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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 Intestate and an Intestate's Predeceased Spouse

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.¹ 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 issue² 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*³ rather than the dece-

1. Situations where an intestate succession scheme may be operative despite the presence of a will include lapsed gifts, invalid components of a will, or "any part of the estate . . . not effectively disposed of by will." CAL. PROB. CODE § 6400 (West Supp. 1989). See *infra* notes 41-47 and accompanying text.

2. "'Issue' of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent." CAL. PROB. CODE § 50 (West Supp. 1989).

3. The term "former in-laws" [hereinafter in-laws] is used by the author to de-

dent's own blood relatives.⁴ 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,⁵ the most recent in a long line of so-called "in-law inheritance" statutes.⁶ Based on the feudal doctrine of descent of ancestral property,⁷ 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.⁸

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.⁹

This practicum guides the practitioner through the quagmire of ap-

note not only those individuals such as father-in-law, mother-in-law, brother-in-law, etc., but also to include the spouse's issue that are not issue of the subject marriage (e.g., step-children).

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.

5. CAL. PROB. CODE § 6402.5 (West Supp. 1989). Provisions are applicable only to decedents dying on or after January 1, 1985.

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

7. Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance By a Community Property Decedent's Former In-laws*, 8 COMMUNITY PROP. J. 107, 108 (1981).

8. See *infra* notes 60, 68-69, 77-91 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 (H_1)¹³ predeceased her (W_1) 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?

10. *Estate of McInnis v. Sylvester*, 182 Cal. App. 3d 949, 956, 227 Cal. Rptr. 604, 609 (1986) (quoting Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 771, 868-69 (1982)).

11. CAL. PROB. CODE § 6402.5 (West Supp. 1989).

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_1 and W_1 will be used to denote husband and wife, respectively, and unless otherwise stated, it is assumed that H_1 predeceased W_1 . Additionally, where this convention is used, and unless otherwise stated, it is assumed that W_1 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).

16. See, e.g., Ferrier, *Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments*, 25 CALIF. L. REV. 261, 280 (1937).

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.

Id.; Reppy & Wright, *supra* note 7, at 135. "Ancestral property inheritance should be abolished in California." *Id.*; Ferrier, *Gifts to "Heirs" in California*, 26 CALIF. L. REV. 413, 431 (1938). "In addition to being responsible for numerous anomalies and injustices in the law of intestate succession, [the in-law inheritance provisions] represent an extreme and complex application of the old doctrine of descent of ancestral property, which is a waning one." *Id.*

17. See generally T. ATKINSON, LAW OF WILLS 39, 71-81 (2d ed. 1953); Reppy & Wright, *supra* note 7, at 108-09.

18. *In re Estate of Putnam*, 219 Cal. 608, 611, 28 P.2d 27, 27-28 (1933).

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.

21. 1880 Cal. Stats. ch. CXV, § 1, at 14 (enacting subsection 9 of Civil Code § 1386). 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.²² 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.²³

At this early stage in the development of the in-law inheritance provisions, there was no need for kindred of the intestate W_1 (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_1 , no part of W_1 's estate would pass to relatives of her predeceased husband H_1 .

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.²⁴ 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.²⁵ The truly significant change, however, was the repositioning of the point along the intestate

be no father nor mother, then such property shall go to the brother and sister 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.

Id.

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.

Id.

25. *Id.*

tate 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_1 , the revised provisions became operable much earlier on the intestate succession hierarchy. W_1 's in-laws, instead of any surviving kindred of W_1 , were given preference as to certain property in W_1 's estate when W_1 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_1 's in-laws would now have a far greater incentive to show that H_1 was the source of W_1 's property, since such a determination could result in the in-laws inheriting part of W_1 's estate to the exclusion of W_1 's own kindred. Similarly, W_1 's surviving kindred would now have an incentive to compile evidence that H_1 was not the source of the intestate's property to rebut such an assertion by the in-laws.

3. Phase Three: Refinement of the Provisions

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

4. Phase Four: The Current Provisions

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.

28. Reppy & Wright, *supra* note 7, at 116-20.

29. 1979 Cal. Stats. ch. 298, § 2.

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.³²

In 1983, the in-law inheritance provisions were renumbered as section 6402.5 of the Probate Code.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.³⁴ Second, only such real property attributable to a spouse who predeceased the decedent by *not more than fifteen years* would be subject to possible in-law inheritance.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.³⁶ Previous in-law inheritance provisions had not been limited by either of these two restrictions.³⁷

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

32. Discussion of the definition and application of the "portion attributed to the decedent's predeceased spouse" is postponed. 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. See *infra* notes 92-98 and accompanying text.

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

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:

CAL. PROB. CODE § 6402.5(a) (West Supp. 1989).

34. See CAL. PROB. CODE § 6402.5(a) (West Supp. 1989).

35. *Id.*

36. This effectively alleviated some necessity for property apportionment. If it were known that H₁ died more than 15 years before W₁, 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.

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. See, e.g., *In re Estate of Brady*, 171 Cal. 1, 151 P. 275 (1915) (15 years and 3 months); *Estate of Bishop v. Donovan*, 209 Cal. App. 2d 48, 25 Cal. Rptr. 763 (1962) (30 years).

38. 1986 Cal. Stats. ch. 873, § 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:

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,⁴⁵ lapsed gifts,⁴⁶ and bequests and devises to a divorced spouse.⁴⁷

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

dent had a predeceased spouse who died not more than five years before the decedent, and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

CAL. PROB. CODE § 6402.5(b) (West Supp. 1989).

39. CAL. PROB. CODE § 6402.5(b) (West Supp. 1989). Real property remains at 15 years. *Id.* § 6402.5(a).

40. See *infra* notes 49-56 and accompanying text for a discussion of the general operation of the intestate succession scheme.

41. CAL. PROB. CODE § 6400 (West Supp. 1989).

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, 28 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

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.⁶⁸ This component contains the source rules which determine what portion of the decedent's estate, if any, is subject to possible in-law inheritance.⁶⁹

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.⁷⁰

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.⁷¹ The predeceased spouse's issue (decedent's step-children or issue thereof) are first in line⁷² with the predeceased spouse's parents next,⁷³ followed by any issue of the predeceased spouse's parents.⁷⁴ 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,⁷⁵ with the *decedent's* kindred once again becoming the preferred takers, beginning with the decedent's parents and continuing to the more remote next of kin.⁷⁶

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.⁷⁷ 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.⁷⁸

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 W₁ died intestate in 1987 with no surviving husband or issue. Assume further that her husband, H₁, died in 1985 and left to W₁, 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 W₁'s death, H₁'s father was still living. The first component of the section is met since W₁ died with neither spouse nor issue surviving. The second component is met, because W₁ 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 W₁ from H₁ would be considered property attributable to the predeceased spouse, H₁. Finally, H₁'s father is an individual within the categories of in-law takers. Therefore, the "attributable" property (which came to W₁ from H₁) will return to H₁'s family, passing to H₁'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 H₁ and W₁ held Blackacre as community property at the time of H₁'s death in 1986. W₁ became the sole owner of the property either by devise of H₁'s one-half interest through a valid will or by descent through intestate succession. Blackacre was part of W₁'s estate at her death in 1987,⁸¹ then one-half of the property would be considered attributable to H₁, and therefore, subject to possible inheritance by H₁'s relatives. The in-law inheritance provisions would generally not, however, reach H₁'s one-half interest in Blackacre if it was either not part of W₁'s estate at her death,⁸² or, alternatively, if it had been transferred to someone other than W₁ either at or after H₁'s death, but nonetheless, ended up in W₁'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]ncestral 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 H₁'s one-half interest in Blackacre vested in W₁ at H₁'s death, but prior to W₁'s death, she disposed of the property by gift, then H₁'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 W₁'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 H₁ devised his one-half interest in Blackacre to W₁; W₁ gifted it to her mother who subsequently gave or devised it to W₁ 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.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.⁸⁵ An example would be where H_1 and W_1 originally held Blackacre as community property, but prior to the death of H_1 , he made an inter vivos gift of his one-half interest to W_1 . At H_1 's death, W_1 already owns 100% of Blackacre; but at her subsequent death, the one-half interest in Blackacre acquired by gift from H_1 will be considered a portion of Blackacre attributable to H_1 , and therefore, subject to possible inheritance by 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.⁸⁶ It has been suggested, through a strained interpretation of the statutory terms, that this property category may include "life insur-

437 P.2d 517, 66 Cal. Rptr. 29 (1968); *In re Estate of Putnam*, 219 Cal. 608, 28 P.2d 27 (1933); *Estate of Blume v. People*, 241 Cal. App. 2d 496, 50 Cal. Rptr. 622 (1966); *Estate of Flood v. Murphy*, 55 Cal. App. 2d 410, 130 P.2d 811 (1942). See also *infra* notes 105-07 and accompanying text.

84. See *supra* note 83. The cases cited 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.

85. Reppy & Wright, *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." 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 (referring 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. Reppy & Wright, *supra* note 7, at 125. 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. *Id.* The second phrase is "given to the decedent by the predeceased spouse by way of gift, descent, or devise." 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). See Reppy & Wright, *supra* note 7, at 126 n.52.

86. Reppy & Wright, *supra* note 7, at 123 & n.46, 124.

ance proceeds traceable to a community policy"⁸⁷ and, possibly, "community funds placed in a pay-on-death bank account or in a Totten trust."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.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 H₁ owned Blackacre prior to his marriage to W₁. During the marriage, H₁ transferred his entire separate property interest to W₁ through an *intervivos* gift.⁹⁰ At W₁'s death, subsequent to H₁'s death, her entire interest in Blackacre (here 100%) would be considered attributable to H₁, 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.⁹¹

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

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).

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.*

89. *Id.* at 124.

90. See CAL. PROB. CODE § 6402.5(f) (West Supp. 1989). Alternatively, transfer of such interest to W₁ at the death of H₁ through devise, descent, or right of survivorship, would yield identical results in this example. *Id.*

91. If, in the alternative, H₁ were to give W₁ only a one-half interest in Blackacre by changing the separate property status of Blackacre to community property, 100% of Blackacre in W₁'s estate would still be considered attributable to H₁: one-half as H₁'s share of community property pursuant to section 6402.5(f)(1), and the other one-half, representing W₁'s share of community property which was a gift of separate property from H₁, pursuant to section 6402.5(f)(4). See also *infra* notes 98-110 and accompanying text for related source discussion.

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.⁹³

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.⁹⁴ This problem becomes more acute as the intervening period between the two deaths increases,⁹⁵ the original property is transformed into other property,⁹⁶ and/or the property is commingled with the surviving spouse's non-attributable property.⁹⁷

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 "[i]n 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.

controlling."⁹⁸

In *Estate of Abdale v. Department of Institutions*,⁹⁹ 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,

98. *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).

99. 28 Cal. 2d 587, 170 P.2d 918 (1946).

100. *Id.* at 588, 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.

101. *Abdale*, 28 Cal. 2d at 589, 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 predeceased spouse."¹⁰²

The courts have not limited their denial of in-law inheritance to situations where, as in *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 *Estate of Riley v. Riley*,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 survivorship. 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 determined that the decedent's predeceased wife was not the true source of any portion of the residence.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.¹⁰⁵ In *Estate of Flood v. Murphy*,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

Thus if a husband gives his separate property to his wife and *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].

Id. at 589-90, 170 P.2d at 920 (emphasis added).

102. *Id.* at 591, 170 P.2d at 921; *see also* *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 true source as husband's separate property); *Estate of McGee v. Seelig*, 168 Cal. App. 2d 670, 336 P.2d 622 (1959) (husband and wife's joint tenancy property had true source as husband's separate property).

103. 119 Cal. App. 3d 240, 173 Cal. Rptr. 813 (1981).

104. *Id.* at 210-11, 173 Cal. Rptr. at 816; *see also* *Estate of Rudman v. Breese*, 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 decedent and decedent's predeceased spouse).

In-law inheritance has also been denied where husband and wife joint tenancy was created prior to their marriage. *Estate of Hobart v. Hagist*, 82 Cal. App. 2d 502, 187 P.2d 105 (1947) (true source of property was not predeceased spouse, but rather, an unmarried individual that ultimately became the decedent's spouse). Similarly, courts have refused to allow in-law inheritance where the predeceased spouse was the donee (spouse was not the donor) of a testamentary power of appointment which he exercised in favor of his wife. *Estate of Sevegney v. Security Pac. Nat'l Bank*, 44 Cal. App. 3d 467, 118 Cal. Rptr. 728 (1975) (property underlying power of appointment did not have its source with predeceased spouse, but rather, with donor of power).

105. *See supra* note 83 and accompanying text.

106. 55 Cal. App. 2d 410, 130 P.2d 811 (1942).

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.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.¹⁰⁸

The determination of the true source of a particular piece of property is not necessarily an all or nothing proposition. In *Abdale*, the decedent himself, and not the predeceased spouse, was found to be the true source or origin of the underlying property.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.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.

107. *Id.* at 412, 130 P.2d at 812; see also *Estate of Westerman v. Westerman*, 68 Cal. 2d 267, 274, 437 P.2d 517, 521-22, 66 Cal. Rptr. 29, 33-34 (1968); *In re Estate of Putnam*, 219 Cal. 608, 610, 28 P.2d 27, 28 (1933); *Estate of Blume v. People*, 241 Cal. App. 2d 496, 500, 50 Cal. Rptr. 622, 624 (1966); *Estate of Bishop v. Donovan*, 209 Cal. App. 2d 48, 58, 25 Cal. Rptr. 763, 770 (1962).

108. *Flood*, 55 Cal. App. 2d at 411-12, 130 P.2d at 812.

109. *Estate of Abdale v. Department of Inst.*, 28 Cal. 2d 587, 591, 170 P.2d 918, 921 (1946).

110. *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. *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, 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, 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 spouse¹¹¹ 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 . . .

111. See *supra* notes 77-91 and accompanying text.

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

113. 132 Cal. App. 2d 190, 282 P.2d 190 (1955).

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. 778, 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

119. *Adams*, 132 Cal. App. 2d at 204, 282 P.2d at 199 (emphasis added).

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).

125. *Nereson*, 194 Cal. App. 3d at 873, 239 Cal. Rptr. at 869; *Estate of Adams v. Ayers*, 132 Cal. App. 2d 190, 204, 282 P.2d 190, 199 (1955); *In re Estate of Bryant v. Greenleaf*, 3 Cal. 2d 58, 68, 43 P.2d 529, 533 (1935).

to tracing property apply.”¹²⁶

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.¹²⁷ “[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.”¹²⁸ 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.”¹²⁹ 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.¹³⁰

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.¹³¹ 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.¹³² The California Court of Appeal has recently acknowledged that expanding this concept of apportionment to reflect "contributions"¹³³ 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."¹³⁴

In *Estate of Nereson v. Nereson*,¹³⁵ 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."¹³⁶ 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"¹³⁷

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_1 due to natural market conditions and not to any contributions or efforts on the part of W_1 , the surviving spouse; (2) all or a portion of the increased revenues and value due to the personal efforts of W_1 subsequent to the death of H_1 ; (3) the attributable property appreciation due to natural market conditions, but increased equity of such property due to payments of principal by W_1 subsequent to the death of H_1 ; and (4) all or a portion of the increased revenues and value due to

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.

134. *In re Estate of Nereson*, 194 Cal. App. 3d 865, 871, 239 Cal. Rptr. 865, 868 (1987).

135. 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987).

136. *Id.* at 871, 239 Cal. Rptr. at 868 (citation omitted).

137. *Id.* at 875, 239 Cal. Rptr. at 871.

infusions of capital by W_1 subsequent to the death of H_1 . 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 H_1 , not associated with efforts or contributions by W_1 subsequent to the death of H_1 , will be shared by W_1 's in-laws at her death.¹³⁹ Of course, W_1 's in-laws have the burden of tracing the attributable assets to her estate.¹⁴⁰

To illustrate, assume the following facts: H_1 and W_1 owned a house as community property, worth \$100,000 at the death of H_1 . Additionally, H_1 owned, as his separate property, 100 shares of Able Company common stock which he bequeathed to W_1 , having a fair market value of \$80,000 at his death. At her death a few years later, W_1 still owned the house, but its value had increased to \$250,000. Prior to her death, W_1 sold the Able stock and reinvested all of the proceeds in Baker Company common stock. Baker subsequently merged with Charlie Company and W_1 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 H_1 's death to W_1 's death, these three companies paid dividends totaling \$20,000. W_1 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 H_1 .

At W_1 's death, one-half of the residence, although actually owned 100% by W_1 at her death, would be considered property attributable

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, H₁.¹⁴¹ 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.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.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.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.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

141. 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.

142. CAL. PROB. CODE § 6402.5(f)(4) (West Supp. 1989). This assumes that the original source of the property was truly separate property.

143. See *supra* notes 122-23 and accompanying text.

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.

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.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.¹⁴⁷ Since no one method of apportionment is considered mandatory,¹⁴⁸ the courts can use any method of apportionment they deem most equitable based on the facts and circumstances.¹⁴⁹ Two general methods of apportionment enjoy wide acceptance: the *Pereira*¹⁵⁰ and *Van Camp*¹⁵¹ approaches.

In a family law context, the *Pereira* approach recognizes that the underlying separate property will experience a reasonable rate of appreciation and/or generate a reasonable degree of revenue.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.¹⁵³ Approaching the problem from the opposite side, the *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.¹⁵⁴

The in-law inheritance apportionment problem is, in effect, the in-

146. See *supra* notes 136-37 and accompanying text.

147. During a marriage, the efforts or services rendered by one spouse are considered community in nature. *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909); *In re Marriage of Marsden*, 130 Cal. App. 3d 426, 181 Cal. Rptr. 910 (1982); *Van Camp v. Van Camp*, 53 Cal. App. 17, 199 P. 885 (1921).

148. *Logan v. Forster*, 114 Cal. App. 2d 587, 600, 250 P.2d 730, 738 (1952).

149. *Beam v. Bank of America*, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137, 141 (1971); *Estate of Gold v. Gold*, 170 Cal. 621, 623, 151 P. 12, 13 (1915); *Estate of Nereson v. Nereson*, 194 Cal. App. 3d 865, 876, 239 Cal. Rptr. 865, 871-72 (1987).

150. *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909).

151. *Van Camp v. Van Camp*, 53 Cal. App. 17, 199 P. 885 (1921).

152. *Pereira*, 156 Cal. at 7, 103 P. at 490-91. There is no definitive rule on what is considered a fair rate of return. *Todd v. McColgan*, 89 Cal. App. 2d 509, 201 P.2d 414 (1949). However, unless there is support for a more realistic rate, the prevailing rate of legal interest will generally be used. *Beam*, 6 Cal. 3d at 19-20, 490 P.2d at 262, 98 Cal. Rptr. at 142-43. The fair rate of return for real estate can be the average rate of return for property which is similarly situated. *Nereson*, 194 Cal. App. 3d at 876, 239 Cal. Rptr. at 871.

153. *Pereira*, 156 Cal. at 7, 103 P. at 490-91.

154. *Van Camp*, 53 Cal. App. at 27-29, 199 P. at 890-91.

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.¹⁵⁵ The *Pereira* and *Van Camp* apportionment methods have suggested application to this type of reverse apportionment situation in the family law context.¹⁵⁶ These methods are viewed as having logical application to the post-death apportionment problem associated with the in-law inheritance provisions.¹⁵⁷ 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.¹⁵⁸

To illustrate: H_1 and W_1 acquired a piece of unimproved real estate during their marriage and held it as community property. At H_1 's death in 1977, the real estate was worth \$100,000 and H_1 's one-half interest in the property was devised to W_1 . The property was not generating any income. During the two years ending with her death in 1987, W_1 , 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 W_1 died intestate without surviving issue or

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.

156. *In re Marriage of Imperato*, 45 Cal. App. 3d 432, 438-39, 119 Cal. Rptr. 590, 594 (1975) (apportionment of community property after separation due to separate property efforts).

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 \$50,000.¹⁵⁹ 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 \$300,000.¹⁶⁰ 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."¹⁶¹ 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.¹⁶² 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.¹⁶³

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.¹⁶⁴ 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.¹⁶⁵ 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

159. Property is attributable to the predeceased spouse via section 6402.5(f)(1). See CAL. PROB. CODE § 6402.5(f)(1) (West Supp. 1989).

160. This represents the one-half share of \$600,000. See *supra* notes 138-44 and accompanying text.

161. *Nereson*, 194 Cal. App. 3d at 876, 239 Cal. Rptr. at 871.

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.

164. *Estate of Ney v. Morgan*, 212 Cal. App. 2d 891, 28 Cal. Rptr. 442 (1963); *Cozzi v. Cozzi*, 81 Cal. App. 2d 229, 183 P.2d 739 (1947).

165. CALIFORNIA FAMILY LAW SERVICE § 12:38, at 548 (E. Jessen ed. 1986).

deemed attributable to H_1 and subject to in-law inheritance, with the balance of \$360,000 inheritable by W_1 's relatives.¹⁶⁶

In theory, both methods should produce identical results.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.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.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.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.¹⁷¹

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 \$360,000.

167. Messinger, *Unification of the Pereira and Van Camp Rules: The Economics Underlying the Division of a Business Between Separate and Community Property in California Divorce Proceedings*, 9 COMMUNITY PROP. J. 286, 287 (1982).

168. *Id.* at 296.

169. *Todd v. McColgan*, 89 Cal. App. 2d 509, 201 P.2d 414 (1949). See *infra* note 171 for an example of the application of the combination approach.

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:

Amount Attributable to H_1 :

Fair return via <i>Pereira</i> (\$130,000 fair value less original cost of \$50,000) $\$80,000 \times 2$ (H_1 & W_1)	\$160,000
Fair value of services via <i>Van Camp</i>	<u>120,000</u>
	\$280,000
Relative value of <i>Pereira</i> return (\$160,000) to total (\$280,000)	57.14%
Multiplied by total appreciation (\$500,000)	\$285,714
Plus: original cost	<u>100,000</u>
Total community property share of property	\$385,714
One-half attributable to H_1	<u>\$192,857</u>

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 subsequently make payments towards the debt principal. Although reducing the debt on property does not alone increase the value of the property, it does increase the owner's equity in the property.¹⁷² Further, the property can experience normal appreciation during the period 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 degree as in the first scenario above.¹⁷³ However, when the source of the debt payments differs from the source category of the underlying attributable property, apportionment is required.¹⁷⁴

In *Nereson*, the situation existed where the surviving spouse, subsequent 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 subsequent death of the surviving spouse was appropriate unless the decedent'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

Amount Not Attributable to H₁:

Total value of property	\$600,000
Less: amount attributable to H ₁ (as above)	<u>(192,857)</u>
Amount not attributable to H ₁	<u>\$407,143</u>

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 underlying 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 former community property sources (i.e., attributable as former community property in their own right); and (2) where the attributable property is the former separate property 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.¹⁷⁵ The court suggested using the *Pereira/Van Camp* method of apportionment.¹⁷⁶ These methods, however, are applicable in situations where the value of property has been enhanced by the services of one spouse.¹⁷⁷ 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.¹⁷⁸

A principal case was the California Supreme Court's 1980 decision in *In re Marriage of Moore*.¹⁷⁹ 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.¹⁸⁰ During the marriage, the couple paid part of the mortgage debt with community funds.¹⁸¹ At the time of divorce, the property had appreciated substantially in value.¹⁸² 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

175. *Estate of Nereson v. Nereson*, 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987). See also *supra* notes 116-20 and accompanying text regarding presumptions of property source.

176. *Nereson*, 194 Cal. App. 3d at 875, 239 Cal. Rptr. at 871.

177. See *supra* text accompanying notes 147-51.

178. *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); *In re Marriage of Moore*, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980); *In re Marriage of Marsden*, 130 Cal. App. 3d 426, 181 Cal. Rptr. 910 (1982); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979); *Vieux v. Vieux*, 80 Cal. App. 222, 251 P. 640 (1926). For an excellent discussion on the historical perspective of these cases, see Wagner, *Apportionment of Home Equity in Marital Dissolution Under California Community Property Law: Is the Current Approach Equitable?*, 9 COMMUNITY PROP. J. 31 (1982); Comment, *Computation of Proportionate Ownership of the Family Residence Upon Dissolution of Marriage*, 15 LOY. L.A.L. REV. 289 (1982).

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

180. *Id.* at 370, 618 P.2d at 209, 68 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

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

Purchase price	\$ 56,640.57
Down payment	16,640.57
Loan	40,000.00
Market value at time of trial	160,000.00
Capital appreciation	103,359.43

Separate Property Interest:

Return of down payment	\$ 16,640.57
Return of amount of reduction of principal by separate funds:	
Before marriage	245.18
After separation	581.07
Credit for down payment	\$16,640.57
and loan proceeds	40,000.00
Less: Amount of reduction of principal by community funds	<u>(5,986.20)</u>

	\$ 50,654.37
Divided by purchase price	\$ 56,654.57
Equals percentage of capital appreciation attributable to separate property	89.43%
Multiplied by capital appreciation (\$103,359.57)	<u>92,434.34</u>
	\$109,901.16

Community Property Interest:

Return of amount of reduction of principal by commu- nity funds	\$ 5,986.20
Amount of reduction of principal by community funds	\$ 5,986.20
Divided by purchase price	\$56,640.57
Equals percentage of capital appreciation attributa- ble to community property	10.57%
Multiplied by capital appreciation (\$103,359.43)	<u>10,925.09</u>
	\$ 16,911.29

See *Wagner*, *supra* note 178, at 34.

184. 130 Cal. App. 3d 426, 181 Cal. Rptr. 910 (1982).

185. *Marsden*, 130 Cal. App. 3d at 437-40, 181 Cal. Rptr. at 915-17 (1982).

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

Purchase price	\$100,000
Down payment	20,000
Original loan amount	80,000
Market value at H ₁ 's death	160,000
Appreciation as of H ₁ 's death	60,000
Market value at W ₁ 's death	280,000
Appreciation between deaths of H ₁ & W ₁	120,000

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 H ₁ (<i>Marsden</i>)	60,000

Apportionment of appreciation after H₁'s death:

Credit for down payment	\$ 20,000
Credit for original loan proceeds	80,000
Less: Reduction of principal by W ₁ after H ₁ 's death	(15,000)
	\$ 85,000
	\$100,000

Divided by purchase price

Equals percentage of appreciation

attributable to community property

85%

Multiplied by appreciation after

death of H₁ (\$120,000)

102,000

Total community property interest

\$192,000

One-half attributable to H₁¹⁸⁷

\$ 96,000

Value not attributable to H₁:

Return of principal payments by W ₁ after the death of H ₁	\$ 15,000
----------------------------------------------------------------------------------	-----------

Apportionment of appreciation after H₁'s death:

Reduction of principal by W ₁	\$ 15,000
Divided by purchase price	\$100,000
Equals percentage of appreciation attributable to community property	15%

Multiplied by appreciation after

death of H₁ (\$120,000)

18,000

Total separate property interest

\$ 33,000

Plus: W₁'s One-half community property interest

96,000

Total value not attributable to H₁

\$129,000

187. CAL. PROB. CODE § 6402.5(f)(1) (West Supp. 1989).

In computing the allocation of appreciation after H_1 '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, H_1 . 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 H_1 , a period when H_1 is no longer potentially liable for the debt. It seems ironic that during this period while W_1 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 H_1 . In the above example, if W_1 , instead of H_1 , 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 W_1 '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 H_1 's death). The loan amount is actually a combination of the loan balance at W_1 's death of \$55,000 (\$80,000 original balance less \$15,000 paid with W_1 's separate funds and \$10,000 paid with community funds) plus the \$10,000 of loan principal paid with community funds while both H_1 and W_1 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:

Summary of Costs and Values

Purchase price	\$100,000	
Down payment	20,000	
Original loan amount	80,000	
Market value at H_1 's death	160,000	
Appreciation as of H_1 's death	60,000	
Market value at W_1 's death	280,000	
Appreciation between deaths of H_1 & W_1		\$120,000
<i>Community Property Interest Attributable to H_1:</i>		
Return of down payment		\$ 20,000
Return of principal payments from community		10,000
Return of appreciation occurring during marriage before death of H_1 (<i>Marsden</i>)		60,000

neither share for the unpaid balance of the debt.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 \$147,792.¹⁹³

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

Apportionment of appreciation after H ₁ 's death:	
Credit for down payment	\$ 20,000
Reduction of principal during marriage of H ₁ and W ₁	<u>10,000</u>
	\$ 30,000
Divided by purchase price	\$100,000
Equals percentage of appreciation attributable to community property	30%
Multiplied by appreciation after death of H ₁ (\$ 120,000)	<u>36,000</u>
Total community property interest	\$126,000
One-half attributable to H ₁	<u>\$ 63,000</u>
<i>Value Not Attributable to H₁:</i>	
Return of principal payments by W ₁ after the death of H ₁	\$ 15,000
Apportionment of appreciation after H ₁ 's death:	
Credit for original loan proceeds	\$ 80,000
Less: Reduction of principal by W ₁ & H ₁ during marriage	<u>(10,000)</u>
	\$ 70,000
Divided by purchase price	\$100,000
Equals percentage of appreciation attributable to community property	70%
Multiplied by appreciation after death of H ₁ (\$ 120,000)	<u>84,000</u>
Total separate property interest	\$ 99,000
Plus: W ₁ 's One-half community property interest	<u>63,000</u>
Total value <i>not</i> attributable to H ₁	<u>\$162,000</u>

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.

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

<i>Summary of Costs and Values</i>	
Purchase price	\$100,000
Down payment	20,000
Original loan amount	80,000
Total reduction of principal as of W ₁ 's death	25,000
Market value at H ₁ 's death (5 yrs. after purchase)	160,000
Appreciation as of H ₁ 's death	60,000
Mkt value at W ₁ 's death (12 yrs. after purchase)	280,000
Appreciation between deaths of H ₁ & W ₁	120,000
<i>Community Property Interest Attributable to H₁:</i>	
Return of down payment	\$ 20,000
Return of appreciation occurring during marriage before death of H ₁ (<i>Marsden</i>)	60,000
Capital appreciation attributable to down payment (proportion of down payment to purchase price multiplied by capital appreciation)	
20,000	
$\frac{100,000}{100,000} \times 120,000$	24,000

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.¹⁹⁴ 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 W ₁ , multiplied by amount principal was reduced up until death of W ₁)	
$\frac{5}{12} \times 25,000$	\$ 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 W ₁ , multiplied by capital appreciation)	
$\frac{80,000}{100,000} \times \frac{5}{12} \times 120,000$	40,000
	<u>154,417</u>
One-half attributable to H ₁	<u>\$ 77,208</u>

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 W ₁ , multiplied by amount principal was reduced up until death of W ₁)	
$\frac{7}{12} \times 25,000$	\$ 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 W ₁ , 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: W ₁ 's one-half community property interest	<u>77,209</u>
Total value not attributable to H ₁	<u>\$147,792</u>

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

194. *Estate of Nereson v. Nereson*, 194 Cal. App. 3d 865, 872, 875, 239 Cal. Rptr. 865, 869, 871 (1987).

allocated to the non-attributable share.¹⁹⁵ The actual capital expenditures made by the surviving spouse are of no consequence in calculating the apportioned amounts under this method.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ Perhaps the utilization of this method, which combines the two approaches, would be appropriate.¹⁹⁹ Another approach might be a modified *Moore/Marsden* method²⁰⁰ which would treat capital contributions as a component of the original purchase price for allocating post-contribution appreciation.²⁰¹

For purposes of illustration, assume that H₁ and W₁, during their marriage, purchased a home for \$100,000 with community funds incurring (somewhat unrealistically) no debt. At H₁'s death in 1980, the house was in its original condition and was worth \$160,000. W₁ 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 W₁ 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 H_1 and subject to in-law inheritance.²⁰² The balance of \$265,000 would be inheritable by W_1 's relatives.²⁰³ A straight *Van Camp* approach would allocate \$145,000 as property attributable to H_1 , with the balance of \$235,000 being property inheritable by W_1 '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 H_1 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 W_1 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 W_1 's relatives is computed by taking the total value of the property at W_1 's death (\$380,000) less the portion computed as attributable to H_1 (\$115,000).

204. The values are computed as follows:

Value Attributable to H_1 :

Total value of property	\$380,000
Less: value attributable to W_1 's contributions (<i>Van Camp</i>)	<u>(90,000)</u>
Total community property share	\$290,000
One-half attributable to H_1	<u>\$145,000</u>

Value Not Attributable to H_1 :

Total value of property	\$380,000
Less: amount attributable to H_1	<u>(145,000)</u>
Value not attributable to H_1	<u>\$235,000</u>

205. The amounts are computed as follows:

Amount Attributable to H_1 :

Fair return via <i>Pereira</i> (\$230,000 fair value less original cost of \$100,000)	\$130,000	
Fair value of services via <i>Van Camp</i>	<u>90,000</u>	\$220,000
Relative value of <i>Pereira</i> return (\$130,000) to total (\$220,000)	59.09%	
Multiplied by total appreciation (\$280,000)		\$165,452
Plus: original cost		<u>100,000</u>
Total community property share of property		\$265,452
One-half attributable to H_1		<u>\$132,726</u>

Amount Not Attributable to H_1 :

Total value of property	\$380,000
Less: amount attributable to H_1 (as above)	<u>(132,726)</u>
Amount not attributable to H_1	<u>\$247,274</u>

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-

Summary of Costs and Values

Purchase price	\$100,000
Down payment	100,000
Original loan amount	0
Market value at H ₁ 's death	160,000
Appreciation as of H ₁ 's death	60,000
Capital contributions by W ₁ after H ₁ 's death	90,000
Market value at W ₁ 's death	380,000
Appreciation between deaths of H ₁ & W ₁	220,000

Community Property Interest Attributable to H₁:

Return of down payment	\$100,000
Return of appreciation occurring during marriage before death of H ₁ (<i>Marsden</i>)	60,000
Capital appreciation attributable to down payment (proportion of down payment to sum of purchase price and capital improvements multiplied by capital appreciation)	
100,000	
$\frac{100,000}{120,000} \times 220,000$	115,789
	<u>\$275,789</u>

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 W ₁ 's capital contribution (proportion of capital contribution to sum of purchase price and capital improvements multiplied by capital appreciation)	
90,000	
$\frac{90,000}{190,000} \times 200,000$	\$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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