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Memorandum 88-21

Subject: Study L-654 - In-Law Inheritance

If a decedent dies intestate without surviving spouse or issue and was predeceased by a spouse, the decedent's property must be divided into that passing to his or her heirs under the usual intestate succession rules (Prob. Code § 6402), and that passing to the predeceased spouse's heirs under the in-law inheritance statute (Prob. Code § 6402.5, set out in Exhibit 1). The in-law inheritance statute applies to the following property:

(1) Real property attributable to the decedent's predeceased spouse who died not more than 15 years before the decedent.

(2) Personal property attributable to the decedent's predeceased spouse who died not more than five years before the decedent, for which there is a written record of title or ownership, and the aggregate value of which is $10,000 or more.

Order of Takers Under the In-Law Inheritance Statute

If the decedent died without surviving spouse or issue and the property meets either of the foregoing tests, the property goes back to relatives of the predeceased spouse as follows:

(1) To surviving issue of the predeceased spouse.

(2) If there is no surviving issue, to the surviving parent or parents of the predeceased spouse.

(3) If there is no surviving parent, to surviving issue of the parent or parents of the predeceased spouse.

If there is no surviving issue, parent, or issue of a parent of the predeceased spouse, property attributable to the predeceased spouse goes to decedent's relatives, the same as the decedent's other intestate property.

Order of Takers Under Usual Inheritance Rules

Property not attributable to the predeceased spouse passes according to the usual rules of intestate succession for a decedent without surviving spouse or issue:

(1) To the decedent's surviving parent or parents.

(2) If there is no surviving parent, to surviving issue of the decedent's parent or parents.

(3) If there is no surviving issue of a parent of the decedent, to the decedent's surviving grandparent or grandparents.

(4) If there is no surviving grandparent, to issue of the decedent's grandparent or grandparents.

(5) If there are no takers in the foregoing categories, to surviving issue of decedent's predeceased spouse.

(6) If there are no takers in the foregoing categories, to decedent's next of kin.

(7) If there are no takers in the foregoing categories, to the surviving parent or parents of a predeceased spouse.

(8) If there are no takers in the foregoing categories, to surviving issue of a parent of the predeceased spouse.

Ancestral Property Doctrine Under Former Law

The in-law inheritance statute is a limited remnant of the ancestral property doctrine as it existed in California before 1985. Under old law, there were three kinds of ancestral property:

(1) Separate property received from a parent or grandparent.

(2) Property received by an unmarried minor by succession from a parent.

(3) Property received from a predeceased spouse (in-law inheritance), regardless of how long previously the predeceased spouse died.

In its 1982 wills and intestate succession recommendation, the Commission recommended repealing all three variants of the ancestral property doctrine. The Commission justified its recommendation as follows:

> Elimination of the ancestral property doctrine will reduce the cost of probate, because this doctrine injects complexity into administration of intestate estates and often causes difficult problems of tracing, commingling, and apportionment. The estate must be sorted out so that the ancestral property may pass by the special rules of succession. When a portion of the decedent's estate goes to relatives of a predeceased spouse, the problems of tracing heirs and giving notice are substantially increased. When property goes to children of a parent there is a likelihood that a guardian must be appointed. Delay, expense, and inconvenience result.

> Moreover, the ancestral property rules violate the basic purpose of the intestate succession laws, which is to provide a will substitute for a person who dies intestate. The laws of succession should correspond to the manner in which the average decedent would dispose of property by will. As a general rule, if the decedent were making a will, it is likely that the relationship of possible beneficiaries to the decedent would be a more important factor than the source of the property.
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> While the ancestral property principles create problems of administration and violate the basic policy of the intestate succession laws, they have been justified on the ground that they provide a measure of equity in some cases. However, whether the principles in fact operate equitably is disputable; the courts have stated that the rules are discriminatory and illogical, and have narrowly construed them. Moreover, the rules are easily defeated by will or where the decedent dies intestate leaving spouse or issue. The minimal beneficial effect the rules may have in a few cases is outweighed by their overall disadvantages and the complexity in the probate law that they generate. [Footnotes omitted.]

Legislative Response to Commission's Recommendation

When the Commission's bill was in the Legislature in 1983, representatives of Brandenburger and Davis, an heir-tracing firm, objected to eliminating in-law inheritance. The bill that would have eliminated in-law inheritance came up for hearing in the second house at the last day for hearing bills and there was a bare quorum of committee members in attendance. The representative of Brandenburger and Davis agreed not to oppose the bill at the hearing if a limited in-law inheritance was added to the bill. The bill was amended to add Section 6402.5: This section restored in-law inheritance but was limited to real property received from a predeceased spouse who died not more than 15 years before the decedent. At the time of the hearing, it was agreed between the Executive Secretary and the representative of Brandenburger and Davis that the heir-tracing firm was free to seek to expand the in-law inheritance provision, and that the Commission was free to recommend eliminating or modifying it.

After Section 6402.5 was enacted, a representative of Brandenburger and Davis appeared at a Commission meeting to request that the Commission recommend that the new in-law inheritance statute be expanded to cover personal property. The Commission declined to

make such a recommendation. The Commission appeared to be inclined to recommend repeal of the provision, but the Executive Secretary suggested that the matter be deferred until work on the new Probate Code was substantially completed. He thought the proposal to repeal the provision would be controversial, and might divert Commission and staff resources from finishing the new code. The Commission decided to defer further consideration of in-law inheritance. But when the priorities for 1988 were considered, the Commission included this matter on the possible recommendations to be submitted to the 1989 legislative session.

Having failed with the Commission, the heir-tracing firm decided to present its own proposal to the Legislature. As a result, Section 6402.5 was expanded in 1986 to include personal property with a written record of title or ownership and an aggregate value of $10,000 or more.

Criticism of In-law Inheritance

The in-law inheritance rule has been criticized by two of the Commission's consultants on probate law, Professor Russell Niles and Professor William Reppy. Professor Reppy has written that the special rule for in-law inheritance injects complexity into administration of intestate estates and often causes difficult problems of tracing, commingling, and apportionment. 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).

In 1979, Professor Niles recommended abolishing the distinction between the two kinds of property -- that attributable to a predeceased spouse and that not so attributable. He argued for revising the basic rule of intestate succession to give more protection to children of a prior marriage. Niles, *Probate Reform in California,* 31 Hastings L.J. 185, 207 (1979).

When the Commission recommended the new intestate succession law in 1982, it did improve the position of issue of the decedent's predeceased spouse: If the decedent dies without a surviving spouse, issue, parent, issue of a parent, grandparent, or issue of a grandparent, then the decedent's property goes to surviving issue of a predeceased spouse. Prob. Code § 6402(e). Under former Section 229

(the predecessor section of the present in-law inheritance statute), issue of a predeceased spouse did not have a general right to inherit decedent's property, but only that property which came from the predeceased spouse. In other words, under former law, the in-law inheritance statute gave issue of a predeceased spouse the right to inherit property that they could not otherwise inherit, while under present law the in-law inheritance statute merely moves such issue up the priority list from the fifth category of takers to the first. Therefore, the argument that in-law inheritance statute is needed to protect children of a predeceased spouse has been weakened.

Repeal of In-Law Inheritance in Other States

Six states other than California have had in-law inheritance at one time or another: Idaho, Indiana, New Mexico, New York, Ohio, and Oklahoma. Annot., 49 A.L.R.2d 391 (1957). See also 7 R. Powell, Real Property ¶ 1001, at 673-77 (rev. ed. 1987). All six of these states have abolished in-law inheritance. Thus California is now the only state with an in-law inheritance statute.

Recent Cases

Two recent cases decided under former Section 229, the predecessor section of Section 6402.5, illustrate Professor Reppy's point that the in-law inheritance statute causes complex problems of tracing and apportionment. Estate of Luke, 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987) (tracing); Estate of Nereson, 194 Cal. App. 3d 865 (1987) (apportionment). These two cases are attached as Exhibits 2 and 3, respectively.

Tracing. In the *Luke* case, Raymond Luke died intestate without surviving spouse or issue. He had been predeceased by his spouse, Catherine. At issue was whether the following property in Raymond's estate was traceable to community property: a residence acquired by Raymond and Catherine as joint tenants, and bank and savings and loan accounts held in Raymond's name alone.

Catherine's relatives contended the community property presumption applied to the residence, and that the in-law inheritance statute entitled them to half. Raymond's relatives contended that the joint tenancy title rebutted the community property presumption, that therefore the in-law inheritance statute did not apply, and that they were entitled to the entire property.

The usual rule is that if title is held in joint tenancy, there is a rebuttable presumption that the property is true joint tenancy, not community. *In re* Marriage of Lucas, 27 Cal. 3d 808, 813, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). The presumption is not overcome solely by showing that community funds were used to purchase the property; the parties must have agreed to hold the property as community. *Id.*

The *Luke* case held there is no presumption of joint tenancy from the form of title when applying the in-law inheritance statute. Whether the property is separate (in-laws do not inherit) or community (in-laws do inherit) is determined by its source. 194 Cal. App. 3d at 1015. This means tracing is necessary despite the joint tenancy title: The source of the property before it was put in joint tenancy must be determined. The court applied the community property presumption, and held that the residence was community property subject to in-law inheritance.

The bank and savings and loan accounts in Raymond's estate were presumed to be Raymond's separate property: Property in the estate of a surviving spouse is presumed to be the separate property of that spouse. *Id.* at 1019. However, Catherine's heirs overcame the presumption by showing that at Catherine's death all the couple's property was community, that Raymond died only six years after Catherine, and that Raymond was not employed and had no significant income after Catherine's death. *Id.* at 1013, 1020. The court held Catherine's heirs had met their burden of tracing account funds to community property by eliminating every other possibility. *Id.* at 1022. Thus the accounts were subject to in-law inheritance.

Catherine and Raymond had spent most of their lives in Iowa. Raymond came to California late in life and after Catherine's death. Iowa does not have an in-law inheritance statute, and it is unlikely that Raymond was aware of California's in-law inheritance statute. Intestate succession law should pass the property the way the average decedent would want if the decedent had a will. It is likely that if Raymond had had an opportunity to express an opinion, application of the California in-law inheritance statute would have caught him by surprise, and would have distributed his property in a manner contrary to his wishes.

Apportionment. In the *Nereson* case, Oberlin Nereson died intestate in 1980 without surviving spouse or issue. He had been predeceased by his spouse, Ethel, who died in 1972. The issue concerned their residence, formerly their community property. At the time of Ethel's death, the residence had a gross value of $50,000. The remaining balance on the original mortgage of $27,500 was $7,177. Oberlin continued to make mortgage payments on the house after Ethel's death. He made the last payment in 1978. Two weeks before Oberlin's death, a fire damaged the residence. In its damaged condition, it was worth $160,000. Fire insurance proceeds of $47,096 were paid to his estate after his death.

Oberlin's sister, Marjorie, was his only blood heir and was administrator of his estate. She used the fire insurance proceeds to repair the residence, and also used $5,529 of her own funds. After repair, the house was valued at $220,000.

Application of the in-law inheritance statute was urged by Ethel's two sisters. Because the residence had been community property, application of the in-law inheritance statute was clear: Ethel's sisters were entitled to an interest. But Marjorie argued that her share should be adjusted upward, and the share of Ethel's sisters adjusted downward, for two reasons:

(1) The insurance proceeds were Oberlin's separate property not subject to the in-law inheritance statute, because the premium was paid in 1980, long after Ethel's death. Marjorie asked that an amount equal to the insurance proceeds be treated as her proper inheritance.

(2) Since Oberlin paid the balance of the mortgage after the community was dissolved by Ethel's death, the share of Ethel's sisters should be adjusted downward according to some apportionment formula.

The court agreed with both of Marjorie's arguments, and reduced the share passing to Ethel's sisters by the amount of the fire insurance proceeds and a pro rata share based on the proportion of the the mortgage payments after Ethel's death to the total mortgage payments.

The court's holding requires an apportionment of the total value of the asset to separate out the portion attributable to the predeceased spouse from the portion not so attributable. This is an

exception to intestate succession law generally, under which there is no apportionment. The court made clear that application of the apportionment rules requires resort to rules governing community property, as well intestate succession law. 194 Cal. App. 3d at 871.

Under community property law, when there have been community and separate property contributions to an item of property that has appreciated in value, the court must allocate the proper portion of enhanced value to the separate and community interests. 7 B. Witkin, Summary of California Law *Community Property* § 25, at 5119 (8th ed. 1974). There is no invariable formula or precise standard. Allocation is a question of fact governed by the circumstances of each case. *Id.* § 26, at 5120. The trial court has considerable discretion in choosing the method for allocating separate and community property interests. Estate of Nereson, *supra* at 876.

One commonly used rule of apportionment in community property law is that of Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909). Under *Pereira*, the separate property contribution to community property is allowed the usual interest on a long-term investment well secured -- for example, seven percent. 7 B. Witkin, *supra* § 28, at 5121. In the *Nereson* case, the mortgage payments made from separate property were $7,177. If we apply the *Pereira* rule and allow seven percent interest on the accumulating mortgage payments, that yields about $2,000 as the return on separate property, with the result that most of the appreciation in value (about $115,000) accrues to the community interest, not the separate property interest.

The other commonly used rule of apportionment in community property law is that of Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921). In *Van Camp*, the husband formed a corporation with separate property funds. He worked for the corporation and received a salary. The salary was obviously community property, but the court held that corporate dividends were his separate property. The court declined to apportion any of the corporate earnings to the husband's skill and labor, a community contribution. Under *Van Camp*, the reasonable value of the husband's services is allocated to the community interest. The rest of the increase in value remains separate property. This is the reverse of the *Pereira* rule (reasonable return

to separate contribution, bulk of appreciation to community interest). If we apply the *Van Camp* rule to the *Nereson* case and allow a seven percent return to the community interest, that yields about $24,000 as the return on community property, with the result that most of the appreciation in value (about $93,000) accrues to the separate property interest, not the community interest.

In making a proper apportionment under the in-law inheritance statute, the court may use the *Pereira* rule, the *Van Camp* rule, or some other formula. Estate of Nereson, *supra* at 876. Thus, it is impossible to tell what the apportionment will be without actually litigating the issue.

Conclusion and Policy Options

It is apparent from the text of Section 6402.5 (see Exhibit 1) that the in-law inheritance statute is very complex and difficult to understand and apply. It has generated complex litigation akin to family law litigation. However, litigation under the in-law inheritance statute presents even greater obstacles than family law litigation because both spouses are deceased and cannot testify. Considerable legal and court time and resources are needed to dispose of such litigation.

In addition, it may be necessary to make expensive searches for heirs of a spouse who died as long as 15 years before the death of the other spouse. The amount ultimately distributed to heirs is reduced by the cost of litigation (unless the claims are compromised with the estate), and the heir must pay a sizable portion of the inheritance, perhaps as much as a third or a half, to the heir-tracing firm that finds the heir.

If the predeceased spouse did not have a will, the separate property of the predeceased spouse may be divided at death of the predeceased spouse between the surviving spouse and heirs of the predeceased spouse. See Prob. Code § 6401 (separate property divided if decedent left surviving issue, parent, brother, sister, or issue of a deceased brother or sister). When the surviving spouse dies, the in-law inheritance statute takes the share of separate property given to the surviving spouse and gives it to heirs of the predeceased spouse who already received a share of the property on the death of the

predeceased spouse. Property inherited by a person other than a surviving spouse goes to the heirs of that person at death, and none of it goes to the heirs of the decedent from whom the property was originally inherited.

California is the only state that still has an in-law inheritance statute. Other states that formerly had such a statute have repealed it.

Policy options include the following:

(1) Make no recommendation, keeping in-law inheritance as is.

(2) Abolish tracing, and apply the in-law inheritance statute only to the specific property received from the predeceased spouse.

(3) Limit in-law inheritance to real property, as it was from 1983 to 1986.

(4) Repeal in-law inheritance altogether as not worth the expense, complexity, and possible inequity it causes in estate administration.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

§ 6402.5. Predeceased spouse; portion of decedent's estate attributable to decedent's predeceased spouse

Applicable to estates of decedents who died on or after Jan. 1, 1985.

(a) For purposes of distributing real property under this section 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 in the manner provided in Section 240.

(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 in the manner provided in Section 240.

(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 purposes of distributing personal property under this section if the decedent had a predeceased spouse who died not more than five 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 in the manner provided in Section 240.

(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 in the manner provided in Section 240.

(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.

(c) For purposes of disposing of personal property under subdivision (b), the claimant heir bears the burden of proof to show the exact personal property to be disposed of to the heir.

(d) For purposes of providing notice under any provision of this code with respect to an estate that may include personal property subject to distribution under subdivision (b), if the aggregate fair market value of tangible and intangible personal property with a written record of title or ownership in the estate is believed in good faith by the petitioning party to be less than ten thousand dollars ($10,000), the petitioning party need not give notice to the issue or next of kin of the predeceased spouse. If the personal property is subsequently determined to have an aggregate fair market value in excess of ten thousand dollars ($10,000), notice shall be given to the issue or next of kin of the predeceased spouse as provided by law.

(e) For the purposes of disposing of property pursuant to subdivision (b), "personal property" means that personal property in which there is a written record of title or ownership and the value of which in the aggregate is ten thousand dollars ($10,000) or more.

(f) 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 property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community 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 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 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.

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

(h) 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. *(Added by Stats.1983, c. 842, § 55. Amended by Stats.1985, c. 982, § 20; Stats. 1986, c. 873, § 1.)*

For provisions applicable to estates of decedents who died prior to Jan. 1, 1985, see Appendix A, post.