ARTICLES

SEPARATE PROPERTY BUSINESSES THAT INCREASE IN VALUE DURING MARRIAGE

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Professor Oldham examines complications that arise when a separately owned business increases in value during marriage. He discusses the two approaches used by most courts to allocate fairly the increase in value between the separate property estate and the community estate, as well as the approaches used by the Uniform Marital Property Act and the Wisconsin Marital Property Act, and the issues that arise under these various approaches.

Professor Oldham concludes that in the American rule states, where the unearned income, rents or profits of separate property are classified as separate, the choice of allocation method should be based on whichever estate, separate or community, that was the chief contributing factor to the increase. In civil law states, however, where the unearned income, rents and profits of separate property are classified as community property, Professor Oldham argues that the separate property claim should be limited to the value of the capital, plus a reasonable annual rate of return on the capital.

I. INTRODUCTION

The characterization of property as “separate” or “community” is significant in community property states. Each spouse has a fifty percent interest in community property when it is acquired. In contrast, separate property is owned solely by the owning spouse. Also, community property states permit either the equal or equitable division of community property at divorce;¹ in most community property states separate property cannot be divided.² At death, a spouse can devise all of the decedent’s separate property and fifty percent of the community estate.

The distinction between separate and community property stems from a conception of marriage as an economic partnership. The partnership is perceived to encompass all property generated during mar-

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1. Some states, such as California, require an equal division; others, such as Texas, permit an “equitable” division of the community estate. See J. Oldham, Divorce, Separation and the Distribution of Property § 3.03[5] at 3-11 (1990).

riage by the efforts of either spouse. Both spouses are awarded an equal interest in this property, regardless of which spouse’s efforts were involved and regardless of title. Property owned before marriage is not considered part of this partnership; this remains the separate property of the owner.

A spouse sometimes marries after she has started a business. Under traditional community property theory, such a business started before marriage with “separate” property consideration remains the separate property of that spouse. However, events after the wedding can complicate matters. For example, assume the business increases in value during the marriage. Before the community claim to this increase can be determined, more information must be obtained. If the increase in value stems from the “normal course of things,” such as inflation or general industry conditions, there is no community claim. All of the business, including all increase in value, is separate property. This is consistent with the general principle that the community has no claim to the increase in value of separate property during marriage, as long as no community resources are expended upon the asset. If the increase in value stems at least in part from the efforts of one or both spouses, however, there can be a community claim to the increase. The “time, toil and talent” of each spouse during marriage is perceived to be a community asset. If a separate property asset increases in value because of a community investment of a spouse’s efforts during marriage, a potential community claim arises. This claim only pertains to the increase in value during marriage (or possibly the value of the services

3. See generally J. Oldham, supra note 1, at § 10.02 at 10-5. However, the Washington Court of Appeals has recently concluded that, although the business is separate property, the goodwill might be community property. See In re Marriage of Brooks, 51 Wash. App. 882, 756 P.2d 161 (1988). This is not consistent with the majority view. See W. Repp & C. Samuel, Community Property in the United States 131-56 (2d ed. 1982).

4. No community property jurisdiction deems all increases in value of separate property during marriage to be community property. This is not true, for purposes of divorce property division, in all common law equitable distribution states. Some common law states that distinguish between divisible “marital” property and nondivisible “separate” or “individual” property consider all increase in value of premarriage accumulations to be divisible property. See, e.g., Colo. Rev. Stat. § 14-10-113 (1987). See generally J. Oldham, supra note 1, at § 6.04 at 6-14; Wenig, The Increase in Value of Separate Property During Marriage: Examination and Proposals, 23 Fam. L.Q. 301 (1989). Most common law equitable distribution states, however, apply characterization approaches analogous to community property analysis to determine what property is divisible at divorce; not all increases in value during marriage of premarriage accumulations are divisible at divorce. J. Oldham, supra note 1, at § 6.04 at 6-14.


7. The potential significant difference whether the community claim is deemed an “ownership” claim or a “reimbursement” claim will be discussed below. See infra notes 176-84 and accompanying text.
contributed); the initial separate property investment at the time of the wedding remains separate property.8

If community efforts are "invested" in a separate property business, a means must be found to determine the amount of the community claim. Different courts have suggested various approaches to this problem. For example, some courts have applied an "all or nothing" analysis.9 Pursuant to this approach, the chief contributing factor to the increase in value is determined. If the separate property capital was the chief factor, all of the increase is considered separate property. If the chief factor was the efforts of one or both spouses, the increase in value is deemed community property. This "all or nothing" analysis obviously lacks precision and is somewhat arbitrary and unfair. Most courts have attempted to create rules that permit an allocation of the increase between the spouse's separate property estate and the community. The different allocation rules that have been applied will be discussed in more detail below.

The two allocation approaches used by most courts today are the Van Camp and Pereira approaches. These two approaches derive from two California cases, Van Camp v. Van Camp10 and Pereira v. Pereira.11 Under Van Camp, the value of the services rendered during marriage is determined. This amount, less any compensation received, is the community claim. All other increase in the value of the business is separate property.12 In contrast, the Pereira approach provides a reasonable annual rate of return for the separate property capital invested in the business. The value of this capital, plus the annual rate of return addition, is the separate property claim. The community property claim is the amount, if any, by which the value of the business at dissolution exceeds the separate property claim.13

This Article will discuss the manner in which the increase in value during marriage of an individual property business is characterized in

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8. This Article primarily considers cases pertaining to this issue that have arisen in community property states. This issue has been presented, however, in common law states at divorce. See, e.g., Halpern v. Halpern, 256 Ga. 639, 352 S.E.2d 753 (1987); Caldwell v. Caldwell, 17 Mass. App. Ct. 1032, 461 N.E.2d 834 (1984); Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987); Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986). The issue becomes much simpler if all increases in value of premarriage property, regardless of the cause of the increase, are marital property that is divisible by the divorce court. See Aletto v. Aletto, 371 Pa. 230, 537 A.2d 1383 (1988). See Wenig, supra note 4, at 316.


10. 53 Cal. App. 17, 199 P. 885 (1921). The Van Camp approach is discussed in Wenig, supra note 4, at 311-14.

11. 156 Cal. 1, 103 P. 488 (Cal. 1909). The Pereira approach is discussed in Wenig, supra note 4, at 311-14.

12. For a discussion of the Van Camp approach, see infra notes 39-81 and accompanying text.

13. For a more detailed discussion of the Pereira approach, see infra notes 82-112 and accompanying text.
Wisconsin under the Marital Property Act (WMPA). According to WMPA, appreciation in value during marriage is individual property if it results from natural forces. However, a marital property claim can arise if a spouse devotes substantial effort during marriage toward the individual property business, the business substantially appreciates due to those efforts, and the spouse does not receive reasonable compensation. The statute does not set forth how the marital property claim should be computed. Various possible computation methods will be suggested. Other unresolved issues presented by the Wisconsin statute will be mentioned.

This Article also will consider in detail the various issues that have arisen in connection with the application of the Van Camp and Pereira approaches. For example, under Van Camp a court has to determine the "value" of the spouse's services. Should this be based upon what a third party with similar background and experience would have been paid, or should other factors be considered? Once this "value" is computed, should it be adjusted for inflation for the period between the time the services were rendered and the date of dissolution? Analogous problems are encountered in connection with Pereira. For example, if the separate property capital is given a "reasonable" rate of return, how is this rate of return to be determined? Can it vary during marriage? Also, if the community claim is the difference between the "value" of the business at the time of dissolution and the value of the separate property capital at the time of marriage, plus the rate of return on the capital, how is the "value" of the business at dissolution to be determined? Also, should the rate of return on the capital be compounded?

Some writers have challenged whether the Van Camp and Pereira approaches are the best ways to allocate the increase in value during marriage of a separate property business. Also, there is some confusion in most community property states regarding how a court should decide whether to apply Van Camp or Pereira to compute the community claim. This Article generally endorses the Pereira and Van Camp approaches as a means to compute the community property claim to a separate property business. Also, this Article suggests that, as a general rule, courts should determine whether the increase in value during marriage was primarily due to a spouse's efforts or due to separate property capital. If the former is true, the approach should be applied that yields the greatest community claim. If capital is the most

17. See infra note 130 and accompanying text.
significant factor, the approach that yields the largest separate property claim should be chosen.

A business started before marriage normally remains the separate property of the owning spouse. However, in some states the community has a claim to the profits of the business realized during marriage, regardless whether a spouse devotes significant efforts to the business. In these states, the "rents and profits" generated from separate property during marriage are community property; in other states, however, the rents and profits are separate property.18 The effect of this divergence upon the community’s claim to increases in value of a separate property business will be discussed below.19

In community property states, the community can have a claim regarding the separate property of one spouse as a result of efforts rendered by a spouse during marriage relating to the separate property, regardless whether the marriage is dissolved by death or divorce.20 Although the types of problems addressed in this Article can arise in probate,21 almost all appellate cases involve divorce actions. This may be due to the lack of family harmony at divorce, as compared to probate matters. Also, many spouses leave their entire estate to the surviving spouse,22 making any community claim to the spouse’s separate property business irrelevant.

II. COMPUTING THE “INCREASE IN VALUE” OF THE “SEPARATE PROPERTY” BUSINESS

A. “Value”

The community has a potential claim to the increase in value of a separate property business if the increase stems from community services.23 However, the computation of the “value” is not always simple. Certain valuation components are relatively straightforward. For example, if retained earnings of the business increase during the marriage, this clearly is an increase in “value.” Other components are more

18. See generally J. Oldham, supra note 1, at 6-19. States where rents and profits are treated as community property are sometimes referred to as “civil law” states, while those treating rents and profits as separate property are called “American rule” states. Id.

19. See infra notes 145-65 and accompanying text.


23. Pursuant to the approach set forth in Pereira v. Pereira, the “increase in value” of the separate property business during marriage directly affects the amount of the community claim. Under the approach announced in Van Camp v. Van Camp, however, the community claim does not stem from the increase in value.
controversial. For example, many businesses possess "goodwill" value. Although there are different definitions and methods to compute the value of goodwill, goodwill essentially stems from the value of loyal customers created during the marriage, as well as the value of the reputation of the business. Different community property states have conflicting rules about the extent to which the community may share in goodwill developed during marriage. Some states permit the community to share in the value of goodwill developed during marriage, even if this "goodwill" is personal to the owning spouse. In other words, even if the customer loyalty is tied to the personality and talent of the owner spouse, rather than to the business, this is considered "goodwill" of the business in which the community may share, if it was developed during the marriage.

Other states have taken a different approach to this issue. For example, in Texas the community may not share in "goodwill" to the extent that the customer loyalty is tied to the owner spouse, rather than to the business. If the loyalty is tied to the business, rather than to the owning spouse, however, the community can share in this goodwill. Similarly, if the loyalty is tied partially to the owner and partially to the business, the community can claim only that portion of the goodwill attributable to the business.

In order to determine whether there is a community property claim regarding a portion of the increase in "value" of a separate property business when a marriage is dissolved, the state's position regarding personal goodwill must be determined. Other valuation complexities may be present. For example, assume the owning spouse has signed a shareholders' agreement or a partnership agreement, and this agreement establishes a procedure for valuing the interest if the owner dies or wishes to retire. Should the valuation formula set forth in such an agreement affect the valuation determination for purposes of divorce?

24. See generally J. Oldham, supra note 1, at § 10.03 at 10-20.
29. No consensus has been reached regarding the significance of such agreements. Some divorce courts have decided that the value set forth in such agreements does not bind a divorce court valuation. See Mitchell, 152 Ariz. at 317, 732 P.2d at 208; In re Marriage of
B. "Increase" in Value

The community can share in increases in value of separate property businesses during marriage to the extent that the increase stems from community efforts. It is important to determine, however, what constitutes an "increase" in value. For example, if a business is worth $10,000 at the time of the wedding and is worth $15,000 at the end of that year, it is fairly clear that there has been an increase in value. However, if the business is worth $10,000 at the time of the wedding and declines in value to $5,000 at the end of that year, and is worth $10,000 at the end of the next year, it is less clear whether there has been an increase in value. This question will be explored in more detail below.30

C. The "Separate Property" Business

Businesses are normally characterized based upon the character of the consideration used to capitalize the business. For example, businesses started before marriage are always separate property, because the capitalization must have been separate property.31 Businesses started during marriage can also be separate property, to the extent separate property is used to capitalize them.32 A business does not have to be all community property or all separate property. For example, if a business is capitalized with some separate property and some community property, the business is part separate property and part community property.33 In this situation, all increase in value during marriage of the community property portion would be community property, regardless whether the spouse worked for the business. The community would only have a possible claim to a portion of the increase in the separate property portion if there had been a contribution of community efforts or an unreasonable retention of retained earnings.

Slater, 100 Cal. App. 3d 241, 160 Cal. Rptr. 686 (1979); Keith, 763 S.W.2d at 950; In re Marriage of Brooks, 51 Wash. App. 882, 756 P.2d 161 (1988). Even though these courts do not consider the agreement value to be conclusive, the value set forth in the agreement could be considered by the divorce court as a factor in connection with valuing the interest. See Mitchell, 152 Ariz. at 317, 732 P.2d at 208.

30. See infra notes 107-08 and accompanying text.

31. If one prospective spouse lends the other money before marriage to start a business, the court might conclude that the business was community property, or that the spouses were partners. See In re Marriage of House, 106 Cal. App. 3d 434, 165 Cal. Rptr. 145 (1980).


33. See Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982).
III. Computing the Amount of the Community Claim

A. The All or Nothing Approach

When a separate property business increases in value during marriage, and a spouse has devoted a significant amount of effort to the business during this period, some mechanism must be developed to determine the amount of the community claim, if any, to the increase in value. Arizona and Nevada initially attempted to make an "all or nothing" determination regarding the increase in value. The courts in these states tried to determine what was the primary cause of an increase in value of a business during marriage. If the primary cause was the separate property capital, the increase was separate property; if the primary cause was the effort of one or both spouses, the increase was community property. Pursuant to this approach, courts developed rules of thumb for different types of businesses. An increase in value of a hotel or a nursery was deemed separate property; in contrast, increases in the value of pool halls, restaurants, saloons or bakeries were considered community property.

This all or nothing approach was not considered sufficiently precise in most community property states. Indeed, both Arizona and Nevada finally abandoned it. Most courts and writers agree that the all or nothing approach is not a good rule. The all or nothing approach

34. See Rundle v. Winters, 298 P. 929 (Ariz. 1931); Lake v. Lake, 18 Nev. 361, 4 Pac. 711 (1884).

The Louisiana approach was also effectively all or nothing under its former statute, Louisiana Civil Code article 2408. See Abraham v. Abraham, 230 La. 78, 87 So. 2d 735 (1956); Downs v. Downs, 410 So. 2d 793 (La. Ct. App. 1982). The current statute, article 2368, does not bar allocation between the separate and community estates. Article 2368 provides for reimbursement only for the increased value due to community labor. However, Louisiana courts may still be applying an all or nothing construction to this statute. See Guarisco v. Guarisco, 526 So. 2d 1126, 1130 (La. Ct. App. 1988). See also McKee v. McKee, 449 So. 2d 564 (La. Ct. App. 1984). Cf. Pellerin v. Pellerin 550 So. 2d 1250 (La. Ct. App. 1989).


35. See In re Estate of Torrey, 54 Ariz. 369, 95 P.2d 990 (1939).


38. See Cockrill, 124 Ariz. at 50, 601 P.2d at 1334; Johnson, 89 Nev. at 244, 510 P.2d at 625. See also Adler, Arizona's All-or-Nothing Approach to the Classification of Gain from Separate Property: High Time for a Change, 20 ARIZ. L. REV. 597 (1978).
allocates all of the increase to one estate or the other; no allocation is possible between the estates. This is an unrealistic zero-sum analysis. Common sense suggests that it normally would be more appropriate to allocate the increase between the two estates. Also, the all or nothing approach created an inflexible rule for all businesses of the same type, regardless of the economic circumstances existing during the marriage and the extent and value of the spouse’s efforts. Other approaches have been suggested that attempt to apportion the increase in value during marriage between the separate and community estates.

**B. The Van Camp Approach**

One method of calculating the amount of the community claim is derived from the California case *Van Camp v. Van Camp*.39 Under this approach, an attempt is made to determine the value of the spouse’s services rendered during marriage in connection with the separate property business. Once the value of the services is determined, any compensation received from the business by the spouse during marriage is deducted from this original figure.40 If the value of the services exceeds the compensation received, the community is entitled to be reimbursed by the owning spouse’s separate estate for the excess uncompensated contribution.41 The owner’s separate estate is entitled to all of the increase in value of the business during marriage. In other words, the separate estate is entitled to the increase in value of the business, less the uncompensated value of the spouse’s services. If the calculated value of the spouse’s services did not exceed the compensation received, there is no community claim.42

*Van Camp* is triggered when a spouse devotes services to separate property during marriage. The separate property does not have to in-

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40. The compensation received during marriage for services rendered during marriage is community property, so it is perceived to be reasonable to deduct these “advances” to the community estate from any reimbursement claim. See Gillespie v. Gillespie, 84 N.M. 618, 506 P.2d 775 (1973); Schulman v. Schulman, 92 Nev. 707, 558 P.2d 525 (1976); Wells v. Bank of Nevada, 90 Nev. 192, 522 P.2d 1014 (1974).
41. See Schulman, 92 Nev. at 707, 558 P.2d at 525. The reverse is not true. If the value of the services is less than the compensation, the community does not have to reimburse the separate property business.

Even if the spouse is adequately compensated, there can be a community property claim based on unreasonable retained earnings policy. See infra notes 145-65 and accompanying text.
crease in value; the concern is the value of the services provided. The owning spouse must devote time to the business, however; the services of other employees do not create a community claim.

The Van Camp approach does present some complexities. The main issue revolves around how one determines the "value" of services. On one hand, the value could be determined by considering how much the business would have had to pay a third party with background and experience similar to that of the spouse to perform the same services as the owning spouse. This analysis presumably would focus upon salaries in comparable businesses. Such an approach would have to consider the amount of time devoted by the spouse. For example, it should matter whether the spouse worked ten hours per week or seventy hours per week.

At least one writer has challenged whether this analysis accurately measures the "value" of the services rendered. Professor Brockelbank argued that an owner is always more concerned about the success of a business than a mere employee. Therefore the community claim would be undervalued if the "value" is computed based upon what an

43. One Texas case has suggested that it is not clear whether a Van Camp reimbursement claim can exceed the increase in value during marriage. Trawick v. Trawick, 671 S.W.2d 105 (Tex. Ct. App. 1984).

The Uniform Marital Property Act has accepted the view that a marital claim is created by services rendered during marriage only if the services increase the value of the separate (individual) property. UNIF. MARITAL PROPERTY ACT § 14, 9A U.L.A. 130 (1983); see infra note 193 and accompanying text.


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employee would earn to perform the same function.\textsuperscript{48} There could be some truth in this criticism. Still, compensation schemes for managers frequently incorporate a profit-sharing arrangement and/or performance bonus. It would seem that such compensation arrangements would reduce the difference in concern for the health of a business exhibited by an employee as opposed to an owner.\textsuperscript{49}

A related concern surrounding the application of Van Camp pertains to the choice of comparable salaries. For example, Vallone v. Vallone\textsuperscript{50} involved a restaurant started by the husband early in the marriage with $20,000 of capital.\textsuperscript{51} A decade later at the time of divorce, the restaurant was one of the most famous in Houston and was worth more than $1,000,000. The husband devoted a good deal of his time to managing the restaurant. How would one begin to determine a comparable salary? Would the relevant compensation level be that for a manager of an average restaurant or a successful restaurant? Would even the latter standard be appropriate here?\textsuperscript{52}

Some argue that a more precise standard for determining the value of the services rendered is the increase in value of the business.\textsuperscript{53} If this argument means that the value of the services is the total increase in value of the business during marriage, this would unfairly deny the separate capital any return during marriage. In many instances, it is appropriate to allocate the increase in value between the two estates. Still, the increase in value seems a relevant concern when valuing the services of a spouse, particularly when the spouse is the key employee of the business. In light of industry practice of giving employees bonuses based upon the profitability of the business or an increase in stock price, considering the profitability of the company or the increase in its value seems quite reasonable. So, a computation of the value of an employee's services could reasonably consider the profitability of the business and/or the increase in value of stock as a factor.\textsuperscript{54}

\textsuperscript{48} There is also a flip side to this argument. In Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984), the trial court determined that the spouse was adequately compensated, in light of his ownership interest in the business. The Texas Supreme Court concluded that this is not the appropriate standard. The test should be what would have been reasonable compensation for someone without an ownership interest and a percentage of the profits. The court concluded that the trial court test undervalued the community claim.

\textsuperscript{49} Of course, an owner might be personally responsible for losses, and an employee normally is not. This might make an owner more concerned about the continuing health of the business.

\textsuperscript{50} 644 S.W.2d 455 (Tex. 1982).

\textsuperscript{51} In this case, the capital was partially separate property and partially community property.

\textsuperscript{52} This may suggest that in a business such as this, where personal services are important and the amount of separate property capital is minimal, Pereira is the best approach. See infra note 131 and accompanying text.


\textsuperscript{54} For example, Hamlin v. Merlino, 44 Wash. 2d 851, 860, 272 P.2d 125, 129.
If the spouse receives a salary during marriage, this of course does not necessarily mean that the spouse was adequately compensated.\textsuperscript{55} A court must make an independent analysis of the issue.\textsuperscript{56}

No decision could be found that discussed whether under \textit{Van Camp} the amount of compensation determined to be reasonable should be adjusted for inflation for the period from the time services were rendered until the dissolution of marriage. This adjustment would be reasonable, in light of the \textit{Van Camp} purpose of compensating the community for the "value" of the services rendered.\textsuperscript{57} If the value is not adjusted for inflation (for the period between the date services were rendered and the dissolution of the marriage), this would not fully compensate the community.\textsuperscript{58} However, community reimbursement claims normally are not adjusted for inflation in community property states.\textsuperscript{59} Courts apparently have not adjusted the reimbursement award under \textit{Van Camp} for inflation.\textsuperscript{60}

An Arizona court recently applied the \textit{Van Camp} rule in a unique way. To determine whether the owning spouse was adequately compensated for his efforts during marriage on behalf of the separate property corporation, the court attempted to compare the value of the separate property capital to the value of the services.\textsuperscript{61} The court decided that the separate property capital was responsible for at least twenty-five percent of the increase in value, and that the services of the spouse were responsible for at least two-thirds of the growth. The court found (1954), contains the statement that "whether the [spouse's annual salary] is fair must depend largely upon the earnings of the corporation during [that] time."

However, Professor McKnight has opined that the increase in value of the business is irrelevant pursuant to the Texas permutation of \textit{Van Camp}. See McKnight, \textit{Family Law: Husband and Wife}, 38 Sw. L.J. 131, 139 (1984)


\textsuperscript{57} Indeed, it could be argued the rate of return should be compounded.

\textsuperscript{58} Under \textit{Van Camp}, the community does receive the "value" of the spouse's services without any offset for income taxes that would have been due on the salary if it had been actually paid. For example, in Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967), the court concluded that the claim should not be reduced for income taxes because no such taxes would in fact be due. One might argue that the lack of an inflation adjustment roughly offsets the windfall the community gets due to the tax-free award. In a marriage of long duration, however, this would not be true.

\textsuperscript{59} See Reppy, \textit{Major Events in the Evolution of American Community Property and Their Import to Equitable Distribution States}, 23 Fam. L.Q. 163, 180 (1989). The rules regarding reimbursement evolved in an era when deflation was encountered as often as inflation, so inflation was not perceived as an important issue. Current economic conditions make this "no inflation adjustment" rule more unfair.


\textsuperscript{61} See Rowe v. Rowe, 154 Ariz. 616, 744 P.2d 717 (Ct. App. 1987).
that the community was adequately compensated for the spouse's efforts because the amount distributed by the business during marriage (considering salary, pension and profit-sharing contributions) amounted to more than seventy-five percent of the earnings of the business and the increase in its goodwill.\(^6\) This is an unusual application of *Van Camp*. Courts normally support *Van Camp* because judges thereby avoid having to determine the relative value of the capital and the labor.\(^6\)

There is some confusion about what services are to be valued in connection with a *Van Camp* claim. In most states a minimal amount of effort devoted to separate property during marriage creates a community claim, and the claim is for the amount of the services.\(^6\) In Texas, a spouse can devote some time to separate property without creating a reimbursement claim.\(^6\) However, a reimbursement claim is created if the spouse devotes more time than that reasonably necessary to manage and preserve the property.\(^6\) The Texas Supreme Court has recently suggested that if a spouse devotes time, toil and talent to separate property, then the appropriate reimbursement measure is the value of the services rendered minus the value of what would have been merely reasonable management attention to manage and preserve the separate estate.\(^6\) If this approach is accepted, it is unclear how significantly the community claim would be reduced.\(^6\)

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\(^{62}\) An analogous case is *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. Ct. App. 1984). In that case the court took a deep breath and determined that the spouse's efforts caused 55% of the increase in value of the business during marriage. The community claim therefore was this amount, less any compensation received during marriage.

In *Jones v. Jones*, 67 N.M. 415, 356 P.2d 231 (1960), the trial court concluded that 50% of the increase in value was due to the owner's services, 10% was due to the other spouse's services, and 40% was due to capital. The New Mexico Supreme Court reversed, stating that the application of the *Pereira* approach was required, and that evidence would have to be given regarding the annual return that could have been realized during marriage on a long investment well secured. *Id.* at 420, 356 P.2d at 235.

\(^{63}\) *See Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).

\(^{64}\) *See infra* note 65 and accompanying text. In contrast, a marital property claim can be created under the Uniform Marital Property Act only where the spouse renders "substantial efforts." *See UNIF. MARITAL PROPERTY ACT§ 14, 9A U.L.A. 130 (1983).*

\(^{65}\) *See Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953).

In some other states, the community apparently has a claim whenever a spouse devotes any time to a separate property investment. *See Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967) (community entitled to reimbursement even where owning spouse devotes "minimal" effort); *Kenney v. Kenney*, 128 Cal. 2d 128, 274 P.2d 951 (1954) (community entitled to reimbursement for "comparatively insignificant" services). Pursuant to this rule, the calculation of the value of the owning spouse's efforts would be simpler, in that there would be no potential reduction for "reasonable" management efforts.

\(^{66}\) *See Jensen*, 665 S.W. 2d at 107.

\(^{67}\) *Id. See also*, *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1983).

\(^{68}\) *In Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. Ct. App. 1984), the court stated that no showing had been made in that case that the spouse's efforts "went beyond that necessary
Under *Van Camp*, the community claim is the difference between the compensation received by the spouse and the value of the services.\(^6^9\) However, if family living expenses during marriage were paid with separate property funds this can reduce the community claim. It is generally agreed that the community should bear the cost of family living expenses during marriage. If separate funds were used to pay family living expenses during marriage when there were no other community funds available, most courts agree that the *Van Camp* community claim should also be reduced by the amount of these family living expenses.\(^7^0\)

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for the maintenance of the company." *Id.* at 762. It is unclear how much time the spouse devoted to the company.

\(^6^9\) Compensation obviously includes more than monthly salary. Fringe benefits and pension contributions also are included in this amount. *See Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. Ct. App. 1984) (also mentioning the value of a company automobile, apparently to the extent that it was available for the personal use of the spouses); *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. Ct. App. 1984) (mentioning the value of club membership dues paid by the business). These benefits must benefit the community, however. So, a company car does not benefit the community, unless it is also available for personal use. Similarly, a company expense account does not benefit the community unless it was used to pay personal, rather than business, expenses. *See Trawick*, 671 S.W.2d at 105. Salary received by the nonowning spouse should be treated similarly. If the salary exceeded the value of the services rendered, this excess could also be offset against any community reimbursement claim. If the salary was equal to the value of the services, the salary should be ignored for purposes of the community reimbursement claim. *See id.* If the salary is less than the value of the services, the community would have an additional reimbursement claim for the excess value contributed by the nonowning spouse.

In *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984), the Texas Supreme Court stated that dividends received during marriage from the business should also be deducted from the "value" of the services when determining the net community claim. Texas is a civil law state; dividends received during marriage from a separate property corporation are community property. *See J. Oldham, supra* notc 1, at § 6.05. Obviously it would be inappropriate to deduct dividends from the community claim under *Van Camp* in states where rents and profits from separate property are separate property. Most cases regarding the *Van Camp* approach have arisen in California, a state where dividends from a separate property corporation are separate property. So, few civil law courts have considered whether it is appropriate to offset dividends paid under *Van Camp*. In addition to the *Jensen* case, a court in Louisiana, a civil law state, has stated that dividends received during marriage should be deducted from the reimbursement claim. *See Abraham v. Abraham*, 87 So. 2d 735 (La. 1956).

When computing a community reimbursement claim, courts frequently consider the offsetting benefits enjoyed by the community stemming from the separate property involved. *See J. Oldham, Texas Marital Property Rights* 202 (1987). It therefore probably is appropriate to offset the dividends received from the community *Van Camp* claim.


In *Beam*, the last major California Supreme Court discussion of this subject, the court stated that it did not have to decide whether these expenses would be offset in a "total recapitulation" manner (that is, comparing the *Van Camp* claim during the marriage to total family living expenses during the marriage) or whether some more frequent accounting should be done, such as year-by-year. *Beam*, 6 Cal. 3d at 21 n.6, 490 P.2d at 263 n.6 98 Cal. Rptr.
In California, a spouse's separate estate does not normally receive reimbursement if separate property rather than community property is used to pay family living expenses during marriage. The decision to contribute separate property when community property is available is deemed a gift. However, the Van Camp claim is determined at dissolution; until then, the amount of the community claim, if any, is unknown. Due to this uncertainty, a different rule was created for family living expenses paid with separate funds when calculating a Van Camp claim. The rule assumes that the paying spouse would have used community funds for the living expenses had he known of the additional community fund.

Professor Bodenheimer has criticized the family expense offset to the Van Camp award. In her view, the family expenses have already been deducted, because the size of the separate property estate is reduced due to the payment of the living expenses during marriage. This comment is simply wrong, as long as one accepts the Van Camp approach. Van Camp focuses upon the "value" of the spouse's services; the increase in value of the separate estate is not the focus.

Professor Bodenheimer encourages courts to review the spouses' expenditures to determine what expenses should be deemed "normal living expenses." This concern seems quite justified. For example, gifts to third parties should not be included in this amount. Professor Bodenheimer also questions whether all living expenses should be offset if the spouses enjoyed a comfortable lifestyle during marriage. This suggestion seems less desirable; if the spouses enjoyed a high standard of living during marriage, it does not seem unfair to offset these costs against any community claim.

Most cases discussing Van Camp involve situations where the community is seeking reimbursement for the owning spouse's services devoted to the business. Some situations present a possible reim-

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71. See Bodenheimer, supra note 16, at 396.
72. Id. at 399.
73. Under Pereira, the focus is the increase in value. See infra notes 81-111 and accompanying text. So, Professor Bodenheimer's concerns do have some relevance to the family living expense offset to the Pereira claim.
74. See Bodenheimer, supra note 16, at 400.
75. Id. at 394-400.
76. If most of the expenditures were for the benefit of only one spouse, however, this might be a reason not to include some living expenses in this offset.
77. Such claims would not be permitted under the Uniform Marital Property Act. A marital claim is created under that statute only where a nonowning spouse renders services.
bursement claim for the nonowning spouse’s services, however. For example, if the nonowning spouse worked for the business, it would be appropriate to create a community claim for the difference between any compensation received and the value of the services rendered. A few cases have mentioned situations where the nonowning spouse has participated in business entertainment relating to the separate property business. Such “services” are probably too attenuated to justify a Van Camp analysis. The Texas rule, that there will only be a community claim when services rendered to separate property by an owning spouse exceed what is necessary to manage and preserve the separate property, would not apply to services rendered by the other spouse. All services of the non-owning spouse rendered during marriage toward the other spouse’s separate property business presumably would create a potential reimbursement claim.

C. The Pereira Approach

The other approach that has been utilized to allocate the increase in value of a separate property business also stems from an old California case. In Pereira v. Pereira, the court described an allocation rule that focuses upon the separate property capital. A reasonable annual rate of return during marriage is credited to the initial amount of the separate property capital. The remainder, if any, of any increase in value of the business during marriage is allocated to the community. So, the community claim is the excess, if any, of the “value” of the business at divorce when compared to the value of the business at the time of the wedding (or when the business was begun after the wedding), plus the amount computed for the annual rate of return during marriage on that initial separate property amount. If the amount of the value of the separate property business at the time

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78. See Cockrill v. Cockrill, 139 Ariz. 72, 676 P.2d 1130 (Ct. App. 1983). See also Gutierrez v. Gutierrez, 791 S.W.2d 659 (Tex. App. 1990). Professor Bodenheimer has referred to some cases where the nonowner worked for the separate property business and these services did not create a community claim. See Bodenheimer, supra note 16, at 400. This is not consistent with general notions of the marital partnership.

79. See Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973). In Hoffmann v. Hoffmann, 676 S.W.2d 817, 826 (Mo. 1984), the Missouri Supreme Court concluded that a marital claim was not created by such services.

80. See Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982).

81. Cf. Gutierrez, 791 S.W.2d at 665. This assumes that Texas courts would not create a “de minimis” exception for reimbursement claims for services contributed by a nonowning spouse. Such an exception could simplify dissolution procedures where the community claim would not be significant.

82. 156 Cal. 1, 103 P. 488 (1909).

83. Note that this presents the goodwill issue discussed above. See, e.g., Jones v. Jones, 67 N.M. 415, 356 P.2d 231 (1960). See also supra notes 23-28 and accompanying text.
of marriage, plus the rate of return, exceeds the actual value of the business at the time of dissolution, there is no community claim.\textsuperscript{84}

In contrast to Van Camp, the Pereira approach does not focus upon whether the spouse was “adequately compensated” during the marriage. So, if the court decides to utilize the Pereira approach, the community can still have a claim even if it is established that the spouse was adequately compensated.\textsuperscript{85} Some opinions suggest, however, that if it is established that the spouse was adequately compensated, no community claim can exist.\textsuperscript{86} These opinions seem to allow the employee spouse to force the court to employ the Van Camp approach. This is inconsistent with the general rule that the court will determine which approach to apply.\textsuperscript{87}

An important issue presented by the Pereira approach is the appropriate rate of return.\textsuperscript{88} One possible measure is the legal rate of interest.\textsuperscript{89} Another possible yardstick is the rate of interest the community would have had to pay for a loan of such capital.\textsuperscript{90} Courts have also considered the “normal” growth rate of businesses of the type owned by the spouse during the period involved in the geographical area where the business is located. According to this view, if the spouse

\begin{itemize}
  \item \textsuperscript{87} See infra notes 122-137.
  \item \textsuperscript{88} One case has suggested that the separate estate should receive no return if the capital did not contribute to the increase in value. Austin v. Austin, 190 Cal. App. 2d 45, 11 Cal. Rptr. 593 (1961). In Austin, there was almost no separate property capital, so this conclusion would not have significantly affected any Pereira computation.
  \item \textsuperscript{89} See Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909) (seven percent interest); Price v. Price, 217 Cal. App. 2d 1, 31 Cal. Rptr. 350 (1963) (seven percent interest); Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967) (seven percent interest).
  \item \textsuperscript{90} See Gillespie v. Gillespie, 84 N.M. 618, 506 P.2d 775 (1973). If this standard is selected, the rate could vary during the course of the marriage. The standard should reflect the risk inherent in the advance of funds to a small business; therefore the rate would normally be higher than the prime rate.
  \item Some courts have announced that the appropriate rate of return is the prevailing rate for a well-secured investment. See Jones v. Jones, 67 N.M. 415, 356 P.2d 231 (1960); Randolph v. Randolph, 118 Cal. App. 2d 584, 258 P.2d 547 (1953); \textit{In re Neilon's Estate}, 57 Cal. 2d 733, 371 P.2d 745 (1962). This standard does not adequately compensate the separate estate, unless the business was established and successful at the time of the wedding. An investment in a small business frequently is much riskier than a “well-secured investment,” and should receive a higher rate of return.
\end{itemize}
possessed different types of separate property businesses, the rate of return selected for each business could be different.\textsuperscript{91} The rate of return selected for the business under this approach should be the average rate of return for that type of business.

If the rate of return selected is based upon that for similar businesses during that time, this could present some difficult issues. For example, assume that a spouse started a restaurant before marriage and continued to be actively involved with it during marriage. What is a "comparable" restaurant? In many areas, some restaurants become quite popular, while others quickly close their doors.\textsuperscript{92} The manner in which the "comparable" business is selected could significantly affect the rate of return computed for the separate estate.

Another relevant factor could be whether the company has made some long-term investments during marriage that will begin bearing fruit in the near future. If the value of the company at divorce does not adequately reflect these investments, this could be a reason to select a lower growth rate.

A California court has applied the \textit{Pereira} approach in an unusual manner. In \textit{In re Marriage of Folb},\textsuperscript{93} the court determined that the average rate of return on California real estate in that area during the period in question was fourteen to eighteen percent. The court then discounted the rate of return to twelve percent "because a portion of the [owner's] community services were devoted to the care, maintenance and development of his separate estate."\textsuperscript{94} This discount makes no sense. Under \textit{Pereira}, the community is already compensated via the difference between the value of the business at the time of divorce and the adjusted value of the separate property capital. There is no reason for an additional reduction in the rate of return due to the spouse's services.

The \textit{Folb} court also discussed whether the rate of growth of the separate capital should be compounded. Without explanation, the court concluded that compounding was inappropriate. This seems unfair. If the owning spouse had left the separate property capital in a bank account, the rate of return would be compounded, at least in an American rule\textsuperscript{95} state. Why punish the spouse for investing the funds in a business?

The applicable rule regarding the character of rents and profits generated from separate property during marriage is another factor that

\textsuperscript{91} See \textit{In re Marriage of Folb}, 53 Cal. App. 3d 862, 126 Cal. Rptr. 306 (1975) (regarding husband's real estate activities).

\textsuperscript{92} See \textit{generally} Paulsen, \textit{supra} note 53, at 693.

\textsuperscript{93} See \textit{In re Marriage of Folb}, 53 Cal. App. 3d at 862, 126 Cal. Rptr. at 306.

\textsuperscript{94} \textit{Id.} at 872, 126 Cal. Rptr. at 313.

\textsuperscript{95} In an American Rule state, rents and profits generated during marriage from separate property are separate property. See \textit{supra} note 18.
could affect the rate of return chosen under the *Pereira* approach. Five out of nine community property states (sometimes called “American rule” states) have decided that rents and profits from separate property should be separate property;

96 the other four (“civil law” states) have reached the opposite conclusion.97 Under *Pereira*, courts need to determine a reasonable rate of return for the separate property capital. Relevant to such a determination is whether only an inflation adjustment is intended, or an inflation adjustment plus a factor for the use value of the capital. In American rule states, because rents and profits from the separate property capital are also separate property, the rate of return chosen should include some factor for the value of the use of the capital. Because civil law states allocate to the community the value of the use of the separate property capital during marriage, a lower rate of return would be appropriate in civil law states.98

After a reasonable rate of return is determined, other complex issues can arise. For example, the court would need to decide whether the rate of return should be compounded.99 Also, because the community claim is the difference between the “value” of the business at the time of dissolution and the adjusted value of the separate property capital, the court would have to decide whether to include the value of the business’s goodwill in this calculation.100

A more fundamental question is posed when a court attempts to compute the “increase in value” of the business during marriage. Common sense suggests that the rate of increase in value for a business will vary during the marriage. This can be attributed to various factors. For example, the business cycle is not constant, particular industries do better at some times and worse at others, and a spouse might be more effective at one time as opposed to another.

Most courts have applied *Pereira* by comparing the value of a

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98. This will be discussed in detail below. See infra notes 145-65 and accompanying text.

99. See supra text accompanying note 95.

100. See supra notes 23-28 and accompanying text.

If the court does accept the view that “personal” goodwill can be marital property, it has been argued that the goodwill existing at the time of marriage (the separate property component) gradually dissipates during the marriage. Under this theory, even if the value of the goodwill remains relatively constant during the marriage, the community component might be increasing. So, the community could have a claim to *more* than the *increase* in value of the business during the marriage. *See In re* Marriage of Brooks, 51 Wash. App. 882, 888, 756 P.2d 161, 165 (1988) (summarizing trial court holding).
business at the time of marriage to the value at the time of dissolution. However, at least one court has suggested that a year-by-year accounting would be more fair.\textsuperscript{101} This distinction can be significant. Consider a simple example. Assume that a business is worth $10,000 at the time of marriage and that it is worth $12,000 at the time of divorce two years later. If the reasonable annual rate of return is ten percent, a normal \textit{Pereira} approach would lead to the conclusion that there is no community claim. This is true even if the value of the business did not increase at all during the first year, and increased $2000 during the second year. In contrast, in the latter example a yearly accounting would yield a community claim of $1000.

Critics of the yearly accounting approach argue that this would make the \textit{Pereira} calculation much more complicated.\textsuperscript{102} Many community property calculations are complicated,\textsuperscript{103} but this is not normally considered a reason to jettison the applicable rule. A more relevant concern is whether the annual accounting is more fair. For example, consider a business in the oil industry or some other cyclical business. If the business does not go up in value for a period and then significantly increases in value during a relatively short period, this does not necessarily mean that the community should have a greater claim than if the business realized the same increase in smaller increments over a longer period. In cyclical businesses, the rate of increase will vary.

There is another reason that courts might favor the duration of marriage accounting over a year-by-year approach.\textsuperscript{104} With year-by-year accounting, the nonowning spouse could have a community property right in the business before dissolution. This could permit creditors of the nonowning spouse to attach business assets.\textsuperscript{105} Also, this could complicate management rules regarding the business. If the business is 100% separate property during the marriage, the owning spouse has sole management power. The nonowning spouse might have management rights if the business is deemed partially community property during marriage.\textsuperscript{106}

If the business actually decreases in value initially and then in-

\textsuperscript{103} See generally J. Oldham, supra note 1, at § 7.10 (considering pension characterization and valuation).
\textsuperscript{104} See W. Reppy \& C. Samuel, supra note 3, at 138.
\textsuperscript{105} See id.
\textsuperscript{106} Some community property states have accepted the view that either spouse should be able to manage community property. See id. at 205.
creases in value, one court still applied a "duration of the marriage" approach.\textsuperscript{107} Therefore, if the business is worth $100,000 at the time of marriage, significantly decreases in value, and then increases in value to be worth $100,000 at the time of dissolution, there would be no community claim. If one accepts the argument that the owning spouse should not be punished for investing in a cyclical business, this probably is appropriate. One court applied a different approach if the business actually went bankrupt during marriage, and the spouse then started a new, similar business.\textsuperscript{108}

One case that appears to accept year-by-year accounting when applying \textit{Pereira} outlines a hypothetical accounting.\textsuperscript{109} If the increase in value during any year exceeds the chosen rate of return for the separate estate, the excess is allocated to the community. If the increase in value during any later year is less than the chosen rate, or if the business loses money, this loss is borne by the separate estate; the community claim is unaffected. This could be characterized as a "heads I win, tails you lose" approach from the perspective of the community,\textsuperscript{110} and therefore is unfair to the owning spouse's separate estate. It might be another reason why year-by-year accounting has not been accepted.

If separate property has been used for family living expenses during marriage, this raises another issue. The \textit{Pereira} claim should be reduced by these living expenses, as long as the separate property did not come from the business.\textsuperscript{111} However, if the living expenses were paid from distributions from the business, there should be no deduction.\textsuperscript{112} Such distributions would have reduced the community property claim under \textit{Pereira}, and the community thereby would have already indirectly borne the living expenses. Therefore the community should not be charged twice for the expenses.

\textbf{D. The Hybrid Approach}

A few courts have applied a combination of the \textit{Pereira} and \textit{Van Camp} approaches. First, the amount of separate property capital in

\begin{itemize}
  \item \textsuperscript{108} See \textit{In re Marriage of Winn}, 98 Cal. App. 3d 363, 159 Cal. Rptr. 554 (1979).
  \item \textsuperscript{110} See G. BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 255 (1988).
  \item \textsuperscript{111} See \textit{generally} Berry v. Berry, 117 Cal. App. 2d 624, 256 P.2d 646 (1953); \textit{In re Neilson's Estate}, 57 Cal. 2d 733, 371 P.2d 745 (1962). See \textit{also} Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971). The \textit{Beam} court merely states that family living expenses are to be deducted from the community claim under \textit{Pereira}. This only makes sense, however, if the living expenses were paid from separate funds not derived from the business.
  \item \textsuperscript{112} See \textit{In re Marriage of Frick}, 181 Cal. App. 3d 997, 226 Cal. Rptr. 766 (1986).
\end{itemize}
existence at the beginning of marriage is computed. After an appropriate rate of return is selected, the "separate property return" can be computed. The value of the spouse's services is then also computed. The income of the business is then shared between the community and separate estates based upon the ratio between these two amounts. For example, in *Todd v. Commissioner*, the court determined that the value of the separate property capital was $151,980 and the annual rate of return should be eight percent. The separate property return for that year was $12,158. The services were worth $10,000 per year. The separate property return was 54.87% of the sum of the two numbers, and the value of the services was 45.13%. The income of the business was $26,990. Thus, 54.87% was allocated to the separate estate and 45.13% of the income (or $12,818) was initially allocated to the community estate. However, family living expenses of $11,763 were paid by the owning spouse's separate estate, so the community claim was reduced accordingly. This hybrid approach could be useful in an American rule state, and for corporations in civil law states. However, few courts seem inclined to apply it.

**E. The Bodenheimer View**

Professor Bodenheimer is not enthusiastic about either *Van Camp* or *Pereira*. In her view, both approaches are complicated and unpredictable. She suggests an approach that would presumptively apportion all increase in value equally between the separate and community estates. She would give the court the right to consider the circumstances of each case to determine the relative value of the capital and the services rendered. If either the capital or services are deemed more important, the court could allocate a maximum of two-thirds of the increase to one estate. The community claim apparently would not be reduced by family living expenses. This would be a simpler approach. Still, it does lose some of

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113. 153 F.2d 553, 555 (9th Cir. 1945).
114. All profits of a separate property proprietorship business in a civil law state are community property. *See J. Oldham, supra* note 1, at 10-6. This is not true of separate property corporations. *Id.*
116. *Id.* at 409. Professor Bodenheimer also suggests some other approaches. *Id.* at 407-13. Professor Wenig apparently would allocate to the community all of the increase in value during marriage. *See Wenig, supra* note 4.
117. In any event, this concept is not mentioned.
118. Other suggested approaches are also relatively simple. For example, Professor Wenig apparently would allocate to the community all the increase in value of a separate property business during marriage. *See Wenig, supra* note 4. Such an approach would also not be very precise and would unfairly give no return to the separate property capital investment.
the attempt at precision incorporated into Pereira and Van Camp. Under Pereira, for example, the separate estate first receives a “rate of return” adjustment; all additional increase, regardless of the amount, is community. This rule reflects the common-sense notion that if the business did not increase in value a significant amount during marriage, the services probably were not worth more than amounts withdrawn from the business. Conversely, if there was a great increase in value, it seems likely that this was primarily due to the services.

For example, consider the situation in Vallone v. Vallone. In that case the capital contribution was about $20,000, and the restaurant was worth $1,000,000 in ten years. Under the Bodenheimer approach, the separate property claim is at least $333,000. This seems excessive. Similarly, consider the business that does not increase in value significantly during marriage. Professor Bodenheimer objects to giving the separate estate “preferential treatment” in this case. The separate estate is given preferential treatment, however, because in this situation it seems likely that the services were adequately compensated, or for some other reason did not contribute a great deal to the business.

Pereira permits the community to “roll the dice.” If the increase in value during marriage is high, the community claim is high. If the increase is small, the community probably has no claim. This generally seems fair, and where it seems unfair in a particular situation, a Van Camp approach could be considered.

F. Choosing the Correct Allocation Approach

The amount of the community claim can vary widely, based upon whether Van Camp or Pereira is applied. As a general rule, if the business increased greatly in value during marriage, Pereira yields a larger community claim; if the increase in value was small, Van Camp normally creates a larger community claim. It can make a great deal of difference, therefore, whether a court applies Pereira or Van Camp. For example, consider a situation like Vallone v. Vallone, where a spouse invests a minimal amount of separate property capital (in Vallone the investment was approximately $20,000). Ten years later the business is worth $1,000,000. Applying Pereira, even if the initial investment were all separate property, with a ten percent simple interest rate of return the community claim would be $960,000. Under Van Camp,

119. 644 S.W.2d 455 (1982).
120. For example, a 30% annual rate of return on capital is considered unusually high. Without compounding, $20,000 would become $80,000 with a 30% annual rate of return over 10 years.
121. See Bodenheimer, supra note 16, at 402.
122. 644 S.W.2d 455 (Tex. 1982).
123. If family living expenses were paid with separate property, this would be offset against the community claim.
if the spouse is deemed adequately compensated the community would receive nothing.

Texas has approved only Van Camp.\(^{124}\) Therefore the choice of allocation approach in Texas is much simpler. Most states have accepted both Pereira and Van Camp;\(^ {125}\) the applicable rule in these other states is less clear.

The California Supreme Court has suggested that a court should choose the approach that will "achieve substantial justice" between the spouses.\(^ {126}\) This rule, without further embellishment, provides no guidance. One Nevada case announced that Pereira is the "preferred method" "unless the owner of the separate estate can establish that a different allocation is more likely to accomplish justice."\(^ {127}\) This is probably a reasonable rule, as long as the Pereira rate of return selected is truly representative of similar businesses during the time involved. Any variation from that rate of return could reasonably be attributed to the spouse's efforts. According to this approach, how would an owning spouse convince a court that Van Camp should be applied? If the Pereira rate of return is calculated based upon the legal rate of interest or the prime rate, and the industry involved was booming during the marriage, a spouse should be able to show that this variant of Pereira would be unfair to the owning spouse's separate estate. It does seem possible to convince a court that the application of Pereira would be unfair in certain circumstances, even if Pereira is considered the preferred approach. For example, even though Pereira has been designated the preferred approach in Nevada, a number of Nevada appellate cases have approved the application of Van Camp.\(^ {128}\)

Another suggested approach focuses upon whether the separate property capital or the efforts of the spouse were the chief contributing factor to the profitability of the business.\(^ {129}\) If the former is established, Van Camp should be applied; if the latter is true, Pereira.\(^ {130}\) If the

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125. See W. REPPY & C. SAMUEL, supra note 3, at 131-56.
129. See In re Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); Beam, 6 Cal. 3d at 19, 490 P.2d at 262, 98 Cal. Rptr. at 142; Schulman, 92 Nev. at 707, 558 P.2d at 525.
130. See, e.g., Logan v. Forster, 114 Cal. App. 2d 587, 250 P.2d 730 (1952); Schulman, 92 Nev. at 711 n.2, 558 P.2d at 528 n.2; In re Marriage of Lopez, 38 Cal. App. 3d at 106, 113 Cal. Rptr. at 66.

Not all courts accept this approach, of course. For example, in Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973), the court applied a Van Camp approach even though the court found that the primary cause of the increase in value was the labor of the spouse.
increase in value during marriage was substantial, the application of Van Camp normally would create a smaller community property claim than Pereira. So, this approach could be seen as allocating the bulk of the increase in value based upon which estate was the chief contributing factor to the increase in value. Professor Reppy has suggested that the rule should be stated to ensure this result. So, if capital is the chief contributing factor, the approach should be applied that yields the greatest separate property claim; if services are the chief contributing factor, the approach should be selected that provides the largest community claim.131

Neither Pereira nor Van Camp is very precise. It sometimes can be quite hard to determine the true “value” of the services rendered, just as it might be difficult to determine the growth rate of “comparable” businesses. For this reason Professor Reppy’s formulation is the best way to resolve this difficult problem.

Texas courts, however, apparently cannot apply the Reppy approach.132 In Jensen v. Jensen,133 the court announced the first detailed Texas Supreme Court discussion of how the community claim should be computed when a spouse devotes services to improve a separate property business. The court concluded that the community should be reimbursed for the “value” of the spouse’s efforts less any compensation received. Little guidance was provided regarding how a court is to determine the value of the services. The opinion suggests that the relevant comparison would be the compensation that an employee would have received to perform the services provided by the spouse.134 Although the court did not cite any California cases, this sounds very

However, Idaho has never approved of Pereira. A few courts have suggested that Pereira should be applied if the capital is the chief contributing factor, and Van Camp should be applied if the efforts are most important. See Beam, 6 Cal. 3d at 19, 490 P.2d at 262, 98 Cal. Rptr. at 142; In re Marriage of Brooks, 51 Wash. App. 882, 888 n.5, 756 P.2d 161, 164 n.5 (1988). This approach seems simply wrong. If the business increased in value significantly during marriage, this approach would give the community the greatest claim when the separate capital was most important, and would give the separate estate the greatest claim when the efforts were most important.


132. Even though there was a finding in Jensen, that the value of the company increased “primarily” due to the efforts of the owning spouse, the court appeared to adopt a Van Camp allocation approach.

133. 665 S.W.2d 107 (Tex. 1984).

134. The opinion declares that under this approach it will not be necessary to determine “what factors actually contributed to the increase in value and in what proportion.” Id. at 109.

A prior withdrawn version of the opinion stated that the increase in value of the stock was a “factor” that could be considered when evaluating the services. See Paulsen, supra note 53, at 680. This portion of the opinion was deleted from the final version; the significance of the deletion is unclear.
much like a Van Camp approach; no mention is made of a Pereira alternative. So, it appears that Texas courts must apply Van Camp.

The court in Jensen emphasized that it was applying a "reimbursement" approach, as opposed to a "community ownership" approach. It is not clear what the court meant. The court did imply that, under a "community ownership" approach, a court would have to determine how much of an increase in value during marriage was attributable to services and how much was attributable to separate property capital. The "reimbursement" approach was adopted to avoid this problem.

The Texas Supreme Court did not address the crucial point presented by these cases. How can a reasonable amount of the increase in value of the business be allocated to the separate property capital provided by the owning spouse while also ensuring that the community will be fairly compensated for the efforts expended? It is possible that the court was intentionally vague in this first Texas discussion of the problem, and will give more guidance later. The vagueness of the Jensen opinion, however, has generated spirited debate in Texas about the appropriate means of determining the "value" of the services contributed by the owning spouse. Some contend that the value of the services should be computed based upon the increase in value of the business during marriage. This is not how Van Camp normally is applied. Under normal Van Camp analysis, the increase in value would only be considered as a factor when determining the value of the services, in light of the industry practice of compensating employees in terms of a percentage of profits or an increase in the stock price.

G. The Reverse Allocation Problem

So far this Article has dealt primarily with a community property claim for services contributed to a spouse's separate property business.

135. Reimbursement claims normally are determined at the time of marriage dissolution. (Also, reimbursement frequently is associated with the inception of title characterization rule. See J. Oldham, supra note 1, at 7-23.) In states that accept pro rata ownership characterization (when separate property and community property are both contributed to purchase an item over time), these rights come into being immediately when the contribution is made, not at the time of dissolution. It does not appear that the court was referring to this distinction between reimbursement and ownership.

Also, under a pro rata ownership system, the community in theory could own a portion of the business at the time of divorce. The court might be concerned that the spouses should not continue as co-owners of the business after divorce, and that a reimbursement money judgment or offsetting award of property would be a more workable system. Still, it is rare for courts to approve a property award where spouses continue as co-owners of property after divorce; most courts attempt to effectuate a "clean break" between the spouses. The significance of this distinction is discussed infra at notes 177-189 and accompanying text.

136. See Paulsen, supra note 53, at 697 nn.240 & 241 (referring to comments by Donald Smith, Fred Weekley and Thomas Featherston).

137. See supra notes 45-54 and accompanying text.
The same problem can be confronted if separate property efforts are contributed to a community property business. This problem is not frequently encountered because the efforts of each spouse during marriage normally are considered a community asset.

California once again provides an example of this allocation problem. In California, spouses cease accumulating community property after a permanent separation. So, if a spouse continues to devote time, toil and talent to a community property business after separation, the spouse is contributing separate property effort to the community property business. This creates what might be called a reverse allocation problem. The separate estate of the spouse providing services has a potential claim. The amount of the claim could be computed either pursuant to Pereira or Van Camp. In other words, the separate property claim could either be (1) the “value” of the post-separation services, less any actual compensation received during this period, or (2) the excess value computed by comparing the value of the business at the time of divorce to the value of the business at the time of separation, plus a reasonable rate of return for the period between the date of separation and the date of divorce.

H. The Business Started Before Marriage and Incorporated During Marriage

A business started before marriage is almost always the separate property of the owning spouse at the time of the wedding. The community can gain an interest in the business, of course, based upon what happens during the marriage. If community funds or services are invested in the business, this can create a community claim.

A spouse sometimes changes the organizational form of the business during marriage. The most common change is an incorporation of what previously was a proprietorship. Corporations normally are characterized based upon whether separate property or community property consideration is given for the stock. When a previously existing business is incorporated, the assets of the business normally are conveyed to the corporation in exchange for the stock. To char-

140. In California, salary received by a spouse after separation is separate property, so this should be offset against any separate property claim for services rendered during this period. See Cal. CIV. Code § 5118 (West 1983).
141. See Allen v. Allen, 704 S.W.2d 600 (Tex. Ct. App. 1986). Of course, the character of the stock could later be transmuted as a result of the behavior of the parties. See Oldham, Tracing, Commingling and Transmutation, 23 Fam. L.Q. 219 (1989).
acterize the stock, one must first determine the character of the proprietorship assets conveyed.

In Rowe v. Rowe, the spouse started a manufacturers' representative business ten years before marriage. Six months after the wedding, the spouse incorporated the business. The spouse was actively involved in the business. The spouse conveyed the assets of the proprietorship for the stock. In order to characterize the stock, the character of the assets conveyed must be determined. To do this, a Pereira/Van Camp analysis must be made, based upon the months between the beginning of the marriage and the incorporation. The court determined that the business did not increase in value during that period and that the spouse was adequately compensated by the business. Therefore there was no community claim under either Van Camp or Pereira for the preincorporation period, and the stock was 100% separate property.144

I. The Profits of the Business

Profits from separate property are not uniformly characterized in community property states. Civil law states treat the profits as community property; American rule states reach the opposite conclusion.145 The civil law rule has weak policy justification. Rents and profits generated from separate property normally require no effort. For example, interest earned on a separate property bank account or cash dividends on separate property corporate stock are "profits." It is difficult to see why the "marital partnership" should have a claim to these assets.

The civil law rule probably was devised as a way to create some

143. Id.

144. Id. at 620-21, 744 P.2d at 721-22. This analysis would be more complicated in a civil law state where all profits of a separate property proprietorship are community property. In these states, the community would have a claim to the profits of the proprietorship business during marriage regardless whether the spouse was adequately compensated. See Josephson v. Josephson, 115 Idaho 1152, 772 P.2d 1236 (Ct. App. 1989). Commingling issues therefore could arise. See Gibson v. Gibson, 202 S.W.2d 288 (Tex. Civ. App. 1947); Oldham, supra note 141; Reed v. Reed, 762 S.W.2d 78 (Mo. Ct. App. 1988) (the same problem considered in an equitable distribution proceeding). Arizona is an American rule state, so these problems were avoided in Rowe.

145. See supra note 18. Although Arizona is an American rule state, there is language in some Arizona cases that suggests that profits of a separate property proprietorship business will be community property if they result from the efforts of a spouse. See Porter v. Porter, 67 Ariz. 273, 195 P.2d 132 (1948); Nelson v. Nelson, 114 Ariz. 369, 560 P.2d 1276 (Ct. App. 1977). However, these opinions normally involved situations where the spouse was not compensated for the services during marriage. If the spouse was adequately compensated, the profits are separate property. See id.; Nace v. Nace, 104 Ariz. 20, 448 P.2d 76 (1968); Lincoln Fire Ins. Co. v. Barnes, 53 Ariz. 264, 88 P.2d 533 (1939).

Although Washington is an American rule state, similar language is found in a few Washington cases about the community character of profits arising from unincorporated businesses. See In re Estate of Smith, 83 Wash. 2d 629, 440 P.2d 179 (1968).
community in those marriages where neither spouse earns a wage, but one spouse has a substantial separate estate. This may have been a significant concern a century or two ago, but hardly seems a common problem today. Almost all married couple households have at least one wage earner. Those households that do not have at least one wage earner are not coupon clippers; almost all are either poor or retired couples paying living expenses with social security checks. The civil law system may have been a good idea a century ago, but it now is difficult to justify. It seems unreasonable to structure a system to deal with the anomaly (the family with no wage earner) rather than the common situation; this may be why five community property states have not accepted this portion of the community property heritage. In any event, the civil law system does prevail in four community property states, and it must be determined whether additional allocation problems are presented in these states.

If a spouse living in a civil law state works for a separate property business during marriage, a community claim could stem either from

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146. In March 1988, in 83% of all married households in the United States either the wife, the husband or both were in the labor force. (This unpublished information was provided to the author by Mr. Howard Hayghe of the Bureau of Labor Statistics, Washington, D.C.)

147. A recent Bureau of Census report estimated that there are approximately 51,352,000 married families in the United States. Of these families, approximately 6,750,000 have no worker in the household. Of these families, 905,000 have a family income below the poverty level. See Money, Income and Poverty in the United States: 1988, 71 (1988) (Table 22).

The report does not shed a great deal of light on the other 86.6%. The report does state that the median income for a married couple household where neither spouse works is $18,091. Id. at 40 (Table 9). This is consistent with the notion that most of the people in this group are retired people living on Social Security payments. However, the data certainly do not prove this. Approximately 546,000 married couple families with no worker have incomes above $50,000. Id. This suggests that there are some relatively wealthy people in this group.

148. Not all writers are in agreement on this point. See Bodenheimer, supra note 16, at 405; Wenig, supra note 4.


There may be another explanation for the American acceptance of the civil law rule in some states. Community property courts in America initially were hesitant to create a community claim if a spouse devoted efforts to separate property during marriage. See Reynolds, Increases in Separate Property and the Evolving Marital Partnership, 24 Wake Forest L. Rev. 239, 263 (1989). In the nineteenth century, this problem frequently was encountered when a spouse devoted significant efforts during marriage to a separate property farm or small business. Because the community property system at that time was reluctant to give the community a claim based upon the value of the efforts, the civil law system may have been accepted so that the community would receive an indirect claim (via the profits) for the value of the efforts contributed to the separate property. It may have been thought that the profits roughly equaled the value of the efforts rendered. If the civil law system was accepted for this reason, the community should not receive both a claim for the profits of a small business and a recovery for the value of the efforts.

150. Idaho, Louisiana, Wisconsin and Texas accept the civil law system. W. Reppy & C. Samuel, supra note 3, at 131. A number of common law equitable distribution states also accept this rule when determining property that is divisible at divorce. See J. Oldham, supra note 1, at § 6.05.
efforts contributed to the business or from profits from the business. In an American rule state, the community claim can only stem from services (or invested community funds); no claim to profits is possible.\textsuperscript{151}

In civil law states, the form of business organization selected by the owner has had a significant effect upon community property rights. This stems from the different attributes of various business forms. For example, for many purposes a corporation is perceived as a separate entity, while a proprietorship is not. This distinction has had a great effect upon the characterization of business profits. In civil law states, net profits of a proprietorship business are community property when earned. It does not matter whether the business retains the profits or pays them to the owner. The profits are immediately attributable to the owner. In contrast, profits of a corporation are attributed to the corporate entity.\textsuperscript{152} The community does not have a right to such profits unless and until they are paid in the form of dividends.\textsuperscript{153}

Treatment of separate property partnership interests has not been consistent in civil law states. For example, before the adoption of the

\begin{footnotesize}
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\item[151.] Cf. In re Estate of Smith, 73 Wash. 2d 629, 440 P.2d 179 (1968). See supra note 145.
\item[152.] See Scofield v. Weiss, 131 F.2d 631 (5th Cir. 1942).
\end{enumerate}
\end{footnotesize}
Uniform Partnership Act, Texas courts treated partnerships as aggregates.\textsuperscript{154} So, if the partnership purchased something before the marriage, and then sold it after marriage, the sales proceeds normally were deemed separate property natural enhancement (as long as the spouse did not contribute services), even if the proceeds were distributed to the partner during marriage.\textsuperscript{155} The adoption of the UPA apparently has changed the Texas approach. Partnerships are now treated as separate entities; distributions to a partner during marriage stemming from the partner's separate property partnership interest are deemed "profits" of the spouse's separate property, regardless whether the source of the proceeds was an asset purchased before marriage.\textsuperscript{156} All such distributions are community property in Texas, because Texas is a civil law state. This "entity" characterization approach suggests that, similar to the separate property corporation, the community would not have a claim to undistributed partnership profits.\textsuperscript{157}

This distinction between proprietorships and corporations initially seems arbitrary.\textsuperscript{158} Still, a number of problems would be created by trying to create a different rule. For example, suppose that a rule were announced that all corporate profits attributable to separate property stock are community property, regardless of the amount paid as dividends. Would this rule apply to the owner of IBM stock purchased

155. See Norris v. Vaughan, 260 S.W.2d 676 (Tex. 1953); Smoot, 568 S.W.2d at 177.

A related issue is whether profits of the partnership that are retained by the business and not distributed to the partners would be community property. In other words, would the partnership profits be treated like a proprietorship or a corporation. If the state chooses the former rule, then it might be relevant whether a corporation makes an "S" corporation election for tax purposes. Such corporations are treated like partnerships, for tax purposes. One might argue that the "S" corporation should also be treated like a partnership for marital property purposes as well. See Thomas v. Thomas, 738 S.W.2d 342 (Tex. Ct. App. 1987) (not accepting this argument).


This issue would not arise in an American rule state, because rents and profits are also separate property. See Stice v. Stice, 81 Cal. App. 2d 792, 185 P.2d 402 (1947). Cf. supra note 145.

The Wisconsin Supreme Court has considered this issue in a divorce case. In Wisconsin, property received by one spouse by gift from a third party generally cannot be divided at divorce. Wis. Stat. § 767.255 (1987-1988). Rents and profits from such property are divisible at divorce if the rents and profits were received by the spouse. Arneson v. Arneson, 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984). In Wierman v. Wierman, 130 Wis. 2d 395, 387 N.W.2d 744 (1986), the Wisconsin Supreme Court decided that undistributed partnership profits accruing during marriage were not divisible if the partnership interest was received by one spouse as a gift from a third party (at least if the spouse did not render services to the partnership and did not control distribution policy).

158. See, e.g., Bell v. Bell, 504 S.W.2d 610, rev'd on other grounds, 513 S.W.2d 20 (Tex. 1974); Comment, *Profits and Increases in the Value of Partnerships and Corporations as Governed by Community Property Law*, 36 Tex. L. Rev. 187 (1957).}
with separate funds? That would seem undesirable, as well as fairly complicated, so a different rule would be needed for small businesses, as opposed to corporations with many shareholders. This problem can be addressed in other ways that create fewer problems.

The corporate profits issue really presents two issues. The easiest issue pertains to the community claim to retained earnings of a separate property corporation where the owning spouse controlled the dividend policy during marriage and severely limited the dividends paid by the corporation. In civil law states at least one court was willing to fashion equitable remedies for this type of fraud on the community.

The harder question pertains to whether in civil law states the community should have a claim to all the profits of the closely held business, regardless whether the spouse is attempting to defraud the community with a restrictive dividend policy. The argument for no community property claim is that all profits of IBM are not attributed to the owner, so the same result should occur for closely held businesses. The opposing view would focus upon the rules applicable to proprietorships, and argue that the closely-held corporation should be treated identically.

159. For purposes of equitable distribution at divorce, Minnesota apparently has adopted a rule regarding retained earnings of a separate property corporation that apparently treats the retained earnings differently based upon whether the spouse was actively involved with the corporation. Compare Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987) with Duffey v. Duffey, 416 N.W.2d 830 (Minn. Ct. App. 1987). This might be another sensible way to deal with problem in civil law community property states.


In Pellerin v. Pellerin, 550 So. 2d 1250 (La. Ct. App. 1989), the court considered whether the owning spouse defrauded the community estate by causing the spouse's separate property corporation not to pay dividends. The court concluded that the dividend policy was justified by business reasons, and was not a result of the husband's intention to defraud the community. See also Josephson v. Josephson, 115 Idaho 1152, 772 P.2d 1236 (Idaho Ct. App. 1989). In both Pellerin and Josephson, neither controlled corporation ever paid a dividend during marriage. Still, in both cases no community claim arose. The courts seemed to require a showing of an actual intent to defraud the nonowning spouse in order to establish a community claim. The owning spouse's claim that the funds were retained in the corporation to avoid additional taxation was considered adequate justification for the lack of dividends. See Pellerin, 550 So. 2d at 1250. If this is true, the judicial review of dividend policy appears useless as a safeguard. The Texas Supreme Court in Jensen did not have to address this issue, in light of the jury finding that the dividend policy was fair. Also, the Idaho Supreme Court did not have to consider this in Wolford v. Wolford, 117 Idaho 61, 785 P.2d 625 (1990), because the spouse had agreed that rents and profits of separate property would be separate property. Id. at 626.

In Hoffmann v. Hoffmann, 676 S.W.2d 817 (Mo. 1984), for purposes of equitable distribution the Missouri Supreme Court decided that the retained earnings of the separate property corporation were separate property because the spouse did not control the dividend decision. See also J.D.P. v. F.J.H., 399 A.2d 207 (Del. 1979), where the Delaware Supreme Court concluded that the retained earnings of a separate property corporation could be included in the marital estate at divorce if the spouse controlled the dividend decision during marriage.
It is surprising that few civil law courts have considered this issue.\textsuperscript{161} The most celebrated case is \textit{Speer v. Quinlan}.
\textsuperscript{162} In that case, the company had accumulated significant after-tax retained earnings. The owning spouse controlled the dividend decision, but no argument was made that the sizeable amount of retained earnings generated during marriage was the result of a dividend policy intended to defraud the wife. Even though no fraud on the community was alleged, the supreme court directed the trial court on remand to determine what portion of the earnings of the company should be deemed "distributable earnings."\textsuperscript{163} The court provides no guidance regarding what it means by this. It is not clear whether all retained earnings are distributable earnings, or whether the court is only referring to some portion of the retained earnings that may exceed a "reasonable" amount.

The \textit{Speer} case is authority for the view that community property divorce courts in civil law states can review a closely held corporation's dividend policy and create a community claim for retained earnings in some circumstances, even if fraud on the community is not alleged. Presumably the remedy could either be an unequal division of property (not available in Louisiana), reimbursement or alimony (not available in Texas). This is one way to compensate the community for the corporation's retained profits and to minimize the difference between the treatment of proprietorships and corporations.

The profits issue could also be approached via a \textit{Pereira} apportionment. Under \textit{Pereira}, all increase in value is allocated to the community, other than the reasonable rate of return provided for separate capital.\textsuperscript{164} If \textit{Pereira} is selected, and the business substantially increases in value during the marriage, all (or almost all) profits would be allocated to the community, even if the profits were retained by the corporation. So, the profits issue normally could be avoided in civil law states by applying \textit{Pereira}.\textsuperscript{165}

\textbf{J. The Unique Business Opportunity Problem}

Most courts and commentators agree that a spouse's separate estate should receive an inflation adjustment for the separate capital invested, as well as (in American rule states) an allocation for the rents and profits
attributable to the capital. There has been some disagreement regarding what should occur if it is determined that a spouse found a unique business opportunity before the marriage, and this is the primary reason the business increased in value.\textsuperscript{166} The Texas Supreme Court apparently\textsuperscript{167} concluded that the "unique business opportunity" factor was a separate property contribution.

The unique business opportunity notion could be incorporated into existing \textit{Pereira} analysis. For example, to apply \textit{Pereira} one needs to value the separate property capital at the time of marriage. If the spouse purchased a business at a favorable price before marriage, the separate property contribution is not the price paid, but the value of the business at the time of marriage; the spouse's separate estate therefore would be compensated for the advantageous purchase. Also, if the unique opportunity is that the spouse foresaw that a particular type of business would be unusually profitable, and this occurs during the marriage, a higher rate of return could be selected to reflect this favorable business environment.

\textit{K. What Situations Present a Pereira/Van Camp Issue?}

The community apparently has a claim in all states when the owning spouse renders more services than are necessary to manage and preserve the separate property. Other states permit a claim whenever a spouse devotes services to separate property, regardless of the amount.\textsuperscript{168}

In most cases that discuss \textit{Van Camp} or \textit{Pereira}, the owning spouse has devoted a substantial amount of time to the separate property business, and has not earned wages at another job. There clearly is a need to create a community claim in this situation; otherwise the community would have no claim to anything derived from the efforts of that spouse during marriage. However, consider what should occur if the spouse devotes time to a separate property business \textit{in addition to} working a full-time job.\textsuperscript{169} In this situation, the community would enjoy the spouse's wages from the full-time job. Should the community still have a claim to the separate property business? The equities in this situation are less clear. On one hand, it might be argued that if a spouse worked at a second job during the marriage, the wages would clearly be community property; the community is not limited to wages for a

\textsuperscript{166} See Paulsen, \textit{supra} note 53, at 667 (mentioning the Texas Supreme Court oral argument in \textit{Jensen}).

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} See \textit{supra} note 65.

forty-hour week. If this view prevails, and it probably would,\textsuperscript{170} for purposes of \textit{Pereira/Van Camp} analysis it would be irrelevant whether the owning spouse worked at a full-time job. If a court did not accept this view, and decided to distinguish between the situation where the owning spouse has a full-time job during the marriage and when the spouse doesn’t have another job, the court should consider whether the spouse’s potential rate of advancement at the full-time job was slowed by her commitments to the separate property business.\textsuperscript{171}

It seems wise not to create a community claim in every situation where a spouse devotes efforts to separate property during marriage. Separate property requires some management. For example, a real estate investment must be maintained and rented. Also, a spouse must from time to time decide how to invest the separate property. Some cases suggest that a community claim arises whenever \textit{any} efforts are expended. So, for example, if the spouse reads the Wall Street Journal and some other investment material to decide how to invest separate property, a community claim would be created.\textsuperscript{172} Collecting rent and renting real estate would also create a claim. This seems both unfair and unwise. If a community claim would be created whenever efforts are devoted to separate property, a great number of reimbursement issues would arise at divorce if either spouse owned separate property. These additional matters would significantly complicate the property settlement process. These complications seem unwarranted where the time expended was slight. Also, such a rule would not be consistent with the expectations of most spouses. A basic tenet of the “marital partnership” system is that a spouse can retain ownership of property acquired before marriage. The expenditure of minimal management efforts during marriage should not justify an exception to this general rule. Most such spouses will also be working outside the home during marriage earning a wage which will benefit the community. There is no need to strain to find an additional community claim due to management efforts of a spouse regarding the spouse’s separate property, as long as those efforts are minimal.\textsuperscript{173}

\textsuperscript{170} For example, a similar issue is presented if a spouse who works at a full-time job also renovates separate property realty on the weekends. Most courts assume that there is a potential community reimbursement in this situation. See Rogers v. Rogers, 754 S.W.2d 236 (Tex. Ct. App. 1988).

\textsuperscript{171} A court might also consider any additional burdens imposed upon the other spouse due to the extensive work responsibilities.

\textsuperscript{172} See In re Ney’s Estate, 212 Cal. App. 2d 891, 28 Cal. Rptr. 442 (1963). Professor Reynolds apparently endorses this approach. See Reynolds, supra note 149.

\textsuperscript{173} Many equitable distribution states create a reimbursement award for the marital estate at divorce only when the spouse’s efforts devoted to separate property were significant. See J. Oldham, supra note 1, at 10-19. It seems likely that this system was selected due to the concerns discussed in this paragraph of the text.

Similarly, the Wisconsin version of the Uniform Marital Property Act accepts the idea
If the spouse is operating a separate property business, however, the
equities change. The spouse is no longer rendering minimal
management efforts; a significant amount of the spouse's time is devoted
to the business. In this situation, it seems more appropriate to create
a community claim. The spouse, in many instances, will not have
another job. Even if the spouse does have another job, the commit-
ments to the separate property business normally would limit the
spouse's prospects at the second job, thereby affecting the wages the
community receives. So, if the spouse devotes more than a minimal
amount of time to the separate estate, a reimbursement claim should
arise.\textsuperscript{174}

\textbf{L. Personal Guarantee of a Business Debt}

Sometimes a spouse or both spouses guarantee a business debt. If
the business is one spouse's separate property, this raises the question
whether the guarantee executed during marriage is a community con-
thtribution for which the community should be compensated. If the busi-
ness does not pay the loan and community assets are attached, there
clearly is a community contribution. A more complex question is pre-
sented where the business repays the loan, and the only community
"contribution" is the guarantee.

In most instances where the community gains an interest in prop-
erty via a credit contribution, the community either executes the note,
or makes payments with community property. I have discovered no
case that gives the community some claim merely for an individual
guarantee of a corporate debt.\textsuperscript{175} Such a personal guarantee could be
considered merely an accommodation of no real significance. Still, it
does appear that the community is making some contribution to the
business by executing the guarantee. Presumably the lender might not
have made the loan to the business but for the guarantee. If it is accepted
that such a guarantee is a community contribution, some means must
be found to place a value on the contribution. Also, it would have to

\textsuperscript{174} See, e.g., Vallone v. Vallone, 644 S.W.2d 455 (Tex. 1982). This rule would create
the issue whether the reimbursement award would be for the total value of the services
rendered, or whether there would be an offset for the value of reasonable minimal management
services. See note 65 supra and accompanying text. The former approach would be the most
workable.

\textsuperscript{175} See, e.g., Faulkner v. Faulkner, 582 S.W.2d 639 (Tex. Civ. App. 1979). However,
In re Marriage of Zaentz, 218 Cal. App. 3d 154, 267 Cal. Rptr. 31 (1990), the court did award
the community $600,000 due to among other things, the husband’s personal guarantee of
certain obligations relating to his separate property corporation, as well as the pledge of
community assets to secure these obligations.
be determined whether any benefits that the community received from the business, such as compensation\textsuperscript{176} or dividends (in a civil law state), might be an offset to the community claim.

\textbf{M. Is the Community Claim a Reimbursement or an Ownership Claim?}

Most courts attempt to evaluate whether there is a community claim to a separate property business (as a result of the spouse's efforts) when the marriage is being dissolved. Only a few courts expressly address whether this is a community "ownership" interest or a "reimbursement" claim. This distinction could have some significance.\textsuperscript{177}

Community ownership claims are vested, present interests that arise during marriage; reimbursement claims arise at dissolution.\textsuperscript{178} Many community property states provide that either spouse may manage community property.\textsuperscript{179} Also, creditors in many states can attach community property to satisfy either spouse's debt;\textsuperscript{180} separate property is more difficult to attach.\textsuperscript{181} This suggests that, for purposes of management powers and creditors' rights during marriage, it could be important to determine whether the community obtains an ownership interest during marriage before dissolution. Most cases have not considered this issue.

Most \textit{Pereira} cases imply that the community interest arises only at dissolution. The \textit{Pereira} "increase in value" computation normally is conducted by comparing the value of the business at the time of the wedding to the value at the time of divorce. A year-by-year accounting is not attempted.\textsuperscript{182} This procedure suggests that the community only has a reimbursement claim that arises at dissolution. The Texas \textit{Jensen} community claim clearly is a reimbursement claim that arises at divorce. The California Supreme Court expressly declined to decide

\begin{footnotesize}
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\item[176.] Compensation could only conceivably be an offset in this instance to the extent the compensation exceeded the value of the services rendered by a spouse.
\item[177.] In addition to the matters discussed below, other issues could be affected by this determination. For example, if the stock of a separate property corporation is awarded to the managing spouse, is this a "sale of stock" which would give rise to the remedies set forth in the securities laws? \textit{See} Head \textit{v. Head}, 759 F.2d 1172 (4th Cir. 1985).
\item[178.] \textit{See} \textit{Reppy}, \textit{supra} note 59, at 180; \textit{Burton v. Bell}, 380 S.W.2d 561, 565 (Tex. 1964).
\item[179.] \textit{See} \textit{W. Reppy & C. Samuel, supra} note 3.
\item[181.] \textit{W. Reppy & C. Samuel, supra} note 3, at 251-67.
\item[182.] \textit{See supra} notes 82-111 and accompanying text.
\end{enumerate}
\end{footnotesize}
whether \textit{Van Camp} required a year-by-year accounting for the value of services and family living expenses.\textsuperscript{183}

Some Washington cases apparently reflect an ownership approach. In \textit{In re Estate of Smith},\textsuperscript{184} the Washington Supreme Court stated that, where a spouse devotes efforts to a separate property proprietorship business, all increase in value (and profits) of the business are presumed to be community property. This is surprising, since Washington is an American rule state. The court must have decided that the profits of the proprietorship reflect, at least in part, immediate compensation for the spouse's effort. This compensation is mixed with other separate property (the remaining profits of the business). Under normal commingling rules, all of the commingled mass becomes community property if the separate property cannot be traced.\textsuperscript{185}

In addition to determining the \textit{time} the community claim arises, for purposes of determining the \textit{amount} of the community claim it also could be relevant whether the claim is an “ownership” claim or a “reimbursement” claim. Reimbursement claims are equitable awards, awarded by a court at dissolution based upon the equities of the situation.\textsuperscript{186} Ownership interests are property interests, and if the marriage is dissolved by death the court has no power to alter these.\textsuperscript{187}

If the community claim is a “reimbursement” award, one would have to determine what equitable concerns could affect the amount of the community claim. For example, a reimbursement award is possible regardless whether the marriage is dissolved by death or divorce.\textsuperscript{188} Would the reimbursement award in this situation be identical in both the death and divorce context? In the case of death, would it matter whether the owner or the nonowner died first?\textsuperscript{189} Also, in either the death or divorce context, would it matter whether the owning spouse also had a full-time job and earned wages during the marriage?

\textsuperscript{183} See Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971).

\textsuperscript{184} 73 Wash. 2d 629, 440 P.2d 179 (1968).

\textsuperscript{185} See W. Reppy & C. Samuel, supra note 3, at 113.

\textsuperscript{186} See Dakan v. Dakan, 83 S.W.2d 620 (Tex. 1935); Miracle v. Miracle, 101 Wash. 2d 137, 675 P.2d 1229 (1984).

\textsuperscript{187} Of course, the court can divide the community estate at divorce. In some states, this is done equitably (see Tex. Fam. Code Ann. § 3.63 (Vernon 1990)); in others, the community estate must be divided equally (see Cal. Civ. Code § 4800 (1969)).


\textsuperscript{189} If the managing spouse dies first, the reimbursement award (50% of the community claim) would benefit the surviving spouse. Most cases involving community claims at death have involved this situation. See Trawick, 671 S.W.2d at 105; Dakan, 83 S.W.2d at 620; \textit{In re McCarthy's Estate}, 127 Cal. App. 80, 15 P.2d 223 (1932); \textit{In re Gold's Estate}, 170 Cal. 621, 151 P. 12 (1915); \textit{In re Herbert's Estate}, 169 Wash. 402, 14 P.2d 6 (1932). If the nonowning spouse dies first, however, the award (again, 50% of the community claim) theoretically would go the spouse's heirs. It is unclear whether courts employing a reimbursement approach would distinguish between this situation and the prior fact pattern when determining the community claim of the nonowning spouse.
IV. WISCONSIN AND THE UNIFORM MARITAL PROPERTY ACT

The Uniform Marital Property Act\textsuperscript{190} (UMPA) incorporates many community property principles. For example, UMPA accepts that spouses should be co-owners of wages earned during marriage by either spouse.\textsuperscript{191} In contrast, the increase in value during marriage of pre-marriage acquisitions or of acquisitions during marriage by gifts or inheritances is generally deemed the separate ("individual") property of the owner.\textsuperscript{192} However, a marital property claim to some or all of this increase in value can be created under section 14 of UMPA if a spouse devotes "substantial effort" toward the other spouse's individual property, reasonable compensation is not received for that effort, and the individual property "substantially" increases in value due to the effort.\textsuperscript{193}

Section 14 of UMPA differs markedly from community property theory in one respect. A marital property claim is created only if a spouse contributes efforts toward the \textit{other} spouse's individual property. This is not consistent with the normal community property view that the marital estate should enjoy all fruits of the efforts of either spouse during marriage. This limitation incorporated into section 14 is a major and unwise restriction upon the marital partnership concept generally endorsed by the act.\textsuperscript{194}

Wisconsin has wisely rejected this limitation incorporated into section 14 of UMPA. In the analogous provision of WMPA, a marital property claim can be created if the spouse contributes efforts during marriage on behalf of either spouse's individual property.\textsuperscript{195} Indeed, without this change the marital estate would rarely have a claim to the increase in value of individual property due to efforts contributed. In many instances, a spouse devotes efforts to property owned by that spouse; it is less common for a spouse to devote significant efforts to property owned by the other spouse. It is difficult to understand the policy judgement underlying the UMPA version. Why should an owning spouse be able to devote all of his efforts during marriage to individual property without creating a marital claim? In all other respects, the Wisconsin provision is analogous to the UMPA provision. If individual property increases in value during marriage, there is a marital property claim only if a spouse contributes substantial efforts, reason-

\textsuperscript{190} 9A U.L.A. 97 (1983).
\textsuperscript{191} Id. § 4(d), 9A U.L.A. 109 (1983). Such joint property is called "marital property" under UMPA.
\textsuperscript{192} Id. §§ 4(f), (g), 9A U.L.A. 109 (1983).
\textsuperscript{193} Id. § 14(b), 9A U.L.A. 130 (1983).
able compensation is not received, and the property substantially appreciates in value.

The author heartily endorses one policy judgement made by the drafters of these sections of UMPA and WMPA. A marital property claim is created only if the spouse renders "substantial" efforts. Such a policy avoids insignificant disputes and allows courts to focus upon matters where a significant marital asset has been invested in individual property. Also, the policy allows spouses to devote some time and effort to the management of their respective individual estates without creating a marital claim. This reasonable system allows spouses in most instances to keep their respective individual estates separate, unless there has been an unusual contribution of time and effort. This probably is consistent with the expectations of most spouses. Courts can apply the concept of "substantial efforts" in a flexible way to achieve an equitable result under the circumstances.

The wisdom of other policy judgements incorporated into this section of UMPA and WMPA seems less clear. For example, a marital claim is created only if "reasonable compensation" is not received by the spouse rendering the efforts. This focus upon reasonable compensation appears to reflect an acceptance of Van Camp as the accepted approach for the calculation of the marital claim. If WMPA and UMPA require the application of Van Camp, this would involve a consideration of the issues discussed above that arise in connection with the application of Van Camp. This construction of the law presents another problem, however. Community property courts have favored more flexibility in this area, so most states have not required the use of any one allocation method in all instances. If UMPA and WMPA are construed to require the use of Van Camp, this could yield unjust results in some situations. Most courts have applied Van Camp by considering what would have been a reasonable salary for a manager of the business. For example, assume that a spouse has been wise enough to start a business with individual property in a market that is very profitable. If the owning spouse devotes all of her time to the business and it greatly increases in value during marriage, under Van Camp the maximum marital claim is the value of compensation that would have been paid to a third party manager, less any compensation received by the owner during marriage. This is true regardless of the

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196. See supra note 173 and accompanying text.
197. See Nolan v. Nolan, 107 A.D.2d 190, 486 N.Y.S.2d 415 (1985), where the spouse quit his job and devoted all of his time to the management of his investments. This obviously is different from the normal situation. The marital estate should have a claim when the owning spouse devotes most of his time to managing the separate property.
198. See supra notes 39-81 and accompanying text.
199. See supra text accompanying notes 34-189.
Separate Property Businesses

amount of capital contributed by the owning spouse. Most community property states have retained the right to apply Periera when appropriate, after considering all factors, such as the amount and type of individual property contributed by the owner to the business, as well as other circumstances that caused the increase in value.201

If there can be no marital claim if the owning spouse is adequately compensated, and "adequate compensation" is determined by what a third party would have been paid for the same services, unfairness can result. For example, in an Idaho case, Wolford v. Wolford,202 the spouse's separate property corporation increased in value by $5,000,000 during seven years of marriage. The value of the corporation at the time of marriage was not set forth, but it apparently was not a particularly successful company until after the wedding. The spouses were the key employees of the business. However, the court concluded that, because the spouses were "adequately compensated," the community had no claim to any of the increase in value during marriage. (The owning spouse received approximately $964,000 in compensation during the marriage, in addition to pension contributions of $151,000.) The application of Van Camp bars a community claim to the increase in value if "adequate compensation" was received.

One alternate construction of UMPA and WMPA could be that the phrase "reasonable compensation" does not relate to the imagined salary that would have been paid to a manager of comparable skill and experience, but that the test relates to the compensation of the owning spouse in light of the increase in value of the business. This construction would give courts more flexibility when calculating the marital claim under UMPA and WMPA. Still, most community property courts have not accepted this definition of reasonable compensation when applying Van Camp.203 It is unclear how courts will construe this phrase under UMPA and WMPA.

It could be argued that the "reasonable compensation" language of UMPA and WMPA is merely a threshold. That is, there is no marital claim if there is reasonable compensation, but absent reasonable compensation, the marital claim could be calculated based upon the increase in value during marriage, rather than the value of third party efforts.204

201. See supra notes 122-30 and accompanying text.
203. See supra notes 43-54 and accompanying text. Most courts apply Van Camp by considering the salary that would have been paid to a third party of comparable skill and experience.
204. This is certainly a plausible reading of the statute. Indeed, one commentary pertaining to Wisconsin law has concluded that the marital claim would be based upon the appreciation in value of the individual property. 1 K. Christiansen, F. Haberman, J. Haydon, D. Kinnamon, M. McGarity & M. Wilcox, Marital Property Law in Wisconsin 3-49 (2d ed. 1986) [hereinafter Marital Property]. Professor June Weisberger has informed the author that many Wisconsin family lawyers believe that this is how the law should be construed.
This would be an unusual policy judgement, however. If the increase in value of the property is crucial or even relevant, why allow the marital claim to be cut off by reasonable compensation (assuming that “reasonable compensation” will be determined based upon objective salary comparisons, rather than the increase in value of the business)?

If the marital claim is to be computed based upon the increase in value of the property, another issue arises. The statute provides that the “application by one spouse of effort” to individual property “creates marital property attributable to that application” if, among other things, “substantial appreciation results from the application.” The marital claim apparently would not be the total increase in value of the property. Some allocation mechanism must be utilized to determine what portion of the increase in value was due to a spouse’s efforts. The statute provides no guidance regarding how such an allocation would be made. One recent Arizona case has attempted to do this by estimating what portion of the increase was due to the spouse’s efforts.

It seems to the author that, at a minimum, WMPA is unclear regarding the extent to which, if any, the increase in value of an individual property business should be relevant to a computation of a marital property claim under section 766.63. If the drafters of WMPA intended the marital claim to be based upon the increase in value of the property during marriage, this should be clarified by statutory amendment. The vagueness of the current version of the Wisconsin statute (regarding how the amount of the marital claim is to be determined) could provide Wisconsin courts with a great deal of discretion. In the view of the author, the Wisconsin version does not clearly specify whether the marital claim should be based upon the increase in value of the property or upon the value of the services. If Wisconsin courts agree with this analysis, they could use either method to compute the marital claim, depending upon the equities of the situation. For example, some community property courts compute the amount of the marital claim based upon the value of the services when the separate property capital was the chief contributing factor to the increase in value; if, however, the spouse’s services were the chief contributing factor, the community claim is computed based upon the increase in value. Wisconsin courts may find this flexibility useful.

205. *Pereira* is the test which determines the community claim based upon the increase in value of the property. Under *Pereira*, of course, the marital claim based upon the increase in value of the property during marriage can arise regardless whether the spouse was adequately compensated.


208. *See supra* notes 129-31 and accompanying text.
WMPA and UMPA create a marital claim only if the property substantially increases in value during marriage due to the spouse's efforts. The marital claim in this situation is compelling. Still, it is not clear that this should be the only instance when a marital claim is allowed. The statute focuses upon when the individual estate has received an obvious benefit. If the property has increased in value due to the spouse's efforts, the individual estate has obviously benefited. However, in other situations the marital estate could have incurred opportunity costs (foregoing wages from third parties). For example, imagine a situation where a spouse devotes a great deal of time to an individual property business that does not increase in value. In this situation the individual estate has received free labor. From this perspective, this policy judgement of UMPA and WMPA requires the marital estate to gamble that the property involved will increase in value. If the business is unsuccessful, the marital estate receives nothing. Also, if the business is successful, the marital estate's maximum claim appears to based upon the value of the services, based upon the salary that would have been paid to a third person, rather than the increase in value. This seems to be unfair to the marital estate.

It could also be difficult to determine when a spouse's efforts cause an increase in value in property. For example, consider what should occur if a spouse devotes a significant amount of time to the maintenance and management of an individual property apartment building. This is a necessary service that needs to be provided to any apartment building, but could it be said that "substantial appreciation of the property results" from the efforts? Similarly, what should occur if a spouse works forty hours per week as an administrative assistant for the other spouse's individual property business, and the nonowning spouse receives no wages. Even if the nonowning spouse's efforts are quite competent, it usually would be difficult to argue that they cause "substantial appreciation" in the value of the business. The only argument would be that the business saved a salary expense and thereby is more valuable because of the expense saved.

The drafters might have been concerned about a spouse rendering a significant amount of useless services claiming an interest in the other's individual property. The current version of WMPA avoids this problem by including the substantial appreciation requirement, but this requirement also restricts certain legitimate marital claims.

The WMPA version does not address certain issues that have been discussed above. For example, if WMPA is interpreted to endorse the Van Camp approach, would dividends paid during marriage from an

209. See supra notes 40-82 and accompanying text.
individual property corporation be offset against any marital claim? If family living expenses incurred during marriage be offset against the marital claim, if those expenses had been paid with the owner's individual property? Also, if the owning spouse controls the corporation's dividend decision, could the other spouse ever challenge a restrictive dividend policy as a fraud on the marital estate?

If Wisconsin courts conclude that the marital claim should be computed based upon the increase in value of the business, not the value of the services, Wisconsin would then need to decide the issues customarily presented by the Pereira approach. For example, would the value of the individual property capital contributed be adjusted for inflation during marriage? If the business initially decreased in value early in the marriage and then increased in value later in the marriage, or vice versa, did the property "increase" in value? Also, would the marital claim be reduced by the amount of family living expenses paid during marriage with the owning spouse's individual property funds?

This discussion has considered WMPA, which governs the property rights of spouses during marriage and at death. Wisconsin divorce law was not revised when WMPA was adopted, and WMPA does not affect division of property at divorce. The applicable Wisconsin stat-
The statute provides that a divorce court can divide all property owned by either spouse at divorce, except property received by one spouse from a third party due to a gift, bequest, devise or inheritance. The statute does not discuss what should occur if property received by gift or inheritance increases in value during marriage. To date, Wisconsin divorce courts have resolved this problem in a manner that is consistent with marital partnership concepts. If the increase in value was due to inflation (or anything other than a spouse's uncompensated services) the increase in value is not divisible (absent a showing of hardship). In contrast, if the increase in value is due to the uncompensated efforts of the nonowning spouse, the increase in value has been deemed divisible, regardless whether a hardship would otherwise result.

A more complicated question under Wisconsin divorce law is presented if an individual property corporation increases in value during marriage. If property received by gift or inheritance generates rents and earnings, the increase in value can be divided if a hardship to one spouse would otherwise result. For example, in Wierman v. Wierman, 130 Wis. 2d 425, 387 N.W.2d 744 (1986), the property increased in value due to the services of the donee's father. This did not create a marital claim. See Haldemann v. Haldemann, 145 Wis. 2d 296, 426 N.W.2d 107 (Ct. App. 1988). Under a marital partnership analysis, the result should be the same regardless whether the owning spouse or the nonowning spouse provides the uncompensated services. No Wisconsin court has considered this question; dictum in Wierman, 130 Wis. 2d at 425, 387 N.W.2d at 744, suggests that the court would reach this result.

The court in Haldemann did not discuss in detail how the amount of the divisible property claim would be computed. In this case, the nonowning spouse made improvements to the wife's farm buildings. The court noted that the value of the farm at the time of marriage was $164,000, and that evidence was introduced that the value at the time of divorce was either $175,000 (the testimony of the expert retained by the wife) or $228,950 (the testimony of the competing expert). Evidence was also introduced regarding a declining real estate market for farms during the period. The court did not provide much guidance about how the court, on remand, was to determine the value of the divisible property claim. For example, the court could consider how much the owning spouse would have had to pay a third party to make the improvements. In contrast, the focus could be upon the change in the value of the property due to the spouse's labor. Note that this could be very different from the change in the value of the property during the marriage. For example, in Haldemann, the value of farms decreased during the marriage; the increase in value due to the improvements therefore probably exceeded the increase in the value of the farm during marriage (because the increase in value of the farm during marriage would include both the increase due to the improvements and the decrease due to the market). In contrast, if properties had been increasing in value during the relevant period, the divisible property claim would be less than the total increase in value (because the increase would include both the increase in value due to the improvement and the increase due to the market).

Another related issue not yet addressed by a Wisconsin court is whether any divisible property claim should be offset by any benefit enjoyed by the couple due to the property. See generally J. Oldham, supra note 1, at 7-24. For example, did the spouses live in the property and not have to pay rent? Also, if the property generated income during marriage, should this be offset? This analysis would be based upon Van Camp concepts, which were discussed supra at notes 39-81 and accompanying text.
profits during marriage, such rents and profits can be divided by the divorce court without a showing of hardship. The rents and profits are considered items that are separate from the original property. In an individual property corporation context, if the corporation increases in value due to retained profits of the business, is this increase a "rent and profit" that can be divided without a showing of hardship? The Wisconsin Supreme Court considered a related but not identical question in *Wierman v. Wierman*. The court concluded that an increase in value of an individual property partnership interest was not a rent and profit. However, in this case the spouse did not actually receive a distribution of any of these revenues; they were retained by the venture. Also, the venture was controlled by someone other than the spouse, and the spouse did not render services to the business. It is unclear whether the court would reach the same conclusion if the spouse was actively involved in the business and controlled the dividend decision.

V. Conclusion

When a spouse works for a separate property business during marriage and the business increases in value, this presents a difficult problem. Community property courts have developed both the *Van Camp* and the *Pereira* methods to allocate the increase in value between the community estate and the separate property estate of the owning spouse. Although neither *Pereira* nor *Van Camp* is precise, they are the best approaches yet suggested to compute the amount of the community claim that arises when a spouse works during marriage for a separate property business.

In American rule states, the allocation approach should be selected based upon which estate was the chief contributing factor to the increase. If the separate property capital was the chief factor, the approach should be chosen that gives the separate estate the highest portion of the increase. Conversely, if the spouse's services were the chief contributing factor, the approach should be selected that gives the community the greatest claim.

Civil law states face the additional problem of allocating the rents and profits of the separate property business to the community. It is difficult to do this pursuant to *Van Camp*, unless a court is willing to scrutinize the dividend policy of the corporation. In light of this problem, *Pereira* normally would be the best rule in civil law states. This would allow the owning spouse's separate property capital to receive some inflation adjustment during marriage, and the increase in value
due to other factors, such as the spouse's efforts or retained earnings, would be allocated to the community estate.

The Uniform Marital Property Act provision regarding this issue only creates a marital claim when the nonowning spouse renders services to the other's individual property. This limitation upon normal marital partnership notions is unwise; Wisconsin sensibly did not accept it when the UMPA was adopted. In Wisconsin, a marital claim can be created when either an owner or a nonowner renders services and is not adequately compensated.

The UMPA does specify that a marital claim is created only when "substantial efforts" are devoted toward individual property. This is a wise limitation on the idea that the marital estate should have a claim to all the fruits of either spouse's efforts expended during marriage. This limitation will allow the marital estate to pursue significant claims, and will not burden dissolution proceedings with endless disputes regarding small matters.