rm34
6/6/89

Memorandum 89-49

Subject: Study L-3007 - In-Law Inheritance

At the February meeting, the Commission decided that the in-law inheritance statute should be repealed, and asked the staff to prepare a Tentative Recommendation for Commission consideration. A staff draft of a Tentative Recommendation is attached to this Memorandum as Exhibit 1.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

#L-654 July 13, 1989

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

IN-LAW INHERITANCE

July 1989

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record and will be considered at a public meeting when the Commission determines what it will recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **SEPTEMBER 10, 1989.**

The Commission often substantially revises tentative recommendations as a result of comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

rm38
6/6/89

Introduction

If a decedent dies intestate without a surviving spouse or issue and was predeceased by a spouse, the decedent's property must be divided into that passing to decedent's heirs under the usual intestate succession rules,[1] and that passing to the predeceased spouse's heirs under Probate Code Section 6402.5,[2] the so-called in-law inheritance statute.

---

1. Prob. Code §6402. Under Section 6402, property not attributable to the predeceased spouse passes:

(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.

2. Under Section 6402.5, if decedent dies without surviving spouse or issue, real property attributable to decedent's predeceased spouse who died not more than 15 years before decedent, and personal property attributable to decedent's predeceased spouse who died not more than five years before decedent for which there is a written record of title or ownership and the aggregate value of which is $10,000 or more, 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 decedent's other intestate property. See *supra* note 1.

See generally Clifford, *Entitlement to Estate Distribution,* in 3 California Decedent Estate Practice §24.19 (Cal. Cont. Ed. Bar 1988).

The following property passes to heirs of the predeceased spouse under Section 6402.5:

(1) Real property attributable to[3] the decedent's predeceased spouse who died not more than 15 years before the decedent.

(2) Personal property attributable to[4] 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.

California is the only state with an in-law inheritance

---

3. It is difficult to determine exactly what is meant by property "attributable to the decedent's predeceased spouse." Probate Code Section 6402.5(f) defines it as follows:

> (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.

Under subdivision (g) of Section 6402.5, quasi-community property is treated the same as community property. For criticism of the drafting of this section and illustrations of the difficulty of determining what property it covers, see 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 (1981).

4. See *supra* note 3.

statute.[5] Six states other than California have had in-law inheritance at one time or another: Idaho, Indiana, New Mexico, New York, Ohio, and Oklahoma.[6] All six of these states have abolished in-law inheritance.

The Commission recommends that Probate Code Section 6402.5 be repealed. Any possible benefits resulting from applying a special rule of in-law inheritance are clearly outweighed by the additional expense and delay the statute causes in probate proceedings and by the inequitable results that sometimes occur under the statute. Other recently enacted legislation covers those situations where recognition of the equities calls for inheritance by relatives of a predeceased spouse.[7] In addition, the interpretation and application of the complex and lengthy in-law inheritance statute presents difficult problems, some of which have not been resolved. The reasons for this recommendation are discussed in more detail below.

---

5. In 1982, the Commission recommended complete repeal of California's in-law inheritance statute. See *Tentative Recommendation Relating to Wills and Intestate Succession,* 16 Cal. L. Revision Comm'n Reports 2301, 2335-38 (1982). However, as the law was finally enacted in 1983, in-law inheritance was kept, but limited to real property received from a predeceased spouse who died not more than 15 years before the decedent. 1983 Cal. Stat. ch. 842, §55. It was thought that by limiting in-law inheritance to real property, it would apply only to property with a clear chain of title, and that by limiting it to the chase where the predeceased spouse died not more than 15 years before the decedent, it would apply in the case where decedent would be more likely to want to provide for family members of the predeceased spouse, and perhaps also would tend to minimize some of the more difficult tracing problems. In 1986, in-law inheritance was further expanded to apply also to personal property with a written record of title or ownership and an aggregate value of $10,000 or more received from a predeceased spouse who died not more than five years before the decedent. 1986 Cal. Stat. ch. 873, §1.

The 1983 enactment also improved the position of issue of the decedent's predeceased spouse to take the decedent's whole estate under general intestate succession law. See *infra* text accompanying notes 31-32.

6. Annot., 49 A.L.R.2d 391 (1957). See also 7 R. Powell, Real Property ¶ 1001, at 673-77 (rev. ed. 1987).

7. See *infra* text under heading "Rights of Relatives of Predeceased Spouse Under Recently Enacted Laws."

In-Law Inheritance Statute Increases Expense and Causes Delay in Probate Proceedings

The in-law inheritance statute imposes additional expense on the estate, adds procedural burdens, and may delay the probate proceeding.

If the decedent died without surviving spouse or issue, was predeceased by a spouse, and the estate includes property covered by the in-law inheritance statute, notice of the probate proceeding must be given to heirs of the predeceased spouse.[8] This is true even if

---

8. See Prob. Code §8110. See also B. Ross & H. Moore, California Practice Guide Probate ¶¶3:204.1-3:204.4 (Rutter Group, rev. #1, 1988):

> [3:204.1] **Special notice provision re heirs of a predeceased spouse:** Under Prob.C. §6402.5 . . . , if decedent left no surviving spouse or issue, the heirs at law of decedent's *predeceased spouse* are entitled to notice in the following instances (note that these rules apply even in *testate* cases, because the §6402.5 heirs may have standing to file a *will contest*):
>
> 1) [3:204.2] **Real property "attributable" to predeceased spouse:** In estates which include *real property* "attributable" to the decedent's predeceased spouse who died not more than *15 years* before the decedent [Prob.C. §6402.5]; *and/or*
>
> 2) [3:204.3] **Personal property "attributable" to predeceased spouse:** In estates which include *personal property* "attributable" to the decedent's predeceased spouse who died not more than *five years* before the decedent *and* as to which (i) there is a "written record of title or ownership" and (ii) the aggregate fair market value (of such personal property) is *at least $10,000* . . . .
>
> Conversely, petitioner need *not* give notice to a predeceased spouse's heirs who might have claim to personal property "attributable" to the predeceased spouse who died no more than five years before decedent if petitioner has a "good faith" belief that the aggregate fair market value of such property is *less than* $10,000. But if the personal property is *subsequently* determined to have an aggregate fair market value in excess of $10,000, notice must then be given to the predeceased spouse's heirs under §6402.5. . . .
>
> [3:204.4] ***PRACTICE POINTER:*** The Code dispenses with the notice requirement if there is no "written record of title or ownership" to the personal property; however, the Judicial Council Form Petition requires notice whenever there is "personal property totaling $10,000 or more" (i.e., without regard to whether there is a "written record" . . .). Despite the Code's waiver provision, notice should be given in doubtful cases.
>
> The same advice applies with respect to the *value* condition: i.e., the Code dispenses with the notice requirement when petitioner has a "good faith" belief that the aggregate fair

the decedent died with an unquestionably valid will that disposes of all of the decedent's property, because heirs of the predeceased spouse may have standing to file a will contest.[9]

The notice must be reasonably calculated to give actual notice to all persons interested in the estate.[10] The petitioner for probate must make a reasonably diligent effort to determine the identities and whereabouts of heirs of the predeceased spouse.[11] Reasonable effort

---

> market value of the §6402.5 personal property is less than $10,000 (above). If the estimated value is *close to* the $10,000 cut-off, it's wise to err on the side of *giving notice,* rather than risk later litigation over "good faith" and possible collateral attack on probate court orders. [brackets in original]

9. B. Ross & H. Moore, California Practice Guide Probate ¶3:204.1 (Rutter Group, rev. #1, 1988).

10. See B. Ross & H. Moore, California Practice Guide Probate ¶3:216 (Rutter Group, rev. #1, 1988), which provides:

> [3:216] **Reasonable efforts required to effect personal or mail service:** Notice must be reasonably calculated to give *actual notice* to *all persons interested in the estate* (whether as heirs, testate beneficiaries, *creditors,* or otherwise). [*Tulsa Professional Collection Services, Inc. v. Pope* (1988) US _____, 108 S.Ct. 1340; *Greene v. Lindsey* (1982) 456 US 444; *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 US 306; *Mennonite Board of Missions v. Adams* (1983) 462 US 791 . . . .
>
> Due process does not necessarily mandate the "best possible" manner of service (i.e., personal service). "[M]ail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." [*Tulsa Professional Collection Services, Inc. v. Pope,* supra, 108 S.Ct. at 1347]
>
> By the same token, mailed notice must itself be "reasonably calculated" to *reach* the proper persons. For due process purposes, therefore, petitioner may be required to make *"reasonably diligent efforts"* to *locate* the interested persons. [*Tulsa Professional Collection Services, Inc. v. Pope,* supra, 1087 S.Ct. at 1347; *Mennonite Board of Missions v. Adams,* supra] A *fortiori,* mail service to the county seat . . . will suffice only if all reasonable efforts to locate the particular heir or beneficiary (or known creditor) have failed.

11. Prob. Code §8110(a) (notice must be given to "known" and "reasonably ascertainable" heirs).

means more than merely questioning immediate survivors concerning the whereabouts of their relatives. Counsel should search through telephone directories, contact the Department of Motor Vehicles, use the U. S. Post Office's forwarding procedures, advertise, and review voting rolls and tax rolls. If these efforts are unsuccessful, counsel should consider asking the Social Security Administration to forward the notice.[12]

If petitioner makes a reasonable effort but is unable to locate an heir of the predeceased spouse, notice may be mailed to the county seat.[13] If this alternative method of notice is used, the estate attorney must prepare a declaration detailing the efforts to locate the missing heir.[14]

---

12. B. Ross & H. Moore, California Practice Guide Probate ¶¶3:217-3:219 (Rutter Group, rev. #1, 1988), which provides:

> [3:217] **"Reasonable" procedures to locate "missing" heirs:** Due process does *not* require "impracticable and extended searches." [*Tulsa Professional Collection Services, Inc. v. Pope,* supra, 108 S.Ct. at 1347; *Mullane v. Central Hanover Bank,* supra, 339 US at 317-318] But "reasonably diligent efforts" to locate the heirs and beneficiaries must be made. [Cf. *Tulsa Professional Collection Services, Inc. v. Pope,* supra (in connection with identifying decedent's creditors)]
>
> Clearly, "reasonable efforts" requires more than simply questioning the immediate survivors about the whereabouts of their relatives. Counsel are expected to do some further investigation.
>
> (a) [3:218] Resort to telephone directories, the DMV, the U.S. Post Office's forwarding procedures, advertising, and review of voting rolls and tax rolls are all acceptable practices to locate missing heirs and beneficiaires.
>
> (b) [3:219] If these efforts are unsuccessful, consider requesting the Social Security Administration to forward notice to the intended recipient. By law, the Administration cannot disclose a person's address; but it can forward notice to the person's last known address or in care of the person's last known employer. [brackets and italics in original]

13. Prob. Code §1215(d).

14. See, e.g., Contra Costa County Probate Policy Manual §303; Fresno County Probate Policy Memorandum §3.2; Humboldt County Probate Rules §12.6; Los Angeles County Probate Policy Memorandum §7.07; Madera County Probate Rules §10.6; Merced County Probate Rules §307; Orange County Probate Policy Memorandum §2.06; San Diego County Probate Rules §4.44; San Francisco Probate Manual §4.03(b)(1); San Joaquin County

The estate must bear the cost of the search for heirs of the predeceased spouse. The search may be a difficult one, especially where the predeceased spouse died long before the decedent. If the decedent has a valid will, notice to heirs of the predeceased spouse may arouse unrealistic expectations that they will share in the estate. The estate attorney must deal with inquiries from these heirs, and must explain that the notice is a procedural formality and that the heirs are not entitled to share in the estate because of the will. The cost of the attorney's time in dealing with heirs of the predeceased spouse also must be borne by the estate, even where those heirs take no part of the estate.

In-Law Inheritance Statute Defeats Reasonable Expectations and Produces Inequitable Results

Three recent cases illustrate how the in-law inheritance statute defeats reasonable expectations and produces inequitable results. In *Estate of McInnis,*[15] decided in 1986, half the decedent's estate went to her predeceased husband's sister under the in-law inheritance statute, despite undisputed evidence that the sister had been estranged from her brother and from his wife for 28 years and that the heirs of the wife had maintained a close relationship with her and had performed various services for her for more than 10 years immediately prior to her death. The court concluded that the statute compelled this result.[16]

In *Estate of Luke,*[17] a 1987 case, Raymond and Catherine Luke were married in Illinois in 1926, moved to Iowa in 1937, and lived there until Catherine's death in 1978. Soon after, Raymond moved to

---

Probate Rules §4-201(B); Solano County Probate Rules §7.10; Tuolumne County Probate Rules §12.5.

15. 182 Cal. App. 3d 949, 227 Cal. Rptr. 604 (1986).

16. Estate of McInnis, 182 Cal. App. 3d 949, 958, 227 Cal. Rptr. 604 (1986) ("principles of equity cannot be used as a means to avoid the mandate of a statute").

17. 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987).

California where he died in 1984. There were no children of the marriage. Catherine's nieces and nephews sought to take a share of the estate under the California in-law inheritance statute. Had Raymond moved to any other state, his heirs would have taken the entire estate. But because Raymond died in California, his estate was subject to California's in-law inheritance statute. Raymond was probably unaware of the California in-law inheritance statute, since California is the only state having such a statute. He probably expected his estate to go to his blood relatives, not to Catherine's. This case illustrates how the in-law inheritance statute may defeat reasonable expectations.[18]

Estate of Riley,[19] decided in 1981, also shows the inequity that may result under the in-law inheritance statute. In *Riley*, decedent's mother made a gift of real property to her son and his wife as joint tenants. The wife died, and the son took his wife's interest as the surviving joint tenant. The son died intestate without surviving spouse or issue. Decedent's mother claimed the property as heir of the decedent. The brother and nieces and nephews of the predeceased wife claimed under the in-law inheritance statute. The Court of Appeal held that decedent's mother was entitled to all of the property under the statute in effect at the time of decedent's death.[20] However, the opposite result is required under the in-law inheritance statute now in effect: Heirs of the predeceased spouse would take a share of the property at the expense of the mother who gave the property to the

---

18. It is also unlikely that a person who has lived in California all of his or her life would be aware of the in-law inheritance statute. The purpose of intestate succession law is to provide a will substitute for a person who dies without a will. Intestate succession law should correspond to the manner in which the average decedent would dispose of property by will. Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 200 (1979).

19. 119 Cal. App. 3d 204, 173 Cal. Rptr. 813 (1981).

20. Former Prob. Code §229, *amended by* 1976 Cal. Stat. ch. 649, §1, *repealed by* 1983 Cal Stat. ch. 842, §19.

decedent and his predeceased spouse,[21] a clearly inequitable result.

It is unclear whether the in-law inheritance statute applies to property given by one spouse to the other during marriage when the marriage ends in divorce. On the divorce, the court will confirm the separate property interest of the donee spouse. Assume the donor dies first; the donee dies last, and dies intestate. Is the property still "attributable to" the donor spouse, or does the divorce cut off rights under the in-law inheritance statute? Ancestral property theory suggests that, if the gift was made during marriage, divorce does not cut off rights under the in-law inheritance statute.[22] This is likely to defeat the decedent's intent in most cases.

The in-law inheritance statute also causes problems with wills which give property to the testator's "heirs":[23] Under the in-law inheritance statute, blood relatives of the predeceased spouse take as heirs of the decedent, not as heirs of the predeceased spouse.[24] So a

---

21. Prob. Code §6402.5. Section 6402.5 applies to "the portion of the decedent's estate attributable to the decedent's predeceased spouse." See Section 6402.5(a). The quoted language is defined in subdivision (f) of Section 6402.5 as "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" and "any separate property of the predeceased spouse . . . which vested in the decedent upon the death of the predeceased spouse by right of survivorship." Accordingly, whether the joint tenancy interest of the predeceased spouse is community or separate property, it is subject to the present in-law inheritance statute.

22. 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, 129-30 (1981). If the conveyance from one spouse to other takes place after their divorce, the in-law inheritance statute does not apply. Estate of Nicholas, 69 Cal. App. 3d 976, 982, 138 Cal. Rptr. 526 (1977).

23. See *In re* Estate of Page, 181 Cal. 537, 185 P. 383 (1919) (devise to "my lawful heirs"); *In re* Estate of Watts, 179 Cal. 20, 175 P. 415 (1918) (devise to "my heirs"); Estate of Baird, 135 Cal. App. 2d 333, 287 P.2d 365 (1955) (gift to "heirs" on termination of testamentary trust); *In re* Estate of Wilson 65 Cal. App. 680, 225 P. 283 (1924) (devise to "my heirs"); Ferrier, *Gifts to "Heirs" in California,* 26 Calif. L. Rev. 413, 430-36 (1938).

24. Note, *Wills: Confusion Surrounding the Determination of Heirs by Application of Sections 228 and 229 of the California Probate Code,* 7 Hastings L.J. 336 (1956).

dispositive provision to the testator's "heirs" may include blood relatives of the predeceased spouse. Normally, one who gives property by will to his or her "heirs" expects that the property will go to his or her own blood relatives.[25] Application of the in-law inheritance statute to a will is a potential trap for one drafting a will.

Rights of Relatives of Predeceased Spouse Under Recently Enacted Laws

A number of recently enacted laws provide rules to deal with situations where equitable considerations favor inheritance by relatives of a predeceased spouse. These new laws do not depend on identifying the source of the property, nor do they require complex tracing and apportionment or burdensome search and notice. The enactment of these new laws has made the in-law inheritance statute no longer necessary or desirable.

The strongest case for inheritance by a child of a predeceased spouse is where the decedent would have adopted the child of the predeceased spouse but for a legal barrier. Probate Code Section 6408, enacted in 1983, provides that in this case a child of the predeceased spouse takes by intestate succession:

> (b) For the purpose of determining intestate succession by a person or his or her decedents from or through a . . . stepparent, the relationship of parent and child exists between that person and his or her . . . stepparent if (1) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the . . . stepparent would have adopted the person but for a legal barrier.

This provision provides significantly greater protection to the stepchild than the in-law inheritance statute which applies only where the decedent leaves no surviving spouse or issue and only to property attributable to the predeceased spouse.

Another compelling case for inheritance by relatives of a predeceased spouse exists where one spouse kills the other and then dies. Without special provisions to cover this case, the killer spouse

---

25. Note, *Wills: Confusion Surrounding the Determination of Heirs by Application of Sections 228 and 229 of the California Probate Code,* 7 Hastings L.J. 336, 338 (1956).

would inherit from the predeceased spouse, and then relatives of the killer spouse would take the property of the killer spouse, including the property inherited from the predeceased spouse. But Probate Code Sections 250-257 prevent a person who feloniously and intentionally kills another from receiving any property from the decedent, whether by will, intestate succession, nonprobate transfer, or otherwise. Thus, if one spouse kills another, the property of the deceased spouse goes to heirs of the deceased spouse excluding the killer spouse. The in-law inheritance statute is unnecessary to deal with this situation.

In an unusual case, it may be possible for the killer spouse to predecease the victim spouse and thus to take advantage of the in-law inheritance statute:[26] In a murder-suicide case about fifteen years ago, the husband shot his wife and then shot himself. He died a few minutes before his wife did. They were both intestate. There were no children of the marriage. On the husband's death, all the community property passed to his wife. When she died a few minutes later, the former community property was subject to the in-law inheritance statute -- the beneficiaries were children of the killer by a prior marriage.[27] Repeal of the in-law inheritance statute would reduce the

---

26. See 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 (1981).

27. 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 (1981). In the insurance context, cases have held that the killer's heirs should not benefit from the crime. See, e.g., Meyer v. Johnson, 115 Cal. App. 646, 2 P.2d 456 (1931). *Cf.* Estate of Jeffers, 134 Cal. App. 3d 729, 182 Cal. Rptr. 300 (1982) (order fixing inheritance tax in murder-suicide case). However, under the in-law inheritance statute, relatives of the predeceased spouse are considered heirs of the last-to-die spouse, not heirs of the predeceased spouse. Note, *Wills: Confusion Surrounding the Determination of Heirs by Application of Sections 228 and 229 of the California Probate Code,* 7 Hastings L.J. 336 (1956). Thus it appears that, in the murder-suicide case where the killer dies first, relatives of the killer spouse can take from the victim spouse under the in-law inheritance statute. Because of revisions in the in-law inheritance statute since this murder-suicide case, relatives of the killer spouse would only take the half of the community property that belonged to the killer spouse and passed to the victim spouse on the former's death. See Reppy & Wright, *supra,* at 108.

likelihood that relatives of the killer spouse could take in such a case.[28]

Legislation was enacted in 1989 to require that a potential heir must live at least 120 hours longer than a decedent who dies without a will in order to inherit property from that decedent.[29] This new rule provides a more just result where a husband and wife each have children of a prior marriage and are both killed in the same accident. Without the new rule, if one spouse survived the other by a fraction of a second, that spouse's children would inherit all the community property and a disproportionate share of the separate property. Under the new rule, the separate property each spouse and half of the community property passes to that spouse's heirs, a result more consistent with what the spouses probably would have wanted. The in-law inheritance statute did not provide a satisfactory solution to this problem, since the statute does not apply where the last spouse to die has surviving issue. The new rule takes into account the equities of the situation and deals with them in the same way they are dealt with in a a number of other states.[30]

In most cases, a person who dies without a will probably would want the children or grandchildren of his or her spouse to take before his or her more remote heirs. The decedent may well have had a close relationship with the spouse's children or grandchildren, and little affection or contact with his or her more remote relatives. This situation is dealt with by a provision added to the general intestate succession statute in 1983[31] to provide that the surviving issue of

---

28. Relatives of the first-to-die killer spouse could still take from the last-to-die victim spouse under subdivision (g) of Probate Code Section 6402 as a last resort to prevent escheat if the victim spouse had no blood relatives.

29. Prob. Code §6403, *amended by* 1989 Cal. Stat. ch. [AB 158]. The 1989 amendment to Section 6403 makes the section the same in substance as Section 2-104 of the Uniform Probate Code (1982) as Section 2-104 applies to taking by intestate succession.

30. See *Recommendation Relating to 120-Hour Survival Requirement,* 20 Cal. L. Revision Comm'n Reports 21 (1990).

31. Prob. Code §6402 (added by 1983 Cal. Stat. ch. 842, §55).

decedent's predeceased spouse take in preference to more remote heirs of the decedent. This provision deals more adequately with this situation than does the in-law inheritance statute.[32]

A person who dies without a will most likely would want the surviving parents or surviving issue of a parent of his or her predeceased spouse to take in preference to having the property escheat to the state. This situation is dealt with by a provision in the general intestate succession statute[33] which permits these relatives of the predeceased spouse to take when there are no next of kin of the decedent. Repeal of the special rule of in-law inheritance would not disturb this general intestate succession rule.

The foregoing shows that the in-law inheritance statute is no longer needed to deal with situations where equity calls for inheritance by relatives of a predeceased spouse. The recently-enacted provisions outlined above deal with these situations better and more comprehensively than does the in-law inheritance statute, and without the need to identify the source of the property, without complex tracing and apportionment, and without burdensome search and notice requirements.

In-Law Inheritance Statute is Complex and Difficult to Interpret and Apply

Section 6402.5 is a long, complex statute that is difficult to understand and apply. Interpretation and application of the statute wastes judicial resources and imposes litigation costs on the estate. Law review articles have analyzed the statute, pointing out

---

32. A distinguished law professor has written that the objective of protecting children of the predeceased spouse by a prior marriage may be better accomplished by improving the priority such children have under the general intestate succession law to take all of the decedent's property, instead of creating a special rule for a limited class of property--that attributable to a predeceased spouse. Niles, *Probate Reform in California,* 31 Hastings L.J. 185, 207 (1979).

33. Prob. Code §6402.

difficulties of interpretation and defects in the statute.[34] The articles conclude that the in-law inheritance statute should be repealed.[35]

Tracing and Apportionment Problems

The in-law inheritance statute requires that the estate be separated into property attributable to the predeceased spouse and property not so attributable. This causes difficult problems of tracing, commingling, and apportionment.[36] Two recent cases illustrate these problems.[37]

The tracing problem is illustrated by *Estate of Luke*.[38] Decedent died intestate in California having been predeceased by his spouse. The court had to examine property transactions going back more than 50 years because the decedent had owned a business before marriage which he sold during the marriage. In holding that the decedent's estate was

---

34. Niles, *Probate Reform in California,* 31 Hastings L.J. 185, 204-08 (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, 135 (1981); 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. See also Currie, *Justice Traynor and the Conflict of Laws,* 13 Stan. L. Rev. 719, 733-42 (1961); Ferrier, *Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments,* 25 Calif. L. Rev. 261 (1937) (in-law inheritance statute "productive of complexities, anomalies, and injustices"); Evans, *Comments on the Probate Code of California,* 19 Calif. L. Rev. 602, 614-15 (1931).

35. Niles, *Probate Reform in California,* 31 Hastings L.J. 185, 204-08 (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, 135 (1981); 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.

36. 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).

37. Estate of Luke, 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987); Estate of Nereson, 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987).

38. 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987).

subject to in-law inheritance, the court had to "unravel a snarl of conflicting presumptions and cases reaching apparently inconsistent conclusions . . . . The task is not an easy one."[39]

The apportionment problem is illustrated by *Estate of Nereson*.[40] Oberlin Nereson died intestate having been predeceased by his spouse, Ethel. Their home had been community property. After Ethel's death, Oberlin continued to make mortgage payments, and the home appreciated in value. The dispute was between Oberlin's sister and Ethel's two sisters. Because the home had been community property, it was clear that the in-law inheritance statute applied, and that Ethel's sisters were entitled to an interest. But Oberlin's sister asked for a share, arguing that Oberlin had made mortgage payments after Ethel's death out of his separate property.[41] The court agreed, and awarded Oberlin's sister a pro rata share based on the proportion of the mortgage payments after Ethel's death to the total mortgage payments.

The court had to apportion the total value of the home to separate out the portion attributable to the predeceased spouse from the portion not so attributable.[42] Apportionment requires resort to community property law as well as to intestate succession law.[43] Under community property law, when there have been both community and

---

39. Estate of Luke, 194 Cal. App. 3d 1006, 1010-11, 240 Cal. Rptr. 84 (1987). California's in-law inheritance statute has been called "almost incomprehensible." Estate of McInnis, 182 Cal. App. 3d 949, 956, 227 Cal. Rptr. 604 (1986).

40. Estate of Nereson, 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987).

41. In the *Nereson* case, there was also an apportionment issue concerning fire insurance proceeds. The home was damaged by fire shortly before Oberlin's death. Fire insurance proceeds were paid into his estate. The fire insurance premium had been paid out of Oberlin's separate property funds, long after his wife's death. The court agreed that the fire insurance proceeds should not be subject to in-law inheritance. Estate of Nereson, 194 Cal. App. 3d 865, 873-74, 239 Cal. Rptr. 865 (1987).

42. Apportionment under in-law inheritance is an exception to intestate succession law generally, under which there is no apportionment.

43. Estate of Nereson, 194 Cal. App. 3d 865, 871, 239 Cal. Rptr. 865 (1987).

separate property contributions to property that has appreciated in value, the court must allocate the proper portion of enhanced value to the separate and community interests.[44] There is no invariable formula or precise standard. Allocation is a question of fact governed by the circumstances of each case.[45] The trial court has considerable discretion in choosing the method for allocating separate and community

---

44. 7 B. Witkin, Summary of California Law *Community Property* §25, at 5119 (8th ed. 1974).

45. 7 B. Witkin, Summary of California Law *Community Property* §26, at 5120 (8th ed. 1974).

property interests.[46] Thus it is impossible to tell what the apportionment will be without actually litigating the issue.

---

46. Estate of Nereson, 194 Cal. App. 3d 865, 876, 239 Cal. Rptr. 865 (1987). 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, Summary of California Law *Community Property* §28, at 5121 (8th ed. 1974). In *Nereson*, the mortgage payments made from separate property were $7,177. If we apply the *Pereira* rule and allow seven percent interest on the mortgage payments, that yields about $2,000 as the return on separate property. The result is that most of the appreciation (about $115,000) accrues to the community property 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 his 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. The result is that most of the appreciation in value (about $93,000) accrues to the separate property interest, not the community interest.

In summary, the *Pereira* and *Van Camp* rules yield the following results in the *Nereson* case:

	Community property portion	Separate property portion
Pereira rule:	$115,000	$2,000
Van Camp rule:	$24,000	$93,000

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to repeal Section 6402.5 of the Probate Code, relating to intestate succession.

The people of the State of California do enact as follows:

Probate Code § 6402.5 (repealed). Portion of estate attributable to decedent's predeceased spouse

SECTION 1. Section 6402.5 of the Probate Code is repealed.

~~6402.5. (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 deceedent 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 deceedent'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 deceedent in the manner provided in Section 6402.~~

~~(5) If the portion of the decedent's estate attributable to the deceedent's predeceased spouse would otherwise escheat to the state because there is no kin of the deceedent to take under Section 6402, the portion of the deceedent'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 deceedent 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.~~

Comment. Former Section 6402.5 is not continued. See Cal. L. Revision Comm'n, Tentative Recommendation Relating to In-Law Inheritance (July 1989).

Uncodified transitional provision

SEC. 2. This act does not apply in any case where the decedent died before the operative date of this act, and such case continues to be governed by the law applicable to the case before the operative date of this act.