

## Memorandum 83-63

Subject: Study L-654 - Probate Law and Procedure (Ancestral  
Property Doctrine)

Introduction

One aspect of the ancestral property doctrine returns property of an intestate decedent to relatives of a predeceased spouse when the property is attributable to the predeceased spouse and the decedent dies without a present spouse or issue. Assembly Bill 25 now contains a narrow ancestral property provision for relatives of a predeceased spouse (see Exhibit 1, attached). The question for consideration is whether the Commission should recommend eliminating this narrow provision as too complex, expanding it as promoting fairness, or leaving it unchanged as a reasonable compromise.

Background

The Commission's original wills and intestate succession recommendation proposed to eliminate the right of certain blood relatives of a married decedent to inherit the decedent's separate property, and instead to pass all separate property to the surviving spouse (except where the decedent is survived by issue of a former marriage). The Commission also recommended abolishing all aspects of the ancestral property doctrine, including the rule passing certain property back to relatives of the first-to-die spouse on the death of the second.

The State Bar Estate Planning, Probate and Trust Law Section objected to the proposal to give all separate property to the surviving spouse. The Section thought the change would have been unfair to the decedent's relatives and probably would not have been consistent with what the decedent would have wanted had the decedent made a will. Others objected to elimination of the ancestral property doctrine benefiting relatives of the first-to-die spouse on similar grounds.

Because of these objections and in order to obtain approval of AB 25 by the Senate Judiciary Committee, the bill was amended to restore existing law with respect to inheritance of separate property and to restore a limited ancestral property provision (Exhibit 1). As limited, the ancestral property provision applies only to real property and only if the predeceased spouse died not more than 15 years before the last-to-die spouse.

In a separate recommendation on the agenda for this meeting (see Memo 83-58), the Commission is renewing its original recommendation to pass all separate property of an intestate decedent to the surviving spouse (except where the decedent has issue of a former marriage), thus eliminating inheritance by decedent's parents, brothers, sisters, nieces, and nephews if the decedent is married. Arguably, this change may call for offsetting improvements in the rights of relatives of the first-to-die spouse by restoring more of the ancestral property doctrine and thus giving them a larger claim in the estate of the last-to-die spouse.

#### Policy Considerations

If the last-to-die spouse dies without spouse or issue, who should have the preferred claim against former property of the first-to-die spouse--parents, brothers, sisters, nieces, and nephews of the last-to-die spouse or parents, brothers, sisters, nieces, and nephews of the first-to-die spouse? With no ancestral property rule, the identity of the intestate takers will depend on the fortuity of the order of death of husband and wife. Fairness suggest that relatives of the first-to-die spouse should have some rights in the estate of the last-to-die spouse with respect to property formerly owned by the first-to-die spouse.

On the other hand, there is an impressive array of scholarly opinion that the ancestral property doctrine should be abolished in all its forms. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 207-08 (1979); Reppy & Wright, California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-Laws, 8 Community Prop. J. 107, 134 (1981); Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 614 (1931); Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 35 (1956); Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 344.

Criticism of the ancestral property doctrine is based both on theoretical and practical considerations. The theory of intestate succession law is that it is a will substitute and thus should pass property in the manner in which the average decedent would dispose of the property by will. Dispositions by will are usually based on the

relationship of possible beneficiaries to the decedent, and not on the source of the property. See Evans, supra. And the ancestral property doctrine causes practical problems: The estate must be sorted out so that the ancestral property may pass by the special rule of succession, and difficult problems of tracing, commingling, and apportionment often arise. If a portion of the estate of the last-to-die spouse is to pass to relatives of a predeceased spouse, those relatives must be identified and located, and the problem of giving notice in the estate proceeding is increased.

#### Possible Alternatives

Possible alternatives include the following:

(1) The Commission could adhere to its original recommendation and recommend abolishing the ancestral property doctrine entirely.

(2) The Commission could decide to retain the limited ancestral property doctrine now contained in AB 25 (Exhibit 1) which confines the doctrine to relatives of a predeceased spouse who died not more than 15 years before the last-to-die spouse, and limits its application to real property.

(3) The Commission could expand the ancestral property doctrine somewhat by applying it to tangible personal property and securities such as stocks and bonds so long as the specific property received from the predeceased spouse is a part of the decedent's estate. In other words, there would be no tracing. If the property is sold or otherwise disposed of by the decedent, the ancestral property doctrine would not apply to the proceeds.

#### Staff Recommendation

The staff is inclined to recommend alternative number (2). The 15-year limit on the time between the deaths of the first and last spouse to die seems a reasonable limitation and minimizes the severest problems of heir-tracing and notice. Similarly, the limitation to real property minimizes problems of commingling, tracing of assets, and apportionment. To keep a limited ancestral property doctrine does make some attempt to address the question of fairness to relatives of the first-to-die spouse where the last-to-die has not made a will.

Respectfully submitted,

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6402.5. (a) *If the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:*

(1) *If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree those of more remote degree take by representation.*

(2) *If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.*

(3) *If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take by representation.*

(4) *If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in Section 6402.*

(5) *If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under Section 6402, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse who shall take in the same manner as the next of kin of the decedent take under Section 6402.*

(b) *For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate:*

(1) *One-half of the community real property in existence at the time of the death of the predeceased spouse.*

(2) *One-half of any community real property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise.*

(3) *That portion of any community real property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.*

(4) *Any separate real property of the predeceased spouse which came to the decedent by gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship.*

*(c) For the purposes of this section, quasi-community real property shall be treated the same as community real property.*

*(d) For the purposes of this section:*

*(1) Relatives of the predeceased spouse conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.*

*(2) A person who is related to the predeceased spouse through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share.*