

#L-654

9/14/83

Second Supplement to Memorandum 83-63

Subject: Study L-654 - Ancestral Property Doctrine

Attached as Exhibit 1 is a letter from Professor Niles objecting to continuation of the ancestral property doctrine. He suggests that consideration be given to giving the issue of a predeceased spouse priority if the decedent has no issue and to providing that if property of the decedent would otherwise escheat the property goes to the heirs of the predeceased spouse.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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September 9, 1983

Mr. John H. DeMouilly
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94306

Dear John:

I shall not be able to attend the San Diego meeting on September 22-24. Professor Paul Basye expects to attend, and he will know my views on the various items on the agenda.

I should like, however, to emphasize a few points.

3. As you would suspect, I am most concerned about Memorandum 83-63, which deals with ancestral property.

First of all, the doctrine should never be extended to personal property, even if there is to be no tracing. Even in feudal England the doctrine was limited to real property. Our Supreme Court restricted the ancestral property doctrine with respect to half-bloods to real property and to specific real property. The burden of determining the source of items in the estate, especially if the rule were extended to stocks and bonds, would be out of proportion to the arguable benefits to a very few. If property is to be kept in families there are many devices (wills, trusts, joint tenancies) better adapted to that purpose than the intestacy laws.

Section 6-402.5 is too complicated for an intestacy statute. Worse than that, it causes as many unfair results as it cures--as scholars have pointed out for many years. I hope the Commission will hold firm on its original plan. Perhaps the issue of a predeceased spouse should have a priority if the decedent has no issue. Furthermore, it would be acceptable to provide that if property of the decedent were otherwise to escheat to the state, such property should pass to the heirs of the predeceased spouse as the decedent's heirs by affinity. Other states have this provision.

Sincerely yours,


Russell D. Niles
Professor of Law

RDN/js

Enclosure