Future Interests -- Contingent Class Gifts -- Implied Conditions of Survivorship

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portions of the accident report were not privileged. In light of the waiver involved, the O'Keefe decision cannot be taken as conclusive on the issue of privilege. But it is a step forward and perhaps the next court to face the same issue will clarify any uncertainty.

Accepting the premise that certain portions of the accident report should be privileged, there is no reason to believe that the court by in camera examination cannot protect the varied interests by using as its determinative standard the public interest in: (1) making available to all parties in a law suit the information necessary to guarantee a just result, and (2) protecting the confidential nature of certain testimony which would otherwise be unavailable in flight safety investigations.

Gerald M. Mayo

Future Interests—Contingent Class Gifts—Implied Conditions of Survivorship

In a class gift of a future interest, should a requirement be implied that only members surviving the preceding estate share the remainder estate when the only condition precedent attached to their interest is unrelated to survival? In Lawson v. Lawson\(^1\) the court implied such a requirement on the contingent interest. Testator devised a life estate to his daughter and, at her death, to her children and, if she had no children, then to her whole brothers and sisters. The daughter survived testator and died without children or descendants of children. Four brothers and sisters survived the daughter, and two brothers survived the testator but predeceased the daughter. The court held the alternative remainder interests of the class to be contingent due to the condition precedent that the life tenant die without children. Without distinguishing contingencies based on survivorship and on unrelated conditions precedent, it permitted only class members surviving the life tenant to share the remainder interest. Exclusion of descendants of predeceased brothers implied a requirement of survivorship to distribution where the only express condition was unrelated to survival.

That a remainder is contingent should not be a sufficient basis

for implying a survivorship requirement without regard to the nature of the contingency. By distinguishing between interests contingent due to a condition precedent unrelated to survival and contingent due to express conditions of survivorship, the court can avoid the legal consequences reached in Lawson. Such distinction would enable all members of the class living at distribution, as well as descendants and devisees of predeceased members, to share the remainder interest.

The Restatement of Property and the text writers support the position that a requirement of survivorship should not be implied upon a totally unrelated contingency. Lawson falls squarely within the Restatement's view that courts have erroneously implied survivorship due solely to a condition unrelated to survival. The courts are divided as to implying such a condition, and the decisions are

\[\text{\textsuperscript{a}}\text{ 3 Restatement, Property § 261 (1940):}\]

In the limitation purporting to create a remainder, or an executory interest, the presence of a condition precedent, or of a defeasibility, dependent on other facts is not a material factor in determining the existence of the requirement of survival to the time of the fulfillment or elimination of such other condition precedent or defeasibility.

*Id.* comment a at 1315:
The rule stated in this Section would be almost too obvious for statement if it were not for the erroneous view, often expressed in cases concerning class gifts, that the members of the class necessarily remain subject to the condition precedent of survival so long as the ultimate ascertainment of the class is postponed by another defeasibility or condition precedent of such gift.

\[\text{\textsuperscript{b}}\text{ 5 American Law of Property § 21.25 (1952):}\]

There is a substantial body of authority to the effect that the presence of a condition unrelated to survival does not imply a condition of survival to the time when possession is to be enjoyed.

2 Powell, Real Property § 334 (1966): Thus, if A limits property "to B for life, remainder to his issue, but if B dies without issue, then to C and his heirs," C's future interest is clearly subject to a condition precedent, namely, that B shall die without issue, but this affords no basis for a finding that C cannot take unless he survives B's death without issue.

Simés & Smith, Future Interests § 594 (2d ed. 1956): Certainly there is no rule of law that a condition precedent of survivorship is implied whenever a gift is subject to any other condition precedent.

There are also cases where the courts have confused the meaning of the word "contingent" as subject to a condition precedent of survivorship and "contingent" as subject to any condition precedent whatsoever, and have thought that, if an interest be contingent in the second sense, it is contingent also in the first sense.

\[\text{\textsuperscript{c}}\text{ 3 Restatement, Property § 261 (1940).}\]

\[\text{\textsuperscript{d}}\text{ Compare In re Ferry's Estate, 13 Cal. Rptr. 180, 361 P.2d 900 (1961); Payne v. Rosser, 53 Ga. 662 (1875); Daniel v. Donohue, 215 Ore. 373, 333 P.2d 1109 (1959); and Booth's Trust, 400 Pa. 117, 161 A.2d 376 (1960),}\]
not harmonious. Some find the alternative remainder to be vested during the life estate, thereby posing no survivorship problem, while others adhere to the Restatement rule of not implying survivorship on unrelated conditions. An extreme example of the latter is Bomberger's Estate where an express condition of survivorship was attached to the first taker of an alternative contingent interest but not to the class of second takers. The first taker predeceased the life tenant. The court refused to imply the condition on the second takers and permitted the entire class to share the interest without regard to their survival of the life tenant.

There is substantial authority that such a requirement should be implied, but Illinois and Michigan are illustrative of an apparent trend against such implication. In Drury v. Drury only members of the class surviving the life tenant were permitted to share the alternative contingent remainder. The court in Hofing v. Willis overruled Drury (stating that it had been vigorously condemned) and held there should be no "mechanical and universal rule of construction that a class gift of a future interest which is contingent on an event other than survivorship is also contingent on survivorship." In re Coot's Estate involved an alternative contingent remainder to designated devisees where the court per-

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Simes & Smith, Future Interests § 655 (2d ed. 1956).
See cases cited note 5 supra.
See cases cited note 5 supra.
It would therefore seem to be clear in California, as it should be and is becoming in other jurisdictions, that the existence of another condition precedent is immaterial in questions of survival. It should not matter whether the contingent interest in question is in the nature of a remainder or an executory interest. Also it should not matter that such interest is in class gift form. That is, if the gift in question is one to a class, that class should be treated the same as it would be treated if the future interest were unconditional.
271 Ill. 336, 111 N.E. 140 (1915).
31 Ill. 2d 365, 201 N.E.2d 852 (1964).
Id. at 373, 201 N.E.2d at 856.
mitted only devisees surviving the life estate to share the remainder. Subsequent to this holding, Michigan enacted legislation\(^{16}\) preventing implied conditions of survivorship in contingent gifts to individuals and to classes.

Some courts distinguish between alternative contingent remainders to individuals and to classes. They do not imply a requirement of survivorship in the former on the theory that persons to take are certain and only the event upon which they are to take is uncertain.\(^{17}\) In contingent gifts to a class, they reason that the takers and the event are uncertain,\(^{18}\) and only members surviving the preceding estate share the remainder. The Restatement\(^{19}\) and text writers\(^{20}\) contend that no distinction should be made between gifts to an individual and to a class.

Contingent remainders may be categorized as shown in Fearne’s treatise on contingent remainders: \(^{21}\) (1) where the remainder depends entirely on a contingent determination of the preceding estate itself, (2) where the contingency, on which the remainder is to take effect, is independent of the preceding estate, (3) where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it, and (4) where the person, to whom the remainder is limited, is

In all cases where the owner of an expectant estate, right or interest in real or personal property, shall die prior to the termination of the precedent or intermediate estate, if the contingency arises by which such owner would have been entitled to an estate in possession if living, his heirs at law if he died intestate, or his devisees or grantees and assigns if he shall have devised or conveyed such right or interest, shall be entitled to the same estate in possession.


\(^{19}\) 3 Restatement, Property § 261 (1940).

\(^{20}\) 2 Powell, Real Property § 326 (1966):
There is also little difference, with respect to the requirement of survival, between the constructional rules applicable to gifts to individuals and gifts to classes.

\(^{21}\) Simes & Smith, Future Interests § 655 (2d ed. 1956):
It is clear that, if we are not dealing with a class gift, the existence of some other contingency does not give rise to an implied condition precedent of survivorship.

It is submitted that the same rule should apply to class gifts. Clearly there should be no fixed rule of law that a contingent class gift cannot be so created that, if a member of a class dies before the contingency happens, his interest will pass to his executor, administrator, heir, or devisee.

\(^{21}\) 2 Fearne, Contingent Remainders §§ 184-87 (10th ed. 1844).
not yet ascertained, or not yet in being. While only the first and fourth categories are material to this discussion, the categorization is useful in illustrating that legal consequences resulting from one type contingency should not automatically be implied as the same consequences resulting from a different contingency.\textsuperscript{2}

In \textit{Lawson} the court completed a transition from early cases, where survivorship was not implied, to the current requirement that survivorship is mechanically attached to every contingent gift to a class. The early view\textsuperscript{23} is represented by \textit{Sanderlin v. Deford}\textsuperscript{24} in which testator devised a life estate to S, then to S's bodily heirs and, upon failure of heirs, to W's children and M's children. Distinguishing between a condition that remaindermen survive a given period and a condition based on an unrelated event, the court held that upon S's death without heirs the remainder interest passed to surviving children of W and M and to administrators of predeceased children. The contingency on the children's alternative remainder interest was the unrelated event of the life tenant dying without heirs, therefore a requirement of survivorship was not implied.

Two developments have apparently deterred the court from the rule set forth in \textit{Sanderlin}. (1) "Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted."\textsuperscript{25} Dependency on this theory has coincided with (2) the court's cessation of distinguishing the different contingencies and their resulting legal consequences. The birth and prosperity of this theory has been fostered from cases involving express conditions of survivorship.\textsuperscript{26} Relying on the above phrase as used in \textit{Strickland v. Jackson}\textsuperscript{27} where a deed was to a husband and wife for life then to surviving children, the court in \textit{Lawson} permitted only members "answering the roll immediately upon the happening of the event"\textsuperscript{28} to share the remainder interest. It seems

\textsuperscript{23} I \textit{American Law of Property} § 4.36 (1952).
\textsuperscript{24} \textit{E.g.}, Mayhew v. Davidson, 62 N.C. 47 (1866); \textit{Sanderlin v. Deford}, 47 N.C. 75 (1854); Weeks v. Weeks, 40 N.C. 111 (1847).
\textsuperscript{25} 47 N.C. 75 (1854).
\textsuperscript{26} \textit{E.g.}, Strickland v. Jackson, 259 N.C. 81, 130 S.E.2d 22 (1963); Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960); Wachovia Bank & Trust Co. v. Schneider, 235 N.C. 446, 70 S.E.2d 578 (1952).
\textsuperscript{27} Ibid.
\textsuperscript{28} 259 N.C. 81, 130 S.E.2d 22 (1963).
\textsuperscript{29} 267 N.C. at 645, 148 S.E.2d at 548 (1966).
that a rule evolving from express conditions of survivorship should afford no basis for an implication of survival.

The doctrine of transmissibility\(^{29}\) of vested and contingent interests has furthered the confusion surrounding survivorship. This should not be a controlling factor in implying a condition of survivorship. If a contingent interest is held to be transmissible, an implication of survivorship prevents a devisee obtaining a vested interest upon the devisor's failure to survive distribution, while a rule that contingent interests are not transmissible accomplishes the same consequences as implying a condition of survivorship.\(^{30}\)

The court has adopted the rule advanced in *Wachovia Bank & Trust Co. v. Schneider*\(^{31}\) that a vested estate is transmissible and a contingent estate is not transmissible. *Schneider* involved a life estate of trust income to D, then income to D's children for twenty years, and then the corpus to D's children and to children of any child predeceasing D. A child dying during the twenty-year period and without issue was excluded, and only children surviving the period shared the corpus. The express condition of survivorship resulting from the gift over to children of a predeceased child provides sufficient basis for this rule as applied in *Schneider*.

Later treatment of transmissibility in *Seawell v. Chesire*\(^{32}\) permitted the devise of an alternative contingent interest to named individuals but denied it in *Poindexter v. Trust Co.*,\(^{33}\) where the alternative interest was to living brothers and sisters. The court in *Poindexter* restated the rule of non-transmissibility of contingent interests. Comparison of these cases indicates that non-transmissibility exists only for an express condition of survivorship. This affords no basis for implying a condition of survivorship, which results upon application of the *Schneider* rule, where the only express contingency is unrelated to survival.

To prevent future methodical exclusion of remaindermen not

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\(^{29}\) Simes & Smith, *Future Interests* § 135 (2d ed. 1956), defines transmissibility as the ability of an interest to be inherited and capable of such transmission even though the original holder thereof does not survive until the interest becomes possessory.

\(^{30}\) Simes, *Future Interests* § 85 (1951), states that if every contingent future interest is subject to an implied condition precedent of survivorship, then no contingent future interest should be descendible since death of the devisor would end all rights of the devisee to take.

\(^{31}\) 235 N.C. 446, 70 S.E.2d 578 (1952).

\(^{32}\) 241 N.C. 629, 86 S.E.2d 256 (1955).

subject to an express condition precedent of survival, the court should distinguish contingent interests as to survivorship or unrelated conditions precedent and proceed to apply appropriate consequences depending on the nature of the contingency. The consequence could be determined by statutory enactment or by judicial adoption of a rule that survivorship will not be implied solely on the basis of an unrelated condition. For a statutory solution the Michigan statute 34 appears to be adequate.

WILLIAM H. THOMPSON

Insurance—Credit Life Insurance—Payment With Proceeds of Credit Life Insurance Gives Insured's Estate a Right to Subrogation Against Assuming Grantee

Plaintiff's testator purchased a truck and executed a conditional sales contract to secure time payment. Included in the time price was an amount charged for credit life insurance which the debtor authorized the seller to purchase. Subsequently the testator transferred the truck to the defendant who assumed payment of the balance remaining on the conditional sales contract. When the testator died, the insurer paid the balance and the creditor cleared title to the property. Plaintiff, as executrix and individually, sued the defendant to recover the amount paid by the insurer.1 In reversing a compulsory nonsuit entered at the close of plaintiff's evidence, the court held that "plaintiff's evidence makes out a case against defendant entitling her husband's estate to subrogation against . . . the assuming grantee . . . to obtain payment from him of the amount paid . . . ."2

A creditor has an insurable interest in the life of his debtor, at least to the extent of the indebtedness.8 Credit life insurance is

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3 Id. at 84, 143 S.E.2d at 268.

The majority of courts have held that even though the creditor procures and pays for the policy, any excess above the amount of the debt goes to the insured's estate. See 2 APPLEMAN § 851, at 349. North Carolina apparently has not decided this point. In Miller v. Potter, supra, the lower court decreed that the excess should be awarded to the insured's estate. This part of the decision was affirmed, but in the meantime the parties had agreed