Michigan Law Review

Volume 65 | Issue 1

1966

Future Interests--Implying a Requirement of Survival in Future Interests: Continued Confusion--*Schau v. Cecil*

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Estates and Trusts Commons, and the Property Law and Real Estate Commons

Recommended Citation

Michigan Law Review, *Future Interests--Implying a Requirement of Survival in Future Interests: Continued Confusion*--Schau v. Cecil, 65 MICH. L. REV. 203 (1966).
Available at: https://repository.law.umich.edu/mlr/vol65/iss1/10

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FUTURE INTERESTS—Implying a Requirement of Survival in Future Interests: Continued Confusion—*Schau v. Cecil**

Testator devised a portion of the family homestead to his son Everett, but provided that "should my son Everett not survive me or he should die without issue, then and in that event, the real estate devised to him herein, I devise to my son Cecil Kelly, conditioned upon the payment by him of Two Thousand ($2,000.00) to each of my daughters." After testator's death Everett died without issue and the heirs of Cecil, who had predeceased Everett, brought an action which necessitated a construction of the instrument. The trial court ruled that the gift over to Cecil was conditioned upon his surviving his brother Everett so that at Everett's death without issue the property did not go to the heirs of Cecil, but rather reverted to the testator's estate and, there being no residuary clause, descended intestate to the heirs of the testator. On appeal the Iowa Supreme Court affirmed, holding that one who receives a remainder in real property, contingent upon the happening of a dubious and uncertain event, must be alive at the time the event occurs in order for his interest in the property to become possessory.[1]

Contingent future interests have caused considerable confusion in cases in which the holder of the future interest dies before the fulfillment of the condition. This confusion stems from a tendency by some courts to use the word "contingent" as a shorthand way of indicating that the interest holder must survive until a certain time or event. A future interest is correctly said to be "contingent" when it is subject to a condition, in addition to the termination of the prior estate, which must occur before the interest becomes a present estate.[2] The two usages of the word are often overlapping, but they are not synonymous; although a requirement of survival is the most

* 136 N.W.2d 515 (Iowa, 1965) [hereinafter cited as principal case].

1. Principal case at 519.

2. 1 FEARNE, CONTINGENT REMAINDERS 3 (10th ed. 1844); GRAY, THE RULE AGAINST PERPETUITIES § 101 (4th ed. 1942); 2 POWELL, REAL PROPERTY ¶ 274 (recomp. 1966); 2 SIMES & SMITH, FUTURE INTERESTS § 571 (2d ed. 1956); RESTATEMENT, PROPERTY § 157 (1936).

common type of condition rendering an interest contingent,[3] it is only one of many types of conditions which may be imposed.

The Iowa Supreme Court viewed the primary issue as simply a question of determining whether Cecil's interest was a vested or a contingent remainder.[4] It is clear that the court was correct in its decision that the interest in question was contingent, since it could take effect at the termination of the prior estate only on the uncertain condition that Everett would die without having children living at his death.[5] The question, however, remains: whether it was necessary for Cecil to survive Everett for his interest to become possessory.

The only language in the will which might suggest a condition of survival is the requirement that Cecil pay $2,000 to each of his sisters. If the requirement of payment is considered personal to the holder of the interest, a condition of survival until the date of the payment might be implied. Most courts, however, refusing to construe such provisions as a condition precedent to acquiring a right to the property, have held that they create a lien upon the property to secure payment of the legacy by whoever eventually takes possession of the property which is the subject of the gift.[6] An important reason for such holdings is that a reading of the whole will containing a requirement of payment to other heirs usually reveals that the testator's purpose in inserting such a provision was to equalize the distribution of his estate among his heirs, rather than to impose a condition of survival. The court in the principal case did not even consider the possible significance of the payment provision, which would indicate that it believed that the issue of survivorship was disposed of once the court had found that the interest was contingent. Without further explanation the court said, "When one takes only a contingent remainder in real estate conditioned upon the

3. BROWDER & WELLMAN, FAMILY PROPERTY SETTLEMENTS 25 (1965); 2 SIMES & SMITH, *op. cit. supra* note 2, § 575.

4. Principal case at 518.

5. One might take issue with the court's characterization of Cecil's interest as a remainder, since it was one which had to divest a fee simple estate in order to take effect in possession. Such interests have been traditionally known as executory interests rather than remainders. 2 POWELL, *op. cit. supra* note 2, ¶ 272; 1 SIMES & SMITH, *op. cit. supra* note 2, § 191; RESTATEMENT, PROPERTY § 25 (1936). The difference in terminology is relatively unimportant, however, since Iowa and most other states have, by statute or decision, abolished the destructibility of contingent remainders, the characteristic which distinguishes them from executory interests. *E.g.*, IOWA CODE §§ 557.6–.9 (1962). At common law if the preceeding freehold estate supporting the contingent remainder and the reversion became united in the same person before the remainder vested, they were merged, thereby destroying the contingent remainder. Likewise if a contingent remainder did not vest prior to or at the termination of the supporting estate it failed, since it could not divest another estate. The Iowa statute abolished both of these attributes of contingent remainders.

6. *E.g.*, Schrader v. Schrader, 158 Iowa 85, 139 N.W. 160 (1912). See also RESTATEMENT, PROPERTY § 262 (1940).

happening of a future event he must live until the event occurs in order to take any interest in the real estate."[7]

The holding in the principal case is not only contrary to the historical definition of contingent remainders, but it is without support in Iowa law. The Iowa cases cited by the court clearly do not justify its holding. In one of the cases cited by the court, a requirement of survival was implied by use of the so-called "divide and pay" rule which provides that when the only language creating the gift is in the direction to divide and pay at a future date, the devisee must survive until the time of payment.[8] In another case, the use of the word "or" in a postponed alternative gift "to A or B" was construed to imply a condition of survival on the part of A until the termination of the preceding estate.[9] In the other cases relied upon by the court, there were words expressing a requirement of survival in the language of the gifts under consideration.[10] In none of the cases was it held that a condition unrelated to survival implied a condition of survival. Moreover, in each of these cases the interest in question was found to be contingent *because* there was a condition of survival, not the reverse.

In the majority of American jurisdictions in which the question has been presented, it has been held that when a future interest is subject only to an express condition unrelated to survival, an additional requirement of survival to the time of the fulfillment of the express condition is *not* to be implied.[11] Two recent cases from different jurisdictions have stated this proposition very clearly. In *Estate of Ferry*[12] the California Supreme Court considered a gift which was almost identical to the gift in the principal case. The gift,

---

7. Principal case at 519.

8. Fulton v. Fulton, 179 Iowa 948, 162 N.W. 253 (1917). The "divide and pay" rule has been generally discredited as a ground for implying a condition of survival and is no longer accepted in Iowa today. See Lytle v. Guilliams, 241 Iowa 523, 41 N.W.2d 668 (1950); 2 POWELL, *op. cit. supra* note 2, ¶ 333; RESTATEMENT, PROPERTY § 260 (1940).

9. Henkel v. Auchstetter, 240 Iowa 1367, 39 N.W.2d 650 (1949).

10. *In re* Estate of Organ, 240 Iowa 797, 38 N.W.2d 100 (1949); Bladt v. Bladt, 191 Iowa 1345, 181 N.W. 765 (1921).

11. See, *e.g.*, *In re* Ferry's Estate, 55 Cal. 2d 776, 361 P.2d 900 (1961); Hofing v. Willis, 31 Ill. 2d 365, 201 N.E.2d 852 (1964); Fulton v. Teager, 183 Ky. 381, 209 S.W. 535 (1919); Fisher v. Wagner, 109 Md. 243, 71 Atl. 999 (1909); Boston Safe Deposit Co. v. Alfred University, 339 Mass. 82, 157 N.E.2d 662 (1959); Anderson v. Anderson, 239 Miss. 798, 127 So. 2d 423 (1961); Tapley v. Dill, 358 Mo. 824, 217 S.W.2d 369 (1949); Colony v. Colony, 97 N.H. 386, 89 A.2d 909 (1952); Matter of Krooss, 302 N.Y. 424, 99 N.E.2d 222 (1951); Massey's Estate, 235 Pa. 289, 83 Atl. 1087 (1912); Loring v. Arnold, 15 R.I. 428, 8 Atl. 335 (1887). The textwriters have uniformaly condemned the policy of implying a condition of survival from an express condition unrelated to survival as unwarranted. See, *e.g.*, 5 AMERICAN LAW OF PROPERTY § 21.25 (Casner ed. 1952); 2 POWELL, *op. cit. supra* note 2, ¶ 334; 2 SIMES & SMITH, *op. cit. supra* note 2, § 594. The position adopted by the *Restatement* is that an express condition unrelated to survival should not be used by a court as an aid in determining whether there is a condition of survival. RESTATEMENT, PROPERTY § 261 (1940).

12. 55 Cal. 2d 776, 361 P.2d 900 (1961).

to take effect upon the termination of a trust, was basically "to A if he is alive, but if he is dead to his wife and issue, but if he leaves no wife and issue then to B." A died leaving no wife or issue. The court, holding that there was no condition of survival upon the gift to B who had predeceased A, rejected the argument that because it was expressly provided that A had to survive until the termination of the trust, the same contingency should be implied as to B. The only contingency affecting B's interest was A's death leaving no wife or issue, and the court found no reason to imply an additional condition of survival.[13] In *In re Jamieson's Estate*[14] the Michigan Supreme Court dealt with a similar gift which can be expressed simply as "to A for life, upon A's death, remainder to B if living, and to B's heirs if he is not living." B as well as some of his heirs predeceased A. The court held that in the absence of an express condition of survival in the gift to B's heirs, none would be implied. The court disapproved of earlier cases which had held to the contrary and criticized them as reaching "a conclusion required neither by policy nor by the express language of the testator."[15]

Unfortunately Iowa is not alone in erroneously using irrelevant conditions in a future interest to imply a requirement of survival.[16] In some jurisdictions the situation is unclear, for the decisions hold both ways on the question whether express conditions unrelated to survival imply a condition of survival.[17] Other jurisdictions which have not implied a condition of survival when the contingent gift was to a named person have experienced some difficulty when the gift was to a class.[18] When the type of class involved does not imply a condition of survival, there is no reason to imply such a requirement simply because a condition unrelated to survival is added, as for example in a gift "to A for life, remainder to A's children, but if A leaves no children then to B's children." Some courts, however, have implied a condition of survival in such a gift because the final takers remain uncertain as long as the class can increase in membership.[19] This reasoning, unfortunately, fails to recognize that the inherent ability of a class to increase in membership is unrelated to

13. *Id.* at 786, 361 P.2d at 904.

14. 374 Mich. 231, 132 N.W.2d 1 (1965).

15. *Id.* at 239, 132 N.W.2d at 5. The court referred to *In re* Wagar's Estate, 292 Mich. 425, 290 N.W. 865 (1940).

16. See Ballentine v. Foster, 128 Ala. 638, 30 So. 481 (1900); *In re* Coot's Estate, 253 Mich. 208, 234 N.W. 141 (1931). The Michigan legislature reversed the holding of the last case. See MICH. COMP. LAWS § 554.101 (1948) (enacted 1931); Stevens v. Wildey, 281 Mich. 337, 275 N.W. 179 (1937).

17. *Compare* First Nat'l Bank v. Somers, 106 Conn. 267, 137 Atl. 737 (1927), *with* Bartrum v. Powell, 88 Conn. 86, 89 Atl. 885 (1914). *Compare* Dusenberry v. Johnson, 59 N.J. Eq. 336, 45 Atl. 103 (1899), *with* Potter v. Nixon, 81 N.J. Eq. 338, 86 Atl. 444 (1913), *aff'd per curiam*, 82 N.J. Eq. 661, 91 Atl. 1070 (1914).

18. See, *e.g.*, Drury v. Drury, 271 Ill. 336, 111 N.E. 140 (1915); Stoors v. Burgess, 101 Me. 26, 62 Atl. 730 (1905).

19. Jones v. Holland, 223 S.C. 500, 77 S.E.2d 202 (1953).

the possibility of a decrease in the class due to an express condition of survival.[20]

Quite frequently a contingent future interest is either in the residuary clause, or, as in the principal case, in a will which does not contain a residuary clause. If the devisee does not meet the implied condition of survival the property must pass by intestacy through the testator's estate. In Iowa, as elsewhere, there is a very strong tendency on the part of the courts to construe a will so as to avoid intestacy on the presumption that the testator intended that his will would completely dispose of his property.[21] A court's desire to avoid intestacy may even be so strong that it will construe as vested an interest which traditionally has been considered contingent. For example, when faced with a gift in the form of "to A for life, remainder to B, but if B should die without issue then to C," some courts have construed C's gift as vested, subject to defeasance if B should die leaving issue.[22] This somewhat strained construction is evidently the result of a belief that the gift to C would have included a condition of survival if it had been construed as contingent.[23] Consequently it seems incongruous for a court which seeks to avoid intestacy to unnecessarily construe a contingent remainder as implying a condition of survival, since frequently such a construction will produce intestacy.

When a court has determined that an interest is "contingent" it has not necessarily determined the question of survivorship, but it has probably introduced the confusion that may be caused by an incorrect understanding of the word "contingent". Thus, when faced with the problem of determining whether a future interest holder must survive the happening of a contingency, it would seem preferable to ignore the question of whether the interest is vested or contingent;[24] a court need only ask whether the language of the will necessitates implying a condition of survival. Unfortunately, a great many courts, like the Iowa court in the principal case, have not confined themselves to the relevant inquiry and as a result have only added confusion to the law of future interests. Such cases should not be relied upon and where they continue to carry the force of authority they should be expressly overruled.[25]

---

20. 3 POWELL, *op. cit. supra* note 2, ¶ 365.

21. See *In re* Larson's Estate, 256 Iowa 1392, 131 N.W.2d 503 (1964); Moore v. McKinley, 246 Iowa 734, 69 N.W.2d 73 (1955).

22. See, *e.g.*, Allen v. Almy, 87 Conn. 517, 89 Atl. 205 (1914).

23. Allen v. Almy, *supra*; *In re* Patterson's Estate, 247 Pa. 529, 93 Atl. 608 (1915).

24. "[I]t is not necessary in this case to decide which of these two possible approaches is to be applied [holding the interest vested or contingent]. Both have the same result upon the major question of the case, that question being whether an implied condition of her surviving Joseph J. Ferry is applicable to Mary Silva's interest." Estate of Ferry, 55 Cal. 2d 776, 783, 361 P.2d 900, 902 (1961).

25. See, *e.g.*, Hoffing v. Willis, 31 Ill. 2d 365, 373, 201 N.E.2d 852, 856 (1964), *overruling* Drury v. Drury, 271 Ill. 336, 111 N.E. 140 (1915).