with it appropriately .......................... 1 1.5 2

4) Ab inutilitate argument .................................................. 0.5 1
a) Explication of argument
* Bernice’s argument renders much of ACC art. 954 superfluous, in particular, all references to “in the mother’s womb” .......................... 1 1.5 2 2.5

b) Rebuttal of argument
* Not necessarily: language is still useful to show that already implanted embryos can inherit .......................... 1 1.5 2

c) Of historical argument .................................................. 0.5 1
1) Source argument
a) Explication of argument
* ACC art. 954 drawn from French commentaries on FCC art. 953 . . . . 0.5 1
* Commentators both think of “conception” in terms of fertilization and implantation .......................... 1 1.5 2
† Duranton: fetus is “a part of the body or the mother” .......................... 0.5 1
† Toullier: conceived means “in the womb of his mother” .......................... 0.5 1

b) Rebuttal of argument
* Meanings of terms can (and should) evolve as the culture evolves . 0.5 1
* In French culture, such an evolution has occurred .......................... 1 1.5 2
† Legislatively: Act No. 3 (Nov. 7, 2000) .......................... 1 1.5 2
† Jurisprudentially: X (on behalf of Z) v. Y (Cr. App. Aix 1999) . . 1 1.5 2
† Linguistically: Vocabulaire juridique (new ed.) .......................... 1 1.5 2

2) Legislative history argument
a) Explication of argument
* Legislature, though aware of new developments in assisted conception technology, did nothing to amend CC arts. 953 & 954 . . . . . . . 1 1.5 2

b) Rebuttal of argument
* Could be because–
**B**

**Dexia**

1. **Bernice’s case-in-chief**
   
   a. **Logic**
      
      1) **Deduction from case law**
         
         * Rule of *Downs*: one inherits if one was “conceived”
         * Bernice was “conceived”
         † One is conceived so long as one has been fertilized
         ‡ Dexion dictionary

      2) **Induction from case law**
         
         * The true “rule” behind *Downs, Hogan*, etc. is that all those who are the “flesh and blood” of the *de cujus* get to share in his estate

      3) **Analogy from case law**
         
         * Under the rule of *Downs, Hogan*, etc., a child that results from in vitro embryo implanted moments *before* father’s death would be able to inherit
         * No significant difference between such a child and one that results from in vitro embryo implanted moments *after* father’s death
         † Authority: Simon First
         † Details: ‡ Both “wanted” by father
         ‡ Both his “flesh and blood”

   b. **Authority**
      
      1) **Domestic scholarship (Simon First):** a child who results from a posthumous implantation procedure should be deemed to have existed as of F’s death provided that (i) he was fertilized in vitro before F’s death, (ii) F gave M permission to implant the in vitro embryo after his death, and (iii) the lapse of time between F’s death and the implantation procedure is brief.

      2) **Foreign (English) cash law:** *S (on behalf of Z) v. Y* (1999)
         
         † Child implanted after father’s death held to “exist” and, so, to be able to inherit under rule of *Blake*, apparent source of *Downs* rule
         ‡ *Blake* was apparent source of *Downs* rule

   c. **Policy**
      
      a) **Rationale behind old rules (ratio decidendi)**
         
         * Purpose of the rule of *Downs, Hogan*, etc. was to assure that all those who are the “flesh and blood” of the *de cujus* get to share in his estate
         * That purpose would be furthered were one to accord capacity to inherit to posthumously implanted children: they are their father’s “flesh and blood”

      b) **Purpose behind Criminal Statutes § 35**
         
         * Need to protect *in vitro* embryos physically (so why not financially?)

      c) **Contemporary values**
         
         * Times have changed: advent of new assisted conception technologies that judges who created inheritance precedents could not even have imagined
         * In these times, people consider *in vitro* embryos to “exist” in some sense and, more importantly, think that, even when they aren’t implanted until after the father has died, the resulting children are still “his” and should share in his estate
         † Evidence of this contemporary viewpoint
         ‡ Recent legislation
         ‡ Dexion: Criminal Statutes § 35
         ‡ France: Act No. 3 of Nov. 7, 2000
         ‡ England: Act No. 3 of Nov. 7, 2000
         ‡ Recent jurisprudence
Bernice’s rebuttal

a  Deduction from recent precedent

1) Explication of argument

*  A (on behalf of C) v. B (Aris. Sup. Ct. 2000) ................................. 0.5 1
†  “Unless and until an in vitro embryo is implanted in the mother, the supposed ‘child’ does not exist and, therefore, is not a person . . . . ” ........................ 1 1.5 2
†  Binding under stare decisis: issued by highest court in Dexia ........................ 1 1.5 2

2) Rebuttal of argument

*  Distinguishable: issue involved there was “ripeness” of demand for child support; here, no such ripeness problem, for child has been born ........................ 1 1.5 2 2.5
*  Quoted statement is dicta: far broader than needed to resolve case ........................ 1 1.5 2

b  “Plain meaning” of ancient precedent ................................................................. 0.5 1

1) Explication of argument

*  When rule of Downs was adopted, “conceived” meant “fertilized and implanted” ... 1 1.5 2
†  Hogan, decided just 2 years later, uses the expressions “conceived” and “in its mother’s womb” as equivalents ................................. 1 1.5 2
†  Dexian Dictionary ................................. 0.5 1

*  Distinctions

†  Downs is distinguishable: the concern in that case was that, given the probable time of conception, the child might not have been genetically related to the father; here, the genetic connection of father to child is not in doubt ........................ 1 1.5 2 2.5
†  Hogan is distinguishable:
‡  Different kind of right at stake, i.e., tort damages ................................. 1 1.5
‡  Different kind of situation: only in utero children might possibly suffer in utero damages ................................. 1 1.5

*  Meanings of terms can (and should) evolve as the culture evolves ........................ 0.5 1 1.5

c  Absurdity argument ................................................................. 0.5 1

1) Explication of argument

*  Bernice’s argument, if carried to its logical conclusion, would produce absurd results, namely, that children not born until decades or centuries after their fathers’ deaths could still qualify as his successors ................................. 1 1.5 2 2.5

2) Rebuttal of argument

*  The problem of the supposed “absurd” case is not presented here; Bernice was conceived only year after her father’s death ................................. 1 1.5 2
*  When such a case is presented, the courts can deal with it appropriately by limiting inheritance rights to those who are implanted “shortly” after F’s death ................................. 1 1.5 2

d  Historical argument ................................................................. 0.5 1

1) Explication of argument

*  Rule of Downs was drawn from English cases ................................. 0.5 1
*  English decisions contemplated “conception” in terms of fertilization and implantation ................................. 1 1.5 2
†  Blake v. Wordsworth: “conceived” child had been both fertilized and implanted ................................. 0.5 1
†  Tudor v. Windsor: conceived means “in the womb of his mother” ........................ 0.5 1

2) Rebuttal of argument

*  Blake & Tudor have been misinterpreted: the rule for which they really stand is that all those who are the “flesh and blood” of the de cujus get to share in his estate ................................. 1 1.5 2 2.5 3
*  Meanings of terms can (and should) evolve as the culture evolves ........................ 0.5 1
*  In English culture, such an evolution has occurred ................................. 1 1.5 2
† Legislatively: Act No. 3 (Nov. 7, 2000) .......................... 1 1.5 2
† Jurisprudentially: X (on behalf of Z) v. Y (Ct. App. 1999) .......... 1 1.5 2
† Linguistically: BLACK’S LAW DICTIONARY (new ed.) ............ 1 1.5 2