rm55
9/26/89

Memorandum 89-89

Subject: Study L-3007 - In-Law Inheritance (Comments on TR)

Attached is the Commission's *Tentative Recommendation Relating to Repeal of Probate Code Section 6402.5 ("In-Law Inheritance") (August 1989)*. We have received 42 letters and one set of handwritten margin notes commenting on the TR (listed in Exhibit 1). All except the handwritten margin notes are attached as Exhibits 2 through 43.

Thirty-three letters (78.5%) unconditionally favor repeal of Section 6402.5. One is from Kathryn Ballsun for Team 4 of the State Bar Estate Planning, Probate and Trust Law Section (Exhibit 2). She says both Team 4 and the Section's Executive Committee support repeal. (A minority of Team 4 would keep in-law inheritance.)

One letter (Exhibit 35) favors repeal only if the Commission's bill to require an heir to survive the decedent by 120 hours to take by intestacy is signed by the Governor. One letter (Exhibit 36) finds "nothing objectionable in the proposed repeal." Six letters are equivocal. One letter and the handwritten margin note oppose repeal.

Arguments for Repeal

The arguments for repeal are stated by Professor Charles Nelson of Pepperdine Law School (Exhibit 3). He "strongly" endorses repeal. He says there is "no clear consensus" that decedents want their in-laws to inherit, and "in-laws are rarely provided for" in wills. He says the moral claim of in-laws to decedent's property "is speculative," and the statute causes administrative burdens, delay, and higher costs.

Arguments Against Repeal

The arguments against repeal are stated by attorney Charles Triay (Exhibit 31). He says in-law inheritance "provides a vital protection for children and other relatives of a predeceased spouse and should not be repealed." He says notice burdens caused by the statute are "minimal." He says delay is justified by the need to protect substantive rights of in-laws. He finds the trend of law reform toward "saving money rather than administering justice" to be "extremely disturbing." He says the "simplification and streamlining of the law,

while it may save money, sacrifices the rights of the people . . . ."

He says the inequitable results cited in the TR (e.g., awarding property to a beneficiary who is estranged from the decedent) occur with equal frequency under general intestate succession law. He rejects the "will substitute theory" of intestate succession law. The will substitute theory is concerned with how the intestate decedent would have wanted the estate distributed. The argument is that, since the decedent had testamentary power over the property, intestate succession law should effectuate the intent of the decedent and of no one else. Mr. Triay argues that intestate succession law should also take into account what the predeceased spouse would have intended, and not focus solely on the intent of the decedent.

Staff Recommendation

Since a large majority favors repeal of Section 6402.5, the staff recommends that we include this in our 1990 legislative program.

No Retroactive Application of Repeal

The TR provides that repeal will not apply to a decedent who died before the operative date. That case will be governed by old law -- the in-law inheritance statute. Susan Howie Burriss (Exhibit 13) would apply the repeal to decedents who die before the operative date if no probate has been commenced. But to do this may cause constitutional problems. Title to property of an intestate decedent passes at death. Prob. Code § 7000. A retroactive law is invalid if it substantially impairs vested property rights. 7 B. Witkin, Summary of California Law *Constitutional Law* § 486, at 675 (9th ed. 1988). Although retroactive application may be justified when necessary to serve a sufficiently important state interest (*id.* § 490, at 681), the staff prefers to avoid constitutional questions of this kind, and so recommends against giving repeal of in-law inheritance any retroactive effect.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1

Letters Supporting Repeal

Exhibit 2: Kathryn Ballsun for Team 4 of the State Bar Estate Planning, Probate and Trust Law Section (minority of Team 4 would keep in-law inheritance, but majority of Team 4 and Section's Executive Committee support repeal).

Exhibit 3: Professor Charles Nelson, Pepperdine Law School (strongly endorses repeal; "no clear consensus" that decedents want in-law inheritance; in-laws are "rarely provided for" in wills; the moral claim of in-laws "is speculative"; statute causes administrative burdens, delay, and higher costs).

Exhibit 4: Jeffrey Dennis-Strathmeyer.

Exhibit 5: Hyman Goldman (strongly approves recommendation).

Exhibit 6: Rawlins Coffman (supports recommendation -- "hurrah!").

Exhibit 7: Letter from Alvin Buchignani (heartily endorses recommendation; in-law inheritance causes "procedural swamp").

Exhibit 8: Ruth Ratzlaff ("very much in favor of" repeal, statute "confusing and badly drafted," results "often unfair and unintended").

Exhibit 9: Wilbur Coats.

Exhibit 10: Alan Bonapart.

Exhibit 11: Brian McGinty, Matthew Bender (in-law inheritance "places an unnecessary burden on the estate, causes unnecessary delay and expense in administration of the estate, and defeats the reasonable expectations of many testators. It should be repealed.").

Exhibit 12: Robin Faisant (in-law inheritance causes "unintended results" and is a "nuisance").

Exhibit 13: Susan Howie Burriss (repeal is "long overdue").

Exhibit 14: David Knapp (repeal is "long, long overdue"; statute causes "confusion, delay and ill feelings").

Exhibit 15: Professor Paul Goda, Santa Clara Law School (statute causes "expense, delay, complexity and confusion").

Exhibit 16: Thomas Thurmond (statute is "confusing and hard to apply"; "most persons are not aware of it and would not expect the resulting disposition of their property at death").

Exhibit 17: Linda Silveria.

Exhibit 18: John Lyons.

Exhibit 19: Professor Benjamin Frantz, McGeorge School of Law.

Exhibit 20: Judge Harlan Veal, San Mateo County Superior Court.

Exhibit 21: Henry Angerbauer.

Exhibit 22: Russell Allen (statute is likely to "defeat expectations" and "impose substantial administrative costs").

Exhibit 23: Stuart Zimring.

Exhibit 24: Professor Susan French, UCLA Law School (statute is "too complicated and costly to justify the marginal benefits").

Exhibit 25: John Hoag, Ticor Title Insurance (repeal proposal is "useful as drafted").

Exhibit 26: Patricia Jenkins.

Exhibit 27: Edna Alvarez.

Exhibit 28: Ruth Phelps (statute is "difficult to interpret" and "complicated").

Exhibit 29: Ernest Rusconi (statute "is difficult and is a waste of judicial resources and time").

Exhibit 30: Damian Smith (statute is an "anachronism").

Exhibit 31: Michael Anderson.

Exhibit 32: Linda Moody (recommendation for repeal is "absolutely persuasive").

Letters Supporting Repeal, But Critical of Text of TR

Exhibit 33: Jerome Sapiro (recommendation "seems satisfactory," but some of the reasoning is dubious).

Exhibit 34: Frank Swirles (supports repeal, but finds "arguments weak" and wonders whether we have "nothing better to do").

Letter Conditionally Supporting Repeal

Letter Conditionally Supporting Repeal

Exhibit 35: Howard Serbin, Orange County Counsel (supports repeal if AB 158 is signed by Governor).

Letter With No Objection to Repeal

Exhibit 36: Larry Kaminsky, Fidelity National Title Insurance Company.

Equivocal or Noncommittal Letters

Exhibit 37: Luther Avery (in-law inheritance causes litigation; repeal "would simplify the law and speed up estate administration"; it

might be unfair to heirs of the predeceased spouse, but since the spouses could have made wills, "it does not seem unfair to simplify the law and speed up the probate process").

Exhibit 38: Professor George Alexander, Santa Clara Law School ("no opinion").

Exhibit 39: Demetrios Dimitriou (recommendation is "fairly innocuous" and "essentially harmless tinkering," but present law "more closely reflects what people would expect").

Exhibit 40: Robert Maize, Jr. (no opinion on proposal, but repeal would make administration "a lot simpler, and probably less expensive").

Exhibit 41: Professor Herbert Lazerow, University of San Diego Institute on International and Comparative Law.

Exhibit 42: Fred Sprague, Trust Officer, Agnews Developmental Center.

Letter Opposed to Repeal

Exhibit 43: Charles Triay (in-law inheritance provides "vital protection for children and other relatives of a predeceased spouse and should not be repealed"; notice burdens caused by the statute are "minimal"; delay is justified by need to protect in-laws; deplores trend of law reform toward "saving money rather than administering justice").

In addition, Melvin Kerwin expressed opposition to repeal of in-law inheritance in handwritten margin notes on his copy of the TR. He says "more inequitable results will occur without the statute."

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PLEASE REFER TO FILE NO.

899001L.724

August 29, 1989

James Quillinan, Esq. BY FAX
Diemer, Schneider, Luce & Quillinan
444 Castro Street, #900
Mountain View, California 94041

Re: Memorandum 89-49, In Law Inheritance

Dear Jim:

On August 10, 1989, Team 4 (Barbara Miller, Harley Spitler, James Willett, Clark Byam and I) discussed Memorandum 89-49; In Law Inheritance. Team 4's comments about the above-referenced Memorandum are as follows:

Although a Team 4 minority believes that that the in-law inheritance provisions should be retained, the majority of Team 4, and the Executive Committee as a whole, agrees with the reasons set forth by the Commission and endorses the proposed repeal of the in-law inheritance statutes.

Thank you for your consideration. If Team 4 may be of further assistance, please do not hesitate to contact us.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
A Member of
STANTON AND BALLSUN
A Law Corporation

KAB/mkr

cc: Terry Ross, Esq.
Irwin Goldring, Esq.
Harley Spitler, Esq.
Lloyd Homer, Esq.
Bruce S. Ross, Esq.
Barbara Miller, Commissioner
James Willett, Esq.
Clark Byam, Esq.

PEPPERDINE UNIVERSITY
SCHOOL OF LAW

September 5, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Commissioners:

I wish to comment upon the proposed Tentative Recommendation to repeal Probate Code Section 6402.5.

I strongly endorse the proposed Tentative Recommendation. At the time the Law Revision Commission undertook to propose a Revised Probate Code, it seemed to me that the focus of the revision was to streamline the probate process so that the amount of the estate devoted to administrative costs could be reduced and the benefits to heirs maximized. I was extremely pleased by the efforts of the Commission in that regard.

It seems to me that, if a proposed section is to work counter to that goal, there must be some strong social policy argument in favor of it. The two that come to mind immediately are (1) that the decedent would likely have intended that result and (2) that the moral claim of the proposed heir are so strong that it should be given effect. Another policy which might be given some weight is the interest of the state in avoiding escheat wherever possible.

With regard to the first policy basis, the best expression of that would of course be a testamentary document. Absent that, I do not believe that there is any clear consensus to the effect that a decedent would wish inheritance by in-laws. I believe it could be fairly well demonstrated from testamentary documents that in-laws are rarely provided for by those who undertake to express their wishes.

The second policy basis may be the stronger of the two. Since Section 6402.5 principally addresses rights to property of the predeceased spouse, it may very well be saying that the "family" of the prior owner of that property may have a greater moral claim to the property than the relatives of the decedent. However, it seems to me that the moral claim is speculative. Since the predeceased spouse could have provided for that contingency by creating a trust or by leaving the surviving spouse a life estate followed by a remainder in the predeceased spouse's relatives, and chose not to do so, why should it be inferred that the moral claim should be honored?

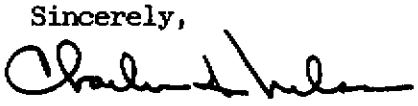
To that must be added the question of administrative burdens. Without discussing the interpretational problems analyzed so thoroughly by

MALIBU, CALIFORNIA 90265 ☐ TELEPHONE 213/456-4611

Professor Reppy, it can be said that the delay occasioned in giving notice to the in-law relatives, the problems of deciding what was, in fact, attributable to the estate of the predeceased spouse, and the accounting problems inherent in the passage of time are significant burdens that substantially impede distribution of the estate on a timely basis, result in higher administrative costs and reduce the estate ultimately available for distribution. All of this occurs without a clear demonstration that the section honors the intent of the decedent or that the moral claim of the in-laws outweighs the interests of the heirs of the decedent.

For these reasons, I support the repeal.

Sincerely,



Charles I. Nelson
Professor of Law and
Director of Overseas Programs

Memo 89-89

EXHIBIT 4

Study L-3007

JEFFREY A. DENNIS-STRATHMEYER
ATTORNEY AT LAW

SEP 05 1989

POST OFFICE BOX 533 - BERKELEY, CALIFORNIA 94701
(415) 642-8317

September 2, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation relating to Repeal of In-Law Inheritance

Sirs:

I support the recommendation. Assuming decedents expect their property to go to their own relatives, their is no reason to expend taxpayer resources on courts and judges in an effort to give in-laws a benefit they would not have received had the decedent died testate. The statute reminds me of a line by Thornton Wilder,

"Wherever you come near the human race there are layers and layers of nonsense."
___Our Town, Act 3

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

Memo 89-89

EXHIBIT 5

Study L-3007
CA LAW REV. COMM'N

SEP 08 1989

RECEIVED

GOLDMAN AND COWAN
ATTORNEYS AT LAW

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TELEPHONE (213) 553-1655

September 6, 1989

Mr. Robert J. Murphy III
Staff Counsel
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303-4739

Dear Mr. Murphy:

I strongly approve the Commission's Tentative Recommendation to repeal Probate Code Section 6402.5.

I have written you previously about an estate we are probating where the application of the section results in distribution of the estate obviously contrary to the wishes of the decedents.

Very truly yours,

Hyman Goldman

HYMAN GOLDMAN

HG:198

RAWLINS COFFMAN
ATTORNEY AT LAW
POST OFFICE BOX 158
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TELEPHONE 527-2021
AREA CODE 916

September 1, 1989

California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: August 1989 Tentative Recommendation relating to Repeal of Probate Code Section 6402.5

August 1989 Tentative Recommendation relating to Uniform Statutory Form Power of Attorney

Dear Commissioners:

Thank you for keeping me on your mailing list.

With respect to repealing Probate Code Section 6402.5, all I can say is hurrah! I hope the legislature pays attention. I am with you 100%.

With respect to the Uniform Statutory Form Power of Attorney Action, I have a few comments:

In my own practice I often have the "agent" date and sign an acceptance at the end of the power of attorney.

I would hope that there could be language in the power of attorney which covers toxic waste problems. For example, should the agent force a power of sale under a deed of trust involving real property contaminated with toxic waste, the principal, as the new owner, becomes jointly and severally liable with others in the chain of title. How can the principal be protected? Can the agent be exonerated? This is a new body of law and I have no answers!

Very truly yours,

R. Rawlins Coffman

RAWLINS COFFMAN

RC:mb

ALVIN G. BUCHIGNANI
ATTORNEY AT LAW

ASSOCIATED WITH
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(415) 421-5650

September 7, 1989

California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303

Re: Repeal of Probate Code Section 6402.5

Ladies and Gentlemen,

I heartily endorse the recommendation to repeal Probate Code Section 6402.5, mainly because of the procedural swamp that the statute creates. The judicial council probate forms will be considerably simplified by its abolition.

Very sincerely,

Alvin G. Buchignani

AGB/ep

RUTH E. RATZLAFF
Attorney at Law
925 N Street, Suite 150
P.O. Box 411
Fresno, California 93708
(209) 442-8018

August 30, 1989

Re: Tentative recommendation relating to repeal of Probate Code Section 6402.5

California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Ladies and Gentlemen:

Thank you for sending me a copy of your tentative recommendation relating to repeal of Probate Code Section 6402.5. I am interested in the on-going revisions to the Probate Code and other estate planning related changes to California law, and the price of putting my comments on paper is a small one in exchange for staying on your mailing list.

I am very much in favor of the repeal of Probate Code Section 6402.5.

The commentators and courts who characterize the statute and its predecessors as confusing and badly drafted are correct. Your commentary about the often unfair and unintended result of the statute is also accurate.

My personal experience with the statute has been with the administrative difficulty of actually tracking down the relatives of the long-deceased spouse. Frequently the estates in which the issue arises are small, and fees to the attorney are not adequate to compensate for time spent. Further, California has a large population of first-generation immigrants, and obtaining information or records from many foreign countries is literally impossible.

In short, I agree with your tentative recommendation relating to section 6402.5.

Sincerely,

Ruth Ratzlaff

Ruth E. Ratzlaff

RER/tih

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

August 30, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

In re: Repeal of Probate Code Section 6402.5.
Uniform Statutory Form Power of Attorney Act.

Gentlemen:

I concur with repeal of Prob. Code Sec. 6402.5.

In the matter of the revised Uniform Statutory Form Power of Attorney Act, I concur with the Act with the exception of adding the provision that will permit designation of co-agents.

My experience has been that those organizations asked to accept the power of an agent are very wary of written general powers. This is especially true of real estate brokers, real property title companies, and banks.

It is my belief that adding a co-agent will create additional difficulty in getting a third party to accept the power. It will be particularly difficult to get a third party to accept the power if co-agents may act separately. The third party is, in my opinion, going to be very wary of accepting the request for action where only one person is acting when two or more agents are cited as having the power to act. The third party will question the authority of a single actor despite the authority set forth in the instrument granting the power to one of the co-agents.

Very truly yours,

Wilbur L Coats

Wilbur L. Coats

12759 Poway Road, Suite 104, Poway, California 92064

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...ES R. BANCROFT
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...D A. BLACKBURN, JR.
...INIS O. LEUER
...ERT L. MILLER
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...N R. BANCROFT
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...EN OLIVE MILOWE
...H R. WEINGER
...TD K. KAGAN SERGI

September 6, 1989

OUR FILE NUMBER
A55.2-1
P74.2-11

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

Tentative Recommendations

With respect to your tentative recommendation relating to Repeal of Probate Code Section 6402.5 ("In-Law Inheritance") August 1989, I believe the discussion is persuasive. I agree that the proposed change should be recommended to the Legislature.

With respect to your tentative recommendation relating to the Uniform Statutory Form Power of Attorney Act, August 1989, I agree that the proposed change should be recommended to the Legislature. The advantage of more national uniformity and the opportunity to write documents that supply any "deficiencies" in the proposed new statutory form outweigh any benefits that may exist in the existing statutory form.

Sincerely yours,

Alan D. Bonapart

ADB:adb:ah

cc: Luther J. Avery

Matthew Bender

Matthew Bender
& Company, Inc.

COMM'N

AUG 31 1989

August 30, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation Relating to Repeal of Probate Code Section 6402.5

Dear Sirs:

Thank you for sending me a copy of the above-referenced tentative recommendation, which I have read with interest.

I support this recommendation. Prob. Code § 6402.5 places an unnecessary burden on the estate, causes unnecessary delay and expense in administration of the estate, and defeats the reasonable expectations of many testators. It should be repealed.

Please continue to send me your tentative recommendations.

Sincerely yours,

Brian McGinty

Brian McGinty
Staff Writer

Times Mirror Books

LAW OFFICES OF
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AUG 3 1 1989

August 29, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation
Repeal of the "In-Law Inheritance"

Dear Friends:

This is to advise that I support your recommendation for repeal of Probate Code Section 6402.5. The principal effect of this section has been to create unintended results, and to be a nuisance in probate administration.

With all good wishes.

Yours very truly,

Robin D. Faisant

RDF:dj

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☐ REPLY TO SANTA CRUZ COUNTY OFFICE
24193 SUMMIT ROAD
LOS GATOS, CA 95030
TELEPHONE (408) 353-3290
TELECOPIER (408) 353-1398

August 28, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Gentlemen/Ladies:

I wish to continue to receive tentative recommendations concerning estate planning, probate and related matters.

My only comment with regard to the Uniform Statutory Form Power of Attorney Act is that it is long overdue.

Similarly, the repeal of Probate Code Section 6402.5 is also long overdue. I recommend, however, that the transitional provision be amended to include that repeal is applicable to decedents who die before the operative date of the Act if no probate proceeding had been commenced as to that decedent as of the operative date of the Act.

Very truly yours,

Susan H Burriss

SUSAN HOWIE BURRISS

SHB/cc

LAW OFFICES
KNAPP & KNAPP
1093 LINCOLN AVENUE
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TELEPHONE (408) 298-3838

DAVID W. KNAPP, SR.
DAVID W. KNAPP, JR.

August 29, 1989

California Law Revision Commission
4000 Middlefield Road Suite D-2
Palo Alto, CA 94303-4739

Re: REPEAL OF PROBATE CODE SECTION 6402.5
and UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT

I have read your tentative recommendations on the two (2) above matters with great interest and would make the following comments respectively:

Concerning the repeal of Section 6402.5 it is long, long overdue and said section has added nothing but confusion, delay and ill feelings within the probate administration of many estates for too great a period.

The Uniform Statutory Form Power Of Attorney Act is, in my opinion, like the statutory will, a document that will, by its very makeup, require a myriad of further questions. The client and/or the individual who purchases the same within a bookstore will either inscribe the same as a simple document and will not take the time to study the enlargement of each choice. I would not use the same in my practice in that I want the client to read EVERY POWER he or she is executing (both in my office and later at home as instructed) so that they will be certain of the important decision they have made to allow another the same authority they have. The idea of simplification in the forms used in the practice of the law is meritorious on its face, however in practicality it is my opinion that the practice has made a complicated matter appear too simple to the layman, resulting in too many cases in further difficulties. Let's give it a good old try anyway!

Incidentally, I marvel at the amount of complex matters your Commission undertakes and satisfactorily completes. You are all to be highly complimented.

Sincerely,

DAVID W. KNAPP, SR.
KNAPP & KNAPP
DWK:dd

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

August 28, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Calif. 94303-4739

To whom it may concern:

I write to comment on your "Tentative Recommendation relating to Repeal of Probate Code Section 6402.5 ("In-Law Inheritance").

I am absolutely for it. I have taught Community Property here for 20 years and Wills for about 10 years. I have given up trying to teach the section other than to say that it is almost the last remnant of ancestral property classification that we have in California. Your points on expense, delay, complexity and confusion are well taken.

Let me add only one comment. You generalize the title as "In-Law Inheritance." But PrC 6402.5 is more than just in-law inheritance. It is in-law inheritance of ancestral property, for want of a better term. You are not suggesting the elimination of the in-law inheritance sections of PrC 6402.

Sincerely,

Paul J. Goda, S.J.

-17-

THOMAS R. THURMOND
ATTORNEY AT LAW
419 MASON STREET, SUITE 118
VACAVILLE, CALIFORNIA 95688
(707) 448-4013

August 27, 1989

California Law Revision Commission
4000 Middlefield Rd., Ste D-2
Palo Alto, CA 94303-4739

Re: (1) Repeal of Probate Code § 6402.5
(2) Uniform Statutory Form Power of Attorney Act

Gentlemen:

I offer the following comments on the subject tentative recommendations published in August 1989:

(1) Repeal of Probate Code § 6402.5

This code section is confusing and hard to apply. In my experience, most persons are not aware of it and would not expect the resulting disposition of their property at death. It is an example of a law written to cover exceptional circumstances that ends up confusing and confounding the general case. It should be repealed as you have recommended.

(2) Uniform Statutory Form Power of Attorney Act

My comments will follow the numbered paragraphs in the tentative recommendation:

(1) Adding the initialing concept is not an advantage to most users. Those desiring a limited, single-function power are better served by a simpler form, whether obtained from a stationery store or an attorney. The majority of those wishing a general durable power of attorney evidence a desire to make it as broad as possible.

(2) In my experience, the general "all other matters" clause serves the interests of most users, who wish to obtain as broad a power as possible.

(3) I recommend to most of my clients that they specifically arrange for these broad estate planning powers. One of the main reasons for this power is to avoid the trap of an incapacitated person being caught in the web of too-frequent tax law changes. These powers provide a needed safety valve. They should automatically be included in most cases and should be excluded only where expressly directed by the principal.

(4) I would retain the gifting powers for the reasons stated in paragraph (3) above.

(5) My preference would be for a form that enabled the selection of successor agents, each of which could be one or more agents, who could act jointly or severally, as designated. Neither the existing nor the proposed form fulfills these requirements.

(6) (i) The clause governing the duration of the power covers the needs of most persons by allowing an indefinite duration unless the principal designates otherwise. This serves as an additional reminder to the principal of the importance and potential long life of this document.

(ii) The clause permitting nomination of a conservator of the estate serves the interests of most persons in selecting the same party as conservator as they have for agent, in the event that they are unable for some reason to avoid a conservatorship. The existing statute should provide space for nomination of successor conservators.

(7) The proposed statute is an improvement over the existing law in that it eliminates the double witness requirement in favor of the more common and equally effective notary acknowledgment.

(8) The explanatory warning statement of the proposed form seems simpler, but both appear to be effective statements calculated to impress the potential user.

In conclusion, the tentative recommendation offers some improvements over the existing law, but eliminates more advantages that the present form contains. I would propose that the existing Short Form Power be modified as I have suggested above to include provisions for:

- indication of successor agents and conservators

- notary acknowledgment in lieu of double witnesses

I trust that these comments will prove useful to you. Thank you for the opportunity to continue reviewing your recommendations.

Yours very truly,

Thomas R. Thurmond
Attorney at Law

TT/hs

LINDA SILVERIA
ATTORNEY AT LAW

August 28, 1989

California Law Revision Commission
4000 Middlefield Road #D-2
Palo Alto, CA 94303-4739

Gentlemen:

I am in receipt of the two Tentative Recommendations which was forwarded to me on August 23, 1989. I would make the following comments:

1. Repeal of Probate Code Section 6402.5 - I agree with this proposal.

2. Uniform Statutory Form Power of Attorney Act - I favor the use of the Uniform form because clients frequently move to another state without having their estate plan reviewed by a local attorney. While I feel that the present California form has some aspects which are better, these omitted items can be inserted into the form.

Thank you for your cooperation.

Very truly yours,

Linda Silveria

Enclosure

2021 THE ALAMEDA #310 SAN JOSE, CALIFORNIA 95126 TELEPHONE (408) 983-0500

EXHIBIT 18

Study L-3007

LAW OFFICES OF
VAUGHAN, PAUL & LYONS
1418 MILLS TOWER
220 BUSH STREET
SAN FRANCISCO 94104
(415) 392-1423

August 28, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation
Relating to Appeal of Probate
Code Section 6402.5
("In-Law Inheritance")

Gentlemen:

I approve the above tentative recommendation. I can think of no real argument against your proposal.

Very truly yours,

John G. Lyons

John G. Lyons

JGL:ea

McGEORGE SCHOOL OF LAW

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

WRITER'S DIRECT DIAL NUMBER

August 25, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Attention: Mr. John H. DeMoully, Executive Secretary

Subject: Recommendations Relating to
Uniform Statutory Form Power of Attorney Act
Repeal Probate Code Section 6402.5

Dear Mr. DeMoully:

I concur in the recommendations to enact the Uniform Statutory form Power of Attorney Act and to repeal Probate Code section 6402.5.

Very truly yours,

Benjamin B. Franta

BDF:mb

Harlan K. Veal
Judge

In Chambers
Hall of Justice
Redwood City, California 94063

1 Sept 1989

To: California Law Revision Commission

Re: Tentative Recommendations on:
1) Repeal of "in-law inheritance" statute
2) Adoption of Uniform ~~Statutory~~ Power-of-Attorney Act

Pursuant to your letter of 23 Aug 89 and enclosures, I concur in both of the above recommendations.

Please continue sending me future Tentative Recommendations.

Harlan K Veal

HENRY ANGERBAUER, C.P.A
4401 WILLOW GLEN CT.
CONCORD, CA 94521

9/1/89

California Law Revision Commission:

Thank you for permitting me to review your two tentative recommendations entitled Repeal of In-law Inheritance and Uniform ~~Statutory~~ Statutory Form Power of Attorney Act. I agree with your tentative recommendations and have no comments to make on both of the above. Thank you again

RUSSELL G. ALLEN
610 NEWPORT CENTER DRIVE, SUITE 1700
NEWPORT BEACH, CALIFORNIA 92660-6429
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FAX (714) 669-6994

September 6, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations Relating to Repeal of Probate Code Section 6402.5 and the Uniform Statutory Form Power of Attorney Act

Dear Ladies and Gentlemen:

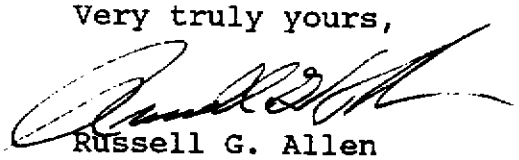
I concur in the recommendation concerning repeal of Section 6402.5. Although I must confess I have had no real-world experience with applying this section, I have had occasion to become concerned about it several times when doing estate plans for clients without close family members. I believe this section is likely to defeat expectations of those who die without a will and impose substantial administrative costs in transferring property from an intestate decedent to his or her heirs.

I also support the tentative recommendation concerning the statutory form durable power of attorney for asset management. I suggest you consider adding another category of authority -- to make gifts. In particular, I suggest including as a standard provision authority to make inter vivos, annual-exclusion gifts to a class of people that includes the principal's grandparents and all descendants of the principal's grandparents and all spouse's descendants of the principal's grandparents. (I suggest that we not worry about the Internal Revenue Code Section 2041 issues with respect to annual-exclusion gifts.)

I must confess that I struggle with the extent to which we should give the agent powers to make estate planning decisions for the principal beyond annual-exclusion gifts. I find it somewhat anomalous that we restrict an agent's authority in Section 2492(d) with respect to insurance policies but have no similar restriction with

respect to Section 2493's authority to disclaim or exercise powers of appointment and 2497's authority with respect to retirement plans. Similarly, I wonder if the failure to address the creation or termination of joint tenancies is intentional or inadvertent. As a general proposition, I would be reluctant to include broad, unsupervised estate planning authority that can be exercised for the benefit of the agent. (Indeed my concern about Section 2041 and self-dealing problems has led me to avoid the current statutory form; I have used an alternative version that does not include the power to make gifts or other estate planning decisions.) Perhaps we should authorize larger gifts and other estate planning acts if approved by the court having jurisdiction to supervise the actions of the agent.

Very truly yours,



Russell G. Allen

RGA/br

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OF COUNSEL
MANYA BERTRAM
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LEGAL ASSISTANTS
PACITA A. FRANCISCO
PATRICIA D. FULLERTON
KIRSTEN HELWEG

September 7, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, California 94303-4739

Re: Tentative Recommendation relating to Repeal of Probate Code Section 6402.5
Tentative Recommendation relating to Uniform Statutory Form Power of Attorney Act

Gentlemen:

Thank you for forwarding me the tentative recommendations regarding the repeal of Probate Code Section 6402.5. I heartily concur with the Law Revision Commission's recommendation.

With respect to the recommendations regarding the Uniform Statutory Form Power of Attorney Act, I must say that I have a bias against "legislated" forms in general. I think the California experience with the Statutory Will shows the pitfalls that such legislation can create.

On the other hand, the "plain English" format of the proposed form goes a long way towards ameliorating the problems the current crop of preprinted Power of Attorney forms have created.

With that caveat, I do think the reference to "estate, trust and other beneficiary transactions" may lead some people to believe that a Power of Attorney can be utilized to execute

LAW OFFICES OF
LEVIN, BALLIN, PLOTKIN, ZIMRING & GOFFIN
A PROFESSIONAL CORPORATION

documents, such as a will, which the holder of the power does not in fact have authority to sign. Further, I think the phrase "tax matters" is so overly broad and vague as to be meaningless. If the intent of the document is to authorize the holder of the power to sign tax returns and/or deal with taxing authorities, I doubt seriously that the Internal Revenue Service would accept this Power of Attorney in lieu of its own form. Thus, I would suggest that item "m" be deleted.

Sincerely,

LEVIN, BALLIN, PLOTKIN, ZIMRING & GOFFIN
A Professional Corporation

By: _____
STUART D. ZIMRING

SDZ:sw

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO SANTA BARBARA · SANTA CRUZ

SCHOOL OF LAW
405 HILGARD AVENUE
LOS ANGELES, CALIFORNIA 90024-1476

[illegible] COMM'N

September 7, 1989 SEP 11 1989

[illegible] E D

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation on Probate Code § 6402.5

I applaud your renewed recommendation to repeal Probate Code § 6402.5. Even before the provisions recently added to the code that make the issue and relatives of a predeceased spouse intestate takers under the circumstances set out in the tentative recommendation, I supported repeal of the precursor to this section. This statute has always been too complicated and costly to justify the marginal benefits it produced. With other recent changes in the Code, there is no reason to retain § 6402.5.

Yours very truly,

Susan F. French (RS)

Susan F. French
Professor of Law
(213) 206-7324

SFF/rs

TICOR TITLE INSURANCE

Memo 89-89 EXHIBIT 25

SEP 2[illegible] 1989

RECEIVED

Study L-3007

John C. Hoag
Vice President and
Senior Associate Title Counsel

September 19, 1989

Mr. John H. DeMoully, Esquire
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations Relating to Repeal of Probate Code Section 64025 and Relating to Uniform Statutory Form Power of Attorney Act

Dear Mr. DeMoully:

Thank you for providing the two tentative recommendations I have referred to above.

The first tentative recommendation is Repeal of Probate Code Section 6402.5 and is useful as drafted.

The second tentative recommendation is well drafted and from a real property transaction and title viewpoint, presents no difficulties.

Thank you for providing me with the opportunity to comment on the two tentative recommendations. When the two recommendations become law, I will re-write my title practices material on each subject covered by the recommendations to reflect reliance upon them.

Very truly yours,

John C. Hoag
Vice President and
Senior Associate Title Counsel

JCH/jdk

-30-

EXHIBIT 26

Patricia Harsh Jenkins
Attorney at Law
2049 Century Park East, Suite 1200
Los Angeles, California 90067
(213) 277-3360

September 17, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Tentative Recommendations

Dear Sir/Madam:

I have reviewed the tentative recommendations for repeal of Probate Code Section 6402.5 and adoption of the Uniform Statutory Form Power of Attorney Act. I support both recommendations.

I would like to continue to receive Commission mailings at my home address, 12631 Milton Street, Los ANgeles, CA 90066. Thank you.

Very truly yours,

Patricia Jenkins

PHJ:mm

LAW OFFICES OF
EDNA R. S. ALVAREZ
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FOURTH FLOOR
LOS ANGELES, CALIFORNIA 90024-4318

TELEPHONE (213) 475-5837
FACSIMILE (213) 474-6926

September 13, 1989

John DeMauley
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: TENTATIVE RECOMMENDATION RELATING TO REPEAL OF PROBATE CODE §6402.5 ("IN-LAW INHERITANCE")

Dear Mr. DeMauley:

I am in receipt of a copy of the above-captioned item which was sent to me for my comments. I have reviewed the proposal and agree with the recommendation of the Commission as contained in said Proposal.

I would appreciate being kept on your mailing list in regard to matters in the probate field.

Thank you very much.

Yours truly,

EDNA R. S. ALVAREZ

ERSA:jw

misc\cal-100.ltr

Phelps, Schwarz & Phelps
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221 East Walnut Street, Suite 136
Pasadena, California 91101

Edward M. Phelps
Deborah Ballins Schwarz
Ruth A. Phelps

(818) 795-8844

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September 15, 1989

Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations Relating to
Uniform Statutory Form Power of Attorney Act and
Repeal of Probate Code Section 6402.5

Dear Sirs/Madame:

I have read both of the tentative recommendations. I approval the one relating to the Uniform Statutory Form Power of Attorney Act since it specifically states that existing powers of attorneys are still effective.

I also approve the tentative recommendation relating to Repeal of Probate Code Section 6402.5. It is difficult to interpret. I had an estate involving ten relatives of the wife, all of them Australians, and eight relatives of a predeceased spouse, all of them Americans. There was no argument as to how the estate should have been divided, and it went very smoothly but it was complicated.

Very truly yours,

Ruth A. Phelps

Ruth A. Phelps
PHELPS, SCHWARZ & PHELPS

RAP:sp

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HOLLISTER OFFICE
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HOLLISTER, CALIFORNIA 95024
(408) 637-8151

September 15, 1989

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

Gentlemen:

This is to acknowledge receipt of the two Tentative Recommendations of your Commission which I received in August. Regarding the Uniform statutory power of attorney act, I agree with the Commission's recommendation that we follow the simpler form rather than the Uniform Act.

I have personal experience with the In-Law inheritance provisions of the Code and agree that the application of this statute is difficult and is a waste of judicial resources and time. In short, I agree with your conclusion that ¶6402.5 of the Probate Code should be repealed.

Sincerely yours,

RUSCONI, FOSTER, THOMAS & PIPAL

E. Rusconi

ERNEST RUSCONI

ER:lsj

DAMIAN B. SMYTH
ATTORNEY AT LAW
220 MONTGOMERY STREET, SUITE 814
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 434-2285

September 15, 1989

California Law Revision Commission
4000 Middlefied Road, Suite D-2
Palo Alto, CA. 94303-4739

Re: Tentative Recommendation/In-Law Inheritance

Gentlemen:

I have read the above with particular interest, and general agreement, because of a couple of recent "annoyances" occasioned by the In-law Inheritance Statute.

(a) The Texan Stepson

I was contacted by a lawyer in Texas on behalf of a client there, who was the stepson of a lady who died in San Francisco recently, the sole owner of record of a home with the typically inflated FMV. Her husband, the claimant's father, had predeceased her by less than the statutory 15 years. The mortgage as of the his death had been completely paid off by his life insurance. Prima facie our Texan had a colorable claim under the subject statute.

It consumed considerably time to verify all this, and yet more time before I could find a probate proceeding, or even a death certificate, for the good lady filed under her maiden name - a name unknown to my client. It turned out she left a Will, so all the work was for naught.

Incidently, each of the spouses who owned this house had been married more than once. This suggests a further scenario where a decedent can have accumulated stepchildren from successive marriages. The family tree thus expanded could be a tangled one indeed.

(b) The Trap in the Petition

A colleague sole general practitioner recently filed a Petition for Probate without adverting to the box way down near the end which asks re spouse predeceased within 15 years. This triggered the filing

of allegations of FRAUD, most upsetting to the elderly administrator....

So I shall not lament the passing of this anachronism. What intrigues me is your letter of transmittal, which reports that when you last proposed repeal to the Legislature in 1982, "a representative of a Sacramento heir-tracing firm objected" - and that was that. Better luck this time !

Yours sincerely,

DAMIAN BARRY SMYTH, Esq.

DBS/cp

Michael J. Anderson, Inc.
A Professional Corporation
777 Campus Commons Drive, Suite 167
Sacramento, California 95825
(916) 921-6921

Michael J. Anderson

September 12, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Uniform Statutory Form Power of Attorney Act
and Repeal of Probate Code Section 6402.5
("In-Law Inheritance")

Dear Members,

In respect to these two recommendations I am in full support of the one dealing with Repeal of Probate Code Section 6402.5 without comment.

In respect to the Uniform Statutory Form Power of Attorney Act I am in agreement with that. However, I have several comments. First, could the Statutory Durable Power of Attorney be enacted to allow for the preparation of a Will. In particular a Pour-Over Will in cases where under the Power of Attorney the person is granting the authority to create, modify or revoke a Revocable or Irrevocable Trust.

I would also recommend, that having the authority to create, modify, or revoke a Trust should be one of the given powers as opposed to a power which must be specifically provided for.

Also, under the substituted judgment provisions of the conservatorship code the conservator on behalf of the conservatee could do all these acts under court supervision. If a Power of Attorney is a grant to let someone act on your behalf and sign, one of the common estate planning tools used in dealing with the disability of ones client, then I think it should be provided for. It would seem logical that they could be done under a Power of Attorney.

In all other respects I agree with the the commission.

Sincerely,

MICHAEL J. ANDERSON
MJA/fa

Memo 89-89

EXHIBIT 32

Study L-3007

CA LAW REVISION COMM'N

SEP 25 1989

RECEIVED

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ATTORNEYS AT LAW
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MILL VALLEY, CALIFORNIA 94941

LINDA A. MOODY
GRAHAM B. MOODY

TEL (415) 332-0216
FAX (415) 331-5387

September 21, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Repeal of Probate Code Section 6402.5 ("In-Law Inheritance")

Ladies and Gentlemen:

Thank you for the opportunity to comment on your proposed legislation.

Your report and recommendations for abolition of the in-law inheritance statute are *absolutely persuasive*. This state is blessed in having a Commission that produces such quality work. If the heir tracers raise their heads again, please advise the bar, so that we may lobby for repeal. It would be an outrage for such limited political interests to be allowed to block such a clearly needed reform.

Very truly yours,

L. A. Moody

Linda A. Moody

JEROME SAPIRO
ATTORNEY AT LAW
SUTTER PLAZA, SUITE 505
1388 SUTTER STREET
SAN FRANCISCO, CA. 94109-5452
(415) 928-1515

Aug. 28, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA, 94303-4739

Re: Tentative Recommendation
Repeal of Probate Code §6402.5

Hon. Commission Members:

The proposed repeal recommendation referred to above seems satisfactory.

However, some of your reasoning does not appear to be valid:

1. Personal representatives and attorneys will still have problems in tracing heirs in intestacy cases and the giving of notice of proceedings to them, i.e. in the case of preference to children and grandchildren of a predeceased spouse over more remote heirs of the decedent, and also in the case of the parents of a predeceased spouse where the decedent leaves no heirs.

2. Giving in to the objection of an heir-tracing firm over the better judgment of the Commission as to repeal when before it in 1982 does not appear to be proper.

3. I do not believe in the verity of the remark at page 10 of the recommendation "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". This would only be true under the current proposal to eliminate the statutory fees, where an attorney is paid on his agreed hourly rate. I know of no Court that would allow heir location services of an attorney as the basis for award of extraordinary fees. Such services would be deemed ordinary services covered by the statutory fees. This would also be true about services involving discussions with such located heirs or their attorneys, unless adverse proceedings were to develop.

Respectfully,

Jerome Sapiro

JS:mes

Frank M. Swirles Law Corporation

POST OFFICE BOX 1490 RANCHO SANTA FE, CALIFORNIA 92067 (619) 756-2080

August 28, 1989

AUG 30 1989

RECEIVED

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations on
"In-Law Inheritance"
and
Uniform Statutory Form Power of Attorney

Gentlemen:

Re the "In-Law Inheritance" recommendation, this is to advise that I agree that the code section should be repealed, but I have read your literature thoroughly and find your arguments weak, and your illustrations of the wrong results of the present statute less than meaty. If I were a law maker and this material came across my desk, and if I were to read it, which is not in character for a law maker, I would probably wonder if you people had nothing better do do.

As to the statutory power of attorney form, I disagree with your recommendation. In my view, what you have proposed does not result in any better protection of a lay client. The proposed form is shorter, but no less complex. I oppose statutory wills, statutory powers of attorney, and all the other statutory efforts to encourage the practice of law without a license. The fact that a client can discover what powers he has granted by referring to sections 2485 et seq is of little moment, because 99.99% of clients will not know that, and if they did, they would never bother to look into the matter.

I think clients should be scared to death by powers of attorney rather than encouraged to rush into them. Attorneys should take particular care in drafting such powers, and should take adequate time to explain them to clients, making sure that the consequences are fully appreciated and understood.

Very truly yours,

Frank M. Swirles

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ADRIAN KUYPER
COUNTY COUNSEL
WILLIAM J. McCOURT
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BENJAMIN P. DE MAYO
HOWARD SERBIN
DANIEL J. DIDIER
GENE AXELROD
ROBERT L. AUSTIN
DONALD H. RUBIN
DAVID R. CHAFFEE
CAROL D. BROWN
BARBARA L. STOCKER
JAMES F. MEADE
STEFEN H. WEISS
SUSAN STROM
DAVID BEALES
TERRY C. ANDRUS
JAMES L. TURNER
PETER L. COHON
NICHOLAS S. CHRISOS
THOMAS F. MORSE
WANDA S. FLORENCE
HOPE E. SNYDER
THOMAS C. AGIN
SHERIE A. CHRISTENSEN
SUSAN M. NILSEN
SARA L. PARKER
ADRIENNE K. SAURO
KARYN J. DRIESSEN
KATHY PAUL
KAREN R. PRATHER
F. LATIMER GOULD
ROBIN FLORY
DEPUTIES

Writer's Direct Dial Number
714/ 834-2002

August 31, 1989

California State Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Ladies and Gentlemen:

Thank you for sending me your tentative recommendations relating to Probate Code Section 6402.5 and to the uniform statutory form power of attorney act.

Although I am a Deputy County Counsel for the County of Orange, please note that the opinions expressed here are my individual views, and I do not write as a representative of the County of Orange, the Orange County Counsel, or the Public Administrator/Public Guardian.

Your recommendation relating to repeal of Probate Code Section 6402.5 ("in-law inheritance") raises difficult issues. I agree the current statute is too complex and difficult to apply, causes delays in probate proceedings, and sometimes produces inequitable results. Yet, in some other cases, it seems to produce equitable results. An example is a case administered by the Orange County Public Administrator, Estate of Hermoine Loud. Ms. Loud died in 1981. Her spouse of 34 years predeceased her by 15 days. Neither spouse had issue, surviving parents, or surviving siblings. Mrs. Loud was survived by aunts. Mr. Loud was survived by children of his pre-deceased sister. One-half of the community property went to the aunts, and one-half to Mr. Loud's nieces.

Theoretically, the heirs of the first spouse to die would just as likely have been supportive and close to the decedents as would the heirs of the surviving spouse. Without the in-law inheritance law, it is fortuitous in such a case as to which side of the family inherits community assets. (I recognize that the result is not exactly "fortuitous" if one considers that the spouses could have provided for their "chosen" side by their wills. But in analyzing what the law of succession should be, we must, of course, only consider cases where we assume there would be no wills.)

I agree the law would be better served if in-law inheritance were repealed, provided there were some mitigating measure to prevent unfairness. In a case where the spouses were close to the family of the first to die, the survivor should have some opportunity to evaluate his/her estate plan in light of the death and to provide for in-laws if that had been the spouses' expectation and the survivor desires that result. There would be no such opportunity in cases such as where both spouses are killed by an accident, although one survives in a coma for a few days. Recently passed Assembly Bill 158, deeming spouses who died within 120 hours of each other as having died simultaneously, goes a long way toward mitigating my concerns. I understand the Governor has not yet signed that bill. Provided he does so, or a similar measure becomes law, I would support the repeal of 6402.5.

I strongly support the proposal to replace the California statutory short form power of attorney with the Uniform Statutory Form. As attorney for a Public Guardian, I see situations where an attorney in fact has abused his trust, and a conservator must be appointed to resolve the problems. Therefore, while recognizing the need for a statutory form, I think it preferable that the form give only those powers for which the principal initials his consent, rather than require the principal to delete powers he does not wish to grant. The new form is better at warning principals and should be better at protecting them from abuse, by requiring affirmative action (apart from just a signature) to grant powers.

I have some concerns about proposed Sections 2492(d) and 2497. In the former, perhaps the restrictions against an agent making himself the beneficiary of an insurance or annuity contract should also apply to the agent's spouse and children, at least to the extent that such persons should not be beneficiaries of substitute contracts for those canceled by the agent that named other beneficiaries, or otherwise benefit in lieu of beneficiaries named by the principal. Regarding 2497(b), I think the agent should be restricted from changing beneficiaries of existing retirement plans in favor of the agent himself, and perhaps also restricted from making a change to his spouse or children. I also am not sure if the power in 2497(g) may be too broad to grant outside the benefit of a court-supervised conservatorship, since it appears to

constitute something like a gift that would not normally benefit the principal (although there may be estate planning reasons to justify use of the power).

Thank you.

Very truly yours,

Howard Serbin

HS:jp

cc: William A. Baker, Public Administrator/Public Guardian
Carol Gandy, Assistant Public Guardian
James F. Meade, Deputy County Counsel
Hope E. Snyder, Deputy County Counsel

Fidelity National Title
INSURANCE COMPANY

Larry M. Kaminsky
Vice President
Assistant General Counsel

CAL LAW REV. COMM'N

SEP 2 1989

RECEIVED

September 22, 1989

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: Comments Regarding Tentative Recommendations

Dear Mr. DeMoully,

The California Land Title Association Forms and Practices Committee comments on the below-described Tentative Recommendations as follows:

1. As to the Repeal of Probate Code Section 6402.5 ("In-Law Inheritance"), we find nothing objectionable in the proposed repeal of this statute.

2. As to the Uniform Statutory Short Form Power of Attorney Act, in general we support the enactment of the Uniform Act, with the following suggestion:

> Sections 2486 (c) and (d)2 purport to give the agent the ability to bring an action in his own name, as agent for the principal, which would appear to be contrary to existing law (e.g., Code of Civil Procedure Section 367, which states, "Every action must be prosecuted in the name of the real party in interest, except as provided in Sections 369 and 374 of this code.") It would appear that either the proposed Uniform Act be clarified that the agent may bring the action in the name of the principal, or existing law be amended to allow the agent action.

Thank you for the opportunity to comment on the above matters, and if you have any questions or comments for us, please don't hesitate to contact us.

Sincerely,

Larry M. Kaminsky

Larry M. Kaminsky
Chairman, Special Subcommittee on
California Law Revision Commission
Legislation of the California Land
Title Association Forms & Practices
Committee

-44-

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LAW REV. COMM'N

AUG 31 1989

August 30, 1989

OUR FILE NUMBER

9911.81-35

Mr. John H. DeMoully
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

IN-LAW INHERITANCE

Dear Mr. DeMoully:

In my opinion, the repeal of the in-law inheritance (Probate Code § 6402.5) would simplify the law and speed up estate administration.

The repeal would operate "unfairly" to the heirs of the first spouse to die if you consider that the in-law inheritance is a form of "forced heirship". However, in view of the fact that both decedents could have made provisions for the in-laws by trust, or will, or otherwise, it does not seem unfair to simplify the law and speed up the probate process.

As an experienced probate practitioner, I rarely see Probate Code § 6402.5 situations and usually such situations involve or cause litigation over whether the claimants qualify as recipients.

Yours sincerely,

Luther J. Avery

LJA:bal
841.8.demoully

SANTA CLARA UNIVERSITY

SCHOOL OF LAW

AUG 31 1989

GEORGE J. ALEXANDER
PROFESSOR OF LAW
(408) 554-4053

August 29, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Commissioners:

I thank you for forwarding draft copies of the proposed Uniform Statutory Form Power of Attorney Act and the act to repeal §6402.5 of the Probate Code.

I have no opinion concerning the latter.

With respect to the Uniform Law, I think that its passage is, as a general matter, a good idea. I do have several concerns, though. As you may know (see Alexander, Writing a Living Will: Using a Durable Power of Attorney, Praeger Press 1988) I am very concerned that durable powers be as accessible and useful as possible. Among other things, as I have written in the Stanford Law Review and you have cited in your work on health care powers, they provide an alternative to conservatorships. The provision of current law now to be removed which provides a form for the designation of a conservator is a very important aspect of the protection needed. A durable power made to avoid overreaching by "near and dear" may be made useless if the relatives can get a conservatorship and a conservator who sees things their way. Appointing a trustworthy attorney-in=fact as conservator makes good sense for those who fear such an eventuality.

The other matter is probably not a criticism of this draft but is related. Adopting a uniform law for durable powers for asset management is a good idea but not essential. Adopting one for health care powers seems to me urgent. Following California's, in my view, bad example, (you may recall my concerns on that subject when the law was proposed) states have passed all sorts of provisions, restrictions and mutually conflicting form requirements. Many states require differing warning statements. Some require that the state drafted form be used - and there is no common form. As a result, the

SANTA CLARA, CALIFORNIA 95053 (408) 554-4443

country risks having these useful documents become worthless as people find themselves incompetent or terminally ill in a state in which they do not reside. As the state which originated both the natural death act provisions and the health care powers, California owes it to the other states to take a leadership position.

My comments concerning health care powers relate to the current proposal to this extent: Ultimately, there should be a single set of uniform forms for both kinds of powers. Passing this set should be seen as merely a step in that direction.

As always, I remain interested in being of whatever help I can in your useful work. Please do not hesitate to call on me as necessary.

Sincerely,

George J. Alexander

GJA:pco

DEMETRIOS DIMITRIOU
ATTORNEY AT LAW
ONE MARKET PLAZA
SPEAR STREET TOWER, 40TH FLOOR
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(415) 434-1000

September 1, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Unif. Statutory Form Power of Atty. Act

Dear Commissioners:

It is very difficult to create any sort of standard form because people's needs are different. The biggest problem is the inherent assumption that the "standard" form takes care of all of my needs. This type of form never makes clear to the user that only a certain percentage of his or her needs are being addressed. For instance, most spouses will appoint each other as their "agent", therefor shouldn't the form provide for self dealing by the agent in certain circumstances? I would also suggest that the investment powers include "puts and calls" as well as covered and uncovered options since they are vehicles which provide for the possibility of increasing income from investments with little risk of loss, assuming they are properly used.

I also have some question about your changing policy concerning the sending of materials. I appreciate that you are trying to limit your costs. You should not do it at the expense of cutting off commentary, particularly from those who have no axe to grind. Nor should you condition anything on the bases of making comment. I would not like you to think that this letter for instance is being sent simply to have me continue to be on your "free" mailing list. I seldom respond because I either have no strong feeling about the issue addressed or am in agreement with your position. For instance, your "In-Law Inheritance" proposal is fairly innocuous although I think the law as it is at present more closely reflects what people would expect to have happen if their attention were focused on the issue. The problem arises after the fact, when both spouses are no longer living. I perceive you efforts in this area as being essentially harmless tinkering (a legislative malaise). In any event I would be happy to pay a nominal annual fee in support of the costs in mailing to me your tentative recommendations whether I make comment or not.

Yours very Truly,

Demetrios Dimitriou

-48-

DD/

ROBERT K. MAIZE, JR.
A PROFESSIONAL LAW CORPORATION

1604 FOURTH STREET
POST OFFICE BOX 11648
SANTA ROSA, CALIFORNIA 95406
(707) 544-4462

September 11, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: In-law inheritance

Ladies/Gentlemen:

I have reviewed the proposed law change and have no particular opinion as to whether or not it should be adopted.

However, I do have an antidote that I want to share with you regarding heir hunters because you indicated that your prior recommendation had not been implemented because of lobbying efforts by an heir hunter. I cannot substantiate what I am about to tell you.

It is my understanding that an heir hunter, instead of actually trying to locate heirs, on one occasion noticed in a probate file where the heirs where located in Germany and the petition had just been filed. But before the heirs could get notice of the proceeding they were contacted by an heir hunter who obtained from them a contract for a share of their inheritance. When I was being told this story I was clearly led to belive that the heir hunter did receive a payment under his agreement with the heir.

I have no objections to what heir hunters to, as I am in the process of closing up an estate in which I had substantial difficulty in locating an heir and ultimately had to engage the services of an heir hunter to locate that person. Their services were only engaged after receiving instructions from the Court, and the heir hunter was engaged on a fee basis and conditioned upon a successful result.

I will say that if your recommendation that in-law inheritance provision be deleted had been accepted, the administration of the estate I am completing would have been a lot simpler, and probably less expensive for the heirs.

Very truly yours,

ROBERT K. MAIZE, JR.,
A Professional Law Corporation

by: 
ROBERT K. MAIZE, JR.

RKM:jas

EXHIBIT 41

University of San Diego

Institute on International and Comparative Law

September 8, 1989

California Law Revision Commission
4000 Middlefield Rd. #D-2
Palo Alto, CA 94303-4739

Dear Sir or Madam:

I have reviewed the 2 drafts you sent on in-law inheritance and powers of attorney for real property matters.

I have no suggestions for improvements on those drafts.

I would, however, appreciate it if you would continue to send me drafts of tenative recommendations for comments.

Sincerely,

Herbert Lazerow
Professor of Law

HIL:gsc

ATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, Governor

PARTMENT OF DEVELOPMENTAL SERVICES
.GNEWS DEVELOPMENTAL CENTER
00 ZANKER ROAD
.N JOSE, CA 95134-2299

SEPTEMBER 12, 1989

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739

DEAR PERSONS:

I HAVE REVIEWED THE COMMISSION'S TENTATIVE RECOMMENDATIONS RELATING TO THE UNIFORM STATUATORY FORM POWER OF ATTORNEY ACT AND THE REPEAL OF PROBATE CODE SECTION 6402.5 ("IN-LAW INHERITANCE"). BOTH OF THE RECOMMENDATIONS UNDER CONSIDERATION APPEAR TO HAVE VERY LIMITED APPLICABILITY FOR DEVELOPMENTALLY DISABLED INDIVIDUALS RESIDING AT AGNEWS DEVELOPMENTAL CENTER.

RATHER THAN THE POWER OF ATTORNEY AUTHORIZED BY THE CALIFORNIA CIVIL CODE, SOME FORM OF CONSERVATORSHIP IS OFTEN SOUGHT AND GRANTED FOR DEVELOPMENTALLY DISABLED INDIVIDUALS. LIMITATIONS IN GIVING INFORMED CONSENT WOULD USUALLY PRECLUDE USE OF THE POWER OF ATTORNEY PROCESS BY DEVELOPMENTALLY DISABLED INDIVIDUALS AT AGNEWS DEVELOPMENTAL CENTER. THERE ARE OTHERS, NO DOUBT, WHO ARE DISSUADED BY THE COMPLEXITY OF THE POWER OF ATTORNEY PROCESS.

THE TYPICAL DEVELOPMENTALLY DISABLED INDIVIDUAL AT AGNEWS DOES NOT HAVE A SPOUSE. FEW, IF ANY, HAVE A CHILD AND MOST ARE SURVIVED BY THEIR PARENTS. THIS SAME TYPICAL INDIVIDUAL DIES INTESTATE WITH VERY LIMITED ASSETS.

SINCERELY,

Fred A. Sprague

FRED A. SPRAGUE
TRUST OFFICER

(408) 432-8500
EXT. 3392

FAS:DD

Memo 89-89

EXHIBIT 43

LAW OFFICES OF
CHARLES A. TRIAY
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CA LAW REV. COMM'N
Study L-3007
SEP 07 1989
RECEIVED

CHARLES A. TRIAY

LEGAL ASSISTANT
JULIE RETTAGLIATA

LEGAL ASSISTANT
SYLVIA TORRES

September 6, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, Ca 94303

RE: Comment on Proposed Repeal of Probate Code Section 6402.5

Dear Sir/ Madam:

I have reviewed the tentative recommendation to repeal Probate Code §6402.5 and the analysis contained therein. I respectfully disagree with both the proposed recommendation and the rationale used to reach the proposed recommendation.

EXPENSE

The additional expense and burden of placing the predeceased spouse's relatives on the list of persons entitled to receive notice is usually minimal. In the vast majority of cases, the identity and addresses of the predeceased spouse's heirs is known.

DELAY

Anytime anyone is granted substantive rights there is a possibility that these rights will be litigated and thus create delay. This argument could be used for the repeal of just about any statute on the books.

INEQUITY

Inequity in application. Examples are cited in the report in support of an argument that the code section is inequitable when applied. The first, the McGinnis case, involved a relative of the predeceased spouse who was estranged from the predeceased spouse. What a curious example. There are many instances in which an intestate heir was estranged from the decedent from whose estate they take. This is not a valid reason to repeal an intestate succession statute. The second example cited, the Lucas case, involved a spouse who moved to California after his predeceased spouse's death. The third example, the Riley case involved property received by a gift from the surviving spouse's family. §6402.5 is a successor to former Probate code §229 which applied only to separate property of the predeaceased spouse. The §6402.5 could be amended to reach a middle ground,

between the separate property of the predeceased spouse and all property attributable to the predeceased spouse, in order to correct these perceived inequities.

I have been involved in many cases involving the application of Probate Code §6402.5. The far more common scenario, and the one I believe the statute was intended to address, is the following: Husband and wife (H1 and W) marry and raise children. H1 dies and leaves all to W. Children are no longer minors at the time H1 dies. W then marries H2. W dies leaving her entire estate to H2, including the property acquired as result of her marriage to H1. H2 then dies intestate leaving his entire estate to his heirs, leaving nothing to the heirs of W and nothing to the heirs of H1. The only way that the children of H1 and W would take anything under the "other adequate protective statutes" would be if H2 had no issue, no issue of his parents, or issue of his grandparents still surviving, an extremely remote possibility. Although H2 may not have intended or expected the children of W and H1 to take a portion of "his" estate, W probably did. Therefore, concern for the intent or expectation of the deceased spouse alone, without consideration for the intent or expectation of the predeceased spouse, is misleading.

It is true that tracing, commingling and appreciation problems arise, just as they arise in divorce cases and other property co-ownership cases. This argument reflects a trend I find extremely disturbing. There is a great focus in current law "reform" on saving money rather than administering justice. (e.g. abolishment of jury trials in will contests.) This simplification and streamlining of the law, while it may save money, sacrifices the rights of the people to a system of justice which can deal with the complexities of human relations.

Probate Code §6402.5 provides a vital protection for children and other relatives of a predeceased spouse and should not be repealed.

Respectfully submitted,

Charles A. Friay

CAT:st
crlc/st-10

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Repeal of Probate Code Section 6402.5 ("In-Law Inheritance")

August 1989

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1990. 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 revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **SEPTEMBER 29, 1989.**

The Commission often substantially revises tentative recommendations as a result of the 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, California 94303-4739

LETTER OF TRANSMITTAL

This tentative recommendation proposes the repeal of Probate Code Section 6402.5, the so-called in-law inheritance statute. Section 6402.5 is a provision that in some cases requires the estate of an intestate decedent to be divided into two parts, with the part attributable to a predeceased spouse of the decedent to pass to heirs of the predeceased spouse ("in-law inheritance") and the part not so attributable to pass to the decedent's heirs under ordinary rules of intestate succession.

This tentative recommendation renews a recommendation the Commission made in 1982. The 1982 recommendation to repeal the in-law inheritance statute was included in a bill proposing a comprehensive revision of the law relating to wills and intestate succession. The bill was heard by the Senate Judiciary Committee on the last day for committee consideration of bills. At that time, a representative of a Sacramento heir-tracing firm objected to the repeal of the in-law inheritance statute. In order to permit enactment of the comprehensive revision of the wills and intestate succession law, the author of the bill amended the bill to retain a limited form of in-law inheritance. The amendment was made with the understanding the Commission would make a further study of the in-law inheritance statute.

The Commission has made another careful study of the in-law inheritance statute and has again reached the conclusion that the statute should be repealed.

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.

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

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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).

(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 statute.[5] Six states other than California have had in-law inheritance at one time or another: Idaho, Indiana, New

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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.

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). Objections were made to the repeal, which was included in a comprehensive revision of the law relating to wills and intestate succession. The effort to repeal in-law inheritance was abandoned so as not to jeopardize enactment of the comprehensive bill. The in-law inheritance statute was continued, but it was 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. 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.

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.

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]

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6. Annot., 49 A.L.R.2d 391 (1956). See also 7 R. Powell, Real Property ¶ 1001, at 673-77 (1989 & 1989 Supp.).

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

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*):

This is true even if 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

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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(a)]; *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 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)

determine the identities and whereabouts of heirs of the predeceased spouse.[11] Reasonable effort 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

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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, 108 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).

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 beneficiaries.

county seat.[13] If this alternative method of notice is used, the estate attorney must prepare and present to the court a declaration detailing the efforts to locate the missing heir.[14]

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 under the will the heirs are not entitled to share in the estate. 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 often 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

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(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 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).

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] This case illustrates how the in-law inheritance statute produces inequitable results.

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 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, is another case that 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

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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).

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).

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 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? If the gift was made during marriage, ancestral property theory suggests that 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.

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

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).

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 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.

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 difficulties of interpretation and defects in the

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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).

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).

statute.[26] Some articles conclude that the in-law inheritance statute should be repealed.[27]

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.[28] Two recent cases illustrate these problems.[29]

The tracing problem is illustrated by *Estate of Luke*.[30] 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 subject to in-law inheritance, the court had to "unravel a snarl of

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26. 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).

27. 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.

28. 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).

29. 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).

30. 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987).

conflicting presumptions and cases reaching apparently inconsistent conclusions . . . . The task is not an easy one."[31]

The apportionment problem is illustrated by *Estate of Nereson*.[32] 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.[33] The court agreed, and held that it would be equitable to award 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.[34] Apportionment requires resort to community property law as well as to intestate succession law.[35] Under community property law, when there have been both community and separate property

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31. 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).

32. 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987).

33. 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).

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

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

contributions to property that has appreciated in value, the court must allocate the proper portion of enhanced value to the separate and community interests.[36] There is no invariable formula or precise standard. Allocation is a question of fact governed by the circumstances of each case.[37] The trial court has considerable discretion in choosing the method for allocating separate and community property interests.[38] Thus it is impossible to tell what the apportionment will be without actually litigating the issue.

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36. 7 B. Witkin, Summary of California Law *Community Property* § 25, at 5119 (8th ed. 1974).

37. 7 B. Witkin, Summary of California Law *Community Property* § 26, at 5120 (8th ed. 1974).

38. 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

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 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:[39] 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.[40] Repeal of the in-law inheritance

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39. 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).

40. 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.

statute would reduce the likelihood that relatives of the killer spouse could take in such a case.[41]

As of July 1989, legislation is pending 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.[42] This new rule will provide 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 of 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 number of other states.[43]

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[44] to provide that the surviving issue of decedent's

41. 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.

42. Assembly Bill 158, amending Prob. Code § 6403. The 1989 amendment to Section 6403 will make 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.

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

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

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.[45]

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[46] 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.

As discussed above, 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.

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:

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45. 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).

46. Prob. Code § 6402.

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 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.~~

Comment. Former Section 6402.5 is not continued. See Cal. L. Revision Comm'n, Tentative Recommendation Relating to Repeal of Probate Code Section 6402.5 ("In-Law Inheritance") (August 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.