#L-654 9/21/84

Memorandum 84-83

Subject: Study L-654 - Ancestral Property Doctrine

The attached letter from a private attorney supports the retention of Probate Code Section 6402.5. This is in contrast to the views expressed by the California Bankers Association (Memorandum 84-80, page 8) and the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Memorandum 84-81, page 13), both recommending repeal of Probate Code Section 6402.5.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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DAVID B. FLINN

Mr. David Rosenberg
Chairman, California Law Revision
Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Study of California Probate Code §229

Dear Mr. Chairman:

As a practitioner who has been somewhat actively involved from time to time in the inheritance of property attributable to a predeceased spouse, I have read with interest the memorandum (84-70) recently prepared regarding your Study L-654 wherein staff counsel represents a total abolition of the "ancestral property" doctrine. The indication that the Commission recommends abolishing all of the ancestral property doctrine because it is persuaded by the "overwhelming weight of scholarly opinion" I find somewhat astonishing. Not only are the law review articles to which references are made somewhat poorly written, but none seems to be written by an active practitioner in the field.

Let me take this opportunity to speak out in favor of the relatives of a predeceased spouse, since the very nature of the problem is such that they are not here to speak for themselves, as such expectations are not ones that are regularly on the minds of our citizenry. There are, however, extremely valid reasons for the maintenance of the doctrine, and there are myths regarding the doctrine which simply do not have any practical existence.

Reasons for the Doctrine

The entire concept of intestate succession is based upon a fairness concept as to inheritance of property not the subject of testamentary disposition, usually as the result of the neglect of the decedent to plan his or her affairs. Obviously, the law attempts to provide a scheme of disposition that is consistent with what the desires of the decedent "would be" under the circumstances. If only the best interests of society as a whole were being contemplated, property obviously would either escheat to the state or be passed for charitable purposes.

Any practitioner who has drafted a substantial number of wills over the years has regularly had the opportunity to discuss with his clients their desires regarding their property in the event that both husband and wife die simultaneously and either there are no issue or their issue also are killed in a common calamity. It is our usual practice to advise our clients to provide in their wills for such eventualities. I suspect that I have written several hundred wills for clients who have made such provisions, and I can recall only rare instances where, because of some unusual or strained relationships, the parties felt it appropriate to leave their community property under such circumstances to the blood relatives of one spouse, to the exclusion of the blood relatives of the other. Indeed, by far the common experience in such will drafting is to divide the properties between the two families. I suspect that my own situation is typical, where my wife and I each provide that should our spouse not survive and our children not survive, the property will go one-half to my wife's siblings and one-half to my siblings.

The abolition of §229 and its counterpart, §6402.5, instead of following this common pattern, reverts the matter to a question of luck, the luck of which spouse survives the other. In the numerous predeceased spouse inheritance cases with which I have dealt in my practice, the result has always been the achievement of fairness, rather than the relatives of the surviving spouse gaining the community worth of the family, it was shared by the two families whose relatives jointly had provided it. While it is true that occasionally there is a substantial time gap between the two deaths, just as often the gap is a short one. I completed a probate proceeding last year where the decedents died within one year of each other, and it was clear during the probate that they were no closer to the family of the husband than to the family of the wife. Section 229 preserved fairness by dividing the property between the brothers and sisters of the wife and the issue of the husband's brother.

The Missing Will

Another practicality in the ancestral property doctrine is the motivation for the disappearance of a will. If one starts with the concept that where there are neither a surviving spouse nor surviving issue the odds are that the decedent, if he or she left a will, provided for both families, a doctrine that passes the intestate property only to the family of the last survivor of the marriage leads to the motivation of that decedent's relatives to destroy the will and take the property themselves under intestate succession. While access to a will in other cases generally would be in the hands of those who benefit by the will, in this case the access is likely to be those who would benefit from its destruction. Indeed, in the last ten years I can recall two cases where §229 came into practice where it did seem that a will had "disappeared," perhaps because a relative thought that without the will they would inherit entirely. Section 229 protected the family, however, and made an equal distribution. One of the two cases involved a surviving spouse whose career had been that of a bank trust officer, and it seemed highly unlikely

that he would not leave a testamentary instrument. Nonetheless, his relative came forward and claimed the entire estate by intestate succession, and only the use of §228 (the section in effect at that time) protected his wife's relatives.

The Myth of "Enormous Complexity in Administration"

A review of our probate court dockets, or discussion with court administrators, would show that the ancestral property doctrine has placed no burden whatsoever upon the probate courts. The law has been clearly established for some time that the burden of tracing and establishing that property is community property attributable to a predeceased spouse lies entirely with the relatives of the predeceased spouse. There is, indeed, a complexity or a workload placed upon those relatives and their counsel in preparing to present an application to participate in the estate as to such property. This has never, in my experience, become a burden of the court. Indeed, the relatives of the predeceased spouse are required by law to present direct and clear evidence of the property history to the court.

In the past ten years I would estimate that I have been involved in 25 probate matters which involved inheritance by a predeceased spouse. Some of them were vigorously contested. Nonetheless, the average amount of time spent in court hearings on such cases was less than fifteen minutes, and the longest proceeding that I can recall on the subject was approximately one hour. Anyone who has spent a morning in the probate courts of this state is aware that there are dozens and dozens of aspects of probate administration that can take up that much of the court's time, in occasional cases.

Furthermore, in the vast majority of such cases counsel for the predeceased spouse relatives and counsel for the decedent's relatives, after reviewing the necessary information, are able to reach a clear agreement to present to the court as to distribution of the property. In summary, experience simply does not bear out that there is unusual complexity in the administration of the ancestral property doctrine.

Conclusion

In conclusion, California testators regularly take estate planning steps to protect that their share of community property will, should their spouse and issue not survive them, go at least in part to their own family. The concept of intestate succession as a will substitute should not turn a deaf ear on those desires. Thank you for your consideration.

Sincerely,

David B. Flinn
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