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It's All Mine - Or at Least Part of It Is: A California Look at Property Apportionment Between the Families of an Interstate and an Intestate's Predeceased Spouse

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I. INTRODUCTION

To the layperson, the term “intestate succession” probably brings to mind the situation of a person dying without a will and the state making the determination of who gets what share of the decedent’s property. When pressed further as to how the state would distribute the decedent’s property, the layperson might answer, quite logically, that the order of distribution would try to mimic how most people would want their estate distributed: the immediate family, consisting of spouse and children, being first in line with the decedent’s parents next, then perhaps the decedent’s siblings, and so on through the family chain with the closest relatives having priority.

The practitioner, in most states, would be in general agreement with such an interpretation with the added knowledge that an estate may be subject to state intestate succession schemes even where a will exists. When faced with a scenario where the decedent’s spouse had died some years earlier leaving everything to the decedent in a valid will and the decedent having died intestate leaving no surviving issue or new spouse, the logical response as to distribution of the estate would probably be that the decedent’s closest living relatives should inherit. This, indeed, would generally be the appropriate response for all jurisdictions in the United States with the exception of California.

California is unique; it is the only state to have an intestate succession scheme in which a significant portion of the decedent’s estate may pass to the decedent’s former in-laws rather than the dece-
dent’s own blood relatives. In the scenario above, it may very well be that, in California, the decedent’s mother-in-law, brother-in-law, or even great-grandnephew-in-law could inherit a sizeable portion of the decedent’s estate to the exclusion of the decedent’s own mother, father, brother, sister or other blood relative.

The blame for this seemingly anomalous result in California lies with section 6402.5 of the Probate Code, the most recent in a long line of so-called “in-law inheritance” statutes. Based on the feudal doctrine of descent of ancestral property, California intestacy statutes attempt to distribute an intestate’s property based on its origin or source of acquisition. It does this, in certain situations, by favoring distribution to the family of a predeceased spouse, rather than the decedent’s family, with respect to property which came from or had as its source a predeceased spouse.

Determining exactly what property of the decedent is attributable to a predeceased spouse can be difficult, and is often made more complex as the intervening period between the death of the two spouses increases. This difficulty can be further compounded when, during this intervening period, any one or combination of the following occur: the value of the property changes; the surviving spouse makes capital outlays or renders services with regard to the property; or the property is transformed due to sale, exchange, condemnation or casualty. Assuming the source of an underlying asset of the decedent’s estate can be traced to a predeceased spouse, the question indeed arises as to what extent the relatives of such predeceased spouse participate in any changes in the property’s value after the death of the first spouse.

This practicum guides the practitioner through the quagmire of ap-

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4. Ohio was the only other state which modernly had similar extensive in-law inheritance provisions, but they were repealed effective January 1, 1976. OHIO REV. CODE ANN. § 2105.10 (repealed 1976). Ohio continues with an in-law intestate provision but only as a last resort to prevent escheat to the state where the decedent dies leaving no surviving kindred. OHIO REV. CODE ANN. § 2105.06(I) (Baldwin 1986). See also infra note 56 relating to similar California anti-escheat provisions.


6. See infra notes 21-39 and accompanying text for a historical perspective of current section 6402.5.


8. See infra notes 60, 68-69, 71-91 and accompanying text.

9. For example, assume property from a predeceased spouse had a value of $50,000 when the first spouse died. Subsequently, the surviving spouse renders services with regard to the property and makes capital contributions. At the death of the surviving spouse, the property has increased in value to $500,000. The question then
portioning property between the families of the intestate and the intestate’s predeceased spouse under the California in-law inheritance provisions. First, the practicum provides the operational framework of the California statutory in-law inheritance provisions, including a brief look at historical developments. Next, it addresses the circumstances under which a decedent’s property is considered to have had its source from a predeceased spouse. Included therein, is a discussion of how property apportionment problems can arise within the in-law inheritance context, with a special emphasis on apportionment problems that develop as a result of changes in property values during the intervening period between the death of the two spouses. Finally, this practicum examines the solutions to these apportionment problems.

II. OVERVIEW OF CALIFORNIA’S IN-LAW INTESTATE SUCCESSION SCHEME

“Through a series of poorly drafted statutes, California has developed an almost incomprehensible rule for intestate succession if a widow or widower dies without either children or a new spouse.”¹⁰ After such a foreboding statement, any understanding of and application of in-law inheritance provisions may appear insurmountable. In reality, however, the provisions, at least on their surface, can be deciphered.

The California in-law inheritance provisions are contained in section 6402.5 of the Probate Code,¹¹ which is within the intestate succession provisions of the code.¹² To oversimplify, assume that a wife’s husband (H₁)¹³ predeceased her (W₁) within a certain number of years and she subsequently died intestate without a new spouse or surviving issue. Property which the wife had previously acquired¹⁴ becomes: how much of the $450,000 increase in the property’s value is subject to possible inheritance by the decedent’s in-laws?

¹². Id.
¹³. To make this practicum more readable, the adoption of a few typographical conventions and some assumptions is necessary. Throughout the text, H, and W, will be used to denote husband and wife, respectively, and unless otherwise stated, it is assumed that H, predeceased W, . Additionally, where this convention is used, and unless otherwise stated, it is assumed that W, subsequently dies intestate, without having remarried, and is not survived by any children or issue thereof.
¹⁴. “Property” includes the predeceased spouse’s share of separate property (CAL.
from her husband is inherited by the husband's blood relatives, rather than the wife's own blood relatives.15

The California in-law inheritance provisions have long been the focus of dissension among both courts and commentators alike.16 At the center of their protests is the state's continued adherence to feudal principals of ancestral property rights,17 which, in their application to intestate succession, serve "to turn the property back to the family from which it came."18 In addition to sometimes producing anomalous and unfair intestacy distributions,19 the ancestrally inspired in-law inheritance provisions create what is often the logistic nightmare of trying to determine from where or what source the decedent's property was derived.20

A. Historical Perspective of California's In-Law Inheritance Provisions

1. Phase One: The Beginning of In-law Inheritance

California's experiment with in-law inheritance began, innocently enough, in 1880 with the introduction of subdivision 9 of section 1386 of the Civil Code.21 The scope of this early intestate succession legis-

PROB. CODE § 6402.5(f)(4) (West Supp. 1989)) and the predeceased spouse's share of community property (id. § 6402.5(f)(1)-(3)). This includes property acquired by gift, devise, inheritance, bequest, or by virtue of survival, from the predeceased spouse. Id. § 6402.5(f)(1)-(4).

15. CAL. PROB. CODE § 6402 (West Supp. 1989); id. § 6402.5 (West Supp. 1989).

It should be considered, however, whether the complete elimination of these code sections [in-law inheritance] from our rules of descent might not be preferable. . . . They seem to represent an extreme application of the old common law rule as to the descent of ancestral property which is being looked upon with increasing disfavor in the states where it still exists.

17. See generally T. ATKINSON, LAW OF WILLS 39, 71-81 (2d ed. 1953); Reppy & Wright, supra note 7, at 108-09.
19. See Estate of McInnis v. Sylvester, 182 Cal. App. 3d 949, 227 Cal. Rptr. 604 (1986) (distribution not to decedent's nieces, with whom decedent had a very close relationship, but to decedent's sister-in-law, whom decedent's predeceased husband had been alienated from and had not spoken to or seen in over 28 years).
20. See infra text accompanying notes 92-98.

Subsection 9 read as follows:

If the decedent be a widow or widower, and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father of such deceased spouse, or if he be dead, to the mother. If there
lation, however, was quite limited when compared to its most recent progeny. Specifically, it operated solely as an "anti-escheat" provision: inheritance by a limited group of the decedent's in-laws, only after no surviving kindred of the decedent could be found and only as a last resort to prevent distribution of the decedent's property to the state. The application of this early in-law inheritance provision was also limited in that it only reached property which was originally community property in the hands of both spouses.

At this early stage in the development of the in-law inheritance provisions, there was no need for kindred of the intestate W, (the second spouse to die) to be concerned about determining the source of the estate assets. As long as there were living kindred of the intestate W, no part of W,'s estate would pass to relatives of her predeceased husband H.

2. Phase Two: Broadening the Scope of In-law Inheritance

Twenty-five years later, in 1905, this early and relatively innocuous anti-escheat in-law inheritance provision received a heavy dose of ancestral property theory which dramatically altered its posture within the intestate succession scheme. The least controversial aspect of these revisions was the broadened concept of property to now include certain separate property of the predeceased spouse which had previously been given to the surviving spouse. The truly significant change, however, was the repositioning of the point along the intestate's estate.

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22. Id. Note that the group of possible takers did not include the predeceased spouse's children or issue.

23. Id. The statute uses the term "common property," the forerunner term to community property. The statute was not applicable to separate property of the decedent that was derived from the predeceased spouse.

24. 1905 Cal. Stats. ch. CDXLIX, § 2, at 608. Subsection 8 of the revised Civil Code section 1386 read as follows:

If the decedent is a widow or widower, and leaves no issue, and the estate or any portion thereof was common property of such decedent and his or her deceased spouse, while such spouse was living, or was separate property of his or her deceased spouse, while such spouse was living, such property goes to the children of such deceased spouse and the descendants thereof; and if none, then to the father of such deceased spouse, or if he is dead, to the mother. If there is no father nor mother, then such property goes to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse by right of representation.

25. Id.
state succession chain at which the provisions became applicable. Where the original in-law inheritance provisions of 1880 served only as a last resort catch-net to prevent escheat to the state when there were no surviving kindred of W, the revised provisions became operable much earlier on the intestate succession hierarchy. W,'s in-laws, instead of any surviving kindred of W, were given preference as to certain property in W,'s estate when W died a widow with no surviving issue.26

Subsequent to these revisions, determination of the source of the intestate's property took on a much more significant role. W,'s in-laws would now have a far greater incentive to show that H, was the source of W,'s property, since such a determination could result in the in-laws inheriting part of W,'s estate to the exclusion of W,'s own kindred. Similarly, W,'s surviving kindred would now have an incentive to compile evidence that H, was not the source of the intestate's property to rebut such an assertion by the in-laws.


The next changes to the in-law inheritance provisions came during the 1930's. These consisted of renumbering the provisions as part of the newly-established Probate Code,27 together with modification, clarification, and refinement of the provisions partially in response to the interpretations by California courts.28


The most recent revisions to the in-law inheritance provisions began in 1979 with an amendment to the statute which reinforced its ancestral property roots.29 Previously, the determination that certain assets of the decedent had their original source with the predeceased spouse served as the cornerstone in applying the in-law inheritance provisions.30 However, the 1979 amendments introduced the concept of the "portion of the decedent's estate attributable to the decedent's predeceased spouse."31 This, to a large degree, codified the parameters for determining the property which would be considered as hav-

26. Id.
27. 1931 Cal. Stats. ch. 281, §§ 228, 229, at 597 (enacting the Probate Code). Renumbered sections 228 and 229 refer to the predeceased spouse's share of community and separate property, respectively.
30. See supra notes 8, 17-19 and accompanying text.
31. 1979 Cal. Stats. ch. 298, § 2. The pertinent portion of revised Probate Code section 228 read as follows: "If the decedent leaves no living spouse or issue and there are issue of the decedent's predeceased spouse, the portion of the decedent's estate attributable to the decedent's predeceased spouse shall go in equal shares . . . ." Id. § 2(a) (emphasis added).
ing its source with the decedent’s predeceased spouse—this property being subject to possible in-law inheritance.\textsuperscript{32}

In 1983, the in-law inheritance provisions were renumbered as section 6402.5 of the Probate Code.\textsuperscript{33} The 1983 amendments also added two important restrictions to the application of the in-law inheritance provisions. First, only real property of the decedent attributable to the decedent’s predeceased spouse would be subject to possible in-law inheritance.\textsuperscript{34} Second, only such real property attributable to a spouse who predeceased the decedent by \textit{not more than fifteen years} would be subject to possible in-law inheritance.\textsuperscript{35} Although these changes did not alleviate the potential problem of apportioning property attributable to the decedent’s predeceased spouse, they did signal a slight pullback in the scope of property which might be subject to the in-law inheritance provisions.\textsuperscript{36} Previous in-law inheritance provisions had not been limited by either of these two restrictions.\textsuperscript{37}

Finally, in 1986, the in-law provisions were amended once again to recant, in part, the 1983 statutory provision precluding personality.\textsuperscript{38}

\textsuperscript{32} Discussion of the definition and application of the “portion attributed to the decedent’s predeceased spouse” is postponed. \textit{See infra} notes 77-91 and accompanying text. This codification of the source rules, however, does not offer any significant simplification to the apportionment problems. \textit{See infra} notes 92-98 and accompanying text.

\textsuperscript{33} 1983 Cal. Stats. ch. 842, \textsection 55 (enacting section 6402.5 of the Probate Code). Section 6402.5 reads, in part, as follows:

\begin{quote}
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:
\end{quote}

\textit{CAL. PROB. CODE} § 6402.5(a) (West Supp. 1989).

\textsuperscript{34} \textit{See CAL. PROB. CODE} § 6402.5(a) (West Supp. 1989).

\textsuperscript{35} \textit{Id}.

\textsuperscript{36} This effectively alleviated some necessity for property apportionment. If it were known that \(H\) died more than 15 years before \(W_i\), there would be no possible application of the in-law inheritance provisions, even if it were determined that all of the decedent’s property was attributable to the predeceased spouse.

\textsuperscript{37} The difficulty associated with tracing the source of personality may have acted as a practical limitation, although there was no such prior statutory limitation. The adoption of a 15-year limitation with regard to real property, however, could be viewed as a real restriction. Many cases under the prior law show evidence of tracing the source of property to the decedent’s predeceased spouse who had died more than 15 years before the decedent. \textit{See, e.g.}, \textit{In re Estate of Brady}, 171 Cal. 1, 151 P. 275 (1915) (15 years and 3 months); \textit{Estate of Bishop v. Donovan}, 209 Cal. App. 2d 48, 26 Cal. Rptr. 763 (1962) (30 years).

\textsuperscript{38} 1986 Cal. Stats. ch. 873, \textsection 1 (amending section 6402.5 of the Probate Code to current form). The current section is applicable to decedents who died on or after January 1, 1985 and reads, in pertinent part, as follows:

\begin{quote}
For purposes of distributing personal property under this section if the dece-
The decedent's personal property, attributable to a predeceased spouse, is now subject to the in-law inheritance provisions provided that such spouse had not predeceased the decedent by more than five years. 39

B. Operational Framework of the Current In-Law Inheritance Provisions of California Probate Code Section 6402.5

The operation of in-law inheritance is part and parcel of the overall statutory intestate succession scheme. With the exception of the in-law inheritance provisions of section 6402.5, the California intestate succession methodology is not unlike those found in many states. 40 The intestate succession mechanism becomes operative with respect to "[a]ny part of the estate of a decedent not effectively disposed of by will . . . ." 41 The obvious situation where intestate succession provisions apply is where the decedent dies without ever having made a will. 42 Similarly, the intestate succession provisions apply where there is a will but it has been declared invalid in its entirety. 43 The intestate succession provisions may also be applicable to only a portion of the decedent's estate. 44 Other situations where the provisions apply include a will which is declared to be only partially invalid, lapsed gifts, and bequests and devises to a divorced spouse. 45

All aspects of California intestate succession law, including the in-

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39. **CAL. PROB. CODE** § 6402.5(b) (West Supp. 1989).
40. See infra notes 49-56 and accompanying text for a discussion of the general operation of the intestate succession scheme.
42. Id. Reasons advanced for not having a will include: (1) procrastination; (2) superstition that having a will hastens death; (3) belief that having no will avoids administration problems at death; (4) belief that having no will avoids delays in distribution of estate; (5) belief that having no will avoids collection of debts against the estate; and (6) lack of knowledge on how to make a will. BOWE & PARKER, PAGE ON THE LAW OF WILLS § 1.6 (rev. treatise 1986).
43. See **CAL. PROB. CODE** § 6400 (West Supp. 1989). Examples of invalid wills include, but are not limited to, the following: persons not of legal age and/or not of sound mind (**CAL. PROB. CODE** § 6100 (West Supp. 1989)); improperly executed will (id. §§ 6110-6113); disclaimed interests, (id. § 282); and where there is duress, menace, fraud, or undue influence in procurement or execution (id. § 328.3).
44. See **CAL. PROB. CODE** § 6400 (West Supp. 1989).
45. See supra note 43.
46. See **CAL. PROB. CODE** §§ 6146, 6148 (West Supp. 1989) (failed devises become part of residue, but where there is no residuary clause, they pass by intestate succession).
47. See **CAL. PROB. CODE** § 6122 (West Supp. 1989) (revocation of testamentary dispositions to former spouse).
law inheritance provisions of section 6402.5, can be completely avoided with a valid testamentary disposition.48

The basic preference of distribution under California's intestate succession scheme is determined by sections 6401, 6402, and 6402.5 of the Probate Code.49 If the decedent has a surviving spouse, the first stop is section 6401 which specifies the portion of the decedent's estate that passes to such spouse.50 Next section 6402, with the one exception of section 6402.5, determines the basic distribution of the balance of the decedent's estate not passing to a surviving spouse.51 Section 6402 establishes the hierarchy of who will inherit, with those in a subordinate position taking only if there are no survivors in a superior position. Quite logically, those most closely related to the decedent have priority starting with the issue of the decedent,52 followed by the decedent's parents,53 the issue of the parents,54 the grandparents of the decedent,55 and more remote next of kin.56

Section 6402.5 interrupts the basic intestate succession chain by interjecting a separate intestacy scheme which gives preference to the decedent's in-laws with respect to certain property of the decedent.57 The section becomes operative only if all four basic components have been satisfied: (1) there are no surviving potential takers up to a cer-

48. CAL. PROB. CODE § 6400 (West Supp. 1989). See Estate of Westerman v. Westerman, 68 Cal. 2d 267, 437 P.2d 517, 66 Cal. Rptr. 29 (1968). "[T]he [in-law inheritance] section never sought to limit the right of the surviving spouse to dispose of [property] by will or conveyance." Id. at 272, 437 P.2d at 520, 66 Cal. Rptr. at 32 (quoting In re Estate of Putnam, 219 Cal. 608, 611, 23 P.2d 27, 28 (1933)). See also Estate of Nereson v. Nereson, 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987). "The rights of the in-law heirs following the death of the first spouse are merely an expectancy, since the surviving spouse is absolute owner and can dispose of the property in his lifetime or by will." Id. at 869, 239 Cal. Rptr. at 867.

49. See also CAL. PROB. CODE § 6404 (West Supp. 1989) (final escheat provisions).

50. CAL. PROB. CODE § 6401 (West Supp. 1989). The surviving spouse inherits the decedent's one-half interest in both community and quasi-community property. CAL. PROB. CODE § 6401(a), (b) (West Supp. 1989). The surviving spouse also inherits between 33% and 100% of the decedent's separate property depending on the existence and number of surviving issue and parents. CAL. PROB. CODE § 6401(c) (West Supp. 1989).

51. Id. § 6402.
52. Id. § 6402(a).
53. Id. § 6402(b).
54. Id. § 6402(c).
55. Id. § 6402(d).
56. Id. § 6402(e), (f). See also id. § 6402(g). This is an in-law inheritance provision (not the subject of this article), which acts solely as an anti-escheat provision similar to the original in-law provisions of 1880. See generally supra note 22 and accompanying text.

57. CAL. PROB. CODE § 6402 (West Supp. 1989). The regular intestate succession provisions apply "[e]xcept as provided in Section 6402.5 . . ." Id.
tain point on the basic intestate succession hierarchy scheme;\(^{58}\) (2) the decedent had a spouse who predeceased the decedent by not more than a statutory number of years depending on the nature of the decedent's property;\(^{59}\) (3) some part of the decedent's property is considered attributable to such predeceased spouse;\(^{60}\) and (4) the relatives of the predeceased spouse (the decedent's in-laws) are of a certain degree of kinship to the predeceased spouse.\(^ {61}\)

The first component of section 6402.5, certain potential takers not surviving the decedent, signifies at what point along the intestate succession chain the in-law inheritance provisions become operable. This point is where the decedent is not survived by either issue or spouse.\(^ {62}\) Although the decedent's issue or spouse have preference over the decedent's in-laws, an in-law's potential inheritance interest comes into effect very early along the intestate succession hierarchy, having preference over any of the decedent's relatives other than issue or surviving spouse.\(^ {63}\)

The second component of section 6402.5 requires that the decedent had, at one time or another, been married and that the decedent's spouse predeceased the decedent.\(^ {64}\) This component of section 6402.5 also places certain limitations on the length of time between the death of the decedent and the decedent's predeceased spouse. Here the statute differentiates between the decedent's real and personal property. With respect to disposing of the decedent's real property, the decedent's spouse must have died "not more than 15 years before the decedent . . ."\(^ {65}\) For purposes of the decedent's personal property,\(^ {66}\) the period is shortened to only five years.\(^ {67}\)

Therefore, if the decedent's spouse predeceased the decedent by more than fifteen years, the decedent's in-laws would not be in a

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\(^{58}\) Id. § 6402.5(a), (b).

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id. § 6402.5(a)(1-4), (b)(1-4).

\(^{62}\) Id. § 6402.5(a), (b). There are also two additional anti-escheat provisions within this section. See id. § 6402.5(a)(5), (b)(5). These anti-escheat provisions are not the subject of this article and future references to section 6402.5 and its requirements are directed to primary in-law inheritance provisions and not these latter anti-escheat aspects.

\(^{63}\) Numerically, section 6402.5 becomes operative between subsections (a) and (b) of section 6402. Id. § 6402.5(a), (a)(4), (b), (b)(4).

\(^{64}\) See id. § 6402.5(a), (b). Without having been married, there would be no in-laws as potential takers. Additionally, if the spouse did not predecease the decedent, the intestate succession provisions of section 6401 (dealing with the surviving spouse's share of the decedent's estate) would govern. See supra note 50.

\(^{65}\) CAL. PROB. CODE § 6402.5(a) (West Supp. 1989).

\(^{66}\) For purposes of these provisions, personal property is defined as "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." Id. § 6402.5(e).

\(^{67}\) Id. § 6402.5(b).
preferential position, under section 6402.5, to inherit either the decedent's real or personal property. If the decedent's spouse predeceased the decedent by more than five years but not more than fifteen years, the in-laws may be in a preferential position to inherit the decedent's real property, but not the decedent's personal property. Finally, if the decedent's spouse predeceased the decedent by not more than five years, the decedent's in-laws may be in a favorable position to inherit the decedent's real and personal property.

The third component of section 6402.5, the decedent's property attributable to a predeceased spouse, represents the core of ancestral property theory—the basis of the in-law inheritance provisions. This component contains the source rules which determine what portion of the decedent's estate, if any, is subject to possible in-law inheritance.

The fourth and final component of section 6402.5, a certain degree of kinship of the decedent's in-laws, serves to both identify and place a limit on those in-laws that have a preferential position of inheritance over the decedent's own kindred. As indicated above, the in-law provisions of section 6402.5 become operative at the point on the intestate succession chain when there are no surviving spouse or issue of the decedent but before other kindred of the decedent.

If the in-law provisions become operative, the focus shifts from the decedent's kindred to the kindred of the predeceased spouse (decedent's in-laws), for which the statute provides a separate intestate succession hierarchy. The predeceased spouse's issue (decedent's step-children or issue thereof) are first in line with the predeceased spouse's parents next, followed by any issue of the predeceased spouse's parents. However, once the point has been reached where

68. See supra note 7 and accompanying text.
69. CAL. PROB. CODE § 6402.5(f)(1)-(4) (West Supp. 1989). Discussion of these statutory source rules and related apportionment issues is postponed. See infra notes 77-91 and accompanying text.
70. See supra notes 62-63 and accompanying text.
71. CAL. PROB. CODE § 6402.5(a)(1)-(3) (West Supp. 1989) (decedent's real property); id. § 6402.5(b)(1)-(3) (decedent's personal property).
72. Id. § 6402.5(a)(1) (decedent's real property); id. § 6402.5(b)(1) (decedent's personal property).
73. Id. § 6402.5(a)(2) (decedent's real property); id. § 6402.5(b)(2) (decedent's personal property). This would be the decedent's mother/father-in-law.
74. Id. § 6402.5(a)(3) (decedent's real property); id. § 6402.5(b)(3) (decedent's personal property). This would include the decedent's brother/sister-in-law or issue thereof.
there are no surviving issue of the decedent’s mother-in-law or father-in-law, the statute goes no further in giving preference to the decedent’s in-laws. At that point, the regular intestate succession scheme of section 6402 becomes operative, with the decedent’s kin-dred once again becoming the preferred takers, beginning with the decedent’s parents and continuing to the more remote next of kin.

III. DETERMINING WHAT PORTION OF THE DECEDENT’S PROPERTY IS ATTRIBUTABLE TO A PREDECEASED SPOUSE

Regardless of whether all other requirements of section 6402.5 are satisfied, no portion of a decedent’s estate will be inherited by the decedent’s in-laws unless such portion of the estate is considered attributable to the decedent’s predeceased spouse. This represents the ancestral property basis of the in-law inheritance provisions which allows property to be returned to the source from which it was derived—in this case, the family of the decedent’s predeceased spouse.

The statute provides an all inclusive, though somewhat perplexing, list of that property in the decedent’s estate which is considered attributable to a predeceased spouse. The four categories of property are defined 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

75. Id. § 6402.5(a)(4) (decedent’s real property); id. § 6402.5(b)(4) (decedent’s personal property).
76. See supra notes 53-56 and accompanying text. The following is an example of the four component requirements of section 6402.5. Assume W, died intestate in 1987 with no surviving husband or issue. Assume further that her husband, H, died in 1985 and left to W, by way of a valid will, his share of the couple’s real and personal community property and his separate property. At the time of W,’s death, H,’s father was still living. The first component of the section is met since W, died with neither spouse nor issue surviving. The second component is met, because W, did have a spouse who predeceased her within 15 or 5 years for real and personal property, respectively. The third component is met since the property received by W, from H, would be considered property attributable to the predeceased spouse, H,. Finally, H,’s father is an individual within the categories of in-law takers. Therefore, the “attributable” property (which came to W, from H,) will return to H,’s family, passing to H,’s father.
77. CAL. PROB. CODE § 6402.5(a), (b) (West Supp. 1989). See also supra notes 68-69 and accompanying text. In-laws could still possibly inherit intestate’s property that is not attributable to a predeceased spouse, but only on a last resort, anti-escheat basis, and not in place of any living kindred of the decedent. CAL. PROB. CODE § 6402(g) (West Supp. 1989).
78. See supra notes 17-18 and accompanying text.
in the decedent upon the death of the predeceased spouse by right of survivorship. 79

The first category of property represents what was, at the time of the predeceased spouse's death, the predeceased spouse's one-half interest in the couple's community property. 80 For example, assume that H 1 and W 1 held Blackacre as community property at the time of H 1's death in 1986. W 1 became the sole owner of the property either by devise of H 1's one-half interest through a valid will or by descent through intestate succession. Blackacre was part of W 1's estate at her death in 1987, 81 then one-half of the property would be considered attributable to H 1, and therefore, subject to possible inheritance by H 1's relatives. The in-law inheritance provisions would generally not, however, reach H 1's one-half interest in Blackacre if it was either not part of W 1's estate at her death, 82 or, alternatively, if it had been transferred to someone other than W 1 either at or after H 1's death, but nonetheless, ended up in W 1's estate at her death. 83 This limita-

79. CAL. PROB. CODE § 6402.5(f) (West Supp. 1989).

80. Although the statute does not specify which spouse's one-half interest in the community property is considered attributable to the predeceased spouse, "[a]nestral property theory requires that the 'portion' be limited to interests once owned by [the predeceased spouse] . . . ." Reppy & Wright, supra note 7, at 126. Prior to this statement, the authors advance a technical, though admittedly conceptually illogical, argument that this property category could represent not the predeceased spouse's share of the community property, but, rather, the surviving spouse's, now deceased, share. Id. at 125, 126 & n.52. See infra note 85 and accompanying text dealing with the second category of property defined as attributable to the predeceased spouse. See also CAL. PROB. CODE § 6402.5(g) (West Supp. 1989) (community property includes quasi-community property).

81. It is not necessary that the exact property be included in the estate of the second spouse to die, but rather, it should be traceable to property which was community property at the time of the death of the first spouse. See infra notes 122-23 and accompanying text.

82. By definition, the interest in question must be property in the decedent's estate. CAL. PROB. CODE § 6402.5(f) (West Supp. 1989). For example, if H 1's one-half interest in Blackacre vested in W 1 at H 1's death, but prior to W 1's death, she disposed of the property by gift, then H 1's kindred would not have any statutory interest in the property by virtue of section 6402.5. But see infra notes 122-23 and accompanying text regarding attributable property not in W 1's estate at her death, but where property in her estate can be traced to the attributable property.

83. Estate of Bishop v. Donovan, 209 Cal. App. 2d 48, 59, 25 Cal. Rptr. 763, 770 (1962). [E]ven though the property originally may have been owned by the predeceased spouse, from whom it was obtained by the surviving spouse . . . . if the latter at the time of death owned the property by virtue of an intervening source, i.e., 'a new title,' distribution is made to the relatives of the surviving [and not the predeceased] spouse. Id. (citations omitted). An example is where H 1 devised his one-half interest in Blackacre to W 1; W 1 gifted it to her mother who subsequently gave or devised it to W 1 who died still holding the interest. See Estate of Westerman v. Westerman, 68 Cal. 2d 267,
tion is also generally true for the remaining three categories of property deemed attributable to a predeceased spouse.\textsuperscript{84}

The second category of property presents a definitional puzzle. It is believed to represent the predeceased spouse's one-half share of community property which was given to the other spouse (surviving spouse) prior to the death of the first spouse.\textsuperscript{85} An example would be where \textit{H}_1 and \textit{W}_1 originally held Blackacre as community property, but prior to the death of \textit{H}_1, he made an inter vivos gift of his one-half interest to \textit{W}_1. At \textit{H}_1's death, \textit{W}_1 already owns 100\% of Blackacre; but at her subsequent death, the one-half interest in Blackacre acquired by gift from \textit{H}_1 will be considered a portion of Blackacre attributable to \textit{H}_1, and therefore, subject to possible inheritance by \textit{H}_1's relatives.

Proceeding to the third category of property, the level of confusion increases as to what type of property it is intended to define. The difficulty with this category is that it speaks of "community property" and "property vesting in the surviving spouse by right of survivorship" as congruous concepts when, in fact, they are mutually exclusive.\textsuperscript{86} It has been suggested, through a strained interpretation of the statutory terms, that this property category may include "life insur-

\begin{itemize}
\item 84. \textit{See supra} note 83. The cases sited therein were decided prior to section 6402.5 and did not identify specific categories of attributable property, but rather, were concerned with broad definitions of attributable property which encompasses the current categories.
\item 85. \textit{Reppy} & \textit{Wright}, \textit{supra} note 7, at 125, 126 n.52. Definition of this category of property is somewhat unclear due to two phrases used in the statute. The first is "[o]ne-half of any community property, in existence at the time of the death of the predeceased spouse." \textsc{Cal. Prob. Code} § 6402.5(f)(2) (West Supp. 1989). The controversy is whether the phrase means the property must exist as community property at the time of the death of the predeceased spouse (referred to the property's status), or alternatively, the property must have been community property at one time but need only be in existence, not necessarily as community property, at the death of the predeceased spouse. \textit{Reppy} & \textit{Wright}, \textit{supra} note 7, at 123. The latter interpretation appears necessary in order for the statute to cover a one-half interest in community property given by the predeceased spouse, before his death, to his spouse. \textit{Id}. The second phrase is "given to the decedent by the predeceased spouse by way of gift, descent, or devise." \textsc{Cal. Prob. Code} § 6402.5(f)(2) (West Supp. 1989). The controversy here centers around the words "descent or devise." A gift of a community property interest by the predeceased spouse is covered; but, the inclusion of "descent or devise" appears to be surplusage, since descent or devise of a community property interest is already covered by the first category of property in section 6402.5(f)(1). Commentators have difficulty reconciling subsections 6402.5(f)(1) and (f)(2). However, they agree that, when read together, the subsections cover community property interests acquired by the surviving spouse via descent or devise as well as by gift (section 6402.5(f)(2) exclusively). \textit{See Reppy} & \textit{Wright}, \textit{supra} note 7, at 126 n.52.
\item 86. \textit{Reppy} & \textit{Wright}, \textit{supra} note 7, at 123 & n.46, 124.
\end{itemize}
ance proceeds traceable to a community policy"\textsuperscript{87} and, possibly, "community funds placed in a pay-on-death bank account or in a Totten trust."\textsuperscript{88} Regardless of exactly what property this category is designed to include, it apparently does not include any property outside the scope of that considered to have had its source with the predeceased spouse.\textsuperscript{89}

The fourth and final category of property that is deemed to be attributable to a predeceased spouse is clear in its intended scope. This category represents the predeceased spouse's separate property which was transferred to the other spouse either during the predeceased spouse's lifetime by gift, or at death by descent, devise, or right of survivorship. One example of this category would be where \( H_1 \) owned Blackacre prior to his marriage to \( W_1 \). During the marriage, \( H_1 \) transferred his entire separate property interest to \( W_1 \) through an inter vivos gift.\textsuperscript{90} At \( W_1 \)'s death, subsequent to \( H_1 \)'s death, her entire interest in Blackacre (here 100\%) would be considered attributable to \( H_1 \), and therefore, subject to possible in-law inheritance. In the case of separate property, it is the entire separate property interest transferred which is deemed attributable to the predeceased spouse, and not just a one-half share as with the aforementioned community property categories.\textsuperscript{91}

Despite the fact that the statute provides an all inclusive definition or list of property considered attributable to a predeceased spouse,\textsuperscript{92} there remains at least three potential source determination/apportionment problem areas. The first such area is in determining the

\textsuperscript{87} Id. at 124. "This requires straining the meaning of 'right of survivorship' so that it refers instead to the intestate's having taken as beneficiary." Id.; see also Estate of Allie v. Cash, 50 Cal. 2d 794, 329 P.2d 903 (1958) (insurance purchased with community funds held to be attributable to a predeceased spouse).

\textsuperscript{88} Reppy & Wright, supra note 7, at 124 n.49. Even if the definition requires de-emphasis on the "right of survivorship" language, such property would come within the scope of category four which deals with separate property of the predeceased spouse. Id.

\textsuperscript{89} Id. at 124.

\textsuperscript{90} See CAL. PROB. CODE § 6402.5(f) (West Supp. 1989). Alternatively, transfer of such interest to \( W_1 \) at the death of \( H_1 \) through devise, descent, or right of survivorship, would yield identical results in this example. Id.

\textsuperscript{91} If, in the alternative, \( H_1 \) were to give \( W_1 \) only a one-half interest in Blackacre by changing the separate property status of Blackacre to community property, 100\% of Blackacre in \( W_1 \)'s estate would still be considered attributable to \( H_1 \): one-half as \( H_1 \)'s share of community property pursuant to section 6402.5(f)(1), and the other one-half, representing \( W_1 \)'s share of community property which was a gift of separate property from \( H_1 \), pursuant to section 6402.5(f)(4). See also infra notes 98-110 and accompanying text for related source discussion.

\textsuperscript{92} CAL. PROB. CODE § 6402.5(f)(1)-(4) (West Supp. 1989).
true source of a property interest that, on its surface, fits within one of the property categories. In other words, if property in a decedent’s estate appears to fit within one of the categories of property considered attributable to a predeceased spouse (e.g., H₁’s interest in jointly-owned property passing to W₁ by right of survivorship), then is H₁ the true source of all or part of such interest passing to W₁ by right of survivorship? As will be seen, the determination and apportionment of the true source of spousal interests is critical to the application of the in-law inheritance provisions.

The second potential problem area is one of tracing. Property which, at the time of the predeceased spouse’s death, was admittedly attributable to such spouse may be difficult to trace to the estate of the second spouse to die. This problem becomes more acute as the intervening period between the two deaths increases, the original property is transformed into other property, and/or the property is commingled with the surviving spouse’s non-attributable property.

The third potential problem is determining the amount of property considered attributable to a predeceased spouse when the value of such property has changed during the period between the death of the predeceased spouse and the death of the surviving spouse. The question becomes how much, if any, of the change in value is properly apportioned to property deemed attributable to a predeceased spouse; that is, what portion of the property’s change in value is shared by the decedent’s in-laws?

A. Determining the True Source of Property Attributable to a Predeceased Spouse

Section 6402.5(f)(1)-(4) defines the categories of property deemed attributable to a predeceased spouse. Although the nature of the property is such that it fits within an attributable property classification, it may, nonetheless, be deemed property not subject to possible in-law inheritance. The courts have made it clear that “in determining the character of property for the purpose of applying section [6402.5] of the Probate Code, it is the source of its acquisition, and not the nature of its ownership immediately before the death, which is

93. See infra notes 98-104 and accompanying text.
94. See infra notes 119-30 and accompanying text.
95. Of course, tracing problems evaporate if the intervening period exceeds the statutory limitations of 15 years for real property, or 5 years for personal property. CAL. PROB. CODE § 6402.5(a) (West Supp. 1989).
96. Examples include sale or exchange of property, condemnation, or renumeration due to casualty.
97. The simplest example of commingling occurs when cash attributable to a predeceased spouse is mixed with the surviving spouse’s funds. The problem is exacerbated when commingled funds are transformed through a subsequent purchase of other property.

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controlling."³⁸

In *Estate of Abdale v. Department of Institutions,* the husband, shortly after marriage, transferred some of his separate property, by way of gift, to himself and his wife as joint tenants. Upon the death of his wife, he once again became vested in 100% of the property as survivor. When he subsequently died intestate and without any issue or a surviving spouse, a brother of his predeceased wife claimed interest in one-half of this property on the basis that the predeceased spouse was the source of a one-half interest.¹⁰⁰ The court, although recognizing that a one-half interest in the property technically met the source requirements of the statute, denied inheritance by the decedent's brother-in-law. The Court looked beyond the title of the property at the death of the first spouse: "the property in question did not have its origin or source as separate property of the predeceased spouse since it was originally the separate property of the decedent and any interest therein of the predeceased spouse came to her as a gift from the decedent."¹⁰¹ In effect, "the decedent himself,

³⁸. *Estate of Reizian v. Johns,* 36 Cal. 2d 746, 749, 227 P.2d 249, 250 (1951) (citations omitted); *Estate of Westerman v. Westerman,* 68 Cal. 2d 267, 271-72, 437 P.2d 517, 520, 66 Cal. Rptr. 29, 32 (1968); *Estate of Hudspeth v. Earlywine,* 225 Cal. App. 2d 759, 37 Cal. Rptr. 778 (1964). The *Hudspeth* court stated: "It is well settled that in determining the character of property for the purpose of applying section [6402.5], it is the source of its acquisition and not the nature of its ownership immediately before death, which is controlling." *Id.* at 762, 37 Cal. Rptr. at 780 (citations omitted). See also *Estate of Cline v. Schoonover,* 214 Cal. App. 2d 152, 153, 29 Cal. Rptr. 495, 496 (1963); *Estate of Krey v. Galvas,* 183 Cal. App. 2d 312, 316, 6 Cal. Rptr. 804, 806 (1960). Although these decisions are pre-codification definitions of attributable property, there is no indication such codification signals abandonment of underlying ancestral property roots upon which source rules are based. "The...[true source determination] approach to construction of this legislation [addition of attributable property definitions] continues to be very necessary if logical results are to be reached." Reppy & Wright, supra note 7, at 120; see also *Estate of Nereson v. Nereson,* 194 Cal. App. 3d 865, 871, 239 Cal. Rptr. 865, 868 (1987) (true source rules applicable to revised statute containing "attributable property" definitions).


¹⁰¹. *Abdale,* 28 Cal. 2d at 587, 170 P.2d at 919-20. The statute in effect at the time of the case made the in-law inheritance provisions applicable to separate property of the predeceased spouse vesting in the surviving spouse by virtue of survivorship—in this case, the one-half interest as a co-tenant. *Id.* at 588, 170 P.2d at 919. This would be comparable to current section 6402.5(f)(4), which includes as property attributable to a predeceased spouse, separate property of the predeceased spouse vesting in the surviving spouse by right of survivorship. CAL. PROB. CODE § 6402.5(f)(4) (West Supp. 1989). See supra notes 90-91 and accompanying text.

¹⁰². *Abdale,* 28 Cal. 2d at 587, 170 P.2d at 920. This situation should not be confused with that of the gifting spouse predeceasing the donee spouse where the in-laws of the gifting spouse may inherit on the subsequent death of the donee spouse. The *Abdale* court recognized this difference and made the following observation in reaching their decision:
and not the predeceased spouse, was the source of the property, for it
was acquired through his efforts before it came by gift to the prede-
cceased spouse.\textsuperscript{102}

The courts have not limited their denial of in-law inheritance to
situations where, as in \textit{Abdale}, the surviving spouse was found to be
the true source of the property, even though the nature of title was
separate property of the predeceased spouse. In \textit{Estate of Riley v. Riley},\textsuperscript{103} the decedent’s mother gave her residence to the decedent
and his wife who held the property as joint tenants. The decedent
acquired the entire property at the death of his wife by right of survi-
vorship. When the decedent died intestate without issue or spouse,
the court refused to allow the decedent’s sister-in-law and half-
brother-in-law to inherit any portion of the residence. The Court de-
termined that the decedent’s predeceased wife was not the true
source of any portion of the residence.\textsuperscript{104}

Conversely, where the title of property at the death of the first
spouse truly reflects the predeceased spouse as the source of the
property, the application of the in-law inheritance provisions will,
nonetheless, be denied if the decedent acquired a new title to the
property in the intervening period prior to death.\textsuperscript{105} In \textit{Estate of Flood v. Murphy},\textsuperscript{106} for example, the surviving wife conveyed to her
daughter property previously acquired by gift from her predeceased
husband. Upon the daughter’s death, the mother reacquired the

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\textsuperscript{102} Thus if a husband gives his separate property to his wife and \textit{predeceases} her,
on her death intestate leaving neither spouse nor issue his kin will inherit the
property under section . . . [6402.5]. It would be a strange anomaly if, should
he survive her and thereby reacquire the property, on his death intestate,
leaving neither spouse nor issue, not his kin but his wife’s would inherit the
property under section [6402.5].

\textsuperscript{103} \textit{Id.} at 589-90, 170 P.2d at 920 (emphasis added).

\textsuperscript{104} \textit{Id.} at 591, 170 P.2d at 921; \textit{see also} \textit{Estate of Cline v. Schoonover}, 214 Cal. App.
2d 152, 29 Cal. Rptr. 495 (1963) (home held by husband and wife in joint tenancy had
2d 670, 336 P.2d 622 (1959) (husband and wife’s joint tenancy property had true source
as husband’s separate property).

\textsuperscript{105} \textit{Id.} at 210-11, 173 Cal. Rptr. at 816; \textit{see also} \textit{Estate of Rudman v. Breedes}, 85 Cal.
App. 2d 270, 196 P.2d 39 (1948) (true source of property was not predeceased spouse
where property originally from decedent’s brother and put into joint tenancy with de-
cedent and decedent’s predeceased spouse).

2d 467, 118 Cal. Rptr. 728 (1975) (property underlying power of appointment did not
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property. When the surviving wife died, the court denied inheritance by her in-laws. The decedent's reacquisition of the property from her daughter created a new title in the decedent separate from that attributable to the predeceased spouse.\textsuperscript{107} The court held as such despite the fact that the surviving wife had originally acquired the property from her predeceased husband by gift; and thus, the predeceased husband was the true source of the property.\textsuperscript{108}

The determination of the true source of a particular piece of property is not necessarily an all or nothing proposition. In \textit{Abdale}, the decedent himself, and not the predeceased spouse, was found to be the true source or origin of the underlying property.\textsuperscript{109} The court, however, indicated that a contribution of separate funds to the property by the predeceased spouse could render a portion of such property in the decedent's estate attributable to the predeceased spouse.\textsuperscript{110}

The practitioner should not be content with determining only the title to the property at the death of the predeceased spouse for purposes of establishing whether or not any portion of the decedent's property is attributable to the predeceased spouse. Property that solely by reason of its title fits within a statutory category deemed attributable to a predeceased spouse does not assure application of the in-law inheritance provisions. Only that property which fits within an attributable property category based on both its title and its true source is subject to possible inheritance by the decedent's in-laws.


\textsuperscript{108} \textit{Flood}, 55 Cal. App. 2d at 411-12, 130 P.2d at 812.

\textsuperscript{109} \textit{Estate of Abdale v. Department of Inst.}, 28 Cal. 2d 587, 591, 170 P.2d 918, 921 (1946).

\textsuperscript{110} \textit{Id.} at 592-93, 170 P.2d at 922. Contributions to the property by the predeceased spouse had to be in the form of a gift, as opposed to a loan, for there to be a share of the property attributable to the predeceased spouse. If contributions took the form of a loan, it would represent a debt of the estate and not a portion attributable to the predeceased spouse. \textit{Id.} at 593, 170 P.2d at 922. For related matters on in-law's burden of tracing the predeceased spouse's contributions to property in the decedent's estate, \textit{see infra} notes 111-30 and accompanying text. Additionally, for methods of apportioning property in a decedent's estate to reflect partial interest attributable to the predeceased spouse, \textit{see infra} notes 131-208 and accompanying text.
B. Tracing Attributable Property to the Estate of the Surviving Spouse

In-law inheritance requires both that the property in question be of a category deemed attributable to a predeceased spouse\(^{111}\) and that such property be part of the estate of the surviving spouse.\(^{112}\) The burden of establishing that such requirements have been met rests with the relatives of either the decedent or the predeceased spouse. In Estate of Adams v. Ayers,\(^{113}\) the court developed a two-step proof requirement. First, the burden is on the relatives of the predeceased spouse to prove what portion of the property was either community or separate property of the predeceased spouse.\(^{114}\) “Second, the heirs of the predeceased spouse have the burden of tracing [this property] into the property found in the estate of the surviving spouse.”\(^{115}\)

There is a rebuttable presumption that property acquired or in possession during marriage is community property.\(^{116}\) For purposes of the first step, this presumption favors the relatives of the predeceased spouse claiming an interest by way of the predeceased spouse’s interest in community property.\(^{117}\) Similarly, this presumption of community status works against the relatives of the predeceased spouse claiming interest by way of the predeceased spouse’s separate property.\(^{118}\)

In the second step of the burden of proof, the assumptions regarding the property’s status are reversed: “the property in the estate of the surviving spouse is [presumed to be] the separate property of the surviving spouse, and . . . the heirs of the predeceased spouse must overcome that presumption by tracing the [attributable] property . . .

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\(^{111}\) See supra notes 77-91 and accompanying text.
\(^{114}\) Id. at 204, 282 P.2d at 199. See also Estate of Hudspeth v. Earlywine, 225 Cal. App. 2d 759, 762-63, 37 Cal. Rptr. 775, 780-81 (1964). These cases dealt only with the attributable category of the predeceased spouse’s interest in community property. The same burden of proof has been applied to other categories of property deemed attributable to a predeceased spouse. Estate of Bishop v. Donovan, 209 Cal. App. 2d 48, 54, 25 Cal. Rptr. 763, 766 (1962) (separate property of predeceased spouse); see Abdale, 28 Cal. 2d at 593, 170 P.2d at 922 (separate property of predeceased spouse).
\(^{115}\) Adams, 132 Cal. App. 2d at 204, 282 P.2d at 199.
\(^{116}\) Id. An in-depth discussion of the determination of property status during marriage is beyond the scope of this practicum.

\(^{117}\) This includes attributable property categories specified in section 6402.5(f)(1)-(3). This presumption of community property makes it incumbent upon the relatives of the decedent to rebut the presumption of community property and to prove that the status of the property is otherwise. See Cal. Prob. Code § 6402.5(f)(1)-(3) (West Supp. 1989).

\(^{118}\) This includes the attributable property category specified in section 6402.5(f)(4). The presumption makes it incumbent upon the relatives of the predeceased spouse to rebut the presumption of community property and prove that the status of the property is the decedent’s separate property. See Cal. Prob. Code § 6402.5(f)(4) (West Supp. 1989).
into the estate of the surviving spouse."119 If the claimant relatives of the predeceased spouse fail to overcome this presumption, then "the property in the estate of the surviving spouse must be treated as separate property of the surviving spouse and distributed to his blood heirs."120

Historically, tracing attributable property to the estate of the decedent was relatively simple. Under the common law ancestral property theory, for property in the estate of the decedent to revert to the relatives of a predeceased spouse, it had to be identical to that which came from the predeceased spouse.121 Therefore, tracing was merely a matter of determining whether the exact property deemed attributable to a predeceased spouse was in the estate of the decedent. This exact conformity of property, however, has never carried over as a requirement in the California application of the in-law inheritance provisions.122 Therefore, property in the hands of the surviving spouse which is deemed attributable to a predeceased spouse can be transformed in any number of ways123 and still retain its character as property attributable to a predeceased spouse.

When attributable property has been transformed and/or commingled with the surviving spouse's separate property, the task of tracing can become difficult for the decedent's in-laws.124 Adequate tracing is generally a question of fact,125 and "the ordinary rules applicable

120. Id.
121. Ferrier, Gifts to "Heirs" in California, 26 CALIF. L. REV. 413, 431 (1938).
122. In re Estate of Brady, 171 Cal. 1, 4-5, 151 P. 275, 276 (1915). This follows the general theory of determining status of property in that:

property does not lose its character or status as separate or community property, by a mere change in form or identity, because of a substitution of other property in the usual manner of sale or exchange, and that interest, rents, or profits therefrom retain the character in this respect of the property from which they are derived.

Id. at 5, 151 P.2d 276 (citations omitted, emphasis in original).
123. Examples of transformation could include selling property and reinvesting the proceeds, exchanging the property for other property, receipt of insurance due to casualty, receipt of money due to condemnation, and the like.
124. The commingling of property and/or funds is not necessarily fatal. Estate of Nereson v. Nereson, 194 Cal. App. 3d 865, 875, 239 Cal. Rptr. 865, 871 (1987). The court stated that "[p]roperty can . . . be 'commingled' without destroying the character of the contributions, as long as the respective amounts can be ascertained." Id. (citations omitted). See also Estate of Neilson v. Neilson, 57 Cal. 2d 733, 744, 371 P.2d 745, 751, 22 Cal. Rptr. 1, 5-6 (1962) (commingling did not make the entire property community in nature because property could be traced to both separate and community sources).
to tracing property apply.”

The Adams court identified two situations in which an inference can arise rebutting the presumption that property in the decedent's estate was the decedent's separate property. "[I]f the first spouse dies after a long married life, and shortly thereafter the surviving spouse dies, there being no evidence that the surviving spouse was gainfully employed, the inference that the property was community will support the finding to that effect." Similarly, “[e]vidence that the surviving spouse over a 10-year period received no gift or income that could be characterized as separate will support the inference that the property that was community on the death of the predeceased spouse remained such until the death of the surviving spouse.” Lastly, it is incumbent upon those claiming inheritance by virtue of property attributable to a predeceased spouse to prove that they are in fact a relative of the predeceased spouse to which the in-law inheritance provisions apply.

C. Apportioning Changes in Value to Attributed Property

Subsequent to the death of the predeceased spouse, property attributable to such spouse may experience an increase in value and/or an increase in the income generated therefrom. This may be the result of natural market conditions. Alternatively, all or a portion of such enhancements may be due to the efforts and/or infusion of capital by the surviving spouse during the period following the death of the first spouse. During this period there may also be an increase in

126. Adams, 132 Cal. App. 2d at 204, 282 P.2d at 199. Discussion of these rules is beyond the scope of this practicum.
127. Id. at 204, 205, 282 P.2d at 199-200. Adams and the cases cited in the following two footnotes deal with attributable property in the form of the predeceased spouse's one-half share of community property being traced to the decedent's estate. The inference should also have applicability to tracing the predeceased spouse's separate property to the decedent's estate. See infra notes 128-29.
128. Id. at 205, 282 P.2d at 199-200 (citing Estate of Bryant v. Greenleaf, 3 Cal. 2d 58, 43 P.2d 529 (1935)). In Bryant, the court used language that the former community property is “presumed” to be in the estate of the decedent under these circumstances. Bryant, 3 Cal. 2d at 68, 43 P.2d at 533. The use of this language appears somewhat loose and “[s]urely this fact raises no more than an inference which is sufficient to overcome the ordinary presumption.” Reppy & Wright, supra note 7, at 134 n.73.
129. Adams, 132 Cal. App. 2d at 205, 282 P.2d at 200 (citing Estate of Jolly v. Rea, 196 Cal. 547, 238 P. 353 (1925)).
130. Estate of Rattray v. Rennie, 13 Cal. 2d 702, 706, 91 P.2d 1042, 1044-45 (1939). In a related matter, the relatives of the decedent must provide notice to the predeceased spouse's relatives when there is personal property in excess of a specified statutory amount. CAL. PROB. CODE § 6402.5(d) (West Supp. 1989).
131. This discussion is in reference to the period after the death of the predeceased spouse. Such an increase in value or increase in revenues can also occur prior to the death of the predeceased spouse but subsequent to the predeceased spouse's gift of his share of community property or his separate property pursuant to sections 6402.5(f)(2) and 6402.5(f)(4), respectively. See Cal. Prob. Code § 6402.5(f)(2), (4) (West Supp. 1989).
equity of leveraged attributable property by the surviving spouse's payments of debt principal. At the subsequent death of the surviving spouse, the question then becomes, to what degree do the decedent's in-laws share in the income and changes in value of this attributable property?

In determining the true source of property attributable to a predeceased spouse, it is proper to apportion their respective interests based on contributions when both spouses separately contributed to property. The California Court of Appeal has recently acknowledged that expanding this concept of apportionment to reflect "contributions" by the surviving spouse during the period following the death of the first spouse "is not inconsistent . . . with the general purpose behind the [in-law inheritance] statute." In Estate of Nereson v. Nereson, the court indicated that the in-law inheritance sections of the Probate Code "cannot be seen as simple succession statutes. Their application necessarily requires resort to rules governing community property as well as intestacy." On the issue of determining what portion of the increase in value of attributable property should pass to the decedent's in-laws, the court stated that "the rules of apportionment commonly used to determine community and separate interests of the spouses following separation are appropriate . . . ."

For purposes of examining the apportionment rules in an in-law inheritance framework, the following four scenarios will be used as a basis for discussion: (1) the increase in the value of and/or income from the attributable property subsequent to the death of H due to natural market conditions and not to any contributions or efforts on the part of W, the surviving spouse; (2) all or a portion of the increased revenues and value due to the personal efforts of W subsequent to the death of H; (3) the attributable property appreciation due to natural market conditions, but increased equity of such property due to payments of principal by W subsequent to the death of H; and (4) all or a portion of the increased revenues and value due to

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132. See supra note 110 and accompanying text. Apportionment in that context is related to contributions by each spouse prior to the death of the first spouse.
133. Contributions need not necessarily be in the form of capital. See infra notes 145-71 and accompanying text.
136. Id. at 871, 239 Cal. Rptr. at 868 (citation omitted).
137. Id. at 875, 239 Cal. Rptr. at 871.
infusions of capital by W₁ subsequent to the death of H₁. Although each scenario is discussed as an individual fact pattern, actual situations involving apportionment may represent a combination of the apportionment methods discussed.

1. Changes in Value and Revenues Due Solely to Natural Market Conditions

It is well established in California that property does not lose its character or status as separate or community property, by a mere change in form or identity, because of a substitution of other property in the usual manner of sale or exchange, and that interest, rents, or profits therefrom retain the character in this respect of the property from which they were derived.\(^{138}\)

Therefore, any increases in income or value of property attributable to H₁, not associated with efforts or contributions by W₁ subsequent to the death of H₁, will be shared by W₁'s in-laws at her death.\(^{139}\) Of course, W₁'s in-laws have the burden of tracing the attributable assets to her estate.\(^{140}\)

To illustrate, assume the following facts: H₁ and W₁ owned a house as community property, worth $100,000 at the death of H₁. Additionally, H₁ owned, as his separate property, 100 shares of Able Company common stock which he bequeathed to W₁, having a fair market value of $80,000 at his death. At her death a few years later, W₁ still owned the house, but its value had increased to $250,000. Prior to her death, W₁ sold the Able stock and reinvested all of the proceeds in Baker Company common stock. Baker subsequently merged with Charlie Company and W₁ received the latter's stock in exchange for her Baker stock. At her death, the Charlie stock was worth $150,000. During the period from H₁'s death to W₁'s death, these three companies paid dividends totaling $20,000. W₁ did not play an active role in the management of any of the assets, nor did she make any capital contributions to such assets subsequent to the death of H₁.

At W₁'s death, one-half of the residence, although actually owned 100% by W₁ at her death, would be considered property attributable

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\(^{138}\) In re Estate of Brady, 171 Cal. 1, 5, 151 P. 275, 276 (1915) (emphasis in original, citations omitted).

\(^{139}\) Id; see also Estate of Bishop v. Donovan, 209 Cal. App. 2d 48, 61, 25 Cal. Rptr. 763, 771 (1962) (increase due to efforts of surviving spouse is not subject to in-law inheritance); Estate of Adams v. Ayers, 132 Cal. App. 2d 190, 202, 282 P.2d 190, 198 (1955) (increase due to no effort of the possessor is shared as if part of the original property); Logan v. Forster, 114 Cal. App. 2d 587, 598-99, 250 P.2d 730, 737 (1952) (natural rents, issues and profits take the same character as the property producing them).

\(^{140}\) Tracing may or may not be an easy task as to the property principal. See supra notes 111-30 and accompanying text. Tracing may be even more difficult for revenues of attributable property since such revenues may no longer be related to the property itself. For example, rental income from attributable property may be placed in decedent's checking account which is used for living expenses.
to the predeceased spouse, H₁.\textsuperscript{141} H₁’s relatives would share fully in the property’s appreciation and would thus have a claim to one-half of the full $250,000 fair market value, or $125,000. This is despite the fact that H₁’s community property share of the residence was worth only $40,000 at his death. Unlike the residence, which was considered fifty percent attributable to H₁ since it was originally community property in the hands of H₁ and W₁, all of the Charlie Company common stock would be considered property attributable to the predeceased spouse, since it was originally his separate property.\textsuperscript{142} It does not matter that H₁’s separate property consisted of Able Company stock at his death and that subsequent to his death the stock was transformed into other assets. As long as H₁’s relatives can trace the Able Company stock and/or the proceeds from its sale to assets in W₁’s estate, such property will not lose its attributable character.\textsuperscript{143} Similar to the residence, the full fair market value at the death of W₁ is the determinative amount—in this case, $150,000. Lastly, assuming H₁’s relatives can trace the $20,000 in dividends from the attributable stock to W₁’s estate, they will also be entitled to such amounts.\textsuperscript{144}

2. Changes in Value and Revenue Due to the Efforts of the Surviving Spouse

Although the decedent’s in-laws may share fully in appreciation and/or increases in income from attributable property, they do not do so when such occurs as the result of efforts of the surviving spouse subsequent to the death of the first spouse.\textsuperscript{145} In these situations, the problem becomes one of apportioning values to reflect the efforts of the surviving spouse.

As previously indicated, the in-law inheritance provisions rely

\textsuperscript{141} \textsc{Cal. Prob. Code} § 6402.5(f)(1) (West Supp. 1989). This assumes that the original ownership was truly community property and did not have some other actual source. See supra notes 98-110 and accompanying text.

\textsuperscript{142} \textsc{Cal. Prob. Code} § 6402.5(f)(4) (West Supp. 1989). This assumes that the original source of the property was truly separate property.

\textsuperscript{143} See supra note 122-23 and accompanying text.

\textsuperscript{144} See supra note 138 and accompanying text. The decedent’s in-laws may be entitled to more or less than $20,000 in the present example. If the dividends were reinvested when received by W₁, H₁’s relatives would be entitled to whatever the value of such reinvested proceeds happened to be at W₁’s death, assuming, of course, that there is adequate tracing.

\textsuperscript{145} See supra note 139 and accompanying text; see also Estate of Bishop v. Donovan, 209 Cal. App. 2d 48, 61, 25 Cal. Rptr. 763, 771 (1962) ("any increase in the value thereof which due to the personal activity, ability or capacity of [W₁], through services rendered after death of [H₁], is not subject to succession under these provisions") (citations omitted).
heavily on community property concepts.\textsuperscript{146} In the family law context, there is a scenario that somewhat parallels the apportionment problem at hand. This situation arises when one spouse brings separate property into the marriage in the form of a business or real estate. During the marriage, through the efforts of one spouse, the value and/or profits from the business or real estate increases. At the death of one spouse or at the dissolution of the marriage, it is necessary to determine the community and separate property interests. As a result, the parties are faced with a problem similar to in-law inheritance: determining how much of the enhancement is attributable to the original separate property versus the community efforts during marriage.\textsuperscript{147} Since no one method of apportionment is considered mandatory,\textsuperscript{148} the courts can use any method of apportionment they deem most equitable based on the facts and circumstances.\textsuperscript{149} Two general methods of apportionment enjoy wide acceptance: the \textit{Pereira}\textsuperscript{150} and \textit{Van Camp}\textsuperscript{151} approaches.

In a family law context, the \textit{Pereira} approach recognizes that the underlying separate property will experience a reasonable rate of appreciation and/or generate a reasonable degree of revenue.\textsuperscript{152} This reasonable rate of return is deemed the separate property of the spouse who brought the property into the marriage; any actual excess appreciation and/or revenue generated is considered community property.\textsuperscript{153} Approaching the problem from the opposite side, the \textit{Van Camp} method recognizes that the spouse's services should be assigned a reasonable value, representing the value of the community property interest. The balance of any actual appreciation and/or revenue is allocated to the original separate property interest.\textsuperscript{154}

The in-law inheritance apportionment problem is, in effect, the
verted image of the classic family law apportionment problem addressed by both the *Pereira* and *Van Camp* approaches. Instead of measuring the amount by which separate property acquired prior to marriage was enhanced by community efforts during marriage, the in-law inheritance apportionment problem involves measuring the amount by which attributable property of the deceased spouse (either community or separate property) was enhanced by "separate property" efforts or the surviving spouse. The *Pereira* and *Van Camp* apportionment methods have suggested application to this type of reverse apportionment situation in the family law context. These methods are viewed as having logical application to the post-death apportionment problem associated with the in-law inheritance provisions. In *Nereson*, the court explained the application of the two methods to the in-law inheritance apportionment situation:

> [T]he *Pereira* formula would assign a fair return to the [attributable] property share, as that share is valued at the time of the first death. . . . In cases where the survivor has improved the property with labor, . . . this approach operates to allocate to the [attributable property] only the natural increase over time, while the heirs of the survivor reap the benefits of his additional contributions. . . . The *Van Camp* formula would assign a value to the survivor’s contributions and allocate this amount to the separate property share.

To illustrate: H₁ and W₁ acquired a piece of unimproved real estate during their marriage and held it as community property. At H₁'s death in 1977, the real estate was worth $100,000 and H₁’s one-half interest in the property was devised to W₁. The property was not generating any income. During the two years ending with her death in 1987, W₁, an attorney, devoted much of her time to the property including planning for the subdivision of the property, negotiating future building and lease agreements, and securing all necessary building permits. When W₁ died intestate without surviving issue or

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155. The status of apportioned property representing services performed by the surviving spouse would have to be deemed separate property of the surviving spouse by the very nature of the marital status of the surviving spouse; that is, the community nature of the husband and wife relationship ends at the death of one spouse.


157. Reppy & Wright, *supra* note 7, at 135. "If there was such labor [of surviving spouse], a kind of *Pereira-Van Camp* apportionment seems to be called for . . . ." *Id.* (citations omitted); see *Nereson*, 194 Cal. App. 3d at 875, 239 Cal. Rptr. at 871.

158. *Nereson*, 194 Cal. App. 3d at 876, 239 Cal. Rptr. at 871 (citations omitted). *Nereson* involved what is now the first category of attributable property, the predeceased spouse’s share of community property. There is no reason to believe that the two approaches would not be equally viable when dealing with the remaining categories of attributable property.
a new spouse, the property was worth $600,000. Other unimproved real estate in the area had experienced annual appreciation at the rate of ten percent per year during the ten-year period from 1977 to 1987.

At the time of H1's death, the portion of the property attributable to him was his one-half share of the property having a value of $50,000. If the property had appreciated to $600,000 at W1's death solely due to market conditions and not as a result of any efforts or capital contributions by W1, the portion attributable to H1 would be $300,000. However, W1 did contribute her efforts; therefore, apportionment of part of the appreciation is appropriate.

Using the *Pereira* approach, a fair return on the original $50,000 share, attributable to H1, would have to be determined. In the case of real estate, "a fair return [can] be calculated by reference to the average annual appreciation rate for real property in the area." In the present example, applying the ten percent average annual rate of appreciation for other property in the area yields an appreciated value of approximately $130,000 at W1's death for the original $50,000 attributable share. Therefore, $130,000 represents the share deemed attributable to H1 and subject to inheritance by W1's in-laws, with the balance of the property, $470,000, inheritable by W1's relatives.

Utilizing the *Van Camp* approach, the value of W1's services would have to be determined. This is probably a more difficult proposition than determining a fair return under the *Pereira* approach. If there is only a minimal amount of effort or time expended, the courts are reluctant to allocate any value to such services. However, if the amount of effort or time expended is significant, then expert testimony is utilized to determine the value of W1's services. Consideration is given to the following factors: (1) the time spent with regard to the subject property or business; (2) the nature and importance of the rendered services; and (3) the type and risk factors associated with property or business. In the present example, assume W1's services are valued at $120,000, thus representing the portion of the appreciation not attributable to H1. Therefore, a total of $240,000 is

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160. This represents the one-half share of $600,000. See supra notes 138-44 and accompanying text.
162. For example, $50,000 increased at the rate of 10% per year compounded annually would grow to $129,687 at the end of 10 years.
163. The balance of $470,000 is computed by subtracting the $130,000 attributable to the predeceased spouse from the $600,000 aggregate value of the property.
deemed attributable to $H_1$ and subject to in-law inheritance, with the balance of $360,000 inheritable by $W_1$'s relatives.\footnote{166}

In theory, both methods should produce identical results.\footnote{167} In reality, however, this may not be the case. In above-average growth situations, the Pereira approach will likely apportion more to attributable property than will the Van Camp method.\footnote{168} To help relieve these variances among methods, some courts have used a combination of the two methods which apportions property based on relative percentages of both the computed fair return and the fair value of the services.\footnote{169} This approach appears to strike a logical balance between the two methods and would seem particularly well-suited to apportionment within the in-law inheritance arena.\footnote{170} In the present example, the combination of the two methods would yield an attributable amount to $H_1$ of approximately $192,857, with the balance of $407,143 available to $W_1$'s relatives.\footnote{171}

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\footnote{166. A total of $480,000 ($600,000 less $120,000 as the value of $W_1$'s services) would represent the increased value of the total original community property interest, one-half of which ($240,000) represents the share attributable to $H_1$. The balance apportioned to $W_1$ is the total value ($600,000) less the share attributable to $H_1$ ($240,000), or $340,000.


168. Id. at 296.


170. Since this method combines the two approaches, it is less likely that the apportionment will be skewed in favor of either party by a singularly inaccurate estimate of either the fair return or the reasonable value of the efforts of the survivor. The probability of inaccurate or inflated estimates of either factor, thereby creating more of a skewed result, would seem to be more likely to occur in an in-law inheritance situation as opposed to the typical family law situation. In the former, neither party is alive to possibly offer and rebut the testimony establishing the particular valuations.

171. The amounts are computed as follows:

\textbf{Amount Attributable to $H_1$:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fair return via Pereira ($130,000 fair value less original cost of $50,000) \times 2 (H_1$ &amp; $W_1$)</td>
<td>$160,000</td>
</tr>
<tr>
<td>Fair value of services via Van Camp</td>
<td>$120,000</td>
</tr>
<tr>
<td>Total</td>
<td>$280,000</td>
</tr>
<tr>
<td>Relative value of Pereira return ($160,000) to total ($280,000)</td>
<td>57.14%</td>
</tr>
<tr>
<td>Multiplied by total appreciation ($500,000)</td>
<td>$285,714</td>
</tr>
<tr>
<td>Plus: original cost</td>
<td>$100,000</td>
</tr>
<tr>
<td>Total community property share of property</td>
<td>$385,714</td>
</tr>
<tr>
<td>One-half attributable to $H_1$</td>
<td>$192,857</td>
</tr>
</tbody>
</table>
3. Increase in Equity From Payments of Debt Principal On
Encumbered Property by Surviving Spouse

Where the attributable property is encumbered at the time of
transfer to the surviving spouse, the surviving spouse may subse-
quently make payments towards the debt principal. Although reduc-
ing the debt on property does not alone increase the value of the
property, it does increase the owner's equity in the property. Fur-
ther, the property can experience normal appreciation during the pe-
riod in which the debt payments are being made. As such, the
property's equity/appreciation and generated income may require
apportioning.

Apportionment in this situation depends on the source of the funds
used by the surviving spouse for the debt principal payments. When
the source of the debt payments is the same as the source of property
deemed attributable to a predeceased spouse, no apportionment is
necessary; the in-laws would share in the property to the same de-
gree as in the first scenario above. However, when the source of
the debt payments differs from the source category of the underlying
attributable property, apportionment is required.

In *Nereson*, the situation existed where the surviving spouse, sub-
sequent to the death of the first spouse, paid off a mortgage on their
appreciated residence, formerly the couple's community property.
The court recognized that apportionment of the property at the sub-
sequent death of the surviving spouse was appropriate unless the de-
cedent's in-laws met the burden of proving that the source of funds
used to make such debt payments were not the separate funds of the

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Amount Not Attributable to H1:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total value of property</td>
<td>$600,000</td>
</tr>
<tr>
<td>Less: amount attributable to H1</td>
<td>(192,857)</td>
</tr>
<tr>
<td>Amount not attributable to H1</td>
<td>$407,143</td>
</tr>
</tbody>
</table>

172. Equity equals the total value of the property less encumbrances thereon.

173. This is because the payments would be attributable property just like the under-
lying property. See generally *supra* notes 138-44 and accompanying text. Examples
include the following: (1) where the attributable property is the former community
property interest of the predeceased spouse and the debt payments are made from for-
mer community property sources (i.e., attributable as former community property in
their own right); and (2) where the attributable property is the former separate prop-
erty of the predeceased spouse and the debt payments are made from former separate
property of the predeceased spouse. Of course, in these situations the predeceased
spouse's relatives have the burden of not only tracing the underlying encumbered or
formerly encumbered property to an attributable source, but also of tracing the source
of the debt payments to such source. See *supra* notes 111-30 and accompanying text.

174. Examples include: (1) where the underlying property has an attributable
source to the former community property interest of H1 and debt payments made from
W1's separate property funds subsequent to H1's death; and (2) where the underlying
property has an attributable source to the former separate property of H1 and debt
payments subsequent to his death are made by W1 from either a former community
property source or W1's separate property.
surviving spouse. The court suggested using the Pereira/Van Camp method of apportionment. These methods, however, are applicable in situations where the value of property has been enhanced by the services of one spouse. Reducing the existing debt associated with a piece of property is conceptually dissimilar to enhancing the property by one's services. Rather, it is more akin to determining the make-up of the property's original contribution base.

A more appropriate method of apportionment, may exist, derived from the family law context where encumbered separate property is brought into a marriage and community funds are subsequently used to make payments reducing the principal debt. Through a series of complex cases, the California courts have developed a methodology for such apportionment.

A principal case was the California Supreme Court's 1980 decision in In re Marriage of Moore. The wife brought property into the marriage which she had purchased prior to the marriage with her separate property consisting of a down payment and mortgage for the balance. During the marriage, the couple paid part of the mortgage debt with community funds. At the time of divorce, the property had appreciated substantially in value. The court apportioned the value of the property as follows: First, it reimbursed each party for their actual share of principal payments and down payment. Then the court allocated the total appreciation value to each spouse.


177. See supra text accompanying notes 147-51.


179. 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980).

180. Id. at 370, 618 P.2d at 209, 168 Cal. Rptr. at 663. The original purchase price of the property was $56,640.57, comprised of a $16,640.57 down payment and a mortgage of $40,000 for the balance of the purchase price. Id.

181. Id. As to the debt principal, $5,986.20 was paid with community funds during marriage. The wife paid an aggregate of $826.25 of debt principal before marriage and after the separation. Id.

182. The appreciated value at the time of trial was $160,000.
based on their relative contributions to the original purchase price giving the wife credit for the amount of the original loan less principal payments made with community funds.183

In In re Marriage of Marsden,184 the formula was refined: First, allocate 100% of the appreciation occurring before the marriage to the spouse owning the separate property. Then, use the Moore approach to apportion the balance of the appreciation.185

Extending this methodology to apportionment within an in-law inheritance context would once again call for application of the principals in reverse.186 Assume that during their marriage, H1 and W1 purchased a house for $100,000, in 1975 with a down payment of $20,000 and a $80,000 mortgage. During their marriage, $10,000 was paid towards the $80,000 loan principal. The down payment and loan payments were made with community funds, and the house was held as community property. At H1’s death in 1980, the fair market value of the house had increased to $160,000. W1 continued to live in the

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183. Moore, 28 Cal. 3d at 373-74, 618 P.2d at 211-12, 168 Cal. Rptr. at 665-66. Apportionment is as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purchase price</td>
<td>$56,640.57</td>
</tr>
<tr>
<td>Down payment</td>
<td>16,640.57</td>
</tr>
<tr>
<td>Loan</td>
<td>40,000.00</td>
</tr>
<tr>
<td>Market value at time of trial</td>
<td>160,000.00</td>
</tr>
<tr>
<td>Capital appreciation</td>
<td>103,359.43</td>
</tr>
</tbody>
</table>

**Separate Property Interest:**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Return of down payment</td>
<td>$16,640.57</td>
</tr>
<tr>
<td>Return of amount of reduction of principal by</td>
<td></td>
</tr>
<tr>
<td>separate funds:</td>
<td></td>
</tr>
<tr>
<td>Before marriage</td>
<td>245.18</td>
</tr>
<tr>
<td>After separation</td>
<td>581.07</td>
</tr>
<tr>
<td>Credit for down payment</td>
<td>16,640.57</td>
</tr>
<tr>
<td>and loan proceeds</td>
<td>40,000.00</td>
</tr>
<tr>
<td>Less: Amount of reduction of principal by</td>
<td></td>
</tr>
<tr>
<td>community funds</td>
<td>(5,986.20)</td>
</tr>
<tr>
<td>Divided by purchase price</td>
<td></td>
</tr>
<tr>
<td>Equals percentage of capital appreciation</td>
<td></td>
</tr>
<tr>
<td>attributable to separate property</td>
<td>89.43%</td>
</tr>
<tr>
<td>Multiplied by capital appreciation ($103,359.57)</td>
<td>92,434.34</td>
</tr>
<tr>
<td></td>
<td>$109,901.16</td>
</tr>
</tbody>
</table>

**Community Property Interest:**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Return of amount of reduction of principal by</td>
<td>$5,986.20</td>
</tr>
<tr>
<td>community funds</td>
<td></td>
</tr>
<tr>
<td>Amount of reduction of principal by community</td>
<td>$5,986.20</td>
</tr>
<tr>
<td>funds</td>
<td></td>
</tr>
<tr>
<td>Divided by purchase price</td>
<td>$56,640.57</td>
</tr>
<tr>
<td>Equals percentage of capital appreciation</td>
<td></td>
</tr>
<tr>
<td>attributable to community property</td>
<td>10.57%</td>
</tr>
<tr>
<td>Multiplied by capital appreciation ($103,359.43)</td>
<td>10,925.09</td>
</tr>
<tr>
<td></td>
<td>$16,911.29</td>
</tr>
</tbody>
</table>

See Wagner, supra note 178, at 34.

186. The Pereira and Van Camp apportionment approaches have been applied in “reverse” in post-death situations. See supra note 156 and accompanying text.
house until her death in 1987. During those seven years, she paid off an additional $15,000 of the loan principal using her separate (non-attributable) funds. At her death, the value of the house had appreciated to $280,000. Apportionment of the equity using a reverse Moore/Marsden approach would result in a total attributable amount subject to possible in-law inheritance of $96,000 and an amount not subject to in-law inheritance of $129,000, computed as follows:

**Summary of Costs and Values**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purchase price</td>
<td>$100,000</td>
</tr>
<tr>
<td>Down payment</td>
<td>20,000</td>
</tr>
<tr>
<td>Original loan amount</td>
<td>80,000</td>
</tr>
<tr>
<td>Market value at H's death</td>
<td>160,000</td>
</tr>
<tr>
<td>Appreciation as of H's death</td>
<td>60,000</td>
</tr>
<tr>
<td>Market value at W's death</td>
<td>280,000</td>
</tr>
<tr>
<td>Appreciation between deaths of H &amp; W</td>
<td>120,000</td>
</tr>
</tbody>
</table>

**Community Property Interest Attributable to H:**

- Return of down payment: $20,000
- Return of principal payments from community: 10,000
- Return of appreciation occurring during marriage before death of H (Marsden): 60,000

Apportionment of appreciation after H's death:

- Credit for down payment: $20,000
- Credit for original loan proceeds: 80,000
- Less: Reduction of principal by W after H's death (15,000)

Divided by purchase price: $100,000
Multiplied by appreciation after death of H (120,000): $102,000
Total community property interest: $192,000
One-half attributable to H: $96,000

**Value not attributable to H:**

- Return of principal payments by W after the death of H: $15,000

Apportionment of appreciation after H's death:

- Reduction of principal by W: $15,000
- Divided by purchase price: $100,000
- Equals percentage of appreciation attributable to community property: 15%

Multiplied by appreciation after death of H (120,000): $18,000
Total separate property interest: $33,000
Plus: W's one-half community property interest: $96,000
Total value not attributable to H: $129,000

---

In computing the allocation of appreciation after H₁'s death, the community property interest is credited with the full remaining balance of the loan,¹⁸⁸ thereby increasing the final amount attributable to the predeceased spouse, H₁. This has been the source of criticism regarding the Moore formula, where in the family law context, it is the separate property interest which receives the boost.¹⁸⁹

Although application of the in-law inheritance provisions draws heavily from community property concepts,¹⁹⁰ strict application of the Moore/Marsden approach to apportionment within the in-law inheritance context may not be appropriate. Specifically, crediting the entire unpaid loan balance to the attributable portion when allocating post-death (of the first spouse) appreciation does not appear to be an equitable proposition. The appreciation in question is that which has occurred after the death of H₁, a period when H₁ is no longer potentially liable for the debt. It seems ironic that during this period while W₁ is potentially liable for the debt, such debt works to increase not her separate interest in the property, but rather, the portion attributed to her predeceased spouse H₁. In the above example, if W₁, instead of H₁, was credited with the unpaid loan balance, the total attributable amount subject to possible in-law inheritance would decrease to $63,000 while the amount inheritable by W₁'s relatives would increase to $162,000.¹⁹¹

Another approach or modification of the Moore formula has been suggested. This approach allocates the appreciation based on respective separate and community contributions towards the down payment and the actual debt principal payments while giving credit to

---

¹⁸⁸. As part of the computation of the 85% apportionment to the community property share, such share was given credit for $65,000 of loan amount ($80,000 original loan balance less $15,000 paid after H₁'s death). The loan amount is actually a combination of the loan balance at W₁’s death of $55,000 ($80,000 original balance less $15,000 paid with W₁’s separate funds and $10,000 paid with community funds) plus the $10,000 of loan principal paid with community funds while both H₁ and W₁ were alive.

¹⁸⁹. Wagner, supra note 178, at 34.

¹⁹⁰. See supra notes 135-37 and accompanying text.

¹⁹¹. The computations of the attributable and separate interests are as follows:

<table>
<thead>
<tr>
<th>Summary of Costs and Values</th>
<th></th>
</tr>
</thead>
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<tr>
<td>Purchase price</td>
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</tr>
<tr>
<td>Original loan amount</td>
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</tr>
<tr>
<td>Market value at H₁'s death</td>
<td>160,000</td>
</tr>
<tr>
<td>Appreciation as of H₁'s death</td>
<td>60,000</td>
</tr>
<tr>
<td>Market value at W₁'s death</td>
<td>280,000</td>
</tr>
<tr>
<td>Appreciation between deaths of H₁ &amp; W₁</td>
<td>$120,000</td>
</tr>
</tbody>
</table>

Community Property Interest Attributable to H₁:
- Return of down payment $ 20,000
- Return of principal payments from community 10,000
- Return of appreciation occurring during marriage before death of H₁ (Marsden) 60,000
neither share for the unpaid balance of the debt.\textsuperscript{192} Utilizing this modified approach in the present example, the total attributable amount subject to possible in-law inheritance would be $77,208, while the amount inheritable by W₁’s relatives would be $147,792.\textsuperscript{193}

Clearly, the method of allocation used can make a significant difference in determining the amount attributable to a predeceased

\begin{equation*}
\text{Apportionment of appreciation after H₁’s death:} \\
\text{Credit for down payment} \quad \$ 20,000 \\
\text{Reduction of principal during marriage of H₁ and W₁} \quad \$ 10,000 \\
\text{Divided by purchase price} \quad \$100,000 \\
\text{Equals percentage of appreciation attributable to community property} \quad 30\% \\
\text{Multiplied by appreciation after death of H₁ (\$ 120,000)} \quad \$36,000 \\
\text{Total community property interest} \quad \$126,000 \\
\text{One-half attributable to H₁} \quad \$ 63,000
\end{equation*}

\begin{equation*}
\text{Value Not Attributable to H₁:} \\
\text{Return of principal payments by W₁ after the death of H₁} \quad \$ 15,000 \\
\text{Apportionment of appreciation after H₁’s death:} \\
\text{Credit for original loan proceeds} \quad \$ 80,000 \\
\text{Less: Reduction of principal during marriage} \quad (\$10,000) \\
\text{Divided by purchase price} \quad \$100,000 \\
\text{Equals percentage of appreciation attributable to community property} \quad 70\% \\
\text{Multiplied by appreciation after death of H₁ (\$ 120,000)} \quad \$84,000 \\
\text{Total separate property interest} \quad \$ 99,000 \\
\text{Plus: W₁’s One-half community property interest} \quad 63,000 \\
\text{Total value not attributable to H₁} \quad \$162,000
\end{equation*}

\textsuperscript{192} Wagner, supra note 178, at 39-41. This approach seems particularly appropriate to in-law inheritance situations because the debt is allocated to those persons who are living during the relative period.

\textsuperscript{193} The computations of the attributable and separate interests are as follows:

\begin{equation*}
\text{Summary of Costs and Values} \\
\text{Purchase price} \quad \$100,000 \\
\text{Down payment} \quad 20,000 \\
\text{Original loan amount} \quad 80,000 \\
\text{Total reduction of principal as of W₁’s death} \quad 25,000 \\
\text{Market value at H₁’s death (5 yrs. after purchase)} \quad 160,000 \\
\text{Appreciation as of H₁’s death} \quad 60,000 \\
\text{Mkt value at W₁’s death (12 yrs. after purchase)} \quad 280,000 \\
\text{Appreciation between deaths of H₁ & W₁} \quad 120,000
\end{equation*}

\begin{equation*}
\text{Community Property Interest Attributable to H₁:} \\
\text{Return of down payment} \quad \$ 20,000 \\
\text{Return of appreciation occurring during marriage before death of H₁ (Marsden)} \quad 60,000 \\
\text{Capital appreciation attributable to down payment (proportion of down payment to purchase price multiplied by capital appreciation)} \\
20,000 \\
\frac{100,000}{120,000} \times 20,000 \quad 24,000
\end{equation*}
spouse. There would appear to be logical support for utilizing some derivative of the traditional Moore/Marsden approach.

4. Changes in Value and Revenues Due to Contribution of Capital by Surviving Spouse

After the death of the first spouse, the surviving spouse may make capital outlays with respect to property which may be otherwise partially or fully attributable to the predeceased spouse. When such outlays represent capital improvements or other enhancements to the property, apportionment of the property at the death of the surviving spouse may be appropriate to reflect such contributions.

In Nereson, the court appeared to endorse the use of the Pereira/Van Camp approach to apportionment in such situations. The use of a straight Pereira approach, evidently, would determine a fair return of the property without the improvements. That return would be allocated to the attributable share, with the excess in actual value

Reduction of loan principal attributable to payments from community property (proportion of number of yearly payments made from community funds to total number of yearly payments made, up to death of W1, multiplied by amount principal was reduced up until death of W1)
\[
\frac{5}{12} \times 25,000 = 10,417
\]

Capital appreciation attributable to loan payments from community property (proportion of loan to purchase price multiplied by proportion of number of yearly payments made from community funds to total number of yearly payments made, up to death of W1, multiplied by capital appreciation)
\[
\frac{80,000}{100,000} \times \frac{5}{12} \times 120,000 = 40,000
\]

One-half attributable to H1
\[
\text{Value not attributable to } H_1 = 154,417
\]

Value not attributable to H1:

Reduction of loan principal attributable to payments from separate property (proportion of number of yearly payments made from separate funds to total number of yearly payments made, up to death of W1, multiplied by amount principal was reduced up until death of W1)
\[
\frac{7}{12} \times 25,000 = 14,583
\]

Capital appreciation attributable to loan payments from community property (proportion of loan to purchase price multiplied by proportion of number of yearly payments made from community funds to total number of yearly payments made, up to death of W1, multiplied by capital appreciation)
\[
\frac{80,000}{100,000} \times \frac{7}{12} \times 120,000 = 56,000
\]

Total separate property interest
\[
70,583
\]

Plus: W1's one-half community property interest
\[
77,200
\]

Total value not attributable to H1
\[
147,782
\]

See Wagner, supra note 178, at 39-41 for computational format.

allocated to the non-attributable share. The actual capital expenditures made by the surviving spouse are of no consequence in calculating the apportioned amounts under this method. The use of a straight Van Camp approach appears particularly odd since its goal is to determine a dollar value for services contributed by one spouse to the apportionable property and allocate accordingly. Whereas, in the current situation, the amount contributed to the apportionable property has a known dollar amount—the contribution. This, in effect, would serve to reimburse the contributing spouse for the actual capital outlay, but not apportion thereto any increase in value or income from the property. Perhaps the utilization of this method, which combines the two approaches, would be appropriate. Another approach might be a modified Moore/Marsden method which would treat capital contributions as a component of the original purchase price for allocating post-contribution appreciation.

For purposes of illustration, assume that H and W, during their marriage, purchased a home for $100,000 with community funds incurring (somewhat unrealistically) no debt. At H’s death in 1980, the house was in its original condition and was worth $160,000. W continued to live in the house; in 1982 she made capital improvements consisting of the addition of two bedrooms, a new kitchen, and a den. The cost of these improvements was $90,000, all of which came from her separate, non-attributable, funds. When W died in 1987, the house was worth $380,000, while similar homes in the area had appreciated to an average of $230,000 during the same period.

195. See supra note 158 and accompanying text.
196. No weight is given here since the determinative factor is the fair return on the unimproved property. See infra note 202 and accompanying text for an example.
197. See supra note 154 and accompanying text.
198. In the family law context, regarding division of property pursuant to divorce or legal separation, California Civil Code section 4800.2 provides for straight reimbursement for separate property contributions to the community. CAL. CIV. CODE § 4800.2 (West Supp. 1989). Extension of this reimbursement methodology to the in-law inheritance context would not, however, appear appropriate. Section 4800.2 is limited in its application only to division of property pursuant to divorce or legal separation and has been held not to apply in division of property in other family law situations. In re Marriage of Gowdy, 178 Cal. App. 3d 1228, 224 Cal. Rptr. 400 (1986); Shue & Velman, California Civil Code §§ 4800.1 and 4800.2: Review, Analysis, and Suggestions for Reform, 12 COMMUNITY PROP. J. 5, 6 (1985).
199. See supra note 169 and accompanying text. See infra note 197 and accompanying text for an example.
200. See supra note 192 and accompanying text. For an example of this method utilized in the family law context, see In re Marriage of Gowdy, 178 Cal. App. 3d 1228, 224 Cal. Rptr. 400 (1986).
201. See infra note 206 and accompanying text for example utilizing this method.
Utilizing a straight *Pereira* approach, $230,000 would be allocated to the community property share with one-half thereof, or $115,000, representing the portion attributable to H₁ and subject to in-law inheritance.²⁰² The balance of $265,000 would be inheritable by W₁'s relatives.²⁰³ A straight *Van Camp* approach would allocate $145,000 as property attributable to H₁, with the balance of $235,000 being property inheritable by W₁'s relatives.²⁰⁴ A combination approach would allocate values of $132,726 and $247,274 to the attributable and non-attributable portions, respectively.²⁰⁵

Utilizing a modified *Moore/Marsden* approach, $275,790 would be allocated to the community property share with one-half thereof, or $137,894 representing the portion attributable to H₁ and subject to in-law inheritance.²⁰⁶ The balance of $242,106 would be inheritable by

---

²⁰² Utilization of the *Pereira* approach in the current example ignores the amount of the actual separate capital contribution by W₁ amounting to $90,000. The $230,000 value assigned to the community property share is derived solely from the value of similarly-situated property without improvements.

²⁰³ The balance of $265,000 inheritable by W₁'s relatives is computed by taking the total value of the property at W₁'s death ($380,000) less the portion computed as attributable to H₁ ($115,000).

²⁰⁴ The values are computed as follows:

**Value Attributable to H₁:**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total value of property</td>
<td>$380,000</td>
</tr>
<tr>
<td>Less: value attributable to W₁'s contributions</td>
<td>($90,000)</td>
</tr>
<tr>
<td><em>Van Camp</em></td>
<td></td>
</tr>
<tr>
<td>Total community property share</td>
<td>$290,000</td>
</tr>
<tr>
<td>One-half attributable to H₁</td>
<td>$145,000</td>
</tr>
</tbody>
</table>

**Value Not Attributable to H₁:**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total value of property</td>
<td>$380,000</td>
</tr>
<tr>
<td>Less: amount attributable to H₁</td>
<td>($145,000)</td>
</tr>
<tr>
<td>Value not attributable to H₁</td>
<td>$235,000</td>
</tr>
</tbody>
</table>

²⁰⁵ The amounts are computed as follows:

**Amount Attributable to H₁:**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fair return via <em>Pereira</em> ($230,000 fair value less original cost of $100,000)</td>
<td>$130,000</td>
</tr>
<tr>
<td>Fair value of services via <em>Van Camp</em></td>
<td>$30,000</td>
</tr>
<tr>
<td>Relative value of <em>Pereira</em> return ($130,000) to total ($220,000)</td>
<td>59.09%</td>
</tr>
<tr>
<td>Multiplied by total appreciation ($280,000)</td>
<td>$165,452</td>
</tr>
<tr>
<td>Plus: original cost</td>
<td>$100,000</td>
</tr>
<tr>
<td>Total community property share of property</td>
<td>$265,452</td>
</tr>
<tr>
<td>One-half attributable to H₁</td>
<td>$132,726</td>
</tr>
</tbody>
</table>

**Amount Not Attributable to H₁:**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total value of property</td>
<td>$380,000</td>
</tr>
<tr>
<td>Less: amount attributable to H₁ (as above)</td>
<td>($132,726)</td>
</tr>
<tr>
<td>Amount not attributable to H₁</td>
<td>$247,274</td>
</tr>
</tbody>
</table>

²⁰⁶ The computations of the attributable and separate interests are as follows:
W1's relatives.207

Once again, the method utilized can make significant differences in the amount determined attributable to a predeceased spouse.208 It would appear that either the straight Pereira approach, the Pereira/Van Camp combination approach, or the modified Moore/Marsden method would carry the greatest degree of logical and equitable support in these situations.

IV. CONCLUSION

There is no doubt that the California in-law inheritance provisions are complex, even in their most basic application. As emphasized in this practicum, the practitioner confronts numerous issues in deter-

<table>
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</tr>
<tr>
<td>Down payment</td>
<td>100,000</td>
</tr>
<tr>
<td>Original loan amount</td>
<td>0</td>
</tr>
<tr>
<td>Market value at H1's death</td>
<td>160,000</td>
</tr>
<tr>
<td>Appreciation as of H1's death</td>
<td>60,000</td>
</tr>
<tr>
<td>Capital contributions by W1 after H1's death</td>
<td>90,000</td>
</tr>
<tr>
<td>Market value at W1's death</td>
<td>380,000</td>
</tr>
<tr>
<td>Appreciation between deaths of H1 &amp; W1</td>
<td>220,000</td>
</tr>
<tr>
<td>Community Property Interest Attributable to H1:</td>
<td></td>
</tr>
<tr>
<td>Return of down payment</td>
<td>$100,000</td>
</tr>
<tr>
<td>Return of appreciation occurring during marriage before death of H1 (Marsden)</td>
<td>60,000</td>
</tr>
</tbody>
</table>

Capital appreciation attributable to down payment (proportion of down payment to sum of purchase price and capital improvements multiplied by capital appreciation)

\[
\frac{100,000}{120,000} \times 120,000 = 115,789
\]

\[
\frac{120,000}{120,000} = 275,789
\]

One-half attributable to H1, $137,894

207. The balance of $242,106 inheritable by W1's relatives is computed by taking the total value of the property at W1's death ($380,000) less the portion computed as attributable to H1 ($137,894). Another way to come to the same result is as follows:

Value Not Attributable to H1:

Capital appreciation attributable to W1's capital contribution (proportion of capital contribution to sum of purchase price and capital improvements multiplied by capital appreciation)

\[
\frac{90,000}{190,000} \times 200,000 = 104,211
\]

Plus: W1's One-half community property interest $137,895

Total value not attributable to H1 $242,106

208. The computed values for the share attributable to H1 in the present example, range in amounts from a low of $115,000 using the straight Pereira approach to a high of $145,000 using a straight Van Camp approach, with the other two methods producing amounts in between these two extremes.
mining the extent to which the in-law inheritance provisions apply to an intestate. Perhaps the most formidable issue is determining the extent to which an intestate's property is attributable to a predeceased spouse. The practitioner should be aware that, in making such a determination, increases in the value of attributable property which occur subsequent to the death of the first spouse may require apportionment based on that which is attributable to such predeceased spouse.

Although no particular method of property apportionment is prescribed for each situation in which apportionment might arise, the potential approaches draw heavily from those methods utilized for apportionment of property in family law settings. This practicum has attempted to explore those situations and identify the most appropriate apportionment methods applicable thereto.

The nature of the in-law inheritance provisions and the consequent apportionment problems are not, however, identical to apportionment situations found in the family law environment. For this reason, the practitioner need not feel that the apportionment methods available in the in-law inheritance context are limited to strict interpretations of those from family law. This practicum has suggested those areas where a divergence from family law concepts appears appropriate, and in those situations, has proposed alternative apportionment methods.

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