UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 68 | Number 6 Article 21

9-1-1990

Rawls v. Early: A Refusal to Imply Conditions of Survivorship upon Ascertained Contingent Remaindermen

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Rawls v. Early: A Refusal to Imply Conditions of Survivorship Upon Ascertained Contingent Remaindermen

Courts traditionally have considered the intent of the testator in construing future interests created by a testator's will.[1] Yet the decision of courts to impose a condition of survivorship upon a contingent future interest often frustrates the intent of the testator.[2] As recently as 1966, in *Lawson v. Lawson*,[3] the North Carolina Supreme Court implied a condition of survivorship upon a contingent gift to a class, invalidating the interests of the contingent remaindermen who predeceased the life tenant.[4] Until 1989, however, North Carolina courts had not considered whether the requirement of survivorship for contingent class gifts should apply to the contingent interests of ascertained individuals. In *Rawls v. Early*[5] the North Carolina Court of Appeals specifically refused to extend the class survivorship requirement to individuals named as contingent remaindermen.[6] In its decision, the court relied upon the established doctrine of transferability of contingent interests and the distinction between contingent interests of a class and contingent interests of an individual.[7]

This Note examines the history of the implied survivorship requirement for contingent class gifts and the reasons why such a requirement arose. The Note explains the rule of transferability of contingent interests, including the distinction between contingencies based upon an uncertain event and those based upon an unascertainable person. In addition, it discusses the advantages and disadvantages of an implied requirement of survivorship. The Note concludes that the North Carolina Court of Appeals' reliance upon the doctrine of transferability effectively refutes implied conditions of survivorship for contingent interests in ascertained individuals.

In *Rawls v. Early*[8] the North Carolina Court of Appeals considered "whether in addition to being subject to the condition precedent of the life tenant not being survived by children, the contingent remainder interest of an ascertained remainderman is also subject to an implied condition of the remainderman surviving the life tenant."[9] The court considered the rights of the parties according to the will of the testator, Telie M. Odom, who died in 1963.[10]

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1. *See* Jernigan v. Lee, 279 N.C. 341, 344, 182 S.E.2d 351, 354 (1971); *see also* 1 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 3, at 6 (2d ed. 1956) ("In no other way is it possible to understand the meaning of many of the provisions in [the law of future interests] . . . than by carefully considering the purposes which were sought by those creating the interests involved.").

2. *See* Note, *The* Schau v. Cecil *Survival Requirement: Consequences for Iowa Property Law*, 63 IOWA L. REV. 924, 945-46 (1978).

3. 267 N.C. 643, 148 S.E.2d 546 (1966).

4. *Id.* at 645, 148 S.E.2d at 548.

5. 94 N.C. App. 677, 381 S.E.2d 166, *disc. rev. denied*, 325 N.C. 547, 385 S.E.2d 500 (1989).

6. *Id.* at 681-82, 381 S.E.2d at 169.

7. *Id.*

8. 94 N.C. App. 677, 381 S.E.2d 166, *disc. rev. denied*, 325 N.C. 547, 385 S.E.2d 500 (1989).

9. *Id.* at 679, 381 S.E.2d at 168.

10. *Id.* at 678, 381 S.E.2d at 167.

The third paragraph of the will granted a life estate to her son, Norman Ray Odom, and continued:

> [A]nd if he has children then to his said children in fee simple, and if the said Norman Ray Odom shall die and does not leave children living at the time of his death, then I give and devise my said real estate to Izetta Rawls, my niece, in fee simple.[11]

Norman Ray Odom, the life tenant, died childless in 1985.[12] Thus, the contingent remainder in his children never vested. Izetta Rawls died in 1978, survived by her heirs at law, Ethel Rawls and Cula Early.[13] As the heirs of Izetta Rawls, Ethel Rawls and Cula Early assumed that they each received an interest in the property of Telie Odom. In November of 1986, Ethel Rawls conveyed her one-half undivided interest in the property to the grantee, Douglas Rawls.[14] Douglas Rawls sought to partition the property, and the trial court allowed the heirs at law of Norman Ray Odom to intervene.[15] According to the heirs, because Izetta Rawls failed to survive the life tenant, her interest in the property never vested.[16] Failure of the devise according to the will of the testator would result in the property passing through intestacy, and because the testator's only son, Norman Ray Odom, would have received the property, the property was inheritable by Norman's heirs upon his death.

The trial court agreed with the heirs of Norman Ray Odom.[17] According to the lower court, because Izetta Rawls predeceased the life tenant, her contingent remainder failed to vest. As a result, Ethel Rawls and Cula Early never inherited the property from Izetta Rawls, and the deed from Ethel Rawls to Douglas Rawls did not convey an interest.[18]

The North Carolina Court of Appeals agreed with the lower court's decision that Izetta Rawls held a contingent remainder before the death of the life tenant without children.[19] Nevertheless, the court of appeals reversed the trial court, finding that the contingent remainder did vest in Izetta Rawls.[20] The court reasoned that "a contingent remainder may be assigned *where the ultimate taker is ascertained*."[21] The alternative contingent remainder to Izetta depended upon an uncertain event: the life tenant's death without children.[22] Izetta Rawls, as the ascertained "ultimate taker," could convey her interest,[23] and her heirs

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 679, 381 S.E.2d at 167.
15. *Id.* at 678, 381 S.E.2d at 167.
16. *Id.* at 681, 381 S.E.2d at 169; *see also* Intervenor Respondent Appellees' Brief at 16, *Rawls* (No. 886SC867).
17. *Rawls*, 94 N.C. App. at 679, 381 S.E.2d at 167-68.
18. *Id.* at 679, 381 S.E.2d at 168.
19. *Id.* at 680, 381 S.E.2d at 168.
20. *Id.* at 681, 381 S.E.2d at 169.
21. *Id.* (quoting Davis v. Davis, 3 N.C. App. 536, 541, 165 S.E.2d 553, 557 (1969) (emphasis added)).
22. *Id.* at 680, 381 S.E.2d at 168.
23. *Id.* at 681, 381 S.E.2d at 169.

inherited her interest upon her death.[24]

North Carolina joined the majority of other jurisdictions with the court of appeals' decision in *Rawls*. Most states do not impose an implied survival requirement.[25] A few states, by contrast, will void a contingent remainder or an executory devise to an ascertained individual if the individual predeceases the life tenant.[26]

The court of appeals allowed the alternative contingent remainder to vest in Izetta Rawls; the contingent remainder to the children of Norman Ray Odom (the life tenant) failed upon his death without children.[27] Earlier North Carolina courts, relying upon the common law, would have invalidated the alternative contingent remainder to Izetta Rawls upon creation of the interest.[28] Before 1827 North Carolina courts held that a devise "to A for life, and if A should die with issue, to A's issue; but if A dies without issue, to B" required A to die with issue *during* the testator's life.[29] Thus, the contingent remainder vested at the death of the testator, and if A did not die during the testator's lifetime, the contingent remainder to B failed.[30] The North Carolina court explained in *Sain v. Baker*:

> [T]his [interpretation] was a strained construction, for the will speaks as of the time of the testator's death, and naturally would contemplate the death of the devisee, without issue, at a subsequent date. The rea-

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24. *Id.* at 682, 381 S.E.2d at 169.

25. *See, e.g., In Re* Ferry's Estate, 55 Cal. 2d 776, 789, 361 P.2d 900, 904-05, 13 Cal. Rptr. 180, 185 (1961); Jossey v. Brown, 119 Ga. 758, 764, 47 S.E. 350, 353 (1904); Evans v. Giles, 83 Ill. 2d 448, 456, 415 N.E.2d 354, 357-58 (1980); Saulsberry v. Second Nat'l Bank, 400 S.W.2d 506, 507 (Ky. 1966); Fulton v. Teager, 183 Ky. 381, 386-88, 209 S.W. 535, 538 (1919); Fisher v. Wagner, 109 Md. 243, 256, 71 A. 999, 1004 (1909); Tapley v. Dill, 358 Mo. 824, 830-31, 217 S.W.2d 369, 372-73 (1949); Concord Nat'l Bank v. Hill, 113 N.H. 490, 494-95, 310 A.2d 130, 132-33 (1973); King v. First Nat'l Bank, 135 N.J. Eq. 319, 324-25, 38 A.2d 445, 448 (1944); *In Re* Young's Will, 62 Misc. 2d 86, 91, 308 N.Y.S.2d 585, 590 (1969); Moore v. McAlester, 428 P.2d 266, 271 (Okla. 1967); Loring v. Arnold, 15 R.I. 428, 429, 8 A. 335, 336 (1887); Black v. Todd, 121 S.C. 243, 252-53, 113 S.E. 793, 796 (1922); Johnson v. Moore, 223 S.W.2d 325, 327-28 (Texas Ct. App. 1949); Shufeldt v. Shufeldt, 130 Wash. 253, 266-67, 227 P. 6, 11 (1924).

In addition, many jurisdictions allow members of a class who predeceased the life tenant to transfer or devise their contingent interests. *See, e.g.*, Williams v. Houck, 143 Conn. 433, 442-43, 123 A.2d 177, 181 (1956); Owens v. Davis, 224 Ga. 146, 148-49, 160 S.E.2d 352, 354 (1968); Hofing v. Willis, 31 Ill. 2d 365, 373, 201 N.E.2d 852, 856 (1964); *In Re* Jamieson Estate, 374 Mich. 231, 252-53, 132 N.W.2d 1, 12-13 (1965); Colony v. Colony, 97 N.H. 386, 390-91, 89 A.2d 909, 911-12 (1952); *In Re* Estate of Stevens, 155 N.J. Super. 575, 581, 383 A.2d 135, 138 (1978); Daniel v. Donohue, 215 Or. 373, 392, 333 P.2d 1109, 1118 (1959); *In Re* Estate of Dickson, 396 Pa. 371, 373-74, 152 A.2d 680, 681-82 (1959); *In Re* Massey's Estate, 235 Pa. 289, 293, 83 A. 1087, 1089 (1912); Rennolds v. Branch, 182 Va. 678, 686-88, 29 S.E.2d 847, 850 (1944); Patton v. Corley, 107 W. Va. 318, 320-21, 148 S.E. 120, 121 (1929).

26. *See* Fletcher v. Hurdle, 259 Ark. 640, 646-47, 536 S.W.2d 109, 112-13 (1976); Schau v. Cecil, 257 Iowa 1296, 1301, 136 N.W.2d 515, 519 (1965); Snow v. President of Bowdoin College, 133 Me. 195, 198, 175 A. 268, 270 (1934). For criticism of *Fletcher* and *Schau*, see Note, Fletcher v. Hurdle: *Implied Condition of Survivorship to Contingent Remainders*, 31 ARK. L. REV. 134 (1977) [hereinafter *Implied Condition of Survivorship*]; Note, *Future Interests—Transmissibility of Contingent Interests*, 20 ARK. L. REV. 190 (1966) (discussing *Schau v. Cecil*); Note, *supra* note 2; Note, *Future Interests—Implying a Requirement of Survival in Future Interests: Continued Confusion*—Schau v. Cecil, 65 MICH. L. REV. 203 (1966) [hereinafter *Future Interests*].

27. *Rawls*, 94 N.C. App. at 680-81, 381 S.E.2d at 168-69.

28. Sain v. Baker, 128 N.C. 256, 258-59, 38 S.E. 858, 859 (1901).

29. *See id.* at 258, 38 S.E. at 859.

30. *See* Buchanan v. Buchanan, 99 N.C. 308, 311-12, 5 S.E. 430, 432 (1888).

> son given, however, was that if it was held to mean a dying after the testator's death, without heirs, or without issue, that would be by common law rules any future failure of heirs, and the devise would fail for remoteness.[31]

The Statute of 1827[32] altered the common law's "strained construction."[33] The statute established a definite time for the vesting of the estate and determined that the contingency (the life tenant's failure to have children) should remain in effect until the death of the life tenant.[34] Dying without issue became "referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person."[35] The Statute of 1827, now codified as section 41-4 of the North Carolina General Statutes, has become such a well-established doctrine that the *Rawls* court assumed, without discussion, that the estate would vest at the life tenant's death with or without issue.[36] Although perhaps taken for granted in *Rawls*, earlier courts' interpretations of section 41-4 contributed to the implied requirement for survivorship in contingent gifts to classes.[37] Because the North Carolina Court of Appeals distinguished between contingent remainders to individuals and contingent remainders to classes in *Rawls*,[38] the history of the implied survivorship requirement for contingent class interests becomes important in understanding such a distinction.

The early rule for class gifts in North Carolina, represented by *Sanderlin v. Deford*,[39] did not require members of a class with a contingent future interest to survive the life tenant.[40] The testator in *Sanderlin* devised a life estate to his son, and at the son's death, to the heirs of the son's body; and if the son died without heirs, to the children of W.W. and Maxcy Sanderlin.[41] The son died without issue, and several of W.W. and Maxcy Sanderlin's children predeceased the life tenant.[42] The court concluded that the administrator of the deceased children's estates received a share of the property, along with the surviving children of

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31. *Sain*, 128 N.C. at 258, 38 S.E. at 859.

32. Act effective Jan. 15, 1828, ch. 7, 1827-1828 N.C. Laws 13 (codified at N.C. GEN. STAT. § 41-4 (1984)).

33. *Sain*, 128 N.C. at 258-59, 38 S.E. at 859. According to the statute:

> Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children . . . shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child . . . living at the time of his death, or born to him within 10 lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it.

N.C. GEN. STAT. § 41-4 (1984).

34. Bell v. Keesler, 175 N.C. 525, 528, 95 S.E. 881, 882 (1918).

35. Patterson v. McCormick, 177 N.C. 448, 455, 99 S.E. 401, 404 (1919).

36. *See Rawls*, 94 N.C. App. at 680, 381 S.E.2d at 168.

37. *See infra* notes 45-56 and accompanying text.

38. *Rawls*, 94 N.C. App. at 681, 381 S.E.2d at 169.

39. 47 N.C. (1 Jones) 75 (1854).

40. *Id.* at 79.

41. *Id.* at 76.

42. *Id.* at 75.

W.W. and Maxcy Sanderlin.[43] The court stated that "[t]he legacy given to the children as a class was necessarily executory and contingent, and yet . . . each child took such an interest in it that upon his or her death, before the contingent event happened, it devolved upon his or her representatives."[44]

North Carolina courts after *Sanderlin* did not adhere to the rule it established, however. Courts began to interpret the language of section 41-4 as requiring that "the roll must be called as of the date of the death of the first taker"[45] and "[o]nly those who can answer the roll immediately . . . acquire any estate in the properties granted."[46] One student author pointed to the use of the "roll call" language as "apparently [deterring] the court from the rule set forth in *Sanderlin*."[47] "[I]t makes sense to call the roll"[48] when the testator expressly provides that only surviving members of a class receive an interest.[49] Yet North Carolina courts, relying upon the cases addressing express survivorship requirements, have interpreted the "roll call" language to imply a survival requirement, even when the testator's will expressed only a condition precedent unrelated to survival.[50]

Lawson v. Lawson[51] provides the clearest example of the misuse of the "roll call" language to imply a survivorship requirement.[52] In *Lawson* the testator devised a life estate to her daughter, and at her death "to her children, if any, in fee simple; if none to the whole brothers and sisters of [her] daughter" in fee simple.[53] Although the contingent interest of the brothers and sisters depended only upon the life tenant's death without children, the North Carolina Supreme Court determined that the brothers and sisters who predeceased the life tenant "could not answer the roll call at her death."[54] Further, "[o]nly those who can

43. *Id.* at 80.

44. *Id.* at 79; *accord* Newkirk v. Hawes, 58 N.C. 265, 268 (1859) (because the contingent remainder depended upon an uncertain event, rather than an uncertain person, the contingent remainder to the "lawful heirs of the testator's body" vested in the estates of the class members who predeceased the life tenant).

45. Turpin v. Jarrett, 226 N.C. 135, 136, 37 S.E.2d 124, 126 (1946).

46. Strickland v. Jackson, 259 N.C. 81, 84, 130 S.E.2d 22, 25 (1963); *accord* Wachovia Bank & Trust Co. v. Schneider, 235 N.C. 446, 453, 70 S.E.2d 578, 583 (1952), Wachovia Bank & Trust Co. v. Waddell, 234 N.C. 34, 36-37, 65 S.E.2d 317, 319 (1951).

47. Note, *Future Interests—Contingent Class Gifts—Implied Conditions of Survivorship*, 45 N.C.L. REV. 264, 268 (1966).

48. Roberts, *Class Gifts in North Carolina—When Do We "Call The Roll"?*, 21 WAKE FOREST L. REV. 1, 18 (1985).

49. *Id.* at 18 & n.113 (citing, among others, Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973); Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963); and Strickland v. Jackson, 259 N.C. 81, 130 S.E.2d 22 (1963)).

50. *E.g.*, Lawson v. Lawson, 267 N.C. 643, 644-45, 148 S.E.2d 546, 548 (1966); Tunnell v. Berry, 73 N.C. App. 222, 226-27, 326 S.E.2d 288, 291, *disc. rev. denied*, 313 N.C. 612, 332 S.E.2d 184 (1985); *see* Note, *supra* note 47, at 268-69 (The *Lawson* court relied upon the "roll call" language used to interpret an express survivorship requirement to imply a condition of survival. "[A] rule evolving from express conditions of survivorship should afford no basis for an implication of survival.").

51. 267 N.C. 643, 148 S.E.2d 546 (1966).

52. Roberts, *supra* note 48, at 22.

53. *Lawson*, 267 N.C. at 643, 148 S.E.2d at 547.

54. *Id.* at 645, 148 S.E.2d at 548.

answer the roll . . . acquire any estate in the properties granted;"[55] therefore, the interests of the predeceased class members failed to vest. The *Lawson* court implied "a survival requirement on the alternative contingent remaindermen"[56] designated as a class.

North Carolina courts historically have not imposed such a requirement of survival upon individually named contingent remaindermen.[57] Although the North Carolina Supreme Court considered the effect of an alternative contingent remainder to a class in *Sanderlin v. Deford*,[58] the court noted that "if the children, instead of being designated as a class, had each been named personally, the interests, though contingent, would have devolved upon the administrators of such of them as died in the life-time of [the life tenant]."[59]

In allowing the devisability of contingent future interests, North Carolina courts have distinguished between remainders contingent upon an unascertained person (such as a gift to the children of A when A has no children) and remainders contingent upon an uncertain event (such as a devise to B if A dies without children).[60] Accordingly, "contingent interests, such as contingent remainders, springing uses, and executory devises may be 'sold, assigned, transmitted or devised' provided the identity of the persons who will take the estate upon the happening of the contingency be ascertained."[61] As an ascertained individual, rather than a member of a class, B may convey his contingent interest, even before the occurrence of the contingent event.[62] Moreover, B's death prior to the event does not invalidate his interest.[63] The unborn children of A, however,

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55. *Id.* (quoting Strickland v. Jackson, 259 N.C. 81, 84, 130 S.E.2d 22, 25 (1963)).

56. *Rawls*, 94 N.C. App. at 681, 381 S.E.2d at 169.

57. *See id.* at 681, 381 S.E.2d at 169 ("North Carolina courts have seemed to apply different rules of survivorship according to whether the contingent remainder interest was a class gift or a gift to ascertained individuals.").

58. 47 N.C. (1 Jones) 75 (1854).

59. *Id.* at 77; *accord* Jernigan v. Lee, 279 N.C. 341, 346, 182 S.E.2d 351, 355 (1971) (executory devisee's ability to convey his future interest did not depend upon his surviving previous devisees); Seawell v. Cheshire, 241 N.C. 629, 86 S.E.2d 256 (1955) (Individually named beneficiaries of a testamentary trust, with a contingent remainder dependent upon the death of the testator's son without issue, predeceased the son. *Id.* at 632-33, 86 S.E.2d at 259. The supreme court affirmed the lower court's decision, allowing the trust property to vest in the heirs of each deceased individual beneficiary. *Id.* at 638, 86 S.E.2d at 263.); Davis v. Davis, 3 N.C. App. 536, 541, 165 S.E.2d 553, 557 (1969) (ascertained individual with a remainder contingent upon the life tenant's death without issue could assign her interest before the life tenant's death); *see also* Coddington v. Stone, 217 N.C. 714, 722, 9 S.E.2d 420, 425 (1940) ("the roll call principle does not apply" to beneficiaries named as individuals rather than as a class).

60. *See* Newkirk v. Hawes, 58 N.C. (1 Jones Eq.) 265, 267 (1859).

61. Jernigan v. Lee, 279 N.C. 341, 345, 182 S.E.2d 351, 355 (1971) (citations omitted); *accord* Seawell v. Cheshire, 241 N.C. 629, 637, 86 S.E.2d 256, 261-62 (1955); Fortescue v. Satterthwaite, 23 N.C. (1 Ired.) 566, 570 (1841).

62. *Seawell*, 241 N.C. at 637, 86 S.E.2d at 261.

63. Moore's Adm'r v. Barrow's Ex'r, 24 N.C. (1 Ired.) 436, 438-39 (1842). *But see* Poindexter v. Wachovia Bank and Trust Co., 258 N.C. 371, 376-77, 128 S.E.2d 867, 872 (1963) ("A vested estate is transmittable, a contingent estate is not."); Wachovia Bank & Trust Co. v. Schneider, 235 N.C. 446, 452, 70 S.E.2d 578, 582 (1952) (also finding that contingent interests are not transmittable). In *Poindexter* and *Schneider* the courts considered the effect of a contingent remainder conditioned expressly upon survival. *Poindexter*, 258 N.C. at 376, 128 S.E.2d at 871; *Schneider*, 235 N.C. at 448-49, 70 S.E.2d at 580. The vesting of the contingent remainders depended upon which individuals survived the life tenant, and unascertained takers may not transfer their contingent interests. Thus, the *Poindexter* and *Schneider* courts did not contradict the established rule that an *ascertained*

as members of a class, may not transfer their future interests, for their identity is as yet unascertainable.

In 1961 North Carolina codified the established right of an ascertained contingent remainderman to transfer, devise, or assign his interest.[64] By its terms, however, the statute applies only to conveyances effective on or after October 1, 1961.[65] Because the statute only applies prospectively, courts continue to rely on the precedent established by North Carolina common law for gifts created before October 1961.[66]

The North Carolina Court of Appeals correctly interpreted the interests created by the testator's will in *Rawls*.[67] The court defined Izetta's future interest as an alternative contingent remainder.[68] A contingent remainder "is a remainder which is '*either* subject to a condition precedent (in addition to the natural expiration of prior estates), *or* owned by unascertainable persons, *or both*.' "[69] The court of appeals in *Rawls* relied upon *Davis v. Davis*[70] as support for its finding that Izetta Rawls held a contingent remainder.[71] Moreover, the

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taker of a contingent interest may transfer her interest. The courts interpreted the rule of transmissibility correctly, although the courts' broad statement of transmissibility may engender confusion.

64. Act of May 16, 1961, ch. 435, 1961 N.C. Sess. Laws 590 (codified at N.C. GEN. STAT. § 39-6.3 (1984)).

65. *Id.* According to the statute:

> The conveyance, by deed or will, of an existing future interest shall not be ineffective on the sole ground that the interest so conveyed is future or contingent. All future interests in real or personal property, including all reversions, executory interests, [and] vested and contingent remainders . . . may be conveyed by the owner thereof . . . subject, however, to all conditions and limitations to which such future interest is subject.

N.C. GEN. STAT. § 39-6.3.

66. For example, in Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971), the court interpreted interests created by the testator's will, effective upon the testator's death in 1921. The court mentioned § 39-6.3 but nonetheless relied upon the established case law. *Id.* at 345-46, 182 S.E.2d at 355.

67. 94 N.C. App. 677, 381 S.E.2d 166, *disc. rev. denied*, 325 N.C. 547, 385 S.E.2d 500 (1989).

68. *Id.* at 680, 381 S.E.2d at 168 (relying upon T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 73 (2d ed. 1984)); *see also* Lawson v. Lawson, 267 N.C. 643, 644, 148 S.E.2d 546, 547-48 (1966) (" 'Alternative remainders limited upon a single precedent estate are always contingent. Such remainders are created by a limitation to one for life, with remainder in fee to his children . . . and, in default of such children . . . to another . . . .' " (quoting 33 AM. JUR. *Life Estates, Remainders & Reversions* § 148 (1941))).

69. *Rawls*, 94 N.C. App. at 680, 381 S.E.2d at 168 (quoting T. BERGIN & P. HASKELL, *supra* note 68, at 73 (2d ed. 1984)); *see also Lawson*, 267 N.C. at 643-44, 148 S.E.2d at 547 (testator's devise to his daughter for life, "and at her death to her children, if any, in fee simple; if none, to the whole brothers and sisters of [his] daughter" presented a "typical example of a contingent remainder").

70. 3 N.C. App. 536, 165 S.E.2d 553 (1969).

71. *Rawls*, 94 N.C. App. at 680, 381 S.E.2d at 168. The court cited *Davis* as an "example analogous to [the] case at bar which holds the remainders are contingent." *Id.* The decision in *Davis*, however, mistakenly characterized the future interests. The testator's will in *Davis* included "a devise to Lizzie Barnes for life, remainder to her children or grandchildren; and, if she should die leaving no child or issue of such, then to Christian Davis and Melissa Aycock." *Davis*, 3 N.C. App. at 538, 165 S.E.2d at 554. According to the court, Christian Davis and Melissa Aycock each held a contingent remainder. *Id.* at 538, 165 S.E.2d at 555. Yet the testator's devise created a vested remainder in the children or grandchildren of the life tenant: the condition attached to the children's gift operated as a condition subsequent, rather than a condition precedent. *See* T. BERGIN & P. HASKELL, *supra* note 68, at 71 (A transfer "to A for life, then to B and his heirs; *but if* B does not survive A, to C and his heirs" gives B a vested remainder subject to complete divestment. Because remainders may not follow an estate in fee, *id.* at 65, the court should have characterized the devise

court found that the *Davis* decision dictated the result of *Rawls*.[72]

In *Davis* the North Carolina Court of Appeals determined whether an ascertained individual could assign his contingent interest even before occurrence of the contingent event.[73] Interpreting earlier North Carolina Supreme Court cases,[74] the court established the validity of an assignment by a remainderman whose interest "was contingent not because of the uncertainty of the person who was to take, but because of the uncertainty of the event."[75]

In *Rawls v. Early* the alternative contingent remainder of Izetta depended upon an uncertain event: the life tenant's death without issue.[76] Based upon *Davis*, the court concluded, "the ultimate taker, Izetta Rawls, is ascertained."[77] As the ascertained ultimate taker, Izetta could devise her interest to her heirs at law, even upon predeceasing the life tenant. The *Rawls* decision relied upon the doctrine of transferability of contingent interests in its refusal to impose the class survivorship requirement upon an individual contingent interest.

Other courts have followed a similar line of reasoning in refusing to require that ascertained contingent remaindermen survive the life tenant.[78] Construing

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to Christian and Melissa as a shifting executory interest. *See id.* at 80 (a transfer "to A and his heirs; but if A marries X, to B and his heirs" gives B a shifting executory interest).

The court of appeals failed to recognize this distinction in *Rawls*, relying upon *Davis* without questioning its characterization of the future interests. *See Rawls*, 94 N.C. App. at 680, 381 S.E.2d at 168. Although the *Rawls* court concluded correctly that the interest created in Izetta was a contingent remainder, the court should have chosen better precedent to support its conclusion. For an example of such precedent, see Lawson v. Lawson, 267 N.C. 643, 148 S.E.2d 546 (1966). The testator in *Lawson* devised a life estate to her daughter, and at her death "to her children, if any, in fee simple; if none, to the whole brothers and sisters" of the testator's daughter. *Id.* at 643, 148 S.E.2d at 547. The *Lawson* court stated that the case presented "a typical example of a contingent remainder." *Id.* at 644, 148 S.E.2d at 547.

Recognition of the correct name of the future interest would not have altered the court's decision in *Davis* (and thus, in *Rawls*). Little distinction exists today between executory interests and contingent remainders; such labels have become almost functionless. T. BERGIN & P. HASKELL, *supra* note 68, at 114-15. Furthermore, both executory devises and contingent remainders to ascertained persons may be assigned, devised, or transmitted. *See Davis*, 3 N.C. App. at 539, 165 S.E.2d at 556.

72. *Rawls*, 94 N.C. App. at 680, 381 S.E.2d at 168.

73. *Davis*, 3 N.C. App. at 538, 165 S.E.2d at 554.

74. Cases relied upon by the *Davis* court include Seawell v. Cheshire, 241 N.C. 629, 86 S.E.2d 256 (1955) (contingent remainder to ascertained individuals held devisable to heirs); Hobgood v. Hobgood, 169 N.C. 485, 86 S.E. 189 (1915) (contingent remainder to ascertained individuals held devisable to heirs); Watson v. Smith, 110 N.C. 6, 14 S.E. 640 (1892) (assignment of contingent remainder upheld in equity); and Fortescue v. Satterthwaite, 23 N.C. (1 Ired.) 566 (1841) (ascertained persons may assign executory interests).

75. *Davis*, 3 N.C. App. at 541, 165 S.E.2d at 557.

76. *Rawls*, 94 N.C. App. at 680, 381 S.E.2d at 168.

77. *Id.* at 681, 381 S.E.2d at 169.

78. *See* Saulsberry v. Second Nat'l Bank, 400 S.W.2d 506, 508 (Ky. 1966) ("[W]here there is no uncertainty as to the person who is to take, and his surviving some particular . . . event does not [form] the contingency upon which the remainder is intended to take effect, if the remainderman dies before the contingency happens, his interest will pass to his heirs.") (quoting 33 AM. JUR. *Life Estates, Remainders, and Reversions* § 152 (1941)); Fulton v. Teager, 183 Ky. 381, 387, 209 S.W. 535, 538 (1919) (interest contingent upon an event, not a person, is "more than a mere possibility," and the contingent remainderman may convey such an interest); Fisher v. Wagner, 109 Md. 243, 256, 71 A. 999, 1004 (1909) (contingent remainderman may devise his interest *"as the person to take was certain,* and there was nothing in the will . . . which indicated [the testator's] intention that such interest or right as a contingent remainderman may have, before the happening of the contingency, should be postponed until the death of the life tenant"); King v. First Nat'l Bank, 135 N.J. Eq. 319,

the remainder as contingent—yet devisable, assignable, and transmissible—avoids the problems inherent in characterizing the interest as a "vested interest in a contingent remainder."[79] Such an imprecise definition of remainders adds to the complexity of future interests: "the use of both terms with reference to one particular interest is calculated to engender confusion."[80] Reference to an interest as a vested interest in a contingent remainder allows the remainderman to devise his interest;[81] the description apparently refers to "a type of contingent remainder which is alienable or transmissible."[82] The use of the "vested interest in a contingent remainder" accomplishes the same result as a simple finding that contingent interests to ascertained individuals are transmissible and devisable. Courts use both constructions to avoid an implied requirement of survivorship.[83]

By allowing Izetta Rawls to devise her contingent remainder, the North Carolina Court of Appeals explicitly rejected application of an implied survivorship requirement to an individual contingent remainderman.[84] The court refused to extend the holding of *Lawson v. Lawson*,[85] which "implied a survival requirement on the alternative contingent remaindermen" designated as a class.[86] As the *Rawls* court emphasized, *Lawson* "is distinguishable from the present case . . . in that *Lawson* involved an alternative contingent remainder to a class. North Carolina courts seem to have applied different rules of survivorship according to whether the contingent remainder was a class gift or a gift to

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324-25, 38 A.2d 445, 448 (1944) (an individual who predeceased the holder of the preceding estate held an executory interest with "the same incidents of devisability as an ordinary contingent remainder in which the contingency is as to an event and not as to the person"); Moore v. McAlester, 428 P.2d 266, 271 (Okla. 1967) (alternative contingent remaindermen, certain and identifiable individuals, could devise their interests); Black v. Todd, 121 S.C. 243, 252, 113 S.E. 793, 796 (1922) ("The well-established doctrine . . . in this jurisdiction . . . [is] that a contingent remainder is transmissible where the contingency depends upon the event and not upon the person . . . .").

For another construction used to avoid requirements of survival for contingent interests, see *Implied Condition of Survivorship*, *supra* note 26, at 137 (courts may find that the interest vests at the death of the testator but is subject to divestment upon the contingent event). *See also* Baldwin v. Hambleton, 196 Kan. 353, 358, 411 P.2d 626, 630-31 (1966) ("A remainder limited to a class consisting of children vest in such children as are in being at the time the will takes effect."); Patton v. Corley, 107 W. Va. 318, 321, 148 S.E. 120, 121 (1929) (the preference for early vesting may lead courts to find that contingent remainders vest at the death of the testator).

79. *See McAlester*, 428 P.2d at 271 (testator's devise to two sons should his daughter die without issue described as "vested interest in a contingent remainder which was not divested by their subsequent deaths before the death of [the life tenant]"); Shufeldt v. Shufeldt, 130 Wash. 253, 269, 227 P. 6, 11 (1924) (Although remainder was contingent on the death of the life income beneficiary without issue, the court defined the interest as a vested remainder. The identity of the remainderman was certain "and he was capable and competent to take possession and enter into the enjoyment thereof the moment the prior estates would determine." With a vested remainder, the remainderman could assign and devise his interest.).

80. L. SIMES & A. SMITH, *supra* note 1, § 112, at 94.

81. *See Shufeldt*, 130 Wash. at 269, 227 P. at 11.

82. L. SIMES & A. SMITH, *supra* note 1, § 112, at 94.

83. For an explanation of the relationship between the doctrine of transferability and avoidance of an implied requirement of survivorship, see *supra* notes 73-78 and accompanying text.

84. *Rawls*, 94 N.C. App. at 681-82, 381 S.E.2d at 169.

85. 267 N.C. 643, 148 S.E.2d 546 (1966).

86. *Rawls*, 94 N.C. App. at 681, 381 S.E.2d at 169 (citing *Lawson*, 267 N.C. at 645, 148 S.E.2d at 548).

ascertained individuals."[87] The court wisely refused to extend the holding of *Lawson*. Commentators have recognized the type of error committed by the *Lawson* court: courts should not imply a survivorship requirement merely because the interest is a contingent remainder, subject to another condition precedent.[88] The *Lawson* court relied upon language used to interpret express survivorship conditions as precedent for implying a condition of survivorship.[89] Further, the court in *Lawson* failed to recognize that earlier cases used the "roll call" language to determine which among several potential classes of takers, rather than which members of a single class, received an interest.[90]

The North Carolina Court of Appeals has criticized the *Lawson* decision, noting that the implied requirement of survival may disinherit "whole lines of a testator's intended takers"[91] and concluding that "*Lawson* is in need of further review."[92] Disinheritance of the intended takers, which may result in intestacy, is but one effect of an implied requirement of survival.[93] An implied condition of survivorship also results in an undisposed remainder interest.[94] Even "[a] simple statutory imposition of survival requirements . . . would leave in its wake very substantial problems of widespread undisposed of reversionary interests."[95] This requirement of survival also may frustrate the testator's intent.[96] Courts rejecting an implied condition of survivorship have assumed that if the testator wanted the remainderman to survive the life tenant, the testator would have

87. *Id.* at 681, 381 S.E.2d at 169.

88. L. SIMES & A. SMITH, *supra* note 1, § 135, at 114-16; T. BERGIN & P. HASKELL, *supra* note 68, at 131 (implying condition of survivorship based upon another condition precedent described as an "anomalous rule"); 2A R. POWELL, THE LAW OF REAL PROPERTY ¶ 334, at 797 (1990) (citing RESTATEMENT OF PROPERTY § 261); Halbach, *Future Interests: Express and Implied Conditions of Survival, Part II*, 49 CALIF. L. REV. 431, 439 (1961); Note, *supra* note 47, at 264-65.

89. In *Lawson* the supreme court relied upon Strickland v. Jackson, 259 N.C. 81, 130 S.E.2d 22 (1963), which interpreted a transfer of property to the wife for life, then to the surviving children. *Lawson*, 267 N.C. at 645, 148 S.E.2d at 548; *see also* Note, *supra* note 47, at 269 ("[A] rule evolving from express conditions of survivorship should afford no basis for an implication of survival.").

90. *See* Roberts, *supra* note 48, at 17 & n.109. According to Roberts, in earlier North Carolina cases, such as Rees v. Williams, 164 N.C. 128, 80 S.E. 247 (1913), "[T]he sense of the ["roll call" language] . . . was that until the death of the first taker with or without issue it could not be determined which among several possible classes of ultimate takers . . . would have an interest." *Id.* at n.109. The *Lawson* court, however, applied the "roll call" language to require members of the same class to survive the life tenant. *Lawson*, 267 N.C. at 645, 148 S.E.2d at 548.

91. Tunnell v. Berry, 73 N.C. App. 222, 227, 326 S.E.2d 288, 291 (1985) (citing T. BERGIN & P. HASKELL, *supra* note 68, at 131).

92. *Id.*

93. *See Future Interests*, *supra* note 26, at 207 (noting that Michigan courts usually attempt to avoid intestacy, yet "frequently [an implied survival requirement] will produce intestacy"). For an example of intestacy resulting from the survivorship requirement, see Schau v. Cecil, 257 Iowa 1296, 1301, 136 N.W.2d 515, 519 (1965) (The contingent remainder failed to vest, and the testator's will contained no residuary clause. Thus, the property descended through intestacy to the testator's heirs.). *Cf.* Jossey v. Brown, 119 Ga. 758, 763, 47 S.E. 350, 353 (1904) (court considered that the testator did not intend partial intestacy in refusing to impose a requirement of survival upon the ascertained contingent remainderman); Concord Nat'l Bank v. Hill, 113 N.H. 490, 494, 310 A.2d 130, 133 (1973) (court weighed construction against intestacy in rejecting survival requirement).

94. *In Re* Ferry's Estate, 55 Cal. 2d 776, 788, 361 P.2d 900, 905, 13 Cal. Rptr. 180, 185 (1961).

95. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused By The Death of a Beneficiary Before the Time Set for Distribution*, 27 ARIZ. L. REV. 801, 835 (1985).

96. Note, *supra* note 2, at 945; *cf.* T. BERGIN & P. HASKELL, *supra* note 68, at 128 ("the implied condition of survivorship tends to disturb orderly and rational dispositive plans").

expressed such an intention.[97] Finally, application of implied conditions of survivorship would limit the devisability and descendibility of contingent interests.[98]

Without the implication of a survivorship requirement, courts may distribute the property to the estate of the remainderman.[99] Reopening the estate of the remainderman, perhaps years after his death, may result in "unnecessary taxes, probate expenses, and creditors' claims."[100] Moreover, if courts refuse to imply a condition of survivorship, the testator's property may "be diverted to takers that the donor would not have wanted to receive the property."[101] Allowing the remainderman to devise her interest—even though she may die before the interest vests—gives the beneficiary the power to leave property to persons outside the family.[102]

One commentator has proposed imposition of a statutory survival requirement, naming alternative beneficiaries to take should the beneficiary die before the time set for distribution of his interest.[103] With a survivorship requirement, the costs of reopening the beneficiary's estate would be avoided.[104] Furthermore, a survivorship requirement would limit alienability of contingent interests;[105] the contingent remainderman may not transfer his interest before the interest vests, perhaps avoiding a devise contrary to the testator's intent.[106]

The proponents of an implied statutory requirement of survival do admit the substantial advantages of refusing to imply a condition of survivorship. Allowing a beneficiary to devise his interest before the time of distribution allows the beneficiary greater flexibility[107] and is "closer to what a sound estate plan

97. *E.g.*, Fisher v. Wagner, 109 Md. 243, 256, 71 A. 999, 1004 (1909) ("[T]here was nothing in the will . . . which indicated [the testator's] intention that such interest or right as a contingent remainderman may have, before the happening of the contingency, should be postponed until the death of the life tenant."); Tapley v. Dill, 358 Mo. 824, 831, 217 S.W.2d 369, 373 (1949) (contingent remainderman's "survival of the particular estate was designedly not made a condition to his rights under testator's will").

98. *In Re* Ferry's Estate, 55 Cal. 2d 776, 787, 361 P.2d 900, 904, 13 Cal. Rptr. 180, 184 (1961). As the *Ferry* court explained, "[s]ince property passes by descent or devise only on the death of the previous owner, . . . a contingent remainder could only pass by descent or devise where the contingent remainderman need not survive the holder of the previous estate." *Id.* at n.4. Thus, with an implied condition of survivorship, only those contingent remaindermen who survive the life tenant could devise their interests. *See also* Note, *supra* note 2, at 944 (result of decision in *Schau* to imply survivorship condition limited alienability of property). The Note also mentions that *Schau*'s survival requirement created a reversionary interest, for the contingent remainder failed to vest. The heirs of the grantor will receive this reversion, and as a result, merger of the life estate and future interests (to produce a fee simple absolute) will become more difficult. *Id.* at 943-44.

99. *See* French, *supra* note 95, at 804. When a beneficiary dies before the time set for distribution, courts may find that the interest is vested, allowing the beneficiary's estate to receive the interest. *Id.*

100. *Id.* at 835.

101. *Id.*

102. *Id.* at 819.

103. *See id.* at 835-36.

104. *Id.* at 805.

105. *See supra* note 98 and accompanying text.

106. *See supra* note 102 and accompanying text.

107. French, *supra* note 95, at 819.

would accomplish."[108] Moreover, the beneficiary, who normally shares the testator's "concern for the family's well-being,"[109] is in a better position than the courts to determine what is best for the family.[110] Although reopening the estate of the beneficiary may be expensive, one possible solution is to distribute the property directly to the beneficiary's heirs, rather than to the closed estate.[111] Such a solution saves administrative costs, although the possibility of creditors' claims and taxes remains.[112]

The advantages of a condition of survivorship do not justify implying a condition that may frustrate the testator's intent, result in disinheritance, and restrict the alienability of future interests. The disadvantages of an implied condition of survivorship, along with the established rule of transferability of certain contingent interests in North Carolina, support the court of appeals' refusal to imply a condition of survivorship in *Rawls*. The *Rawls* court found that an ascertained individual may devise her contingent interest, even though she may predecease the life tenant.[113] Recognizing the distinction between contingent interests to classes and contingent interests to individuals enabled the court to refuse to extend the much-criticized implied survivorship requirement of *Lawson*. With its refusal to imply a condition of survivorship, the North Carolina Court of Appeals ensured the continued transferability of contingent future interests and avoided implying a condition which serves to frustrate the intent of testators.

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108. *Id.* at 817.

109. *Id.* at 818.

110. *Id.* at 817-18.

111. Although the New York courts rejected such a solution in *In Re* Woodcock's Will, 19 Misc. 2d 268, 272, 186 N.Y.S.2d 447, 451 (1959), such a solution appears well-established in Delaware. In Security Trust Co. v. Cooling, 31 Del. Ch. 423, 76 A.2d 1 (1950), the court determined that the testator's devise to the issue of his grandchildren violated the Rule Against Perpetuities, resulting in intestacy. Rather than distributing the property through the estate of the testator's widow, the court ordered the trustee to distribute the property directly to the beneficiaries of the widow's will. *Id.* at 431-32, 76 A.2d at 5. The Delaware Chancery Court applied the rule of *Cooling* in a case analogous to *Rawls v. Early*. In Security Trust Co. v. Irvine, 33 Del. Ch. 375, 93 A.2d 528 (1953), the court determined that the remainder to the testator's brothers and sisters vested at the testator's death, rather than at the death of the surviving life tenant. *Id.* at 380, 93 A.2d at 531. Therefore, the brothers and sisters who predeceased the life tenant received an interest in the testator's property. Following the decision of *Cooling*, the court in *Irvine* ordered distribution of the property "directly to the persons entitled," rather than through the estates of the deceased brothers and sisters. *Id.* at 383, 93 A.2d at 532.

112. *See* WILLS, TRUSTS, AND ESTATES 726-27 (J. Dukeminier & S. Johanson 3d ed. 1984).

113. *Rawls*, 94 N.C. App. at 681, 381 S.E.2d at 169.