Future Interests: Express and Implied Conditions of Survival

Part II[†]

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THIS IS the second of two installments of this article, which is concerned with the question of whether the holder of a future interest is required to survive until a date *later* than the effective date of the instrument. The first installment, in addition to examining certain common situations involving the problem of *implied* conditions, considered some of the principles upon which survival cases might turn. In general, it was urged that courts should not readily imply requirements of survival. This position is not merely based on the traditional preference for early vesting or for early indefeasibility, since that preference itself should have reasons for its continued existence and should yield when the reasons for its application do not exist. Instead, the reasons asserted for generally opposing implied conditions have primarily to do with the adverse consequences of such implied

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conditions, particularly the interference with probable and natural objectives of a testator or donor.¹ It was also urged that less attention be paid to particular choices of words and to supposed particular facts of the case when such words or facts are not really persuasive as a basis for departing from a sensible rule of construction.² When a given rule of construction is not "sensible" as a method of determining a testator's probable intent, it tends to defeat intent, or at least to breed litigation. Such a rule should be discarded completely rather than merely avoided by artificial findings of peculiar language or facts which are said to make the rule inapplicable to the particular case.

The first installment of this article covered specific problems of implied survival requirements in future interests created in named individuals and in classes. That discussion related to future interests which were not conditioned upon other circumstances. The last portion of the discussion of implied conditions, covering the survivorship problem in future interests which are contingent or defeasible upon conditions unrelated to survival, is found below.

Other matters, which might also be classified as problems of implied conditions, are to be taken up in the later portions of this installment dealing with expressed conditions. Thus, for example, where an alternative limitation is employed, it is usually so clear that some requirement of survival is being imposed that the real problems are those which are typical of expressed conditions of survivorship. Also, when there is an expressed requirement of survival under *some* circumstances, it is this limited, expressed condition which must be interpreted to determine its possible implied application under other circumstances.

I

IMPLIED CONDITIONS OF SURVIVAL (*Continued*)

C. Future Interests Complicated by Conditions Unrelated to Survival

Because of the frequently encountered confusion between survival requirements and vesting, some courts have found that the question of survivorship is complicated by the presence of other conditions unrelated to the survival of the beneficiary in question. Normally these other conditions should make no difference.

1. Conditions Subsequent

Under most circumstances a court will not imply a requirement that a remainderman survive until the date of possession. This is true whether

¹ See Halbach, *Future Interests: Express and Implied Conditions of Survival, Part I*, 49 CALIF. L. REV. 297, 304-07, 312 (1961) [hereinafter cited as *Part I*].

² *Id.* at 304, 318-20, 328-29.

the remainder is to an individual³ or to a class,⁴ unless the class designation itself is found to import such a condition.⁵ Will this refusal to require survival be affected by the remainder being otherwise subject to partial or complete defeasance? This question might arise in connection with a remainder interest in an inter vivos trust over which the settlor, who will typically be the life beneficiary as well, has reserved a power of revocation; or it might arise in the case of a remainder following the interest of a life beneficiary who holds, or in whose behalf a trustee holds, a power to invade principal; or it might arise in the case of a remainder in default of appointment, where the life beneficiary has failed to exercise his power of appointment.

It would seem that in none of these cases should a court imply a requirement that the remaindermen, or the takers in default of appointment who are specified in the instrument,⁶ must survive until the date of distribution. To the extent that no condition of survival would be implied in the absence of powers to invade, appoint, or revoke, the courts seem to be in general agreement that no condition should be implied because of such powers.⁷ In other words, expressed conditions subsequent not related to the survival of the remainderman do not affect the result of survival cases.

Among the California cases is *Randall v. Bank of America*,⁸ which ap-

³ *Id.* at 299-300.

⁴ *Id.* at 307-20.

⁵ As in the case of "issue" or "descendants." *Id.* at 321-22; RESTATEMENT, PROPERTY § 296, comment g (1940).

⁶ Where the takers in default are not specified, but the class of objects is sufficiently definite that the court will either imply a gift in default to that class or exercise the power in favor of the class, a difficult problem of survival may then be presented. If the gift in default is *implied*, much as if it were being written in for the settlor, it would seem that no requirement of survival exists, and the shares of takers who died after the effective date of the instrument but before the date of distribution would pass through the estates of such deceased takers. But if the court concludes that the power is "imperative" or "coupled with a trust," it will probably also conclude that it must appoint in favor of all those to whom the donee could have appointed, thereby excluding any predeceased objects of the power. This problem is aptly illustrated by *Daniel v. Brown*, 156 Va. 563, 159 S.E. 209 (1931), where the life tenant held a power to appoint to such of the testator's nieces and nephews as she might choose. The attempted appointment was invalid and there was no default provision. Some nieces and nephews had predeceased the life tenant, and their heirs were precluded from sharing because the court concluded that it should appoint equally among all the nieces and nephews then living, since the donee's appointment would have been limited to living members of the class.

⁷ *E.g.*, *Estate of Ritzman*, 186 Cal. 567, 199 Pac. 783 (1921) (testator devised in trust, his widow to receive the income and as much principal as needed for her comfort and support for life, with remainder to his six named children; the estate of a child who predeceased the widow was entitled to the share that child would have received if alive); *First Nat'l Bank v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15 (1956) (trustor retained, in addition to income, an unexercised power to amend and revoke; interest of named remainderman, who predeceased the settlor, passed via remainderman's will); *In re Wadleigh's Estate*, 250 Wis. 284, 26 N.W.2d 667 (1947) (remainder passed to heirs of remainderman although he predeceased the life tenant, who had a power to invade principal); RESTATEMENT, PROPERTY § 261 (1940).

⁸ 48 Cal. App. 2d 249, 119 P.2d 754 (1941).

propriately illustrates the usual handling of such situations. In 1935 *A* purchased an investment certificate of a building and loan association, having the certificate issued to "*A* or *B* under a trust agreement." The separate trust agreement recited: "With reference to the [certificate] . . . standing in the name of [*A*] . . . , it is understood to be in trust for himself [*sic*], during his lifetime with full power of revocation And on his death, all unpaid principal and interest, shall vest in [*B*]" *B* died in 1938, and *A* died in 1939 without exercising his power of revocation. It was held that the future interest of *B* was an asset of his estate and passed to his widow. After deciding that a trust existed, the court reasoned that the words of futurity referred to vesting in possession and concluded that the remainder was vested subject to divestment.

One of the principal difficulties with these relatively easy cases involving divesting conditions is that courts frequently purport to decide the survival question on the basis of whether the remainder is vested or contingent.⁹ It is true that such conditions are properly classified as conditions subsequent.¹⁰ However, the question is not properly the nature of the independent condition but simply whether survival is required. The danger of this reasoning which stresses the importance of the interest being vested is illustrated by the types of cases considered in the succeeding paragraphs.

2. Contingent Remainders and Executory Interests: Effect of an Independent Condition Precedent

Courts have experienced considerably greater difficulty when confronted by a disposition which creates a future interest which is clearly subject to some independent condition precedent—that is, where there is an expressed condition precedent which has nothing to do with survival by the remainderman in question.

The difficulty in these cases is a false one. The problem is that the court cannot say that the magic term "vested" applies to the interest. Consequently, some courts have thought the holder of a contingent future interest must survive until distribution, or at least until vesting, to take the property. Yet the numerous cases and statutes establishing that contingent

⁹ *E.g.*, *First Nat'l Bank v. Tenney*, 165 Ohio St. 513, 516, 138 N.E.2d 15, 17 (1956) in which the court asks: "Is the power of revocation . . . a limitation on the gift of the remainder or is it a condition subsequent? Or, in other words, did the remainderman take a contingent remainder . . . or did she take a vested remainder subject to be divested by revocation?" Only after a prolonged discussion of this question did it decide that the power was merely a condition subsequent, that the interest was vested, and that it was therefore safe to hold that no requirement of survival existed.

¹⁰ *E.g.*, CAL. CIV. CODE § 781 provides that future interests in default of appointment may be vested, codifying the common law. See 1 *SIMES & SMITH, FUTURE INTERESTS* § 113 (2d ed. 1956).

future interests may pass by will or intestacy¹¹ would seem to demonstrate the fallacy of such reasoning. The meaning of such statutes would be extremely narrow¹² if the statute is not based on a legislative purpose which includes, or at least assumes, the non-existence of implied conditions of survival in such cases. There should be no reason for a court to be unwilling to concede that an interest is contingent and still proceed to find that the death of the remainderman before possession is immaterial to the descendibility of his interest.

Despite the apparent fallacy of their reasoning, numerous courts have thought the test in such cases to be whether the interest in question is contingent or vested. The question typically arises in connection with the interest of *B* in a disposition such as the following: "to *A* for life, remainder to *A*'s issue; but if *A* should die without issue, then to *B*." Another variation is a remainder "to *A* and his heirs; but if *A* should die without issue, then to *B*." Ignoring the other constructional problems presented by these dispositions, the question we are concerned with arises if *B* predeceases *A*, and then *A* dies without issue. Assume *B*'s entire estate was left to *C*. Does *C* take the property or did *B*'s future interest fail when he did not survive until the "vesting" of his interest? Numerous courts have inquired whether *B*'s interest was "vested" and, of course, found it was not. *A*'s death without issue was obviously a condition precedent to the vesting of *B*'s interest. Therefore, such a court would conclude, *B*'s interest failed as a result of his death before any interest vested in him.¹³ Possibly the temptation is greater where *B*'s interest is an executory interest,¹⁴ and still greater yet when the disposition upon *A*'s death without issue is to a class.¹⁵ The rea-

¹¹ 4 Simes & Smith, *op. cit. supra* note 10, at §§ 1883, 1902. See also CAL. CIV. CODE § 699, providing that "future interests pass by succession, will, and transfer in the same manner as present interests," read with CAL. CIV. CODE § 693, which defines a future interest as "either: 1. Vested; or, 2. Contingent."

¹² Such a statute *could* still mean that the contingent future interest is transmissible upon the death of an assignee of the original remainderman, and it could apply to contingent remainders *expressly* made free of any survival requirement.

¹³ For example, the often cited case of *In re Coot's Estate*, 253 Mich. 208, 234 N.W. 141 (1931), so held, deciding that the testator's heirs took by intestacy "because survival of the life tenant by the contingent remainderman is a condition precedent to the latter's taking." The rule in Michigan was changed by MICH. COMP. LAWS § 554.101 (1948) (enacted 1931).

¹⁴ *E.g.*, *Davis v. McKown*, 131 Me. 203, 160 Atl. 458 (1932).

¹⁵ *E.g.*, *Drury v. Drury*, 271 Ill. 336, 111 N.E. 140 (1916), holding that a class member who predeceased the life tenant, upon whose death without heirs of her body the gift over to the class (testator's great-grandchildren) was to take effect, had no descendible interest. The court so decided even though "if a remainder is vested in a member of a class the maximum number of which is to be ascertained in the future, and therefore will open to let in new members, it will descend to heirs," and even though "it is also true that a contingent remainder is descendible where the contingency is not as to the person who will take the ultimate remainder In this case the remainder was contingent upon the death of the life tenant without issue The interest . . . was not only subject to the contingency of the life tenant dying without issue, but also to the contingency of being a member of the class when ascertained." The latter contingency, of course, was implied. *Id.* at 340-41, 111 N.E. at 142-43.

soning that the contingent nature of the interest has the effect of requiring survival can most frequently be found in cases involving the class designation "heirs."¹⁶

This fallacious reasoning does not always lead to the wrong result, however. Some courts have travelled this obstacle course of their own making and then, by some judicial gymnastics, have avoided classifying the interest as contingent, thereby providing some substantiation for the none-too-well-established doctrine that two wrongs make a right. Thus, if the court, in seeking unnecessarily to determine whether the interest in question is vested or contingent in order to resolve the survivorship question, can convince itself that what is obviously a condition precedent is really only

¹⁶ The worst of these cases is *Continental Ill. Nat'l Bank & Trust Co. v. Eliel*, 17 Ill.2d 332, 161 N.E.2d 107 (1959), where the court strictly required the *actual heirs* of a person deceased long ago to survive until distribution. More frequently the condition precedent is used as a basis of requiring survival, in effect, via a postponed determination of a class of artificial "heirs," so as to leave the class flexible until the date of vesting. *E.g., In re Powers' Will*, 210 N.Y.S.2d 639 (Surr. 1960). Such cases are typically those in which the only actual heirs are also the life beneficiaries upon whose death the gift over to the "heirs" is to take effect (although this is not true of the *Eliel* and *Powers* cases, *supra*). Because of that circumstance, the delayed determination of heirs in these latter cases is justifiable on the basis of the commonly recognized "sole heir" exception to the usual meaning of the term "heirs." See *Part I, supra* note 1, at 316-17. However, a court may reach this result by the fallacious reasoning that the remainder to the heirs is contingent, being dependent on the life tenant's death without issue. This, for example, was the sole basis of the court's reasoning in *Merrill Trust Co. v. Perkins*, 142 Me. 363, 53 A.2d 260 (1947), the sole-heir factor being ignored. In *Salter v. Drowne*, 205 N.Y. 204, 98 N.E. 401 (1912), the court also stressed the contingent nature of the interest. In *re Latimer's Will*, 266 Wis. 158, 63 N.W.2d 65 (1954), reached the result of a deferred determination of the testator's heirs using the contingent-remainder reasoning as an alternative basis for its decision, but it appears that the sole-heir reasoning really led to the result and that the contingent-remainder reasoning may have been an afterthought. It also appeared, in *Latimer*, that the court was not particularly fond of the basic rule of determining heirs at the date of the ancestor's death when possession is postponed. The court emphasized the "great practical difficulties" in tracing those heirs and their successors, a problem which is inherent in the basic rule itself.

The recent case of *Second Bank-State St. Trust Co. v. Weston*, 174 N.E.2d 763 (Mass. 1961), is particularly interesting. Following life interests in testatrix' daughters, the remainder was to go to their issue, but if all daughters died leaving no issue, the fund was to go to testatrix' "heirs at law." The court felt bound to apply the constructional rule of Maryland, the domicile of the testatrix at death. It found that, although "the Maryland court in recent years has made substantial effort to avoid application of the Demill [v. Reid, 71 Md. 175, 17 Atl. 1014 (1889)] rule, by finding that particular instruments give transmissible contingent interests to persons . . . , even though described [as] a class . . . it cannot now be said . . . that the rule no longer exists. . . . [W]e feel constrained . . . to treat it as still existing We are confronted with a situation where there are no reliable indications whatsoever of actual intention. . . . We are thus thrown back wholly on rules of construction. The Demill rule . . . is more directly relevant than the rule favoring early vesting" *Id.* at 769-70. The court then held that the heirs were not to be determined at the testatrix' death but rather at the date of distribution. The court's result, under Maryland cases, stemmed from the contingent nature of the interest, not from the fact that testatrix' true heirs were the life beneficiaries at whose death without issue the heirs were to take. *Id.* at 770 n.4.

a condition subsequent, the feat is performed, and the future interest is transmissible by will or intestacy.¹⁷ Some courts have also held such future interests descendible by using the label of a "vested interest in a contingent remainder."¹⁸ This really describes nothing more than a contingent interest in which there is no requirement that the holder thereof survive. Under this latter approach the problem is simply one of semantics resulting from the varying usages of the word "vested." The distinction might also be expressed as being one between interests which are contingent as to *person* and those which are merely contingent as to *event*, and the court would properly conclude that these cases involve the latter variety of contingent remainder.¹⁹ Where the court simply chooses to call an interest of the type here being discussed "vested" and to label the other condition a divesting condition, however, the word "vested" is not a mere substitute for the word "descendible" and the problem is not just one of semantics.²⁰

It appears quite clearly from the more recent cases that the confusion of the survivorship question with the question of whether an interest is vested or contingent is being eliminated. In a considerable part this may be the result of the helpful discussions in modern treatises and the position of the *Restatement*.²¹ Numerous recent cases have joined the better-reasoned of the older cases in refusing to imply a condition of survival merely because the interest in question is, for other reasons, admittedly a contingent future interest.²² This is true even though the contingent remaindermen are described as a class.²³

¹⁷ *In re Patterson's Estate*, 247 Pa. 529, 93 Atl. 608 (1915) (court felt it was aided by the fact that the interest in question was *not* one to a class); *Allen v. Almy*, 87 Conn. 517, 89 Atl. 205 (1914) (even though interest in question *was* one to a class); *Ley v. Flessel*, 210 N.Y.S.2d 636 (Sup. Ct. 1961) ("aided" by statutory definition of vested future interests); *cf. Trumbull v. Trumbull*, 149 Mass. 200, 21 N.E. 366 (1889) (question involved was not one of survivorship). Such an argument was also urged in *Tapley v. Dill*, 358 Mo. 824, 217 S.W.2d 369 (1949), but the court found it unnecessary to use this line of argument in its well reasoned opinion.

¹⁸ *Hills v. Barnard*, 152 Mass. 67, 25 N.E. 96 (1890); *Hays v. Cole*, 221 Miss. 459, 73 So. 2d 258 (1954).

¹⁹ *Black v. Todd*, 121 S.C. 243, 113 S.E. 793 (1922). This is also the distinction used in *Drury v. Drury*, 271 Ill. 336, 111 N.E. 140 (1916) *supra* note 15, but the Illinois court reached the wrong result because of the class-gift reasoning which leads to the conclusion that the class designation renders the condition one as to *persons* who are to take.

²⁰ See *Trumbull v. Trumbull*, 149 Mass. 200, 21 N.E. 366 (1889), where the label seemingly affected the result, the question not being one of survivorship.

²¹ RESTATEMENT, PROPERTY § 261 (1940): "[T]he presence of a condition precedent . . . dependent on other facts is not a material factor in determining the existence of the requirement of survival to the time of the fulfillment . . . of such other condition precedent . . ."

²² *E.g., In re Ferry's Estate*, 55 A.C. 783, 361 P.2d 900, 13 Cal. Rptr. 180 (1961); *Tapley v. Dill*, 358 Mo. 824, 217 S.W.2d 369 (1949); *Daniel v. Donohue*, 215 Ore. 373, 333 P.2d 1109 (1959); *In re Dickinson's Estate*, 396 Pa. 371, 152 A.2d 680 (1959).

²³ *E.g., Daniel v. Donohue*, *supra* note 22. Although the class term "nieces" was used in *In re Dickinson's Estate*, *supra* note 22, the class was not open to any nieces born after testator's death. Also compare *In re Hope's Estate*, 398 Pa. 470, 159 A.2d 197 (1960).

The continuing process of putting the California law of future interests in order was virtually completed in the area of implied conditions of survivorship when the California Supreme Court decided *In re Ferry's Estate*²⁴ in May of this year. The disposition in question was as follows, quoting from the decree of distribution of the testator's estate:

Should the said Joseph J. Ferry die before the natural termination of this trust [which was to occur in 1969], said trust estate shall be distributed immediately to the wife and living issue of said Joseph J. Ferry, in equal shares, and if none, then to Mary Silva, sister of decedent.

Mary Silva died in 1953. Joseph J. Ferry, the testator's son and the primary beneficiary of the trust, died testate in 1957, survived by neither wife nor issue. The superior court ordered distribution of the trust estate in one-fourth shares to each of three daughters of the testator and one-fourth to the beneficiaries under Joseph's will, finding that an intestacy resulted from "non-fulfillment of conditions precedent" to the interest of Mary Silva. Mary's children, her sole heirs, appealed. (It may be of interest to note that the now extinct opinion of the district court of appeal, in reversing, reasoned that Mary's interest passed to her heirs because there was "a fee simple estate subject to defeasance vested in Mary" upon the testator's death; however, it also stated that whether "Mary Silva's estate was contingent, or vested, subject to divestiture, is now of little importance since the decision . . . in *Estate of Stanford*."²⁵) The California Supreme Court held that Mary's children were entitled to the property, since "Mary Silva did not have to outlive Joseph in order for her heirs to take the trust property on Joseph's death."²⁶ In behalf of Mary's children it had been urged, under the reasoning criticized above,²⁷ that Mary's interest was vested subject to being divested. The court rejected such reasoning and accepted the argument that Mary's interest was subject to a condition precedent (although showing no concern over the false issue of whether it was technically vested or contingent). It refused to attribute any importance to the question of whether Mary held an executory interest²⁸ or an alterna-

²⁴ 55 A.C. 783, 361 P.2d 900, 13 Cal. Rptr. 180 (1961).

An earlier case, *In re Carothers' Estate*, 161 Cal. 588, 119 Pac. 926 (1911), involving a similar disposition, reached a result like that in *Ferry*, but this particular survival question was not really argued.

²⁵ *In re Ferry's Estate*, 8 Cal. Rptr. 585, 590 (1960).

The quoted reference to *Estate of Stanford* is to *In re Stanford's Estate*, 49 Cal.2d 120, 315 P.2d 681 (1957), discussed in *Part I, supra* note 1, at 308-11. *Stanford*, involving a class gift, is an important case in that it made clear the California Supreme Court's reluctance to imply conditions of survivorship in future interests.

²⁶ 55 A.C. at 795, 361 P.2d at 905, 13 Cal. Rptr. at 185.

²⁷ Text preceding note 17 *supra*.

²⁸ The executory-interest construction would be based on another provision of the decree, note 24 *supra*, under which Joseph would have received the trust estate had he survived until the natural termination of the trust in 1969. The court observed that if Joseph's interest on such termination were vested but defeasible, Mary's interest would then operate as an executory interest.

tive contingent remainder, and disapproved the still too-often encountered suggestion that interests like Mary's are "mere possibilities" or "expectancies." The court simply sought an answer to the real question before it: Was there an implied requirement that Mary survive beyond the testator's death? With the question clearly framed the court unanimously held that there was no such requirement. This result is consistent with the reluctance of the California law, as clarified four years earlier by *In re Stanford's Estate*,²⁹ to impose implied conditions of survival.

It is noteworthy that the opinion in *Ferry*, written by Justice Dooling, rested on broad, useful principles for the solution of survivorship cases. The court admirably resisted what must have been a temptation to rely upon the testator's expressed intention to disinherit his daughters (who were three of his four next of kin). This factor of the case could have been used as a basis for concluding, under the "particular facts" of the case, that the testator must not have intended to require Mary Silva to survive because of the interest such a requirement would have left in the very next of kin he intended to disinherit. The general significance of the decision as a guide in future cases is enhanced by the fact that the court did not rely on these "particular facts" of the case. The intended disinheritance was referred to only after the result had been reached and stated, the court remarking that the result also "carries out the testator's expressed intention that his three daughters should each receive \$1.00 'and no more.'"³⁰

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. Where no express reference is made to survival in a gift over to the heirs of a person already deceased (typically the testator), the heirs should have no further requirement of survival in the normal case. The exceptions to this rule should be the same as the exceptions relating to determination of heirs in an unconditional future interest to heirs.³¹ In a contingent remainder to "children" there should be no requirement of survival beyond the effective date of the instrument. Real difficulty arises, as noted in the first installment, where the future interest is to a class described as "issue" or "descendants." These designations are generally held to imply a requirement of survival until the time of distribution, even though distribution occurs later than the death of the ancestor whose issue

²⁹ 49 Cal. 2d 120, 315 P.2d 681 (1957), discussed *Part I, supra* note 1, at 308-11.

³⁰ 55 A.C. at 795, 361 P.2d at 906, 13 Cal. Rptr. at 186.

³¹ See *Part I, supra* note 1, at 315-20.

are in question. But there is disagreement on this proposition, particularly where an alternative limitation is involved, although this latter factor should not matter. If a requirement of survival is found at all, it should be based on the use of the word "issue" or "descendants" and not on the other factors; but these other factors also should not *eliminate* the requirement if it is to be impliedly imposed by the class designation itself, as case authority and the *Restatement* indicate.³² The problem, however, seems to have been complicated by the abundant warnings in treatises and cases, such as *Ferry*, against implying conditions of survival from conditions precedent or alternative limitations.³³ In the effort to heed this warning a court may fail to realize that the requirement of survival, as in the case of "issue," may be implied from the class designation itself, and not from the expressed condition or from the fact that the issue are alternates to another potential taker who was required to survive.³⁴

The proper solution would seem to be for courts to reach the same result whether unrelated conditions are present or absent.

II

EXPRESSED CONDITION OF SURVIVAL

A. Time as of Which Survival is Required

A common defect in the drafting of future interest dispositions is the failure to state the time as of which survival is required when the disposition makes it clear that some survivorship requirement exists. There will be at least two possibilities present in connection with any such future interest. One is that the beneficiary must be living at the effective date of the instrument; in the case of a will, of course, this means surviving the testator. The other possibility is that the beneficiary must be alive at the time at which distribution is to be made. In some dispositions other possibilities will exist.

1. To What Time Does "Surviving" Relate?

The simplest example of this type of ambiguity is found in *H*'s testamentary trust which provides a life interest for *W*, his wife, and then provides that the remainder is to go to his "surviving" or "living" children. The remainder might be to his surviving nieces and nephews, in which case

³² *Id.* at 321-22; RESTATEMENT, PROPERTY § 296, comment *g* (1940).

³³ See, e.g., 2 SIMES & SMITH, FUTURE INTERESTS § 581 (2d ed. 1956) (quoted in the *Ferry* case, 55 A.C. at 794, 361 P.2d at 905, 13 Cal. Rptr. at 185), which states: "The persons who are the alternative takers need not survive unless such a requirement is specifically expressed."

³⁴ See discussion of alternative limitations to "issue" in *Part I*, *supra* note 1, at 323-27; contrast the discussion of dangers in implying a requirement of survival in alternative limitations to "children," *id.* at 326 n.99.

the problem is much the same. Or it might be to his surviving issue, in which case the same ambiguity exists, but the practical consequences of the choice are materially different, although the cases apparently have not recognized these differences.

Continuing with the original disposition involving a remainder to the testator's "surviving children," assume further that *H*'s children are *D* and *S*, a daughter and son respectively, and that both are alive at *H*'s death. Before the death of *W*, *S* dies leaving all of his property to his child, *GC*. Then *W* dies, and the question is whether *D*, as the only child surviving at *W*'s death, takes all of the trust estate. It is obvious that the grandchild, *GC*, is not one of the testator's children. Therefore, after failing to convince the court that the word "children" was meant to include grandchildren as well,³⁵ *GC* argues that "surviving" referred to survival at *H*'s death rather than at *W*'s, and thus that *GC* is entitled to half of the remainder as the sole beneficiary of *S*'s estate, which included *S*'s remainder interest. The question is then presented, did "surviving" relate to the death of the life beneficiary or to the testator's death? The cases are divided as to which construction is to be preferred, with a great deal of authority supporting each position.³⁶

The view which presumes that survival is required until the date of distribution has generally been based upon what is thought to be "the natural meaning" of the language.³⁷ Certainly this would be a sound basis for a

³⁵ Even on this point *GC*'s case is not altogether hopeless, however. See 2 SIMES & SMITH, FUTURE INTERESTS § 723 (2d ed. 1956). The unusual result of treating grandchildren as included in the word "children" is most frequently encountered in cases in which all of the children involved were known by the testator to be dead when the will was executed. *E.g.*, *In re Schedel's Estate*, 73 Cal. 594, 15 Pac. 297 (1887).

³⁶ See 2 POWELL, REAL PROPERTY ¶ 328 (1950), and 2 SIMES & SMITH, FUTURE INTERESTS § 577 (2d ed. 1956), each of which indicates that the majority view is that "surviving" refers to the date of possession. For an interesting case involving a choice between the two views, see *In re Pleasonton's Estate*, 45 N.J. Super. 154, 131 A.2d 795 (1957), deciding to apply the forum's majority view rather than the minority view of the state (Pennsylvania) in which the will was executed.

³⁷ *E.g.*, *In re Gautier's Will*, 3 N.Y.S.2d 502, 146 N.E.2d 771, 169 N.Y.S.2d 4 (1957); RESTATEMENT, PROPERTY § 251 (1940) (which at comment *a* observes that this is an application of the principle preferring that result "which conforms more closely to the intent commonly prevalent among conveyors similarly situated"); *cf.* 5 AMERICAN LAW OF PROPERTY § 21.15 (Casner ed. 1952) (that it "seems improbable that transferors normally wish to give beneficiaries vested interests in property prior to the time when they are entitled to possession"); *accord*, *Caine v. Payne*, 182 F.2d 246 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 855 (same reasoning involving alternative form).

Earlier New York cases have often been cited as leaders for the opposed position. *In re Gautier's Will*, *supra*, was decided against a background of conflicting New York decisions without discussing the oft-cited contrary authorities of that state. See Sparks, *Future Interests*, 1958 *Survey of American Law*, 34 N.Y.U.L. Rev. 421, 426 (1959). The doubt which existed immediately following this decision seemingly has been removed by more recent decisions involving somewhat similar problems. See note 61 *infra*. Along with these later cases, the strong language in *Gautier*, stressing the natural meaning of the language, would seem to make it clear that New York has now adopted the *Restatement* view.

constructional preference. A number of legislatures seem to have been similarly persuaded about the natural meaning of such language,³⁸ and California is among the states which have enacted legislation embodying this preference. Section 122 of the California Probate Code provides:

Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

The second and somewhat less popular view,³⁹ preferring the result that the remainderman is only required to be living at the effective date of the instrument (*H*'s death in our hypothetical case), may be justified on the basis of many of the same reasons which support a reluctance to imply conditions of survivorship. It has commonly been suggested that this second view is an extreme application of the preferences for early vesting and early indefeasibility.⁴⁰ To thus summarize the reasons behind this preference is an oversimplification and does not do justice to the position of some of the courts which have adopted this second view. Where ambiguity exists, in addition to seeking a natural *meaning* for the *words* used, on which point it would seem the first view has the better of it, the choice of a general constructional preference should also be concerned with giving effect to the natural *desires* of an *average testator* and with bringing about what might be called a socially desirable result. On these latter points the second view would seem to have the better of it and ought not to be dismissed as if it were simply a dry adherence to the principle of early vesting. This second view tends to prevent the unnatural result of disinheriting a line of descendants. The law should and does prefer interpretations which lead to equality among lines of descent and among those having like claims upon a testator's bounty.⁴¹ It is a difficult question whether the ambiguous use of the word "surviving" is a sufficiently clear manifestation of actual intent to justify the unnatural result of excluding one line of descent. Is it so clear that "surviving" refers to the date of possession that normal presumptions

³⁸ In addition to the California statute, see, e.g., MONT. REV. CODES ANN. § 91-220 (1947); UTAH CODE ANN. § 74-2-20 (1953). However, one legislature has had a different reaction. GA. CODE ANN. § 85-708 (1955).

³⁹ *Alsman v. Walters*, 184 Ind. 565, 111 N.E. 921 (1916); *Porter v. Porter*, 50 Mich. 456, 15 N.W. 550 (1883); *In re Nass' Estate*, 320 Pa. 380, 182 Atl. 401, 114 A.L.R. 1 (1936).

⁴⁰ E.g., 2 POWELL, REAL PROPERTY § 328 (1950).

⁴¹ RESTATEMENT, PROPERTY § 243, comment *f* (1940); accord, *In re Backesto's Estate*, 71 Cal. App. 409, 235 Pac. 670 (1925); *In re Ferdinand's Estate*, 7 Wis.2d 577, 97 N.W.2d 414 (1959). See also RESTATEMENT, PROPERTY § 243(a) (1940), which prefers results that accord with the prevailing *intent* of testators. The second view, as presented in the text, would seem more likely to reach such prevailing intent than the first view, adopted by the *Restatement* itself (see note 37 *supra*), which really appears to be based not on prevalent *intent* of testators but on the more likely (though admittedly ambiguous) *meaning* of particular *words*. Certainly the prevailing intent of persons is something different from natural meaning of particular words.

of a testator's natural or probable intent should be abandoned, even at the risk of disinherit the family of a deceased child? Even if one *meaning* is thought to be somewhat more probable, in the face of such ambiguity might it not be better to prefer *results* which appear more natural? How often does a lawyer encounter a client who, *when asked*, wishes to exclude the issue of a child who might be deceased at some subsequent time? To this writer these questions are hard to ignore, and some courts have gone to extremes to avoid disinherit a line of issue in cases of this type.⁴² The position of such courts represents a refusal to adopt a constructional preference which, in many cases, would cause an unnatural result. This position, then, requires a person who *intends* the unusual result to make his intent clear beyond question, thus protecting those who do not so intend and thus preserving the "more desirable" result by restrictive interpretation of words like "surviving."

The dangers suggested by the arguments in behalf of the second view should at least serve as a warning to the draftsman of the consequences of requiring members of a class to survive to any date without providing for the admission of a deceased member's issue into the group of ultimate takers. On balance, however, the first view is probably the better one. True, it would normally be difficult to imagine that *H*, in our hypothetical situation, would really wish to exclude *GC* from sharing in the trust estate with *D*, merely because *S* predeceased *W*. Yet the law must also give effect to desires which are not those of the "average" testator, and when some requirement of survival is expressed the court must give it some meaning. The court cannot properly disregard the requirement because the testator *may* not have really intended its consequences. Then it must be conceded, as even the second of the above views would concede, that *GC* would have been omitted under the terms of the will if *S* had died before *H*, *the testator*. It thus becomes clear that some "unnatural" intent must be attributed to *H*, whether in fact it exists or not. Once it is accepted that the issue of a child who predeceased the *testator* would be disinherited, it is no longer so difficult to accept the "unlikely" result of disinherit the issue of a child whose death occurred after that of the testator but before *distribution*. In fact, it seems even less likely that a testator would intend to provide for the issue of a child who dies after the testator but before the life tenant when the issue of a child who predeceases the testator *are* being excluded, the anti-lapse statute probably having been made inoperative by the word "surviving."⁴³ On the other hand, under this interpretation of

⁴² See *Alsman v. Walters*, 184 Ind. 565, 111 N.E. 921 (1916); *In re Nass' Estate*, 320 Pa. 380, 182 Atl. 401 (1936).

⁴³ See 5 AMERICAN LAW OF PROPERTY § 22.51 (Casner ed. 1952); ATKINSON, WILLS § 140 (2d ed. 1953). See also *In re Bennett's Estate*, 134 Cal. 320, 66 Pac. 370 (1901).

"surviving," extraordinary consequences might follow if the local pretermitted heir statute protected the issue of a child who died before the testator, since obviously it would not protect the issue of a child who died between the death of the testator and that of the life beneficiary.⁴⁴ Nevertheless, in the absence of a statutory basis for re-writing the disposition to avoid the consequences of such possible oversight, the appropriate solution does seem to be that adopted by the majority of states and required by statute in California. The "normal" intention to provide for all descendants seems to be overcome by (1) the natural meaning of "surviving" as referring to the time of distribution, together with (2) the suggested existence of an "unnatural" intent, as corroborated by the apparent willingness to exclude at least the issue of a child who predeceases the testator.

If the class gift designation is changed to one such as "brothers and sisters"⁴⁵ or "nieces and nephews," or even if the remaindermen are designated as individuals, the problem is basically the same: Did the testator mean to require survival until distribution, thus leaving nothing to the family of any beneficiary who fails to survive until that time? It would seem that such an intent regarding collateral relatives is not as hard to accept as in the case of descendants, although it would certainly be best to apply the same rule in both types of cases.

The problem could be significantly easier when the class designation is one such as "issue" or "descendants." The danger of disinheriting a line of descent is no longer present. Furthermore, as has already been observed, even an implied condition of survivorship is readily found as the result of the use of "issue" or "descendants." In those states which are reluctant to interpret "surviving" as referring to distribution because of the danger of disinheriting descendants, two alternatives are available. It would be possible to adhere to that state's usual rule that "surviving" relates to the testator's death, for the sake of consistency; or it would be possible to take the position that the reason for the restricted interpretation of "surviving" is now absent and that consistency with other cases involving "issue" requires that the takers be determined from among descendants living at distribution. Thus, the requirement of survivorship until distribution could be based on the word "issue," rather than on the word "surviving," in such

⁴⁴ The issue of a child who predeceased the testator in such a case would in some states be held to be protected by a pretermitted heir statute on the theory that the issue would otherwise be omitted by inadvertence. *In re Todd's Estate*, 17 Cal. 2d 270, 109 P.2d 913 (1941). This might have the anomalous result of protecting the issue of the child who predeceased the testator while wholly excluding the issue of a child who died during the life tenancy (as would be required under a statute such as CAL. PROB. CODE § 122, quoted in text following note 38 *supra*).

⁴⁵ *In re Winter's Estate*, 114 Cal. 186, 45 Pac. 1063 (1896), applied the earlier version of CAL. PROB. CODE § 122 to a future interest to "brother and sisters."

a jurisdiction. Of course, in states which generally presume that "surviving" relates to possession, the solution to "surviving issue" is obvious and unobjectionable.⁴⁶

Much like the "issue" cases are those in which, in addition to using the word "surviving," provision is made for the children, issue or heirs of a first described or named remainderman to take in his place if he fails to survive. Such a provision for substitute takers should make it unobjectionable to interpret the first taker's survivorship requirement as referring to distribution, the danger of inadvertent disinheritance being removed. However, even here courts which presume that an ambiguous survival requirement relates to the testator's death seem to adhere to that presumption. For example, in *Stone v. Lewis*,⁴⁷ the Virginia court, emphasizing that the testator merely said "surviving" and not "then surviving," held that the remainderman needed to survive only the testator, despite an alternative provision for a deceased remainderman's children. Such cases are really more in the nature of the cases involving alternative and supplanting limitations, which are to be discussed subsequently.⁴⁸

"*Then Surviving*."—The requirement that a person or class of remaindermen be living or surviving is often accompanied by the word "then." If this word is so inserted that it modifies the word "surviving" (providing, in essence, that on termination the remainder shall be distributed "to my nieces and nephews *then surviving*"), is it now clear that the requirement of survival applies until termination? The answer would seem to be that it is wholly clear.⁴⁹ Note, however, that this is critically different from placing the word "then" at a different point in the sentence, as in providing that on termination the remainder "shall *then* be distributed to my *surviving* nieces and nephews." In this latter situation the ambiguity still exists, and the result of the case should not be affected, and a court which does not

⁴⁶ E.g., *In re Clark's Estate*, 64 Cal. App. 2d 636, 149 P.2d 465 (1944) ("surviving issue" determined at distribution). The unfortunate, broad dictum as to class gifts in general, *id.* at 641-42, 149 P.2d at 468, has clearly been superseded, however.

⁴⁷ 84 Va. 474, 5 S.E. 282 (1888). The present status of this and other Virginia cases now seems to be in doubt. See, e.g., *Griffin v. Central Nat'l Bank*, 194 Va. 485, 74 S.E.2d 188 (1953), which reads like the opinion of a court trying to be freed of an unwanted rule but unfortunately not willing openly to throw it out.

⁴⁸ See text at notes 53-57 *infra*.

⁴⁹ See *Rennolds v. Branch*, 182 Va. 678, 29 S.E.2d 847 (1944), and *In re Evans' Estate*, 264 Pa. 357, 107 Atl. 731 (1919), for cases relating "then living" to the time of distribution in states where the presumption regarding "living" appears to be the opposite; and in California see *In re Phelps' Estate*, 182 Cal. 752, 190 Pac. 17 (1920), and *In re Washburn's Estate*, 11 Cal. App. 735, 106 Pac. 415 (1909), in which the language "then living" did not have to be puzzled over before proceeding to the questions (perpetuities and merger respectively) before the courts. See also *Stone v. Lewis*, 84 Va. 474, 5 S.E. 282 (1888), contrasting the language before it (held to require only survival of the testator) with the language "then surviving."

otherwise presume that words such as "surviving" refer to possession will hold that the word "then" does not cause it to so refer.⁵⁰

In general, then, when dealing with language which obviously requires survival but does not specify until when, the language is commonly—sometimes by statute, as in California—presumed to refer to the date of possession, even though in some cases this rule will result in disinheritance of some descendants. Slightly less common is the view that "surviving" relates to the testator's death. It is possible, though doubtful, that this restrictive interpretation would be confined to cases in which alternative takers are not provided either by an alternative gift or by the inherent nature of the class designation. Thus, as in the questions of implied conditions, in this latter group of states the question of the time to which an expressed condition refers might turn on the existence or non-existence of an alternative disposition.⁵¹ At any rate the choice is not merely one between natural meaning and dry adherence to the constructional rule preferring vested construction. When the serious consequence of possibly unintended disinheritance is considered, it would seem that the choice is a difficult one. It is a decision of which the draftsman ought to relieve the court.

Surviving, or then surviving, "heirs."—One additional, and somewhat different, problem is encountered when the term "heirs" is used to describe the class of "surviving" or "then surviving" beneficiaries. Even if the date to which survival is required is clear or has been determined, the word "heirs" may pose a peculiar problem. For example, *A* devises "to *B* for life, and on his death remainder to *my then living heirs*." *A*'s heirs are his children *C* and *D*. Before *B*'s life estate ends, *C* dies survived by issue *E*. Obviously *C* cannot take because he is not "then living." The question is whether strict survival is required or whether there is to be a deferred determination, at *B*'s death, of a class of artificial heirs of *A*. That is, does the remainder go to such of *A*'s actual heirs (*C* and *D*) as are alive at *B*'s death, so that *D* takes all? Or does it go to those who would be *A*'s heirs if

⁵⁰ *E.g.*, *In re Nass' Estate*, 320 Pa. 380, 182 Atl. 401, 114 A.L.R. 1 (1936). See also *In re Ferry's Estate*, 55 A.C. 783, 361 P.2d 900, 13 Cal. Rptr. 180 (1961), among numerous California cases supporting the general proposition that the word "then" is not a word of futurity which affects survival questions.

⁵¹ RESTATEMENT, PROPERTY § 255 (1940) could be read to cover this case (assuming, of course, that section 251, relating survival to distribution, is rejected in the particular jurisdiction involved). It provides:

In a limitation . . . which is ambiguous as to whether such interest is, or is not, subject to a requirement of survival to some particular time, the absence . . . of both an alternative and a supplanting limitation tends to establish that such interest is free from any requirement of survival to such time. . . .

However, this section is further qualified by being made applicable when (roughly) it would avoid an intestacy. Such a qualification is unfortunate in many respects, especially in the context of certain class gifts.

they were to be determined from among persons living at *B*'s death, so that *E* shares with *D*? Literally, it would be the former; but it seems so probable that *A*'s intent was to have the latter result that, coupled with the preference for equal treatment of lines of descent, a departure from the usual rules for determining heirs appears perfectly justified. California cases seem to support this latter interpretation, although the peculiar facts of the cases and the nature of the opinions leave considerable doubt.⁵²

2. To What Time Do Alternative and Supplanting Limitations Relate?

Where a provision refers to potential remaindermen in the alternative or provides for a substitution of beneficiaries by way of a supplanting limitation, it should be apparent that there is a requirement that the first named, or described, takers be surviving at some subsequent time in order to take. For example, if the remainder after a life estate in *X* is to "*Y* or his issue," it is obvious that *Y* is subject to some requirement of survival, except in those few cases (particularly where the alternative gift is to the primary taker's "heirs") in which "or" may be construed to mean "and."⁵³ As the converse of the exception just stated, it has been held in several recent cases that the word "and" meant "or," and in at least one of these cases it appears that the court was clearly right as to the testator's intent.⁵⁴ However, assuming that the disposition is deemed to involve an alternative or supplanting limitation, the question is one of determining the date at which the choice between the primary and the alternate takers is to be made.

Such dispositions may take many forms. In addition to the above example, the primary takers may be described as a class, while the alternative

⁵² See *In re Layton's Estate*, 217 Cal. 451, 19 P.2d 793, 91 A.L.R. 480 (1933); *In re Hoover's Estate*, 16 Cal. App. 2d 529, 60 P.2d 1010 (1936).

⁵³ *Peterson v. Neeld*, 22 N.J. Super. 469, 92 A.2d 62 (1952); *Chas. W. Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942); *Chapman v. Chapman*, 90 Va. 409, 18 S.E. 913 (1894). This result does not appear to be as common as is indicated by some of the treatises, many of the cases cited for this proposition being cases in which the survival requirement stemming from the word "or" was merely interpreted as referring to the date of the testator's death. Even some of the cases reading "or" to mean "and" could as well have been decided by relating the survival requirement to the testator's death. *E.g.*, *Chapman v. Chapman*, *supra*.

⁵⁴ *In re Gulbenkian's Will*, 9 N.Y.2d 363, 174 N.E.2d 481, 214 N.Y.S.2d 379 (1961) (remainder to two named brothers "in equal shares and their several descendants per stirpes").

One of the other cases, *In re Yeater's Trust Estate*, 295 S.W.2d 581 (Mo. App. 1956), noted 23 Mo. L. Rev. 87 (1958), was, by this interpretation, able to avoid the consequences of assignments by two remaindermen whose interests, although subject to an unrelated condition precedent, would not otherwise have been subject to a requirement of survival under the doctrine of *Tapley v. Dill*, 358 Mo. 824, 217 S.W.2d 369 (1949) (see text and note at note 21 *supra*). Ironically, even with the word "or" thus present, it now appears that the resultant requirement of survival by the primary takers (the assignors) relates only to the testator's death and not to the date of possession under Missouri law. See *Uphaus v. Uphaus*, 315 S.W.2d 801 (Mo. 1958).

takers may be described as the "children," the "descendants," or the "heirs" of the primary takers, or otherwise. Rather than the alternative form, typified by the word "or," the disposition may be in the form of, or in a form more nearly resembling, a supplanting limitation, which is typified by the language "but if" or "in the event" following the names or descriptions of the primary takers. This discussion is applicable to all these forms. It also applies to cases in which the alternative or supplanting limitation is accompanied by a reference to the death of a primary taker, but it is confined to those in which the reference is to death under all circumstances. Therefore, it does not include cases involving death *without issue*. Such cases are beyond the scope of this article and involve different considerations, different constructional problems, and additional possibilities relating to the time when the condition may occur.⁵⁵ However, one aspect of such cases, which becomes involved with questions of general survival, will be taken up subsequently.⁵⁶ Furthermore, this section is not concerned with whether the alternate beneficiaries, if they take at all, must themselves be living at a time later than the effective date of the instrument. That problem has been dealt with previously.⁵⁷ Thus the question now under discussion relates only to the time to which survival is required of the primary taker or takers (*Y*, in our example), to determine when the choice must be made between a primary taker and his alternates.

Returning to the hypothetical case in which, at *X*'s death, the remainder is to go to *Y* or his issue, we might assume that *Y* survived *T*, the testator, but died before *X*, leaving all of his property to his wife, *W*. Then, if the word "or" requires *Y* to survive only until *T*'s death, *W* takes. On the other hand, if "or" relates to the time of possession, *Y*'s issue will take.

A surprising number of courts have held that such a primary taker must only survive the testator.⁵⁸ Under this view *Y*'s estate, which he left

⁵⁵ See generally SIMES, *FUTURE INTERESTS* §§ 86-89 (1951). See also *In re Carothers' Estate*, 161 Cal. 588, 595, 119 Pac. 926, 928 (1911), stating that CAL. PROB. CODE § 122, referring to "death or survivorship, simply," does not apply to cases involving death without issue.

⁵⁶ See text at notes 68-83 *infra*.

⁵⁷ Until the death of the primary taker, the alternates' interests would be contingent, but (as indicated in text *supra* at notes 21-34) this factor should not alter the basic rules discussed in the first installment of this article. Once the condition precedent is removed and while the alternate takers are awaiting the termination of the preceding estates, the discussion of alternative limitations becomes especially relevant. See *Part I, supra* note 1, at 323-27, discussing "issue" and *id.* at 326 n.99, discussing "children." Basically the alternate beneficiaries should not be subject to an implied condition of survival unless such a condition would be implied as to such takers were they not alternate takers. See also *In re Ferry's Estate*, 55 A.C. 783, 794, 361 P.2d 900, 905, 13 Cal. Rptr. 180, 185 (1961).

⁵⁸ *Knight v. Pottgieser*, 176 Ill. 368, 52 N.E. 934 (1898) (children and their descendants, the descendants to take the parent's share); *Gibbens v. Gibbens*, 140 Mass. 102, 3 N.E. 1 (1885) (children; the issue of a deceased child standing in the place of the parent); *Dow v. Bailey*, 146 Me. 45, 77 A.2d 567 (1950) (son or his heirs); *Uphaus v. Uphaus*, 315 S.W.2d 801 (Mo.

to *W*, would include an indefeasibly vested remainder in the trust created by *T*'s will. In an alternative disposition it is probably fair to say that such a result usually is but an extreme application of the rule favoring early vesting. Because of the alternative provision for *Y*'s issue, a line of descent would not have been excluded by requiring *Y* to survive until *X*'s death. The likelihood of an "unnatural" result, which was the main obstacle to interpreting the word "surviving" as relating to the time of distribution, is absent in most, though not all, alternative disposition cases.⁵⁹ However, for the sake of consistency in interpreting ambiguous survivorship requirements in those states in which "surviving" is read to mean surviving the testator, it may be necessary to apply to alternative dispositions the same meaning as that applied to avoid unnatural results in cases involving no alternative provision for the family of a deceased primary taker. On the other hand, a manageable and consistent rule could be developed along the lines of a refusal, in the absence of a clear intent to the contrary, to require survival beyond the effective date of the instrument unless provision is made for substitute or alternate takers either expressly or by virtue of the class designation (such as "issue").⁶⁰

The other and more popular view would permit *Y*'s issue to take under the above hypothetical set of circumstances. Such cases hold that survivorship requirements imposed by the word "or" and its functional equivalents prevent the interest of a primary taker from vesting, or at least from vesting indefeasibly, until termination of the preceding estates.⁶¹ It seems so prob-

1958) (children or their descendants); *In re Ferdinand's Estate*, 7 Wis. 2d 577, 97 N.W.2d 414 (1959) (sisters and brothers or the survivors of them).

⁵⁹ For example, of the cases in note 58 *supra*, this danger was absent in the first four, but in *In re Ferdinand's Estate*, *supra* note 58, the danger of disinheritance of natural objects of the testator's bounty was present (since the alternative gift was to the survivors rather than to descendants of a deceased taker) and was emphasized by the court.

⁶⁰ Cf. RESTATEMENT, PROPERTY § 255 (1940) quoted and discussed in note 51 *supra*.

⁶¹ *Lawyer v. Munro*, 118 So. 2d 654 (Fla. App. 1960) (named nephews or their survivors or survivor); *Harris Trust & Sav. Bank v. Jackson*, 412 Ill. 261, 106 N.E.2d 188 (1952) (nephew or, if he be dead, to his heirs); *Taylor v. Taylor*, 118 Iowa 407, 92 N.W. 71 (1902) (children or their heirs); *Church v. Gibson*, 286 S.W.2d 91 (Ky. App. 1955) (*X* or his children); *Old Colony Trust Co. v. Barker*, 332 Mass. 533, 126 N.E.2d 188 (1955) (*X* or in case of his death to his issue); *In re Gulbenkian's Will*, 9 N.Y.2d 363, 174 N.E.2d 481, 214 N.Y.S.2d 379 (1961) (after the court construed "and" to mean "or": brothers or their descendants); *Wyman v. Kinney*, 111 Vt. 94, 10 A.2d 191, 128 A.L.R. 298 (1940) (named daughters or their heirs); RESTATEMENT, PROPERTY § 252 (1940).

In the form of a supplanting limitation, the condition subsequent continues until distribution under this view. *Koelliker v. Denking*, 148 Kan. 503, 83 P.2d 703 (1938), *modified on other point*, 149 Kan. 259, 86 P.2d 740 (children, except that the heirs of any deceased child shall receive his share); *accord*, *In re Larkin's Will*, 9 N.Y.2d 88, 172 N.E.2d 555, 211 N.Y.S.2d 175 (1961) (to named sons; in case any die leaving descendants, descendants to take).

That even the alternative form may occasionally be construed as involving a vested interest in the primary taker and a condition of defeasance in the event of his death before pos-

able that this is what the testator meant in his use of the alternative that this view is clearly preferable. It also accords with the sound planning principle which opposes the creation of interests which are transmissible on death prior to the date of possession.⁶² Incidentally, at least if it is considered desirable to treat the two forms consistently, the appropriateness of this latter result under the alternative form may be an additional reason for construing "surviving" as relating to possession under the less common form, previously discussed, which contains no alternative gift. Conversely, certainly, if a state has construed "surviving" as relating to the time of distribution, it should construe "or" in the same manner.

Section 122 of the California Probate Code expressly applies to words "referring to death or survivorship." Thus the statutory rule, which presumes that such words as applied to future interests relate to the time of possession, governs supplanting limitations referring to the event of a primary taker's death.⁶³ Even without words expressly referring to death, the survival requirement imposed by the word "or" should also be presumed to relate to possession. This presumption now appears established in California, although without reference to section 122.⁶⁴ One case, *In re Norris' Estate*,⁶⁵ recognized this presumption but held it inapplicable, finding the opposite result required by the wording of the decree of distribution under which the trust had been created. The decree in *Norris* did not conform to the wording of the will, which had in substance provided for a remainder to certain children or their heirs. Because of the California rule that the will is superseded by the decree and may not be resorted to as an aid in interpretation unless the decree is ambiguous,⁶⁶ the court's arguable con-

session, see *Caine v. Payne*, 182 F.2d 246 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 855 (nephews or the survivor or survivors of them). See also *McDougald v. Kennedy*, 203 Ga. 144, 45 S.E.2d 654 (1947) (children or their descendants), where the court, on the basis of the gift over being in behalf of *descendants*, narrowly restricted the survival requirement, concluding that because the interest of a child was "vested" it became indefeasible and descendible when she died *without* descendants between the death of the testator and the time of distribution. To label the primary taker's interest vested subject to divestment and to label the interest to be substituted an executory interest would, of course, be proper if the latter were in the form of a supplanting limitation. RESTATEMENT, PROPERTY § 253 (1940).

⁶² See text following note 118 *infra*.

⁶³ Without reference to Civil Code § 1336, the predecessor of CAL. PROB. CODE § 122, the limitation "among his children, the children of any deceased child taking by right of representation" was so construed in *In re Whitney's Estate*, 176 Cal. 12, 167 Pac. 399 (1917). Similar results were reached in *In re Young's Estate*, 215 Cal. 127, 8 P.2d 846 (1932); *In re Thompson's Estate*, 18 Cal. App. 2d 680, 64 P.2d 984 (1937).

⁶⁴ *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 280 P.2d 81 (1955) (named person or his heirs), although the court was not certain, nor did it matter, whether the condition was one precedent or subsequent.

⁶⁵ 78 Cal. App. 2d 152, 177 P.2d 299 (1947).

⁶⁶ *Id.* at 160, 177 P.2d at 304.

clusion that the decree "unmistakenly indicates" what was intended⁶⁷ resolved the issue in favor of the admittedly unusual interpretation that survival was not required beyond the testator's death.

B. Scope of the Expressed Survival Requirement

Even where it is clear that *some* survival requirement exists, the scope of that requirement may be unclear. Sometimes the testator will wish a remainderman's interest to be dependent upon his being alive at a particular time, or the testator may wish only to provide that the remainderman's interest should fail if the remainderman should die prior to that time under certain circumstances—commonly, for example, without issue. Where this intent is in doubt the court may have to determine the intended scope of the survival requirement. Of course, there is no certainty it will reach the result intended by the transferor. In some dispositions this lack of certainty would be a great surprise to the draftsman because to him it appeared that all contingencies were covered. Often these cases, unlike so many of the cases involving questions of interpretation, appear to arise not because the lawyer failed to raise the question, or because the client failed to form any intent on the question, but because the intent of the client has been inadequately expressed in the instrument.

1. Scope of Requirement of Survival Where Expressed Reference is Only to Certain Circumstances

Where a remainder is given to an individual, to a group of individuals, or to a class, with an expressed provision for a gift over to others if the primary taker should die under certain specified circumstances, it is conceivable that the primary taker's death will be held to defeat his interest regardless of the circumstances, if that death should occur before the relevant time. Typically, such a problem arises either in the context of a supplanting limitation which is expressly to take effect in the event of a primary taker's death "without issue" or in the context of such a gift over in the event of his death "with issue." For example, consider whether the interest of *X* in the following disposition will pass by his will if he should die leaving no issue: "To my wife, *W*, for life, remainder to my children, *X* and *Y*; but if either should die leaving issue, his share to his issue." Ignoring the collateral problems of interpretation, assume that *X* died *without* leaving issue, and that he devised any interest he might have in this property to his widow. The question then arises whether his failure to survive defeated his interest, or whether his interest was defeasible only if he should die *leaving* issue and therefore was transmissible on his death under any other circumstances. It is generally accepted, in accordance with the principle of con-

⁶⁷ *Ibid.*

fining divesting conditions to situations of their literal application, that X's interest is transmissible upon his death if he does not leave issue.⁶⁸ X's interest is properly classifiable as vested subject to defeasance, the only divesting condition being his death leaving issue,⁶⁹ so that it is not divested by his death under any other circumstances. In a number of cases, however, it has been held that the remainderman in question was required to be alive at the termination of the life estate and that his interest failed even upon his death without issue.⁷⁰ Such results should be reached only under the most persuasive circumstances.

Similarly, where the gift over is expressly to occur in the event of a remainderman's death "*without issue*," a court certainly should not infer from this that there is a requirement of survival under all circumstances. To do so would cause the interest in question to fail in the event of the remainderman's death *leaving* issue, resulting either in the disinheritance of the issue or in the necessity of implying a gift to the issue. Thus, in the typical case of this type, it should be clear that the only basis of defeasance is the primary remainderman's death *without issue*.⁷¹ However, the California law is not altogether clear because of earlier cases⁷² involving situations slightly different from the typical one involving a remainder following a life estate in another person.

The principal California case is *In re Blake's Estate*,⁷³ where a general requirement of survival was implied, primarily from the existence of a gift over on death without issue. The will had created a trust for two daughters and a grandchild (G) of the testator, providing that "as each

⁶⁸ *Warner v. Warner*, 237 F.2d 561 (D.C. Cir. 1956); *Burkholder v. Burkholder*, 412 Ill. 535, 107 N.E.2d 729 (1952); *In re Krooss*, 302 N.Y. 424, 99 N.E.2d 222, 47 A.L.R.2d 894 (1951); *Byrnes v. Stilwell*, 103 N.Y. 453, 9 N.E. 241 (1886); *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949); 2 POWELL, REAL PROPERTY ¶ 330 (1950).

⁶⁹ RESTATEMENT, PROPERTY § 252 (1940).

⁷⁰ *White v. White*, 312 Ill. App. 628, 39 N.E.2d 79 (1942); *Gatto v. Gatto*, 198 Ky. 569, 250 S.W. 833 (1923); cf. *In re Sullivan's Trust*, 6 Misc.2d 994, 157 N.Y.S.2d 30 (Sup. Ct. 1956). Neither the *White* case nor the *Gatto* case, *supra*, appear now to represent rules of construction in the states involved.

⁷¹ E.g., *In re De Vries' Estate*, 17 Cal. App. 184, 119 Pac. 109 (1911); *Sumpter v. Carter*, 115 Ga. 893, 42 S.E. 324 (1902); RESTATEMENT, PROPERTY § 252 (1940). But see *In re Easterday's Estate*, 45 Cal. App. 2d 598, 613, 114 P.2d 669, 677 (1941) (dictum that an express gift over on death without issue implies a gift over to the issue in the event of death *with* issue).

⁷² *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287 (1910); *Woestman v. Union Trust & Sav. Bank*, 50 Cal. App. 604, 195 Pac. 944 (1920). In the latter case the testatrix' estate was left "to my two boys . . . [names] share and share alike, or if either should die without issue, then to the other, the same, however, to be held in trust . . . until my said hoys reach the age of forty years." The court held that the sons were required to survive until the distribution of their trusts and that there was by implication a contingent interest in the issue of each son, to take effect in the event of his death leaving issue.

⁷³ 157 Cal. 448, 108 Pac. 287 (1910).

... arrives at the age of thirty years she shall have the right to demand" one-third of the fund, "and if either of my said daughters or granddaughter shall die without issue" before receiving her share, that share was to go to the surviving beneficiaries. *G* died at the age of twenty-seven, survived by her two children *A* and *B*. The testator's daughters each sought one-third of *G*'s share as intestate property of the testator. They urged that *G* had a "contingent remainder" which failed because it was not to vest until age thirty. *G*'s personal representative sought *G*'s entire share, arguing that *G*'s interest in that share was vested and that the only divesting condition, her death without issue, had not occurred. *A* and *B* argued in their own right that, even if *G* were required to survive under all circumstances, there was an implied gift to her issue. The California Supreme Court held that the attainment of age thirty was a condition precedent to the vesting of *G*'s interest and that there was an implied gift to the issue of *G* if she died under that age leaving issue. The court sought to avoid an intestacy by looking to what was said in the will and the necessary implications of the words.

In certain dispositions, an implied gift to issue is both appropriate and supported by considerable authority.⁷⁴ It is *not* appropriate where, by the terms of the disposition, the issue can take by will or intestacy from the deceased beneficiary. Thus, a disposition "to *A*, and if *A* should die without issue to *B*" is properly deemed to give *A* a transmissible interest in the event of his death leaving issue and does not require an implied gift to issue.⁷⁵ By contrast, "to *X* for life, and if he should die without issue to *Y*" is an appropriate case for such an implied gift when *X* dies leaving issue.⁷⁶ Since *X*'s estate is specifically one for life only and since *Y* takes only in default of issue, an apparently unintended intestacy would result if the interest in the issue were not implied.

The facts of the *Blake* case are not quite like those of any of the more frequently recurring death-without-issue situations. Care should be taken, as has not been done in some cases since this decision, not to generalize too broadly from it. The beneficiaries in *Blake* had been given only the right to *demand* and receive their shares at age thirty, and therefore the instrument could be construed as giving them only an unexercised *power* to withdraw their interests, or at least as requiring some action which could not occur if they died before age thirty. However, this factor was not emphasized by the court. It could also be urged that, since this case did not involve a postponement of possession for the convenience of a prior interest in another person, it is but a variation of the cases involving implied survival re-

⁷⁴ E.g., *In re Heard's Estate*, 25 Cal. 2d 322, 328, 153 P.2d 553, 556 (1944) (dictum).

⁷⁵ RESTATEMENT, PROPERTY § 272, comment *c* (1940).

⁷⁶ RESTATEMENT, PROPERTY § 272 (1940).

quirements resulting from a bequest to a person "at" or "when he reaches" a specified age.⁷⁷ Under that theory, however, the fact that the beneficiaries in *Blake* were entitled to all of the interim income should have prevented the implied survival requirement.⁷⁸ Thus, attempts to explain *Blake* in any fashion seem unsatisfactory. The case has been both followed⁷⁹ and disregarded⁸⁰ subsequently in analogous situations. At any rate, *Blake* stands for no useful principle of construction, and possibly has no constructional significance at all today. Although interpreting a materially different form of disposition, the majority in *In re Stanford's Estate*⁸¹ expressly disapproved the *Blake* decision as it related to the problem before the court. Reading Probate Code section 28 along with the *Stanford* dictum, there is reason to hope that *Blake* will no longer be troublesome precedent.

Aside from the cases involving either death with or without issue, there are numerous other instances of decisions which have strictly interpreted the wording of divesting conditions. Often, and in widely varying forms, a gift over will be provided upon a beneficiary's death, or death without issue, under specified additional circumstances. In such cases it is usual for a court to hold that death, or death without issue, under other than the specified conditions will not divest the interest.⁸² There are, of course, exceptions to this rule, too.⁸³

⁷⁷ See *Part I, supra* note 1, at 301-04.

⁷⁸ *Id.* at 301-02.

⁷⁹ *Woestman v. Union Trust & Sav. Bank*, 50 Cal. App. 604, 195 Pac. 944 (1920). See also dictum in *In re Easterday's Estate*, 45 Cal. App. 2d 598, 114 P.2d 669 (1941).

⁸⁰ *In re De Vries' Estate*, 17 Cal. App. 184, 119 Pac. 109 (1911). See also *In re Budd's Estate*, 166 Cal. 286, 135 Pac. 1131 (1913), where the testatrix provided for a gift to the beneficiary at a stated age if he, after reaching that age, agreed to carry out certain wishes of the testatrix. Relying on the predecessor to CAL. PROB. CODE § 28, the court strictly confined the "divesting" condition of nonconsent so as to hold the interest vested and not subject to a requirement of survival; however, the case was one in which the court was avoiding the then existing rule against suspension of the power of alienation.

⁸¹ 49 Cal. 2d 120, 129, 315 P.2d 681, 686 (1957), discussed in *Part I, supra* note 1, at 308-11.

⁸² *Howard v. Batchelder*, 143 Conn. 328, 122 A.2d 307 (1956), involved a life interest to wife and a remainder to daughter at age 30; if the daughter should die under 30 and without issue, there was a gift over. When daughter died without issue after reaching age 30, during the life tenancy of wife, her interest was not divested. In *Carr v. Hermann*, 16 Ill.2d 624, 158 N.E.2d 770, 73 A.L.R.2d 462 (1959) the testator directed that in case son, A, dies without descendants and leaves a wife surviving, then to the testator's remaining descendants. When A died without issue but did *not* leave a wife, his interest was not divested and passed by his will to charity. *Sturgis v. Sturgis*, 242 Mich. 52, 217 N.W. 771 (1928) concerned a disposition to son for life, remainder to his male children, if any survive him, and if not then over. When *some* male children *did* survive, the share of one who did not survive passed to such predeceased child's heirs. The limitation in *Ricardo v. Kelly*, 136 N.J. Eq. 365, 41 A.2d 901 (1945) was remainder to life tenant's sons; if either should die leaving issue to the issue; if both should die without issue then over. *Both* sons *did not* die without issue but *one* son *did* die without issue, so the divesting condition did not occur and the interest of the son who died without issue passed to his heirs.

⁸³ *E.g.*, *Crews v. Oven*, 159 F.2d 780 (10th Cir. 1946), *cert. denied*, 331 U.S. 836 (1947).

Naturally, there will be some cases in which, by limiting a condition to its precise terms, the actual intent of the testator will not be fulfilled. The trouble is that no one can tell in which particular cases this will be true. This is the inevitable effect of less than perfect drafting, but it is a chance which courts must accept. Even where the scope of these conditions is narrower than the *average* person would probably intend, a court must confine a condition to its literal terms so long as it is reasonably clear. To do otherwise would not give fair opportunity for the fulfillment of the wishes of the person whose intended disposition departs from the average. When a disposition is actually ambiguous, general rules of construction, based on or calculated to fulfill the intent of a hypothetical average person, are valuable aids to attaining an appropriate result in most cases. On the other hand, when the basis upon which defeasance was intended has been specified, a court should be careful to adhere to the expressed terms of the condition, even if it thinks another result might be more in line with the intention of the average person similarly situated.

The basic types of divesting conditions mentioned at the outset of this section might be used to illustrate that logical reasons may have existed for the testator's insertion of a gift over under one condition but not others. For example, where a gift over is provided in the event a child dies *without* leaving issue, it can quite easily be seen that the testator may want the property to be distributed among the testator's other descendants, rather than to allow the deceased child to leave it to his spouse or to an outsider. Yet, if the child should leave issue, the testator may not wish to divest the child's interest even in favor of the issue. The testator may intend then to allow the child to make such provision for his spouse and issue as to him appears appropriate. Because of the issue, provision for the son-in-law or daughter-in-law may be acceptable to the testator even though he would have excluded the child's widower or widow in the absence of issue. Furthermore, rather than divesting the interest of a deceased child and providing for outright distribution to such child's issue, the testator may wish to allow his child to make testamentary provision for such issue by way of trust or otherwise, as subsequently appears to the child to be desirable. This approach of allowing a child to dispose of a share of the testator's estate under certain circumstances is particularly likely to be used by the testator who has not been advised regarding the use of powers of appointment.

In this case the disposition stated that should any beneficiary die before receiving her portion at the stated age, leaving descendants, then in trust for the descendants. When the beneficiary died under age but *without* leaving descendants, the court held the interest divested, implying a requirement of survival until that age under all circumstances.

A gift over only in the event of a child's death *leaving* issue might also be for good reason as far as the testator is concerned. He may feel that, if his child dies before distribution leaving issue, he would want to insure that the share will go to those issue; whereas, if the child should not leave issue, the same testator might then feel that he would be willing to allow the child to bequeath his share to his spouse, to his brothers and sisters or their children, or otherwise, as the child thought appropriate. In fact, the testator might generally intend the child to have full ownership and control over that interest, except in the event of the child's death survived by issue, in which case the testator might want the issue protected as against the child's assignees or devisees.

As long as the language of a narrow defeasance provision is clear, a court should not engage in manufacturing conditions which are not imposed either literally or by necessary implication, particularly since such provisions are typically neither unnatural nor indicative of intentions which would be difficult to believe existed. In California, any application of the supposed rule in the *Blake* case to other death-without-issue situations, as some subsequent cases have suggested might be appropriate, is not only uncalled for but can be destructive of quite reasonable objectives.

2. *Scope of Alternative and Supplanting Limitations Which Are Not Expressly Restricted as to Circumstances*

Another source of difficulty concerning the scope of a survival requirement is the remainder provision which embodies an alternative or supplanting limitation but which contains no expressed restriction as to the circumstances under which the death of a primary taker is to cause his interest to fail. Thus the question is whether his interest fails in any event if he should die before the relevant time, or whether it fails only if those who are designated to take in his place are available to do so. Such cases differ from those just discussed in that they involve dispositions in which it is not stated that the gift over is to occur in the event of death under specified circumstances. Instead, provision is made for the descendants of a deceased remainderman. The obvious inference is that a deceased remainderman is not to share in the remainder, at least under some conditions. For example, consider the effect of an alternative limitation: *H* devises "to my wife, *W*, for life, remainder to my *children or their issue*." Assume that, whatever the requirement of survival may be, it relates to the death of *W* and not just to that of *H*. Assume further that at *H*'s death all of his children are living but that prior to *W*'s death a child, *C*, dies without having had issue, leaving everything he owns to his surviving spouse, *S*. Does *S* take one-third of the property on *W*'s death, or does it all go to the other children of *H*, all of whom survive *W*? The question, then, is whether *C* was re-

quired under *all* circumstances to survive until possession or whether *C*'s interest was to fail only if he left issue who could take the share otherwise intended for him. Was his interest to fail only in favor of his own issue, if any? Obviously, *H* had formed an intent that on *W*'s death *C* should take a share if then living and that *C*'s issue should take the share if *C* had died leaving issue who were alive at *W*'s death. When neither situation materialized, however, and neither *C* nor his issue could personally take, it is not wholly clear what *H* intended. Does the word "or" or the language "to my children, the share of a deceased child to his issue" in effect give the word "children" the meaning of "*then living* children"? Or do these forms mean "but if a child should die before the life tenant survived by issue, then his share to his issue"?⁸⁴ Does the use of a supplanting limitation rather than the alternative form present a materially different case?

When the precise question now being considered has been presented, dispositions in the form of a *supplanting limitation* have generally been interpreted to mean that the share of a child, or other primary taker, became indefeasible when he predeceased the life tenant leaving no issue.⁸⁵ Thus, in the hypothetical case posed above, *S* would share equally with the then living children of *H*. There are also a few cases involving the *alternative* form which have defined the scope of the survival requirement imposed by the word "or" so narrowly as to hold the primary taker's interest transmissible upon his death when he was not survived by issue.⁸⁶ The same

⁸⁴ In addition, it may be asked whether in this context the latter interpretation means leaving issue alive at distribution or just leaving issue alive at the child's death. If this latter is meant, is the interest of each of the child's descendants subject to a condition that the descendant also survive until possession? And if so, does this not create the risk of divesting a child's interest in favor of his issue, all of whom fail to qualify anyway? Contrast RESTATEMENT, PROPERTY § 254, comment *d* (1940), with *id.* at § 296, comment *g*.

⁸⁵ *De Korwin v. First Nat'l Bank*, 179 F.2d 347 (7th Cir. 1949), *cert. denied*, 339 U.S. 982 (1950) (grandchildren, the surviving issue of any deceased grandchild to take what the grandchild *would have taken if then living*); *American Security & Trust Co. v. Sullivan*, 72 F. Supp. 925 (D.C. 1947) (nephews, the children of any deceased nephews taking the parent's share); *Security Trust Co. v. Irvine*, 33 Del. Ch. 375, 93 A.2d 528 (1953) (brothers and sisters, the issue of deceased brothers and sisters to take the parent's share); *Faris v. Nickel*, 152 Kan. 652, 107 P.2d 721 (1940) (children, the descendants of any deceased child to take the parent's share); *Plitt v. Peppler*, 167 Md. 252, 173 Atl. 35, 109 A.L.R. 1 (1934) (children, the children of any deceased child to take the share of the parent); *In re Suydam's Estate*, 193 Misc. 151, 82 N.Y.S.2d 906 (Surr. 1948) (brother's children, issue of any deceased child to take the parent's share); *In re Neel's Estate*, 252 Pa. 394, 97 Atl. 502 (1916) (brothers and sisters, the children of deceased ones to represent their parent); *cf. Williams v. J. C. Armiger & Bro.*, 129 Md. 222, 98 Atl. 542 (1916). See also *Gibbens v. Gibbens*, 140 Mass. 102, 3 N.E. 1 (1885).

⁸⁶ *McDougald v. Kennedy*, 203 Ga. 144, 45 S.E.2d 654 (1947) (my children or their lineal descendants); *accord, Lockwood v. Clarke*, 136 N.J. Eq. 195, 41 A.2d 37 (1945) (children or if they be dead to their issue); *cf. In re Renskorff's Estate*, 211 N.Y.S.2d 671 (Surr. 1961) (sisters or their issue, if either should predecease life tenant leaving issue; "aided" by careless citation of *In re Krooss*, 302 N.Y. 424, 99 N.E.2d 222, 47 A.L.R.2d 894 (1951), *supra* note 68); *Boyd v. Bartlett*, 325 Mass. 206, 89 N.E.2d 772 (1950) (children then living or the issue of any deceased child; however, the case may have turned on other aspects of the form of the particular disposition).

result has also been reached where the conjunctive form has been used.⁸⁷ In the cases so holding, whatever the form involved, the interests of the primary takers are said by the court to be *vested subject to being divested*, a matter of great doubt under the alternative form,⁸⁸ although quite proper according to classic characterization where the disposition is in the form of a supplanting limitation.⁸⁹ It is then reasoned that the divesting occurs if, and only if, the primary taker dies *leaving issue*. Since the limited circumstances which would defeat the interest of *C*, in our example, did not occur under this interpretation, *C*'s interest would be held to have been effectively devised to *S*.

Just why it should follow, from the defeasibly vested character of such an interest, that the sole basis of defeasance is death *leaving issue* is not altogether clear. The basis for defeasance could as well be death under any circumstances. Conceptually, this may pose some problems once it is concluded that the interest is vested subject to a condition subsequent, for it is not expressly stated who is to receive the share which would be divested if a primary taker should die leaving no issue. Conceptually, a share has been created for such a taker and thus must pass somewhere if it is held to be divested. It could be urged that there is a gift over by implication to the other takers under the disposition, or the result of intestacy could be accepted. Such solutions are not necessary and are probably not appropriate. These conceptual problems are avoided if the survival requirements are deemed conditions precedent, as is certainly proper at least for the alternative form. Then the choice of takers is originally (as well as finally) made at distribution, with no more shares being created than are necessary to allot one to each qualified primary taker and each class of qualified alternates. Then it would be easy to drop out any primary taker who died leaving no issue. No problem of intestacy or of implying a gift over is encountered, no share having been set aside for the deceased primary taker. Even in what has generally been characterized as a supplanting limitation, it could be reasoned (and probably accurately) that the testator intended, but did not bother to state because he evidently *assumed*, that each primary taker was to be required to survive until distribution in order to take. This intent may be clearly *implied* from the reference to the death of a primary

⁸⁷ *Old Colony Trust Co. v. Clemons*, 332 Mass. 535, 126 N.E.2d 193 (1955) (nieces and nephews, and the issue of any deceased nieces and nephews); *Staples v. Mead*, 214 N.Y. 625, 108 N.E. 1108 (1915), *affirming*, 159 App. Div. 922, 144 N.Y. Supp. 1146 (1913), 152 App. Div. 745, 137 N.Y. Supp. 847 (1912) (grandchildren and to the issue of any who have died leaving issue); *accord*, *In re Lloyd's Estate*, 326 Pa. 230, 192 Atl. 98 (1937) (children and the issue any deceased child).

⁸⁸ See RESTATEMENT, PROPERTY § 252 (1940).

⁸⁹ See *id.* §§ 253, 254 (especially § 253, comment c, contrasting "but if," "and if," and "in case" with the alternative form "or").

remainderman and from the provision for such person's issue, which provision was inserted merely to prevent the disinheritance of such issue and not to restrict the survival requirement. Thus, a condition precedent of survival under all circumstances is implied as to the children from the provision for the issue of a deceased child, so that the primary takers are treated as if described as "then living children."

The *Restatement* interprets the alternative form as creating a requirement of survival in the form of a condition precedent,⁹⁰ for which proposition there is abundant case authority.⁹¹ It interprets this requirement of survival as applying in *all* circumstances rather than distinguishing between death *with* and *without* issue. Therefore, the interest of a primary taker fails even when he dies leaving no issue.⁹² There is very little authority supporting this latter proposition where the precise issue has been litigated.⁹³ Nevertheless, and despite the also rare cases holding the contrary,⁹⁴ the *Restatement* position seems sound and is likely to be accepted by most courts on the basis of the more general and quite well established proposition that the interest of a primary taker in such a case is, because of the word "or," subject to a condition which is precedent.

Where an ambiguous supplanting limitation is involved, the *Restatement* apparently would reach the opposite result, although it is certainly arguable that this form was intended to accomplish the same thing as the alternative form. After setting out the general proposition that restricted supplanting limitations, which are *expressly* worded to apply to some specified failures to survive, do not require survival under circumstances other than those specified, the *Restatement* goes on to indicate that the ambiguous limitations here being discussed are abbreviated forms of the expressly restricted limitation. It equates "*B*'s children, the issue of any deceased person taking the parent's share" with "*B*'s children, but if any child predeceases *B*, survived by children, then such persons shall take the parent's share."⁹⁵ As already observed, this is the view of most cases.⁹⁶ There are, however, a few cases taking the position that survival under *all* circumstances is required by the ambiguous language, so that it is not treated as

⁹⁰ *Id.* at § 252.

⁹¹ *E.g.*, see cases cited in note 61 *supra*; 2 SIMES & SMITH, FUTURE INTERESTS § 581 (2d ed. 1956).

⁹² RESTATEMENT, PROPERTY § 252, comments *d* and *e*, and illustration 4 (1940).

⁹³ One directly supporting case is *Robertson v. Robertson*, 313 Mass. 520, 48 N.E.2d 29 (1943). See also *Carpenter v. Smith*, 77 R.I. 358, 75 A.2d 413 (1950) (upon another condition precedent then to named niece or in event of her prior death to any of her children who survive her).

⁹⁴ Cases cited note 86 *supra*.

⁹⁵ RESTATEMENT, PROPERTY § 254, comment *a* (1940).

⁹⁶ Cases cited note 85 *supra*.

equivalent to the expressly restricted condition subsequent.⁹⁷ Thus, these few cases—clearly a minority—seem to conclude that the person who devises a remainder “to my children, the issue of any deceased child to take such child’s share” intends that children must be alive at distribution in order to be entitled to a share.

The proper result in cases involving “children or their issue” would certainly seem to be that the children are required to survive under all circumstances until distribution. It would also seem likely that a remainder to “children, the issue of any deceased child to take such child’s share” was merely used to accomplish the same result as “children or their issue” (rather than being an abbreviated form of the gift over only under restricted circumstances), the testator apparently *assuming* that any child who fails to survive until distribution would take nothing. From these conclusions it would seem to follow: (a) that both the alternative and the so-called supplanting limitations should receive the same treatment; and (b) that it is erroneous to presume that such dispositions were intended to give the primary taker a vested interest which is subject to defeasance if, but only if, he should die before distribution *leaving issue*. That is not what such dispositions mean to the average person,⁹⁸ and that is not likely to be what it meant to the testator or his attorney. Furthermore, the intent of the testator “is derived from a consideration of the interests [he] . . . thought he was creating rather than of those . . . he succeeded in creating.”⁹⁹ Why

⁹⁷ *In re Burdsall's Will*, 128 Misc. 582, 219 N.Y. Supp. 614 (Surr. 1927), *aff'd*, 221 App. Div. 756, 222 N.Y. Supp. 777 (1927) (named cousins; in the event either dies before distribution to her descendants); *In re Bond's Estate*, 127 N.Y.S.2d 693 (Surr. 1953) (brother's children, the descendants of a deceased child to take the child's share). In the *Burdsall* case, *supra*, the court reasoned that, whether the interest was termed vested or contingent, it was subject to being divested by the primary taker's death under any circumstances prior to possession, and it was so held despite a resulting intestacy. More recently the distinction between such a disposition and the *specifically restricted* condition of defeasance in the event of a child's death leaving issue was recognized in *In re Krooss*, 302 N.Y. 424, 99 N.E.2d 222, 47 A.L.R.2d 894 (1951). The court thus distinguished *Burdsall* from the type of case which was then before it and which is discussed in text at notes 68 and 69 *supra*.

⁹⁸ The author's casual poll of a number of laymen and a number of lawyers, having varying degrees of familiarity with estates practice and future interest law, failed to turn up a single person who thought that, under either form of expression, a person who used such language would have intended anything to pass by the will of a child who predeceased the life tenant leaving no issue. This, then, seems an appropriate situation for a natural meaning rule, which incidentally would also give effect to the often recognized preference for a construction under which property passes to those of the blood of the transferor (his other lines of descendants, for example) rather than to persons not of the blood (a son-in-law, for example). See, e.g., *In re Lawrence's Estate*, 17 Cal. 2d 1, 12, 108 P.2d 893, 899 (1941); RESTATEMENT, PROPERTY—CALIF. ANN. § 243, Clause (a) (1950).

⁹⁹ RESTATEMENT, PROPERTY § 252, comment d (1940) (in support of its proposition that the primary taker under an alternative limitation is required to survive until distribution even though there is a failure of alternate takers).

shouldn't a court just ask what a person who used such language probably meant, instead of becoming involved in the distinctions between contingent and defeasibly vested interests? For purposes of construction this artificial relic should be recognized as totally irrelevant, if it has to be recognized at all.

It is ironic that some courts are so willing to imply a condition of survivorship because of the presence of "words of futurity," because of the mere use of some form of class gift, or because of another condition precedent, when there is no evidence that the question of survival had crossed the testator's mind, and yet when a disposition is found in which the testator has expressly made provision for the issue of deceased primary remaindermen, a court is unwilling to infer from this that the interest of a primary remainderman was intended to fail if he died before distribution. But the greatest irony in these cases is that some courts will take the unrestricted survival requirement in a remainder to "children or their issue" and cut it down to a gift over only on death leaving issue, while others will take a clear, expressly restricted gift over in the event of death leaving issue and blow it up into an unrestricted requirement of survival under *all* circumstances.¹⁰⁰

III

DOES IT MATTER WHETHER A CONDITION OF SURVIVORSHIP IS PRECEDENT OR SUBSEQUENT?

Where the question before the court is which beneficiaries are entitled to take the property at the termination of a trust or legal life estate, it does not matter whether a given survival requirement is in the form of a condition precedent or subsequent.¹⁰¹ Once it is determined that a claimant's interest is subject to a requirement of survival and that the requirement is not satisfied, the interest is as effectively defeated if the condition is subsequent as if it had been precedent. For purposes of estate taxation, too, the issue of whether a future interest is to be included in the estate of a remainderman who dies before possession turns on the question of descendibility, which depends on the existence or non-existence of a condition of survivorship, not on its form.

There are, however, situations in which it is necessary to decide whether a condition of survivorship, which concededly exists, is precedent or subse-

¹⁰⁰ See note 70 *supra*. See also note 83 *supra* and *In re Blake's Estate*, 157 Cal. 443, 108 Pac. 287 (1910), discussed in text at note 73 *supra*.

¹⁰¹ As has already been seen, however, where the scope of a survival requirement is uncertain, the fact that the requirement is characterized as a condition subsequent may affect the court's interpretation of that requirement in regard to the scope of its application. See text at notes 85-94 *supra* for discussion of alternative and supplanting limitations which are not expressly restricted in the circumstances of their application.

quent—that is, in which it is necessary to know whether that interest is technically vested or contingent. Historically, the classification of interests as vested or contingent was of considerable importance. Today the significance of such classification is diminishing but unfortunately is still far from extinct. The distinction between conditions precedent and subsequent as a basis for deciding the substantive rights of litigants is outmoded and illogical. It is but a litigation breeder which places undue emphasis on the *form* of expression, regardless of whether this form realistically has anything to do with the purposes or intentions of the person using it or whether it relates to any rational policy of modern law. The distinction enables courts to manipulate the outcome of cases in a fashion that detracts from the rule of law. As will be seen, California has progressed a long way—probably as far as any other state—in the direction of eliminating this artificial distinction.

Assuming that a condition of survivorship does exist, when might it matter whether that condition is precedent or subsequent? In those states in which contingent remainders are held to be destructible, the distinction is still important,¹⁰² but such states are few.¹⁰³ Despite language in some opinions phrased in terms of distinctions between contingent and vested future interests,¹⁰⁴ in cases involving actions for damages, waste or partition the relevant distinction is between indefeasibly vested interests on the one hand and interests which are either contingent or vested subject to defeasance on the other, the latter types of interests being treated alike because of their similar uncertainties.¹⁰⁵ Unfortunately, however, modern property law is not in all respects so logical in its treatment of such interests.

Ancient rules governing the inalienability of contingent future interests still survive in a few jurisdictions, but no such disability exists as to vested remainders even though subject to complete defeasance,¹⁰⁶ although as a practical matter an interest of the latter variety may well be less substantial than one of the former. More widely held is the rule that, although contingent as well as vested future interests are alienable voluntarily, contingent interests are not liable to execution or other locally appropriate creditor process, while defeasibly vested future interests are subject to

¹⁰² See generally 1 SIMEs & SMITH, *FUTURE INTERESTS* §§ 193–209 (2d ed. 1956).

¹⁰³ The doctrine has been abolished in California. CAL. CIV. CODE § 742.

¹⁰⁴ *E.g.*, *Rhoda v. Alameda County*, 134 Cal. App. 726, 26 P.2d 691 (1933); *Bush v. Hamill*, 273 Ill. 132, 112 N.E. 375 (1916).

¹⁰⁵ See generally 4 SIMEs & SMITH, *op. cit. supra* note 102, at §§ 1661 and 1663 on problems of waste and at § 1772 on partition. In *Rhoda v. Alameda County*, *supra* note 104, the court talked of the disability of contingent remaindermen to bring actions for damages, but the interest before it was more in the form of one vested subject to defeasance (there being a divesting gift on failure to survive either with issue or without issue).

¹⁰⁶ 4 SIMEs & SMITH, *op. cit. supra* note 102, at §§ 1856–59.

such involuntary alienation.¹⁰⁷ Yet the element of sacrifice in a forced sale of the latter is every bit as real as in the former, and in most instances it is purely fortuitous that one form of interest has been created instead of the other to accomplish the same purpose. California has some authority for the unusual proposition that defeasibly vested remainders are also not subject to the claims of creditors. In *Anglo California National Bank v. Kidd*¹⁰⁸ it was held that the future interest before the court was not subject to execution, although it was clearly transferable voluntarily. In response to the contention that the interest was vested subject to defeasance, rather than contingent, the court stated that the policy which opposes forced sale of contingent future interests at nominal prices is equally applicable to vested interests which are subject to complete defeasance.¹⁰⁹ However, the court found that the interest before it was contingent. Consequently, the case represents only an admirable dictum about the similar treatment of defeasible and contingent interests, although the language creating the interest in question was not revealed, and the case has recently been cited as authority involving a condition subsequent.¹¹⁰

That a future interest is defeasibly vested rather than contingent also becomes important when, because of a gap in the disposition, it is necessary to decide who is entitled to the income from, or possession of, the property during the period for which no express disposition has been provided. The classic English case of *Edwards v. Hammond*¹¹¹ aptly illustrates this situation. In that case there was, in substance, a transfer by *A* reserving a life interest, and then to *A*'s oldest son and his heirs if he lived to age twenty-one; provided, and upon condition, that if he die before age twenty-one the property should revert to *A* and his heirs. The problem was to determine who was entitled to possession of the property from the time of *A*'s death until the eldest son reached the required age, it being contended that the interim right of possession was undisposed of and therefore descended to *A*'s youngest son. The court reasoned that, if the attainment of age twenty-one were a condition precedent, nothing would vest in the eldest son until he reached that age and that the interim right of possession would be un-

¹⁰⁷ See generally Halbach, *Creditor's Rights in Future Interests*, 43 MINN. L. REV. 217, 225-37 (1958). The distinction has not been preserved under Section 70a(5) of the Bankruptcy Act, 30 Stat. 565 (1898), 11 U.S.C. § 110(a)(5) (1958) (where the test is *voluntary* alienability under state law), except in the few states in which local property rules have preserved the distinction for purposes of *voluntary* transfer.

¹⁰⁸ 58 Cal. App. 2d 651, 137 P.2d 460 (1943).

¹⁰⁹ 58 Cal. App. 2d at 655, 137 P.2d at 462. See also *In re Zuber's Estate*, 146 Cal. App. 2d 584, 304 P.2d 247 (1956) (involving seizure under a federal statute), on the unimportance of whether a condition is precedent or subsequent for purposes of alienability.

¹¹⁰ *In re Zuber's Estate*, *supra* note 109, at 592, 304 P.2d at 253.

¹¹¹ 3 Lev. 132, 83 Eng. Rep. 614 (K.B. 1683).

disposed of; but that if the failure to reach that age were a divesting condition, the eldest son's interest would be vested and he would be entitled to the benefits of the property until the occurrence of the divesting condition. Since the disposition contained language typifying a condition precedent ("if he live") and also language typifying a condition subsequent ("provided, and upon condition, that if he die"), the court preferred the vested construction. This vested-or-contingent test has been utilized in California to resolve an interim-income problem,¹¹² but in this state such cases should normally be resolved without resort to the distinction between conditions precedent and subsequent. Civil Code section 733 provides that, in the absence of a valid direction to accunulate, a right of income which is not expressly disposed of "belongs to the persons presumptively entitled to the next eventual interest." Thus, the same result should follow in California in the case of contingent interests as is reached where the interest in question is vested.

Possibly one pleasant function served by the distinction between conditions precedent and subsequent has to do with the Rule Against Perpetuities. Although the difference in treatment does tend to preserve this artificial distinction, certain interests may be rescued from the Rule in a fashion which probably fulfills the transferor's intent without obstructing the policy of the Rule. For example, consider various forms of a trust to pay the income to *A* for life and to provide a remainder for *A*'s children. If the remainder is to be divided equally among "such of *A*'s children as are living when the youngest reaches the age of twenty-five," the remainder is invalid. If, however, the remainder had been "to *A*'s children in equal shares; but if any child should die before the youngest reaches age twenty-five, his share shall go to the survivors," then the children's interests "vest" at birth and are valid (and, in fact, are indefeasible because the divesting interests fail).¹¹³ The latter result would more nearly accord with the testator's intent than the former, since the interests of the primary remaindermen are preserved. This occasion for distinguishing conditions precedent from conditions subsequent is still important in California,¹¹⁴ but one might wonder why a testator who violates the Rule Against Perpetuities in one form deserves a better break than one who uses another form.

Fortunately, the consequences of future-interest rules distinguishing between conditions precedent and subsequent are not likely to be such as to concern or burden the average draftsman in his expression of a survival

¹¹² *In re Reimer's Estate*, 67 Cal. App. 2d 634, 159 P.2d 677 (1945).

¹¹³ See GRAY, *THE RULE AGAINST PERPETUITIES* § 108 (4th ed. 1942); 6 *AMERICAN LAW OF PROPERTY* §§ 24.18, 24.19 (Casner ed. 1952).

¹¹⁴ Authorities under the common-law Rule Against Perpetuities are clearly applicable under CAL. CIV. CODE § 715.2.

requirement. However, rules which require courts to characterize conditions as precedent or subsequent are seriously objectionable, despite such "worthy" purposes as saving interests from the Rule Against Perpetuities. The distinction embodied in such a rule of law encourages courts to defeat the rule itself by construing the instrument so as to justify the result sought to be reached. In many instances it appears that courts have been unfairly criticized for so manipulating case results, but in future-interest cases involving conditions it is impossible to close one's eyes to what is happening. Where a court wishes to avoid a result it feels it would be compelled to reach if it classifies an interest as vested rather than contingent, or vice versa, it is tempted to make convenient, if erroneous, classifications. For example, in perpetuities cases a condition in the form of a condition precedent may be construed to be subsequent to avoid invalidity,¹¹⁵ while in creditor cases a condition in the form of a condition subsequent may be construed to be precedent in order to avoid the sacrifice sale of a defeasibly vested interest.¹¹⁶ Such decisions are poor substitutes for correcting the indefensible common-law rules which distinguish between conditions precedent and subsequent. Why should an alternative contingent remainder fare better or worse than its counterpart in the form of a vested remainder subject to an executory interest? Certainly rules utilizing such distinctions need not wait for legislative correction, while courts in the meantime are encouraged to abuse the flexibility that is inherent in the process of interpretation as a means of reaching what they consider appropriate results. The preservation of such future-interest rules is an open rejection of fundamental, but often forgotten, principles of the common law, codified in California as "maxims of jurisprudence":

When the reason of a rule ceases, so should the rule itself.¹¹⁷

Where the reason is the same, the rule should be the same.¹¹⁸

IV

PLANNING AND DRAFTING

A. Why Survival Should be Expressly Required

Obviously, it is essential for the draftsman to make clear whether a condition of survivorship is intended to be imposed upon the holder of any

¹¹⁵ See, e.g., *In re Budd's Estate*, 166 Cal. 286, 135 Pac. 1131 (1913).

¹¹⁶ See, e.g., *Adams v. Dugan*, 196 Okla. 156, 163 P.2d 227 (1945); *Home Bank v. Fox*, 113 S.C. 378, 102 S.E. 643 (1920). See also *San Diego Trust & Sav. Bank v. Heustis*, 121 Cal. App. 675, 10 P.2d 158 (1932), questionably construing an interest as contingent, and thus immune from levy, before any indication existed that the distinction between contingent and defeasible interests should be disregarded for such purposes in California.

¹¹⁷ CAL. CIV. CODE § 3510.

¹¹⁸ CAL. CIV. CODE § 3511.

future interest. Whenever a condition of survivorship is created, it has been seen that there are additional questions which need to be answered. However, planning with regard to these matters involves more than simply providing a clear-cut answer to the various aspects of the survival problem. It is also important that an appropriate answer be given. An appropriate answer not only requires the lawyer to ascertain his client's intent but also to assist the client in developing this intent. This in turn necessitates an explanation of the relevant considerations to the client.

Unlike most aspects of the estate-planning process, where the question involved is that of survivorship, there *is* a standard solution which will almost always be appropriate: Survival until the termination of all preceding estates should be required.

The primary reason for this stock solution is that any future interest which does not fail in the event of the holder's death will be unnecessarily exposed to death taxation. If the remainderman should die before the time fixed for distribution of his interest, the survivorship requirement will prevent its inclusion in his taxable estate; but if his interest is a descendible one it will be subjected to estate and inheritance taxation.¹¹⁹ Taxable future interests that are subject to other conditions precedent or conditions of defeasance, in whole or in part (and a well drawn trust would normally contain a power of invasion by or in behalf of the life beneficiary), also create serious problems of evaluation. Even if an individual remainderman's share of a particular trust does not appear substantial enough for these considerations to be significant, it must be remembered that the value of the corpus may grow and that the remainderman's independent estate may alter the situation considerably. The \$60,000 federal estate-tax exemption and the specific exemptions typically allowed in inheritance taxation have not kept pace with inflation. Today, even the average young family man, who thinks he has been able to accumulate nothing except an equity in his home, will probably have some death-tax problems upon his death if he has adequately protected his family through life insurance. Of course, it does not matter for purposes of death taxation whether a condition of survival is precedent or subsequent, although, as will be seen hereafter, the problems of drafting inevitably seem to be simplified if the condition precedent form is used.

The existence of transmissible future interests give rise to non-tax problems too. One such problem, particularly in trusts of long duration, may be that of tracing descendible remainders through the estates and possibly the inter-vivos transactions of deceased remaindermen and of their successors in interest. This is complicated by the frequent omission of such

¹¹⁹ See INT. REV. CODE OF 1954, § 2033; Treas. Reg. § 20.2031-1(1) (1960). See also CAL. REV. & TAX. CODE §§ 13304, 13601.

remainders from the inventories and decrees relating to the remaindermen's estates.¹²⁰ Naturally, testamentary and lifetime dispositions, possibly even involving execution sales, are likely to result in a far different ultimate disposition of the trust estate than would have been prescribed by the settlor had he been led to consider the situation of a remainderman's death and to formulate his own pattern of distribution. Furthermore, the remainderman whose interest had not yet become possessory may have neglected to have his own estate planned, or at least to have it properly planned with the future interest in mind. He may have failed to recognize the desirability of having a will, which would be obvious to a person who held comparable property values in hand. Thus even the settlor who wishes to vest the dispositive power over a future interest in the remainderman would likely be disappointed by the latter's failure to plan his affairs with such nonpossessory interests in mind. An expressed provision for alternative takers, or for persons to take in default of appointment, would be better calculated to assure the carrying out of the client's wishes.

One obvious and easily answered objection to requiring survival is that the client may want to allow each remainderman to dispose of his future interest in any way he might wish, or simply to let such interest pass as any other property of the remainderman would pass, in the event of the latter's death. Virtually anything which is sought to be accomplished by indefeasibly vesting the remainder can be accomplished by one or more of a variety of other provisions. Most obviously, the privilege of deciding the ultimate disposition of the property can be granted in the form of a broad, special power of appointment. Through this device not only can the power of disposal on death be given the beneficiary, but this power can be restricted in nearly any fashion, and the default provision can be tailored to the settlor's purposes, thus covering a failure of the beneficiary to have his estate planned. The power can be made exercisable only by expressed testamentary reference to the power or by filing a writing with the trustee, in order to prevent interference with the settlor's scheme unless the beneficiary makes affirmative provision for exercise. This would tend to assure that the donee of the power would give special attention to the property subject to his appointment.

It is true that a simple limitation (which can be drawn as readily as an indefeasibly vested remainder) providing for distribution to include the issue of deceased remaindermen may not be wholly satisfactory. Even if adequately drafted, such a provision may be inadequately planned in that (a) no provision is made for retention in trust of the property of a deceased remainderman's minor issue, and (b) no provision is made for the spouse

¹²⁰ See, e.g., *In re Latimer's Will*, 266 Wis. 158, 63 N.W.2d 65 (1954).

of the deceased remainderman. Replacement of, and improvement upon, the indefeasible remainder would thus present a more exacting task both of interviewing and of drafting, if the client's wishes render it inappropriate to use the simple provision for distribution to the issue of a deceased remainderman. However, the advantages of indefeasibly vested future interests can be provided and improved upon, while avoiding the adverse consequences of such interests, either through the power-of-appointment device or by creating a trust of the share to be set aside for the issue or family of a deceased remainderman. The method, simple or complex, of handling the survival problem is, of course, ultimately up to the client, but it should not be ignored purely by oversight or concealed in the creation of transmissible remainders. With the varied alternatives offered by proper planning to replace any of the desirable characteristics of transmissible interests, it would be an unusual situation in which it would not be worthwhile to require all future interest holders to survive until the termination of the preceding estates.

B. Suggestions on Drafting

Once the basic questions relating to survival have been asked of the client and have been resolved, the problem is one of giving adequate expression to the decisions reached. The first and most obvious essential is to leave no doubt whether there is a requirement of survival. Such a requirement should never be imposed by mere implication, however clear it may seem. Alternative and supplanting limitations, for example, have proven deceptively ambiguous. Thus, initially the *existence* of the requirement, if any, and the circumstances of its application should be made unequivocally clear. *This applies to substitute or alternate takers as well as primary takers.*

In addition to the existence and scope of any survival requirement, the limitation should expressly state the time as of which survival is required. Reliance should never be placed upon a rule of construction, or even upon a statute as clear as Probate Code section 122 in California, because such rules are only rules of construction, yielding to a "showing" of other intent. Furthermore, there is no assurance that the law of another jurisdiction will not be applied. Particular care is required when distribution is not to be made until both the termination of a preceding estate and the attainment of a stated age by the remainderman.

The matter of expressing the existence, scope, and duration of these requirements is not difficult so long as the possible uncertainties are recognized. Thus, a remainder to children following a life interest in the surviving spouse could be given simply to "such of my children as survive my wife," and that would answer the survival questions just mentioned. How-

ever, certain shortcomings should be apparent in this disposition, although they have seemingly been overlooked in many instruments.

Unless the desire to omit provision for the issue of deceased children is more common than this writer believes is the case, draftsmen often fail to complete their dispositions properly. This shortcoming is found so often it is difficult to believe that the limitations in question say what was intended. The fault occurs in the choice of a restrictive class designation which will not adapt to the event of a class member's death, or in the failure to provide substitutes for a named remainderman who fails to survive as required. Thus one can find lines of issue being omitted in the frequently litigated cases involving remainders to certain "children should they survive the life tenant,"¹²¹ or trusts providing that upon the expiration of the life interest of a child of the testator the corpus is to be divided "equally among all my grandchildren then living."¹²² In these cases the existence of a survival requirement is clear, as is the time to which it relates, but before imposing such requirements it is important for the draftsman to be certain he is using the proper class designation to carry out the client's purpose. The drafting of survival requirements without considering what is to occur in the event of nonsurvival is as ill-advised as it would be for a court to imply such a condition. The mere use of flexible class designations such as "issue" and "descendants," instead of "children," can avoid the dangers of unintended exclusion of natural objects. Instead of remainders to his brothers and sisters, the childless testator can avoid disinheritance of nieces and nephews by simply designating the remaindermen as the issue of his mother, providing for those alive at distribution to take *per stirpes*.

The extremely common purpose of providing for a distribution *per stirpes* among descendants serves as a ready illustration of drafting to solve survivorship problems. The elaborateness of the drafting will depend upon the preferences of the lawyer and of his clients. It also will depend upon the role (do further trusts have to be developed for some beneficiaries under the provision?) and the importance (is it a basic dispositive provision or a remote gift over upon some contingency?) of the limitation in question. Adequate forms vary all the way from the very brief provision that upon termination of the trust the remainder shall be distributed to certain "issue then living *per stirpes*" to the form, which the client will probably find more understandable and less impersonal, providing for division into "as

¹²¹ *E.g.*, *Allen v. McKee*, 128 Ind. App. 329, 148 N.E.2d 343 (1958).

¹²² *E.g.*, *In re Welles' Will*, 9 N.Y.2d 277, 173 N.E.2d 876, 213 N.Y.S.2d 441 (1961). It is argued in the dissent that "grandchildren" should be construed to include great-grandchildren, but the majority thought the language too clear for that interpretation, even though some carelessness in the usage of various words describing descendants might have been inferred: on the daughter's death, the corpus was to go to her *children*, but if she died without *issue* surviving her, it was to go to testator's grandchildren then living.

many equal shares as there are children of mine who are living at [the termination of all preceding estates] and children of mine who are then deceased leaving descendants then living" and then providing for the distribution of each share or for its subsequent retention in trust.¹²³

In selecting the form or approach for the drafting of future interests in which survival is to be required, as it generally should be, one particular observation might be helpful. The source of difficulty in nearly all such cases is traceable to one factor: *the draftsman has created too many interests* and has then tried unsuccessfully or ambiguously to dispose of those created for remaindermen who fail to survive. In other words, instead of making survival a condition precedent, the draftsman has set apart a share for each primary remainderman, has provided for its divestment if that beneficiary should die before distribution, and then has attempted to cover all possible situations with dispositions to the beneficiary's issue or others.¹²⁴ Even in cases of near success, it is common to find that, if the primary remainderman dies before distribution, his share is to go to his issue per stirpes, and it is even made clear that these issue are to be living and to be determined at distribution. Then it is provided that, if the primary remainderman should "die without issue," his share is to go to some other persons: those other persons' interests are dependent upon the remainderman dying *without* issue, so if he dies *with* issue but the line of issue (a sole child, for example) should expire before distribution, there is a gap in the terms of the disposition. The draftsman who is finding it difficult to construct a provision for the ultimate distribution of a trust is likely to find, if he looks again, that the source of his trouble is that he has been creating vested remainders subject to defeasance. If he starts over by making the survival of an intended beneficiary or class of beneficiaries a condition precedent to the creation of an interest for such person or class, the draftsman may find that the drafting problem itself has failed to survive. Under this approach the remaindermen are, in effect, selected *initially*, as well as finally, at the time fixed for distribution.

CONCLUSION

As illustrated by the recent *Stanford*¹²⁵ and *Ferry*¹²⁶ cases in California,

¹²³ For useful, complete examples of dispositive provisions, see CASNER, ESTATE PLANNING 1270-71 (3d ed. 1961), containing a brief form providing for distribution of income and then of the principal on termination to issue, and *id.* at 1241-51, for an elaborate set of provisions for subdividing a trust into further separate trusts of various types for living children, issue of deceased children and widows of issueless deceased sons.

¹²⁴ See, e.g., *Pyne v. Pyne*, 154 F.2d 297 (D.C. Cir. 1946), where it appears (but the ambiguities prevent certainty) that, after creating a secondary life estate, the testator was merely trying to say "to my issue then living per stirpes."

¹²⁵ *In re Stanford's Estate*, 49 Cal. 2d 120, 315 P.2d 681 (1957), discussed in *Part I, supra* note 1, at 308-11.

¹²⁶ *In re Ferry's Estate*, 55 A.C. 783, 361 P.2d 900, 13 Cal. Rptr. 180 (1961), discussed *supra* at notes 24-34.

modern cases have tended to clarify the constructional rules applicable to survivorship questions. These cases also illustrate the general, though certainly not universal, escape from such false issues as whether the remainder in question is or is not one to a class, or whether it is technically vested or contingent. More specifically, these cases are illustrative of the general reluctance of most courts to find that conditions of survivorship are imposed by implication, an attitude which is certainly desirable in the case of a remainder to named individuals or to an inflexible class such as "children." However, considerable doubt remains in California and elsewhere in cases involving adaptable class designations such as "issue," although it appears that survival until distribution is generally required in such cases.¹²⁷ In these latter cases implied conditions are not really objectionable, since more remote descendants would be substituted for those who fail to fulfill the survival requirement, and the class designation is one which seems to suggest that such a pattern of substitution was contemplated by the testator.

Although a court cannot create a disposition to compensate for the consequences of an *implied* survival requirement, and it is therefore generally inappropriate for such conditions to be implied, this does not mean that draftsmen should not require survival by *express* provision. In fact, the opposite is true. In order to avoid the adverse consequences of transmissible interests, such as unnecessary estate taxation, survival should normally be required of all remaindermen. Then the instrument should provide for appropriate disposition of the property in the event of nonsurvival by one of the remaindermen. It is the opportunity to provide for such a disposition that makes it appropriate for the draftsman to impose a survival requirement, even though a court should not do so. Thus, the draftsman must make it clear whether, under what circumstances, and until what time survival is required, and he must also make provision to compensate for possible failures to satisfy any such requirement.

When the draftsman has failed in any but the last of the above-mentioned particulars and the case comes to a court, the solution of the survivorship question will be facilitated by (a) the fact that there will be but a few possible alternative meanings and (b) the fact that, in most instances, there are certain strong, natural tendencies of transferors, by which courts should be guided. These tendencies should be *reflected* in con-

¹²⁷ See *Part I, supra* note 1, at 322; RESTATEMENT, PROPERTY § 296, comment g (1940). However, this proposition is somewhat doubtful, particularly because of the cases that have refused to require issue to survive under *alternative limitations* involving issue. *E.g.*, *Central Trust Co. v. Guthrie*, 175 N.E.2d 113 (Ohio App. 1961). It is not clear whether cases of this latter type are a rejection of the "general rule" on issue, or whether they result from excessive caution based on warnings against implying conditions of survival from conditions which are unrelated to survival or which have been imposed upon *other* beneficiaries.

structional rules, not *impaired* by them. Because of the strength of such natural tendencies, rules of construction seem particularly useful in survival cases. It is often said that precedent is of little value in deciding questions concerning the meaning to be attributed to donative instruments, because such decisions turn upon the particular facts and language of each case. In survival cases at least, such a statement does not seem valid. More often it appears that it is the peculiar facts and language of a particular case that will be useless in deciding such questions. It is obvious that rules of construction are not needed when the meaning of an instrument is clear from the particular language in question, from a consideration of the instrument as a whole,¹²⁸ or from the surrounding circumstances and any extrinsic evidence which is properly before the court. But often there is no reasonably persuasive indication of actual intent, or even of a sufficiently definite purpose to suggest what would have been intended. In such cases unconvincing "particular facts" and forms of expression should not be used as a basis for decision. Resort should be had to a constructional preference, and such preferences should be developed sensibly, so as to permit their application without apology.

A sound, forceful rule of construction cannot represent merely a way of getting cases decided, and it cannot be based merely on hollow, traditional rules. Ultimately, such rules should reflect the most likely and natural intent of transferors under similar circumstances. The social desirability of the result should also be important. In cases involving implied conditions of survival, it so happens that the traditional preferences for early vesting and early indefeasibility usually lead to the natural and desirable result. A rule opposed to implied conditions is often valuable to prevent failure of provision for a line of descendants or for the family of a chosen but deceased beneficiary, thus avoiding problems like those for which anti-lapse legislation was required in the case of testamentary gifts. The favorable consequences of a sound rule¹²⁹ should not readily be surrendered before the unpersuasive special factors or wordings which can be produced in any

¹²⁸ When the entirety of a provision or instrument reveals a dominant purpose with reasonable clarity, the result indicated by that purpose should be preferred to an inconsistent, literal reading of specific words. *Contrast* the approaches of the court in *In re Gulbenkian's Will*, 9 N.Y.2d 363, 174 N.E.2d 481, 214 N.Y.S.2d 379 (1961), and *In re Larkin's Will*, 9 N.Y.2d 88, 172 N.E.2d 555, 211 N.Y.S.2d 175 (1961), with the unfortunate approach to the interpretation of a statute in *In re Gardiner's Will*, 20 Misc. 2d 722, 191 N.Y.S.2d 520 (Surr. 1959) (holding that the statute, which changed the common-law presumption of a per capita result to that of a per stirpes result where a gift is to "issue" of unequal degree, did not apply where the will used the term "descendants," so that a living daughter had to share equally with her own children).

¹²⁹ As to other general considerations opposing implied conditions of survival in most cases, see *Part I, supra* note 1, at 304-07.

case. Strong rules of construction in survival cases not only create a desirable element of predictability, but also generally lead to better results.

Strong rules, of course, must be sound rules. Thus, the first step should be a willingness of courts to clarify, create and even change constructional rules, and to state them, as the *Ferry* case has done, in terms which will offer guides for solving cases when other persuasive indications of the intent to be attributed to the transferor are lacking. The constructional pairs, from which a court can select either of two "rules" to justify its chosen result, are utterly useless as guides for resolving controversies. Rules of construction, however old and cherished, should be discarded if they tend to defeat intent. Lawyers are not likely to have relied upon them, and laymen are not likely to have heard of them; if the draftsman had addressed himself to the question before the court, resort to the court and to rules of construction would have been unnecessary. Thus a court, if convinced that a particular constructional rule is preferable for cases of the type before it, should not hesitate to establish that rule, even at the expense of precedent. Such a constructional preference, based upon reasons which are presently valid, need not be rebuttable "by the slightest showing of other intent," an approach used to circumvent intent-defeating rules on the basis of flimsy indications of intent—a poor substitute for putting the rule right. When a constructional rule suggests one result and common sense the other, the latter prevails only after wasteful litigation. When rules and common sense coincide, the result follows easily. The law of future interests is so laden with costly relics¹³⁰ that the common-law role of courts cannot be fulfilled by awaiting legislative action. The *Stanford* and *Ferry* cases in California are illustrative of a hopeful trend in at least the survival cases.

¹³⁰ Although the Rule in Shelley's Case is a rule of law rather than of construction in Illinois, the cost of archaic rules of future-interest law was aptly illustrated recently in *Orme v. Northern Trust Co.*, 29 Ill. App. 2d 75, 172 N.E.2d 413 (1961) (over \$220,000 in fees incurred mainly in deciding that a reference to a person's "children or heirs" did not refer to her "heirs," thus avoiding Shelley's Rule). On the general need of reform in future interests and for suggestions therefor, see Browder, *Future Interest Reform*, 35 N.Y.U.L. REV. 1255 (1960).