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BEYOND THE BASICS ™

APPORTIONMENT: A TO Z

Garrett C. Dailey, CFLS, AAML

I. Key Statutes

Fam. Code §760

Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property. (Ad Stats 1992, C 162)

Fam. Code §770

(a) Separate property of a married person includes all of the following:
(1) All property owned by the person before marriage.
(2) All property acquired by the person after marriage by gift, bequest, devise, or descent.
(3) The rents, issues, and profits of the property described in this section.
(b) A married person may, without the consent of the person's spouse, convey the person's separate property. (Ad Stats 1992, C 162)

Fam. Code §2640

(a) "Contributions to the acquisition of property," as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.

(c) A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement. The amount reimbursed shall be without

interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division. (Am Stats 2004, C119)

II. Family Residence

Marriage of Frick

***Moore/Marsden* formulas summarized.**
In re Marriage of Frick (1986) 181 Cal.App.3d 997, 226 Cal.Rptr. 766
Johnson, J. DCA2
FACTS: H owned commercial real property prior to marriage on which he operated hotel. C/P funds used during marriage to reduce encumbrance. Trial ct. apportioned appreciation using *Moore/Marsden* formula, which it summarized as follows:

"[First determine] the separate property and community property percentage interest in the property. The separate property percentage interest is determined by crediting the separate property with the down payment and the full amount of the loan on the property less the amount by which the community property payments reduced the principal balance of the loan. This sum is divided by the purchase price. The resulting figure is the separate property percentage share. The community property percentage share is determined by dividing the amount in which community property payments reduced the principal by the purchase price. [Citation.] The separate property interest in the property as valued at the end of marriage is determined by adding all the prenuptial appreciation, the amount of capital appreciation during marriage attributable to the separate funds (determined by multiplying the capital appreciation during marriage by the separate property percentage interest), and the amount of equity paid by separate funds. [Citation.] The community property share in the value of the property is determined by adding the amount of capital appreciation during marriage attributable to community funds to the equity paid by community funds." (Id. at p. 1008.)
NOTES: See *In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, ABC Card FaRe 278.00 [No credit in *Moore/Marsden* for paydown of a home equity loan not used to paydown mortgage] and ABC Card FaRe 277.00 [*Moore/Marsden* interest is not offset by rental value of residence].
FaRe 131.01

Marriage of Marsden

C/P entitled to *pro tanto* interest in s/p residence based upon making payments on encumbrance. Premarital appreciation allocated to s/p interest.
In re Marriage of Marsden (1982) 130 Cal.App.3d 426, 181 Cal.Rptr. 910
Barry-Deal, J. DCA1
FACTS: H built house in 1962 which had substantially appreciated when parties married in 1971. H argued and Court of Appeal agreed that *Moore* formula (see preceding ABC Card FaRe 018.05) should be modified to credit his s/p interest with equity in residence on date of marriage.

"Where the separate property is owned for a considerable period before marriage, the increase in value in an inflationary market, such as we have had for the past several decades, is substantial. The fair market value at the time of marriage would usually be significantly greater than the purchase

price .... We think it is equitable to credit the separate property interest with this prenuptial appreciation." (Id. at p. 438.)
NOTES: (1) *Marsden* variation of *Moore* formula will apply whenever there is substantial premarital appreciation in property, as it must be set over to "separate property interest."

(2) Improvements: See In re Marriage of Wolfe (2001) 91 Cal.App.4th 962, 110 Cal.Rptr.2d 921, ABC Card FaRe 245.00 [Where community funds are used to make capital improvements to a spouse's separate real property, the community is entitled to reimbursement or a *pro tanto* interest under *Moore/Marsden* rule both because its rationale applies equally to the reduction of an encumbrance and to capital improvements.]
FaRe 019.01

Marriage of Moore

C/P entitled to *pro tanto* interest in s/p residence to extent principal payments on secured note made from c/p.
In re Marriage of Moore (1980) 28 Cal.3d 366, 168 Cal.Rptr. 662, 618 P.2d 208
Manuel, J.
FACTS: W purchased house shortly before marriage. After marriage, H and W lived there for 10 years; during that time, c/p funds used to make payments on secured note. Title remained solely in W's name. Court held that, in addition to credit for actual paydown on principal, proper way to allocate increase in equity was to give c/p *pro tanto* interest in ratio that payments on purchase price with community funds bears to payments made with separate funds. In calculating c/p contribution, only payments applied to principal are counted. Payments for interest, taxes and insurance are not considered. Original loan treated as s/p contribution.
NOTES: (1) Court specifically adopted *Aufmuth* formula (*In re Marriage of Aufmuth* (1979) 89 Cal.App.3d 446, 152 Cal.Rptr. 668, disapproved on other grounds, *In re Marriage of Lucas* (1980) 27 Cal.3d 808, 166 Cal.Rptr. 853, 614 P.2d 285).

(2) See *In re Marriage of Frick* (1986) 181 Cal.App.3d 997, 226 Cal.Rptr. 766 (this subtopic) for summary of application of *Moore* Formula.

(3) Improvements: See *In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962, 110 Cal.Rptr.2d 921, ABC Card FaRe 245.00 [Where community funds are used to make capital improvements to a spouse's separate real property, the community is entitled to reimbursement or a *pro tanto* interest under *Moore/Marsden* rule both because its rationale applies equally to the reduction of an encumbrance and to capital improvements.]
FaRe 018.06

C/P not entitled to credit for payments made which do not increase the equity of the property.
In re Marriage of Moore (1980) 28 Cal.3d 366, 168 Cal.Rptr. 662, 618 P.2d 208
Manuel, J.
FACTS: See facts discussed on preceding card FaRe 018.06. In rejecting H's argument that the community should get credit for payments made during marriage for interest, taxes and property insurance on W's s/p residence, Court stated:

"[Husband] argues, however, that interest and taxes should be included in the computation because they often represent a substantial part of current home purchase payments. We do not agree. ••Since such expenditures do not increase the equity value of the property, they should not be considered in its division upon dissolution of marriage••. The value of real property is generally represented by the owners' equity in it, and the equity value does not include finance charges or other expenses incurred to maintain the investment. Amounts paid for interest, taxes and insurance do not contribute to the capital investment and are not considered part of it. A variety of expenses may be incurred in the maintenance of investment property, but such expenses are not considered in the valuation of the property except to the extent they may be relevant in determining its market value from which in turn the owners' equity is derived by subtracting the outstanding obligation. Upon dissolution, it is the court's duty to account for and divide the assets and the debts of the community. ••Payments previously made for interest, taxes and insurance are neither. Moreover, if these items were considered to be part of the community's interest, fairness would also require that the community be charged for its use of the property••." (Emphasis added.) (Id. at pp. 372-373.)
FaRe 288.00

Marriage of Neal

For purposes of former Civil Code section 4800.1 and former Civil Code section 4800.2 [replaced by Fam. Code §2640], property is "acquired" when placed into joint names, regardless of reason.
In re Marriage of *Neal* (1984) 153 Cal.App.3d 117, 200 Cal.Rptr. 341, disapproved on other grounds, *In re Marriage of Buol* (1985) 39 Cal.3d 751 and *In re Marriage of Fabian* (1986) 41 Cal.3d 440
King, J. DCA1
FACTS: When H and W married in 1976, W already owned residence, title to which was in her name alone. In 1980, house refinanced to obtain loan. Lender required W to transfer title to H and W as joint tenants. W testified there was oral agreement that house remained her s/p. Parties separated in 1981, when W learned H already married. Trial ct. determined residence was W's s/p based upon oral agreement. H appealed and during appeal former Civil Code section 4800.1 [replaced in part by Fam. Code §2581] became effective. W contended that statute didn't apply because house was not "acquired" during marriage. Court of Appeal disagreed and reversed, holding that date on which she placed H's name on title was date property was acquired for purposes of statute. Fact that W required to put H's name on title by lender makes no difference.
NOTES: (1) *Neal* disapproved in *In re Marriage of Buol* (1985) 39 Cal.3d 751, 763, 218 Cal.Rptr. 31, 705 P.2d 354, ABC Card FaRe 002.00, which held it unconstitutional to apply former Civil Code section 4800.1 to cases decided prior to its effective date.

(2) See also In re Marriage of Anderson (1984) 154 Cal.App.3d 572, 201 Cal.Rptr. 498, disapproved on other grounds, *In re Marriage of Buol* (1985) 39 Cal.3d 751, 763, 218 Cal.Rptr. 31, 705 P.2d 354 and *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451, 224 Cal.Rptr. 333, 715 P.2d 253 [house acquired for purposes of statute when put into joint names, not when originally purchased].

(3) See In re Marriage of Weaver (2005) 127 Cal.App.4th 858, cards ß{FaRe 268.00 and ß{FaRe 271.00 [Rule permitting reimbursement for s/p equity on date spouse's name added to title criticized].
FaRe 123.02

If property "acquired" by adding other spouse's name to previously s/p asset, amount reimbursed is s/p equity on date of conversion.
In re Marriage of Neal (1984) 153 Cal.App.3d 117, 200 Cal.Rptr. 341, disapproved on other grounds, *In re Marriage of Buol* (1985) 39 Cal.3d 751 and *In re Marriage of Fabian* (1986) 41 Cal.3d 440
King, J. DCA1
FACTS: When H and W married in 1976, W already owned residence, title to which was in her name alone. In 1980, house refinanced to obtain loan. Lender required W to transfer title to H and W as joint tenants. W testified parties had oral agreement that house remained her s/p. Parties separated in 1981, when W learned H already married. Trial ct. determined residence was W's s/p based upon oral agreement. H appealed, and during appeal former Civil Code section 4800.1 [replaced in part by Fam. Code §2581] became effective. Court of Appeal found former Civil Code section 4800.1 to control and reversed. It then held that W entitled to reimbursement pursuant to former Civil Code section 4800.2 [replaced by Fam. Code §2640] equal to her equity when H's name placed on title.

"[T]he measure of the value of [wife's] separate property contribution to be reimbursed to her pursuant to [former Civil Code section 4800.2], is the value of the separate property equity in the property as of the date of its conversion into joint tenancy, to be increased by any other separate property 'contributions to the acquisition of the property' as defined in section 4800.2." (Id. at p. 125.)
NOTES: (1) *Neal* disapproved in *In re Marriage of Buol* (1985) 39 Cal.3d 751, 763, 218 Cal.Rptr. 31, 705 P.2d 354, ABC Card FaRe 002.00, which held that it was unconstitutional to apply former Civil Code section 4800.1 to cases decided prior to its effective date.

(2) See also In re Marriage of McNeill (1984) 160 Cal.App.3d 548, 206 Cal.Rptr. 641, disapproved on other grounds, *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451, fn. 13, 224 Cal.Rptr. 333, 715 P.2d 253, also holding that amount of reimbursement is equity in property on date of transfer. H transferred residence into joint names. H entitled to reimbursement pursuant to former Civil Code section 4800.2: "The residence itself is his reimbursable separate property contribution, namely his equity in the home at the time of transfer to husband and wife. No tracing is necessary in this instance, merely evaluation of his equity on [date of transfer]." (Id. at p. 562.) Fabian disapproved McNeill's application of former Civil Code section 4800.2 to case pending before 1/1/84.
FaRe 124.01

Marriage of Sherman

***Bono v. Clark* limited to probate proceedings; DOT valuation appropriate in *Moore/Marsden* calculations; c/p should share in appreciation.**
In re Marriage of Sherman (2005) 133 Cal.App.4th 795, 35 Cal.Rptr.3d 137
Johnson, J. DCA2
FACTS: See Facts discussed on ABC Card FaRe 273.00.

"[W]e disagree with the *Bono* Court's characterization of an increase in the value of a residence—which was owned during the marriage and was partially community property—as the

earnings or accumulations of one spouse while living separate and apart from the other spouse." (Id. at p. 802.)

Bono v. Clark [(2002) 103 Cal.App.4th 1409, ABC Card FaRe 253.01] provided a formula for determining c/p's *pro tanto* interest where parties used c/p funds to pay for improvements to H's s/p real property. *Bono* decided DOS, which was more than 6 years before trial, was the proper valuation date. *Bono* found it was "appropriate to depart from the *Moore/Marsden* approach" to valuation because the matter did not "involve[] the division of community property in [a] dissolution proceeding[]." (Id. at pp. 1426-1427.) H had filed for divorce, but passed away before the dissolution proceedings were completed. W filed the action at issue against her H's estate. *Bono* concluded Fam. Code §2552 did not apply because the matter concerned the division of property in a civil proceeding, not a dissolution proceeding. It found "the relevant statute" to be Fam. Code §771, which provides, "[t]he earnings and accumulations of a spouse ... while living separate and apart from the other spouse, are the separate property of the spouse." The court concluded this provision "dictates crediting the separate property estate with postseparation appreciation."

Sherman held that since this was a dissolution proceeding, Fam. Code §2552 applied and trial court should have valued the residence as close to the date of trial as practicable in determining the community's *pro tanto* interest. Nothing indicated a date of trial valuation as opposed to a DOS valuation would be inequitable. In fact, a DOS valuation is inequitable because the $450,000 increase in the value of the residence between DOS and the date of trial was not the result of H's efforts.

Sherman further disagreed with *Bono*'s holding that Fam. Code §771 is incompatible with a date of trial valuation. To read this to mean a DOS valuation date is proper would "'overlook[] the inherent growth factor found in many assets, investment and re-investment of capital, market fluctuations, and numerous other components that can increase the value of most assets.' The community should share in the post-separation increase in value of an asset which is not attributable to the efforts of one spouse." (*In re Marriage of Sherman*, 133 Cal.App.4th at p. 802.)

NOTES: Since the parties stipulated to the c/p equity depending on the approach and date of valuation used, there was no need for the court to address the propriety of *Bono*'s formula which gives the community a *pro tanto* interest in separate property improved with community funds, as opposed to reimbursement, as provided by Fam. Code §2640 (b).

COMMENT: (By Ron Granberg, Esq., CFLS): *Sherman* declined following two modifications *Bono* v Clark (2002) 103 Cal.App.4th 1409 suggested be made to the *Moore/Marsden* formula.

One modification was that the *pro tanto* period must end at date of separation, instead of at date of trial. *Sherman* declined following this modification on two grounds: 1) a dissolution case like *Sherman*, unlike a probate case like *Bono*, is required to follow Fam. Code §2552 [assets to be valued at trial date]; and 2) *In re Marriage of Imperato* (1975) 45 Cal.App.3d 432, 435-437, ABC Card BuIn 132.00 requires any increase in a marital asset's value between separation and trial to be allocated between the community and the Separatizer. In *Imperato*, the Separatizer was the spouse operating the community business after separation, whereas in *Sherman* the Separatizer was the owner of the real estate that was improved with community funds.

Another modification *Bono* suggested was that premarital appreciation must be added: 1) to the numerator of the separate property Marsden fraction, and b) to the denominators of both the community property and separate property Marsden fractions. *Sherman* also declined following this modification, distinguishing *Sherman* (in which community funds were used to benefit the property shortly after its purchase) on its facts from *Bono* (in which the community funds weren't used to benefit the property until at least 17 years after its purchase). *Sherman* could have criticized the *Bono*

modification by pointing out it gives the Separatizer a "double dip" by: 1) confirming the entire premarital appreciation to the Separatizer, then 2) using the premarital appreciation to increase the Separatizer's share of marital appreciation by adding the premarital appreciation to the *Marsden* fractions.
FaRe 274.00

No reason to depart from *Moore/Marsden* in dealing with pre-marital appreciation where there isn't long delay in marriage or in making improvements.
In re Marriage of Sherman (2005) 133 Cal.App.4th 795, 35 Cal.Rptr.3d 137
Johnson, J. DCA2
FACTS: See Facts discussed on ABC Card FaRe 273.00.

W also argued *Bono* "improperly shrinks the community's *pro tanto* interest" in a way the *Moore/Marsden* formula does not. The *Moore/Marsden* formula "credit[s] the husband's separate property estate with premarital appreciation, but it [does] not incorporate that premarital appreciation into its calculation of the respective separate and community percentage interests." The *Bono* formula, on the other hand, adds the premarital appreciation to the separate property acquisition cost to determine a total separate property investment which is used to calculate the separate property percentage interest.

In *Bono* v. Clark (2002) 103 Cal.App.4th 1409, ABC Card FaRe 253.01, H purchased the property in 1960 and did not marry W until 1977. Thus, the premarital appreciation contributed more to FMV of the property than its acquisition cost did. "In fairness, that appreciation should be credited to decedent's separate property estate just as if it were an element of the acquisition costs." (Id. at p. 1426.) Thus, court departed from the *Moore/Marsden* formula as follows:

"'Here, ... we are dealing with community-funded improvements that began long after decedent's initial acquisition of the property—and some undetermined time after the parties were married. We are not dealing with a separate property loan extant at the time of marriage being partly satisfied by community payments, as was the case in both *Moore and Marsden*.' [*Bono* v. Clark, *supra*, 103 Cal.App.4th at p. 1426.]" (*In re Marriage of Sherman*, *supra*, 133 Cal.App.4th at p. 803.)

Sherman saw no reason to depart from the *Moore/Marsden* approach to appreciation like the appellate court did in *Bono*. In *Sherman*, H purchased the residence in 1993. Parties married in 1995. H used c/p salary to make mortgage payments. Thus, the community immediately began acquiring an interest in the residence unlike the situation in *Bono*. Moreover, in *Sherman*, the community-funded improvements were made less than 5 years after H purchased the property as opposed to at least 17 years later (and potentially much more) in *Bono*.
COMMENT: The Court doesn't explain why the delay in marriage or improvements should make any difference in determining whether "to depart from the *Moore/Marsden* approach to appreciation." Logically, it should not.

Since the parties stipulated to the c/p equity depending on the approach and date of valuation used, there was no need for the court to address the propriety of *Bono*'s formula which gives the community a *pro tanto* interest in separate property improved with community funds, as opposed to reimbursement, as provided by Fam. Code §2640 (b).
FaRe 275.00

Marriage of Weaver

Rule granting FC 2640 (b) reimbursement for s/p equity on date spouse's name added to deed criticized.
In re Marriage of Weaver (2005) 127 Cal.App.4th 858, 126 Cal.Rptr.3d 121
Gaut, J. DCA4
FACTS: See Facts discussed cards ß{FaRe 265.00 and ß{FaRe 271.00. After holding grantor's testimony, that W's name was erroneously added to deed to residence, was insufficient to overcome Fam. Code §2581 presumption of title, Court of Appeal discussed whether H was entitled to reimbursement per Fam. Code §2640 (b) for his equity in residence on the date W's name added to deed. After reviewing the case law permitting reimbursement, including In re Marriage of *Neal* (1984) 153 Cal.App.3d 117, ABC Card FaRe 123.02, In re Marriage of Anderson (1984) 154 Cal.App.3d 572, ABC Card FaRe 270.00, In re Marriage of Perkal (1988) 203 Cal.App.3d 1198, ABC Card FaRe 012.01, and In re Marriage of Witt (1987) 197 Cal.App.3d 103, ABC Card FaRe 011.02, Court of Appeal criticized it, but reluctantly followed it:

"A deed, which changes title to joint tenancy during a marriage, in our view, sufficiently conveys in writing the intent of the donor to waive his separate property interest and transmute the separate property interest to community property. Allowing reimbursement under such circumstances renders the section 2581 community property presumption meaningless since the effect of allowing reimbursement under section 2640 is to negate the transfer of title to joint tenancy and the section 2581 community property presumption. The joint tenancy deed, in effect, becomes illusory in the event of marital dissolution. [¶] Nevertheless, unless our high court rules that section 2640 does not allow reimbursement for real property, we shall follow the current trend in construing section 2640 broadly to allow reimbursement for real property contributions, unless there is a written statement, apart from a joint tenancy deed, which specifically waives the right to reimbursement." (Id. at p. 870.)
FaRe 268.00

Amount of reimbursement when donor spouse acquires property by way of gift.
In re Marriage of Weaver (2005) 127 Cal.App.4th 858, 126 Cal.Rptr.3d 121
Gaut, J. DCA4
FACTS: See Facts discussed on ABC Card FaRe 265.00. When H's father died, H and mother each owned 1/2 interest in Thule residence. When they put W's name on title, they each transferred a 1/6 interest to her. This reduced their respective shares to 1/3. At that point, H and W's interest became c/p pursuant to Fam. Code §2581. On remand, H to be reimbursed for his 1/2 interest in residence on date of transfer. The additional 1/6 interest that parties acquired is c/p to be equally divided between H and W. Likewise, any increase in the equity value of the s/p contribution thereafter is c/p to be divided equally between H and W.
FaRe 269.00

Parties' transmuted s/p joint tenancy residence into c/p by their actions during marriage, hence FC 2640 (b) reimbursement proper.
In re Marriage of Weaver (2005) 127 Cal.App.4th 858, 126 Cal.Rptr.3d 121

Gaut, J. DCA4
FACTS: Two days before marriage, H and W purchased Scandia residence as joint tenants. H contributed $10,600 as a downpayment and $6,878 closing costs. Parties remodeled residence after marriage using proceeds from second mortgage. Parties made all payments on residence with c/p. Trial ct. found residence to be c/p and awarded H $10,600 reimbursement per Fam. Code §2640 (b). W appealed, arguing reimbursement improper as residence was s/p. Court of Appeal affirmed.

HELD: Parties' transmuted s/p joint tenancy residence into c/p by their actions during marriage, hence FC 2640 (b) reimbursement proper.

There was a transmutation of the Scandia property to c/p as a consequence of commingling the parties' s/p interest with c/p used to pay mortgage and home improvements during marriage.

"[Fam. Code §852 (a)], which provides that a transmutation of property is not valid unless made in writing by an express declaration, is inapplicable due to the commingling of separate and community property. ([Fam. Code §852 (d)].)" (Id. at p. 871.)

This case similar to In re Marriage of Rico (1992) 10 Cal.App.4th 706, ABC Card FaRe 210.01, which permitted trial ct. to allocate the parties' interests in a s/p residence in accordance with c/p principles.

"While Rico provides authority for reimbursing husband for the downpayment, the equitable formula used in Rico to calculate the amount of reimbursement has been superseded by enactment of Civil Code section 4800.4, subdivision (a), recodified as [Fam. Code §2650]. That provision allows the court, at the time of dissolution, to divide property owned by the parties prior to marriage 'in accordance with the same procedure for and limitations on, division of community estate.'" (In re Marriage of Weaver, *supra*, 127 Cal.App.4th at p. 871.)

Thus, H was thus entitled to reimbursement for the downpayment paid from his s/p.
FaRe 271.00

Court disagrees with logic of permitting 2640 reimbursement for s/p interest in residence on date spouse's name added to title of s/p residence, but reluctantly follows it.
In re Marriage of Weaver (2005) 127 Cal.App.4th 858, 126 Cal.Rptr.3d 121
Gaut, J. DCA4
FACTS: See Facts discussed on ABC Card FaRe 265.00. In determining the parties' interest in the Thule residence, Court discussed the history of Fam. Code §2581 and Fam. Code §2640. It specifically disagreed with the logic of case law that permits a right of reimbursement when a spouse's name is added to title of a s/p residence, but reluctantly followed it:

"A deed, which changes title to joint tenancy during a marriage, in our view, sufficiently conveys in writing the intent of the donor to waive his separate property interest and transmute the separate property interest to community property. Allowing reimbursement under such circumstances renders the section 2581 community property presumption meaningless since the effect of allowing reimbursement under section 2640 is to negate the transfer of title to joint tenancy and the section 2581 community property presumption. The joint tenancy deed, in effect, becomes illusory in the event of marital dissolution. [¶] Nevertheless, unless our high court rules that section 2640 does not allow reimbursement for real property, we shall follow the current trend in construing section 2640 broadly to allow reimbursement for real property contributions, unless there is a written statement, apart from a joint tenancy deed, which specifically waives the right to reimbursement." (Id. at p. 870.)

FaRe 287.00

III. Time Rule/Employment/Retirement Benefits

Marriage of Adams

Nonemployee spouse's interest properly based on ultimate retirement benefit, not benefit accrued as of date of separation.
In re Marriage of Adams (1976) 64 Cal.App.3d 181, 134 Cal.Rptr. 298
Hastings, J. DCA2
FACTS: Parties separated in 1970, after 23 year marriage. Status was bifurcated and judgment entered in 1972. At that time, H's pension benefits at retirement would have been $459/mo. When H retired in 1974, his benefits had increased to $805/mo. Remaining issues were tried in 1975. Trial ct. used time formula and awarded W a share of H's actual retirement benefits, rather than what had accrued in 1972. H appealed, arguing that increased amount of monthly benefits was s/p per former Civil Code section 5118 [replaced by Fam. Code §771], since the increase was based upon his efforts after separation.

HELD: Affirmed. His final salary was based upon all of his years of service, including the almost 22 years during marriage. Trial ct. did not abuse discretion by awarding W share of actual retirement benefit.
Pen 177.01

Marriage of Anderson

Time rule applied even though pension increased in value after date of separation, because early years should count as much as later years.
In re Marriage of Anderson (1976) 64 Cal.App.3d 36, 134 Cal.Rptr. 252
Allport, J. DCA2
FACTS: H and W separated in 1974, after 29 year marriage. On date of separation, H was entitled to pension of $339/mo. 13 months later, H's pension entitlement had increased to $501/mo. Trial ct. divided pension based upon its value at separation, and W appealed.

HELD: Reversed. H contended that his pension was contributed to solely by his employer based upon efforts after separation, which made increase his s/p per former Civil Code section 5118 [replaced by Fam. Code §771]. Court of Appeal disagreed, holding that the time rule should be applied to the total monthly pension which he receives. The increased monthly benefit between separation and retirement was not solely his separate property, because the amount of the pension was dependent upon the total number of years of service.

"[T]he first few years of service (during the marriage) must be given just as much weight in computing total service as the last few years (after separation)." (Id. at p. 39.)
Pen 040.01

Marriage of Bergman

In-kind division makes valuation unnecessary.
In re Marriage of Bergman (1985) 168 Cal.App.3d 742, 214 Cal.Rptr. 661
King, J. DCA1
FACTS: See Facts discussed on ABC Card Pen 051.00.

"'This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present value of the pensions rights, and divides equally the risk that the pension will fail to vest.' [Citation.] Thus, even though there is neither expert testimony nor any other information except for the fact that a pension plan exists, and regardless of whether the interest in the plan is vested, the court can divide the community interest between the parties." (Fn. omitted.) (Id. at p. 758.)
Pen 043.02

Marriage of Bowen

Only years of employment relevant to calculation of benefits may be counted in denominator; early retirement penalty that is dependent on date application made for benefits not actual employment not considered.
In re Marriage of Bowen (2001) 91 Cal.App.4th 1291, 111 Cal.Rptr.2d 431
Moore, J. DCA4
FACTS: Couple married in 1962 and H began working for Flying Tiger (FT) in 1966. They separated in 1982 and divorced in 1984. H worked for FT until 1989, when FT and Federal Express merged. Thereafter, he worked for FedEx until 1996 retirement, at which time he elected to receive FT pension benefits as lump-sum payment plus monthly benefits.

Fixed FT plan was defined benefit plan and variable plan was initially a defined contribution plan. H's expert (E) testified the variable plan became a hybrid plan, used as a "feeder" plan to ensure payments under fixed plan: If fixed plan underfunded, monies from variable plan could be used to fund defined benefits payable under fixed plan. Variable plan funded by FT contributions. Contributions to variable plan ceased in 1982.

W filed OSC seeking QDRO to establish her rights to benefits under H's 2 Flying Tiger pension plans, asserting entitlement to 50% share of the variable plan benefits and a 34.375% share of the fixed plan benefits. Each fraction determined by using number of years of respective plan participation during marriage as numerator, and total number of years of respective plan participation as denominator: Denominator of 15.58 years for variable plan and 22.67 years for fixed plan, excluding 7 years FedEx. H argued denominator for each should be 30 years, the total number of years he worked for FT and FedEx combined. Court agreed with H and awarded W 25.9% of benefits under each plan. W appealed and Court of Appeal reversed and remanded.

HELD: H's retirement benefits should be based on years of service with Flying Tiger prior to FedEx merger; as additional years with FedEx did not contribute to FT benefits, they could not be included in time rule denominator.

Re issue of number of years of service to be used as denominator with respect to each of the two FT pension plans, parties disagreed as to whether 7 years of FedEx employment should be included. Expert (E) opined they should be factored in for four reasons: (1) employment continued post-merger; (2) different rates of pay, based on rank, taken into consideration in benefits

calculation; (3) H could not have begun receiving benefits on date of merger without suffering early retirement penalty; and (4) divorce judgment provided benefits would be divided on retirement, taking total length of employment into consideration. H also argued investment value of his benefits increased over 7-year period of FedEx employment.

The Court of Appeal analyzed and rejected each of H's arguments.

1. Post-merger employment/rates of pay

Court of Appeal noted documents which established the plans were not part of the record on appeal. Moreover, H didn't claim the plan documents addressed years of service with a successor employer. There was no evidence whatsoever 7 years of FedEx employment were necessary to earn any of FT pension benefits. To the contrary, E testified the FT pension plans were not merged with FedEx pension plan, and the FT pension benefits were based on FT wages, to the exclusion of FedEx wages. Court found this consistent with analysis provided by pension plan administrator, which excluded FedEx years, taking into consideration rank and rate of pay for last 5 years of service with FT, not FedEx. Thus, neither FedEx years nor rank relevant to calculation of FT pension benefits.

2. Early retirement penalty

Court of Appeal found the benefits had been fully earned by the date of the merger. As long as H waited until age 60 to start receipt of benefits, he would receive full benefits. H not required to work with FedEx to avoid penalty, simply wait to age 60 to apply. In this case, it was unreasonable to include the 7 years with FedEx in the denominator, because doing so diluted community property share, and thereby did not fairly account for it. (See *In re Marriage of Henkle* (1987) 189 Cal.App.3d 97, 234 Cal.Rptr.2d 351, ABC Card Pen 045.00 [Once maximum benefits earned, further employment not considered in trim rule formula]; and *In re Marriage of Hughes* (1994) 26 Cal.App.4th 34, 31 Cal.Rptr.2d 250, ABC Card Pen 297.00 [Entitlement to retirement pay derived solely from years on active duty; W entitled to her share of reserve "retainer" pay]).

3. Investment value of benefits

Court of Appeal found that, assuming investment value of benefits did increase over 7-year FedEx time, same would have been true even if he had terminated employment in 1989 and never worked again. What was determinative of total investment value was date H elected to receive pension benefits, not additional years of employment, as benefits fully earned in 1989 and this was what governed, not the effect of market fluctuations and accruals on benefits already earned.

4. Interpretation of judgment

1984 judgment on reserved issues provided W would receive 1/2 of the benefit from the pension plans in the ratio that H's "employment during marriage and prior to separation bears to his ••total employment•• during marriage ••and after marriage••, i.e. the *Brown* Formula. . The payments to [wife] for her one-half of the community interest shall be made upon petitioner's retirement or age 60, whichever shall first occur. . . ." (Italics added.) H and E argued judgment intended for entire period of H's employment to be included. H even said W was seeking a belated modification of judgment. Court of Appeal disagreed. At time, H not expected to receive retirement benefits for years after date of the judgment, and it was reasonable to expect that future, uncontemplated events might have an impact on pension benefits rights. When judgment entered, parties didn't anticipate a merger in five years and issue would arise.

"What [Wife] seeks is not to rewrite or modify that judgment, but to implement it. (Citation.) In so doing, the court must 'arrive at a result that is "reasonable and fairly representative of the relative contributions of the community and separate estates." [Citation.]' (Citation.) It must achieve

'substantial justice' between the parties. (Citation.) To include the seven years of Federal Express employment in the denominator would be to aggrandize the separate property share and diminish the community property share, a result that would violate these maxims. The court abused its discretion in so providing." (*In re Marriage of Bowen, supra,* 91 Cal.App.4th at p. 1300.)
D. Variable Plan

W also suggested years of post-separation and pre-merger employment with FT should be excluded. She argued the variable plan benefits were 100% c/p because variable plan fully funded when parties separated in 1982. But Court noted the proper application of time rule was dependent on date benefits earned, not when plan funded. W also failed to address significance of transformation of the variable plan into a hybrid plan. Court found W did not meet her burden of showing court erred in including in the denominator of the apportionment formula the years of FT employment between date of separation and date of merger. In any event, Court questioned whether she could have met burden, because calculation of benefits with respect to years of service and rank was characteristic of a defined benefit plan. This would indicate the variable plan had lost its identity as a defined contribution plan, consistent with E's testimony.
NOTES: See also *In re Marriage of Henkle* (1987) 189 Cal.App.3d 97, ABC Card Pen 045.02 [Once max benefits are earned, further employment not considered in time rule formula].
Pen 354.01

***Marriage of B*rown**

Nonvested pension rights acquired during marriage are c/p subject to division.
*In re Marriage of B*rown (1976) 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561
Tobriner, J.
FACTS: Parties married 23 years, during which H was employed by General Telephone Co. and accumulating retirement rights. On date of separation, H had 72 of 78 points needed for retirement (two more years were necessary for vesting.) As pension was still not "vested" ["a pension right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement" (Id. at p. 842)], trial ct. held it was not c/p subject to division, relying on "*French*" rule [nonvested pensions rights mere expectancy and therefore not property] (*French v. French* (1941) 17 Cal.2d 775, 112 P.2d 235, disapproved *In re Marriage of Brown* (1976) 15 Cal.3d 838, 841, 126 Cal.Rptr. 633, 544 P.2d 561). Supreme Ct. reviewed French and determined that holding resulted in "an inequitable division of rights acquired through community effort" (*In re Marriage of Brown*, *supra*, 15 Cal.3d at pp. 841-842), and overruled it.

Pension benefits are not mere expectancies, but a form of deferred compensation for services rendered. Employee's right to such benefits is contractual, i.e., derived from terms of employment contract. As such, it is a chose in action, which is a form of property that employee acquires upon entering upon performance of employment contract.

"Over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community. [Citation.] A division of community property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent that equal division of community property contemplated by [former Civil Code section 4800,

replaced in part by Fam. Code §2550]." (Id. at p. 847.)

Court rejected H's argument that any inequality could be addressed by a spousal support award:

"Alimony, however, lies within the discretion of the trial court; the spouse 'should not be dependent on the discretion of the court ... to provide her with the equivalent of what should be hers as a matter of absolute right.'" (Id. at p. 848.)

NOTES: (1) The court limited the retroactivity of *Brown* to cases not yet final. See, e.g., *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 455, 143 Cal.Rptr. 139, 573 P.2d 41 [case reversed due to retroactive application of *Brown*].

(2) *Brown* applied to permit partition action to divide omitted pension which was unvested on date of separation (1967), but vested on date of judgment (1971). (*Huddleson v. Huddleson* (1986) 187 Cal.App.3d 1564, 232 Cal.Rptr. 722, ABC Card Pen 183.00.)

(3) *Brown* applied to permit partition action to divide that portion of omitted pension which was vested on date of judgment (1968), but not that portion which was unvested. (*Bowman v. Bowman* (1985) 171 Cal.App.3d 148, 217 Cal.Rptr. 174, ABC Card Pen 185.00.)

(4) Pre-*Brown* unvested pension may not be later divided in partition action. (*Shaver v. Shaver* (1980) 107 Cal.App.3d 788, 165 Cal.Rptr. 672, ABC Card Pen 189.00.)

(5) Accord, *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 74 Cal.Rptr.2d 825, 955 P.2d 451, ABC Card Pen 065.01.

COMMENTS: There is a significant difference in how the term "vesting" is used in family law proceedings as compared to use in the pension industry.

Vesting, as used in the pension industry, refers to the status of the accrued benefit of an employee who leaves an employer for a reason other than death (or in some cases disability) before retirement. A vested benefit will become payable at a future date, even if the employee is no longer in the service of the employer at that future date. This vesting occurs at the time the employee has a full interest in the accrued (earned to date) benefit.

Vesting, as defined in family law proceedings, occurs when an employee is certain to receive benefits, whether or not employment continues, although survivorship to a particular age may be an additional requirement for actual payment. (*In re Marriage of Brown*, *supra*, 15 Cal.3d at 842.)

In *Brown*, the Supreme Court held that pension rights, whether vested or not, comprise a community interest subject to division in a dissolution, to the extent that such rights derive from employment during coverture.

Pen 001.01

Court may award each spouse a portion of each pension payment as paid.

In re Marriage of Brown (1976) 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561

Tobriner, J.

FACTS: See Facts discussed on preceding card. In describing options available to court to divide nonvested pensions, court suggested either cash-out, where present value of rights are determined, after taking into account possibility that death or termination may destroy rights before they mature, or in-kind division, where future pension payments are divided when received:

"[I]f the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid. This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present

value of the pension rights, and divides equally the risk that the pension will fail to vest." (Fn. omitted.) (Id. at p. 848.)
NOTES: But see *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, ABC Card Pen 364.00, holding that *Brown* did not endorse a time rule method of division.
Pen 038.01

Court has discretion to divide pension in any way which complies with former Civil Code section 4800 [replaced by Fam. Code §2550 et seq].
In re Marriage of Brown (1976) 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561
Tobriner, J.
FACTS: See Facts discussed on preceding cards. In discussing the options available to divide c/p interests in pension benefits, court made it clear that its earlier suggestion favoring cash-out was not intended to limit trial court's discretion.

"Our suggestion in *Phillipson v. Board of Administration* [(1970) 3 Cal.3d 32, 46, 89 Cal.Rptr. 61, 473 P.2d 765], that when feasible the trial court should award the employee all pension rights and compensate his spouse with other property of equal value, was not intended to tie the hands of the trial court. That court retains the discretion to divide the community assets in any fashion which complies with the provisions of Civil Code section 4800." (Id. at p. 848, fn. 10.)
Pen 056.01

Marriage of Davis

Time in reserves was not counted in time rule when it did not count towards retirement pay.
In re (1980) 113 Cal.App.3d 485, 169 Cal.Rptr. 863
Brown, J. DCA4
FACTS: H was on active duty in Navy for 20 years, 17 during marriage. He then transferred to the Fleet Reserve and began serving 10 years in reserves before he could "retire." Parties separated four years later. After H retired, W sought an interest in H's pension, which had not been mentioned in parties' 1973 judgment. Trial ct. awarded W an interest in the pension based upon H's active duty time only. H appealed, contending that his entire 30 years should have been counted. Court of Appeal reversed, holding that a separate action was required to divide the pension; it could not be done as part of dissolution. To guide trial ct. in subsequent action, court affirmed trial court's decision to omit 10 years of Fleet Reserve service from consideration. Although it was required that he "serve" the 10 years, no duties were required of him other than to take a couple of physicals. During the 10 years he received "retainer pay" equal to what his retired pay would be. He received no additional retired pay by virtue of having been in Fleet Reserve. If he were called to active duty, he would receive active duty pay, not retainer pay. As the right to retired pay was earned solely by service on active duty, only the active duty years should count.
NOTES: A separate action is no longer required to divide an omitted asset. (Fam. Code §2556, formerly Civil Code section 4353, repealed effective 1/1/94).
Pen 048.01

Downer v. Bramet

Nonemployee spouse may have interest in "gift" from employer to employee spouse.
Downer v. Bramet (1984) 152 Cal.App.3d 837, 199 Cal.Rptr. 830
Kaufman, J. DCA4
FACTS: H and W separated in 1971, after 18 year marriage. H employed by Chilcott Enterprises (C) from 1943 and was key officer in operations. C had no retirement program. In mid-60's, H told W that C was going to give him part of a ranch in Ore., in lieu of retirement. Parties separated in 1971, and in 12/72, entered into MSA acknowledging respective earnings after 3/72 were s/p. MSA also provided that any after discovered c/p would be split. In 8/72, C deeded ranch in Ore. to H and 2 other employees. Ranch not mentioned in MSA. In 1978, ranch sold for $1.35 million. In 1980, W learned of conveyance to H and commenced action to determine her rights in property. Trial ct. nonsuited her, and she appealed. W argued that transfer of ranch was in lieu of retirement benefits, hence c/p. H argued ranch a gift, hence s/p per former Civil Code section 5108 [replaced by Fam. Code §770]. Court of Appeal agreed that transfer "legally" a gift, in that C was under no legal obligation to deed property interest to H. But former Civil Code section 5108 must be read in context with entire marital property scheme. There was strong evidence that transfer was in recognition of H's skillful services during lifetime of service to C, and earnings from personal skill and effort during marriage are c/p. H was their trusted employee, but he never socialized with C. Except for business lives, he had practically no contact with C. Thus, although conveyance may have been in form of gift, it appears to have been, in whole or in part, remuneration in recognition of H's services to C. Thus, it was error to grant nonsuit against W.
COMMENTS: As the property had been gifted to husband prior to the signing of the marital settlement agreement, had the marital settlement agreement specifically confirmed it as husband's separate property, wife's suit might have been prevented. Of course, it is also possible that had husband disclosed the existence of the property, wife wouldn't have signed the marital settlement agreement. As husband's attorney is at risk either way, s/he should have written a protective letter to the client explaining the risks of either approach.
EmBe 005.02

Marriage of Foley

Partnership agreement cannot change character of income; if work to generate it was done during marriage, fact that the right to receive it vests after DOS does not change its character.
In re Marriage of Foley (2010) 189 Cal.App.4th 521, 117 Cal.Rptr.3d 162
Johnson, J. DCA2
FACTS: Parties separated on 11/7/03, after a 17-yr. marriage. H was an equity partner in law firm (LF). As an equity partner, H was allocated an ownership share in the LF partnership, which was adjusted every two years. Partners received a percentage of the firm's profits as compensation, using a formula based on a variety of factors. Typically, LF received 40% of its income in the last 3 mos. of the year. During the year, H received semi-monthly draws against his share of the LF's future profits, calculated as 55% of his income for the year based on budget projections. Remainder of a partner's distribution was received in three installments: the 1st in December, the 2d around the

10th of January, and the 3d during the last week of January. LF's policy and planning committee determined partnership compensation at the end of the calendar year. If a partner left before the determination of the prior year's compensation, per LF's partnership agreement, s/he forfeited the right to receive any amounts in excess of the bi-monthly draws that the partner had already received.

Relying on *In re Marriage of Iredale & Cates* (2004) 121 Cal.App.4th 321, ABC Card BuIn 325.01, trial ct. determined there was no community interest in LF's 1/04 partnership distributions to H. Trial ct. reasoned that compensation was governed by the partnership agreement, which provided that partners had no vested interest in year-end distributions until the distributions were approved by LF. Partnership agreement had been consistently applied to deny compensation to any partner who left the firm prior to year's end. Partners had no share in any of the firm's accounts receivable or work in progress, and thus no income until the firm's profits were determined at the end of the year. Since H had no interest in the 2004 Partnership Distribution until 1/04, which was after the date of the parties' separation, community had no interest in these partnership distributions.

W appealed and Court of Appeal reversed.

HELD: If the work which generated the income was done during marriage, the fact that the right to receive the payment vested after separation does not affect its character.

Relying on *In re Marriage of Brown* (1976) 15 Cal.3d 838, ABC Card Pen 001.00, Court held that W had an interest in unvested partnership distribution because it was earned in part based on work done prior to separation.

"Time of acquisition is the key factor considered. [Citation.] 'Perhaps the most basic characterization factor is the time when property is acquired in relation to the parties' marital status.' [Citation.] Therefore, to apply the proper analytic focus, we must first look to see if the right to the payment accrued during the marriage." (Id. at pp. 526-527.)

Since H's efforts on behalf of the community during the year garnered him the right to receive his share of the partnership profits at the time the firm chose to calculate them, the community's right to part of the 2004 Partnership Distribution accrued prior to separation.

"His right to receive partnership profits was not based on the firm's beneficence at the time of their distribution postseparation, but rather his performance on behalf of the firm during the entire previous year." (Id. at p. 527.)

The fact that H's right to receive the LF's profits could be defeated if he withdrew from the partnership before the time the firm actually calculated and distributed them did not affect the analysis.

"The vesting of the community property interest is distinct from whether [husband's] contractual right to receive his partnership distribution had ripened." (Id. at p. 528.)

Thus, although H's right to receive 2003 profits in 1/04 was contingent upon his continued employment with the firm, the c/p interest in part of them vested during the period before the parties' separation in 11/03.

In any event, H did not withdraw from the partnership and his right to receive the 2004 Partnership Distribution was not defeated. Thus, his argument based upon a contingency that did not occur did not affect the present characterization of the property.

On remand, trial ct. was to use its discretion to apportion the 2004 Partnership Distribution:

"Whatever the method it may use, however, the superior court must arrive at a result that is 'reasonable and fairly representative of the relative contributions of the community and separate estates.'" (Id. at p. 529.)

Court of Appeal rejected W's argument that she was entitled to a percentage of H's income for

the following two years since his share had been determined based on marital services.

"Although this formula was based upon historic facts (accounts receivable, recruiting efforts, technical skill, hours billed) occurring during the existence of the community, the facts underlying the genesis of [husband's] percentage share was merely foundation of the compensation formula going forward." (Id. at p. 528, n.4.)

BuIn 337.00

Marriage of Freiberg

That c/p share of H's pension will be based upon H's basic pay at retirement irrelevant to time rule division.

In re Marriage of Freiberg (1976) 57 Cal.App.3d 304, 127 Cal.Rptr. 792, disapproved on other grounds, *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 425, fn. 5, 174 Cal.Rptr. 493, 629 P.2d 1

Coughlin, J., by assign. DCA4

FACTS: H had been in Navy 17 years, 12 of which were during marriage. Trial ct. awarded W a share of H's benefits based upon time rule when H retired. H appealed, arguing that W's interest should not be calculated using his basic pay at retirement, which would be both his s/p and higher than at date of separation. Court of Appeal affirmed, stating that W had interest to a percentage of his ultimate retirement benefit, regardless of whether it is based upon a basic pay which is higher or lower than his basic pay on the date of separation.

"The fact the husband's basic pay at the time of retirement would be his separate property is alien to the retirement rights of the parties [citation]." (Id. at p. 311.)

Pen 041.00

Marriage of Gowan

Even where employee's service not continuous, pension based on total service years may be divided according to time rule.

In re (1997) 54 Cal.App.4th 80, 62 Cal.Rptr.2d 453

Cottle, P.J. DCA6

FACTS: See Facts discussed on ABC Card Pen 233.00. Trial ct. concluded combined pension included s/p and c/p and time rule appropriate method for ascertaining c/p interest.

HELD: Court had broad discretion and, given conflicting inferences possible from evidence, entitled to find pension related to all H's service years with Beckman, including those during marriage.

Although H correct that cases employing time rule generally involved single, continuing period of employment, matter was contemplated in *In re Marriage of Bergman* (1985) 168 Cal.App.3d 742, 214 Cal.Rptr. 661, ABC Card Pen 052.00, and "[Bergman] court thus held that the time rule would properly divide a pension, even if the pension reflected two different periods of non-continuous employment." (*In re Marriage of Gowan, supra*, 54 Cal.App.4th at p. 90.)

"We agree with the *Bergman* court that even where an employee's service is not continuous, a pension based upon total service years may be divided according to the time rule. The rationale for the time rule applies wherever the ••total number of years served•• by the employee spouse

(continuous or otherwise) is a substantial factor in computing the retirement benefits. Although [Husband] had two separate employment periods with Beckman, his pension was based upon his ••total•• service years. The time rule fairly accounts for both the marital and post-marital years of service because it assigns to the community only a portion of the pension corresponding to the portion of service during marriage and before separation." (Ibid.)

Community's 14-yr. contribution to H's pension was crucial to the final value of pension. Despite the break in service and higher postmarital salary, the application of the time rule was appropriate.

"Like the court in [*In re Marriage of Judd* (1977) 68 Cal.App.3d 515, 137 Cal.Rptr. 318, ABC Card Pen 039.00], we are persuaded that the community contribution to [Husband's] pension (approximately 14 years ...) was crucial to its final value and to the amount received by [him]. Under these circumstances, despite the break in service and the salary differential, the trial court acted within its discretion when it utilized the time rule to apportion the parties' interests in the pension." (*In re Marriage of Gowan, supra,* 54 Cal.App.4th at p. 91.)
Pen 236.00

Marriage of Henkle

Once max benefits are earned, further employment not considered in time rule formula.
In re Marriage of Henkle (1987) 189 Cal.App.3d 97, 234 Cal.Rptr. 351
King, J. DCA1
FACTS: H had been on active duty in USAF for 26 years when he married W. Six years later, after 32 years of service, he retired and separated from W. W argued that c/p was entitled to 6/32 of H's pension. H argued that since only first 30 years of service count towards retirement pay, c/p only entitled to 4/30. Trial ct. sided with W, and H appealed.

HELD: Reversed. C/P owns all pension rights attributable to employment during marriage. Here, H served for 2 years during marriage during which he accumulated no increase in his retirement benefits. Relying on *In re Marriage of Poppe* (1979) 97 Cal.App.3d 1, 158 Cal.Rptr. 500 (preceding card) [time rule appropriate only where amount of retirement benefits substantially related to years of service], court held that where years of service do not add to retirement benefits, they are not considered in time rule.
COMMENTS: There is a certain unfairness to this result. The basic notion is that retirement benefits are developed over the work period. In *Henkle*, the husband worked 32 years. He was married six years. The time rule should have been 6/32, not 4/30. The concept in *Poppe* is to make the time-rule apportionment based on time actually worked. The military retirement benefit is related directly to service-it just has a benefit cap. In an extreme case, assume that the wife had married after the husband had already served 30 years. If they were married for an additional 10 years before he retired, would she be entitled to zero retirement benefits?
NOTES: Accord *In re Marriage of Sonne* [*Sonne II*] (2010) __ Cal.App.4th __, __ n. 9, ABC Card Pen 378.00 [Discussion of propriety of only considering time that actually counts towards retirement, as opposed to time employed, in time rule formula].
Pen 045.02

Marriage of Judd

Pension should be divided according to time rule.
In re Marriage of Judd (1977) 68 Cal.App.3d 515, 137 Cal.Rptr. 318
Emerson, J., by assign. DCA1
FACTS: H was 55% vested in his retirement annuity plan through Standard Oil at date of separation. Trial ct. awarded W one-half of vested portion of total plan upon H's retirement. H appealed, arguing that she should have gotten one-half of the value of plan as of date of separation with no consideration given to future increases. W appealed, arguing that she should get one-half of c/p interest in pension based on time rule. Court of Appeal reversed and agreed with W, holding that the time rule was the fairest way to divide the parties' interest in H's pension. The time rule was defined as follows:

"[T]he community interest [is] that fraction of retirement assets, the numerator of which represents the length of service during the marriage but before the separation, and the denominator of which represents the total length of service by the employee-spouse." (Id. at p. 522.)

Court rejected H's arguments that time rule was unfair because his last years of employment, being ones with highest salary, had greatest impact on amount of his retirement benefit.

"'[T]he first few years of service (during the marriage) must be given just as much weight in computing total service as the last few years (after separation.)'" (Id. at p. 523.)
NOTES: (1) The time rule is routinely applied in cases where the ultimate benefit is substantially related to the years of service. See, e.g., *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 74 Cal.Rptr.2d 825, 955 P.2d 451, ABC Card Pen 065.01; *In re Marriage of Gowan* (1997) 54 Cal.App.4th 80, 62 Cal.Rptr.2d 453, ABC Card Pen 233.01, *In re Marriage of Jacobson* (1984) 161 Cal.App.3d 465, 207 Cal.Rptr. 512; *In re Marriage of Adams* (1976) 64 Cal.App.3d 181, 134 Cal.Rptr. 298; *In re Marriage of Freiberg* (1976) 57 Cal.App.3d 304, 127 Cal.Rptr. 792, disapproved on other grounds, *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 425, fn. 5, 174 Cal.Rptr. 493, 629 P.2d 1; *In re Marriage of Anderson* (1976) 64 Cal.App.3d 36, 134 Cal.Rptr. 252; *In re Marriage of Bergman* (1985) 168 Cal.App.3d 742, 214 Cal.Rptr. 661.

(2) See *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 520, ABC Card Pen 364.00: "[T]he essence of the time rule" is "the qualitative aspect of each service year as measured by its associated level of compensation has no effect on the final benefit as apportioned, equalizing all years of service regardless of rate of pay."
COMMENTS: The concept that all years of service should be given the same weight is sometimes referred to as the "momentum" or "equal dignity" rule.
Pen 039.03

Marriage of Lionberger

Pension apportioned by number of credits earned.
In re Marriage of Lionberger (1979) 97 Cal.App.3d 56, 158 Cal.Rptr. 535
Alarcon, J. DCA2
FACTS: At date of separation, H had earned 17.0531 "credits" with union pension. Trial ct. properly divided pension by awarding W "'one-half of the ratio of 17.0531 credits to the total number of credits [employee spouse] has at the time of his retirement....'" (Id. at p. 66.)

OMMENTS: The time rule should be based on actual time worked. Often in union retirement plans, more than one year of credited service is earned if the employee works excess hours. *Lionberger* and *Poppe* support the same concept. (See Comment *to In re Marriage of Poppe* (1979) 97 Cal.App.3d 1, 158 Cal.Rptr. 500 (this subtopic).)
Pen 047.01

Marriage of Poppe

Time rule apportionment not appropriate when benefit not substantially related to years of service.
In re Marriage of Poppe (1979) 97 Cal.App.3d 1, 158 Cal.Rptr. 500
Kaufman, J. DCA4
FACTS: H entered Navy in 1937 served on active duty until 1946, when he married W and joined reserves. Parties separated in 1973. H continued to serve in reserves until 1977, when he began receiving Naval Reserve pension payments. W moved to modify judgment to get her share of pension. Pursuant to time rule, she argued, she was entitled to $254 of $592 monthly payment. H objected because his pension was based not on time served, but on points accumulated, the vast majority of which he earned while on active duty before marriage. Using this formula, W's share would have been $96/mo. Trial ct. divided based on W's time formula, and H appealed.

HELD: Reversed. Trial court's order was "unreasonable, arbitrary, and an abuse of discretion." Although time rule is most commonly used method of dividing pension interests, it is not appropriate in all cases. In this case, the amount of the pension was not substantially related to years of service.

"[A]pportionment on the basis of the 'time rule' is appropriate only where the amount of the retirement benefits is substantially related to the number of years of service." (Id. at p. 8.)
COMMENTS: Although generally listed as an alternative to the time rule, *Poppe* is really just a refinement of it. A "point" was the equivalent of a day's work; so *Poppe* really said that "time" equals "time actually worked." Therefore, the rule of *Poppe* is that apportionment should be based on the ratio of time actually worked from date of marriage to separation, to total time actually worked that counts towards retirement. Usually chronological time is a fair measure of the separate and community estates' contributions to the ultimate retirement benefit so that the *Poppe* variation is not required.
Pen 046.00

Marriage of Sonne I

Since c/p funds redeposited to reacquire s/p service credits contributed only to annuity part of retiremnt allowance, community entitled to *pro tanto* share of annuity–not of the much larger pension component funded by employer contribs.
In re Marriage of Sonne (2010) 48 Cal.4th 118, 105 Cal.Rptr.3rd 414, 225 P.3d 546
Baxter, J.
FACTS: H was covered by CalPERS from 1971 until he retired in 2002. H divorced W1 in 1991 and married W2 in 1994. In 1995, H transferred to W1 1/2 of the CalPERS service credit earned during

their prior marriage. CalPERS credited W1's nonmember account with 8.7 yrs. of service credit and $42,556 in member contributions and interest. When W1 withdrew the contributions and interest, H exercised his option to redeposit them into his member account through a paycheck deduction. Deduction taken from his salary and from his monthly retirement allowance after retirement.

H filed for divorce from W2 in 1/04, after he had retired, but the deductions from his retirement allowance for the redeposit continued. Total paid during W2 marriage was $31,939. Member contributions and accumulated interest over H's entire career totaled $238,064. Actuarial present value of the retirement benefit at trial was over $2 million. Difference between H's total contributions and the actuarial present value of the retirement account was funded entirely by his employer as a "current period expense."

In divorce proceedings of W2 marriage, character of the redeposited member contributions and the service credit arising from the W1 marriage was in dispute. Parties' experts opined on different methods of dealing with redeposited credits.

Trial ct. calculated that the community had provided $31,939 of the $45,090 in redeposited member contributions (70.83%) and concluded the community share of the service credits from the W1 marriage was 70.83%. When added to the service credit earned during W2 marriage, total community share of the retirement allowance was calculated by the trial court to be 41.22%, and W2 was awarded one-half of this as her share.

Court of Appeal affirmed this aspect of the judgment on different grounds, agreeing H had a s/p interest in the premarital service to his employer, "which created his right to repurchase the service credits." However, H had commingled c/p with his s/p when he used community funds to redeposit member contributions in order to recoup the premarital service credit, and he did not "indisputably establish" or "unequivocally trace" what proportion of the service credit was attributable to his s/p and what proportion to the community so as to overcome the presumption that the service credit became community property. Court of Appeal also rejected H's suggestion that the community be reimbursed for its contribution instead of being awarded an interest in his retirement allowance. Supreme Ct. granted H's petition for review and reversed.

HELD: Since c/p funds redeposited to reacquire s/p service credits contributed only to annuity part of retiremnt allowance, community entitled to *pro tanto* share of annuity–not of the much larger pension component funded by employer contribs.

Trial ct. assumed the community acquired a 70.83% share of the service credit arising from the W1 marriage because the community had redeposited 70.83% of the member contributions for that time period—in essence, the community ••purchased•• the service credit by redepositing member contributions. But Supreme Ct. noted "a redeposit of member contributions for a prior period of service does not constitute consideration for the service credit for that period; it is merely a condition precedent to a credit for that previously rendered service. (See Gov. Code §20756.) The service credit (and the pension component of the retirement allowance) are more correctly described as '"a form of deferred compensation for services rendered."'" (Id. at p. 125.) Trial ct.'s analysis gave no weight to the ••service•• H rendered as a deputy sheriff during those years, all of which preceded the W2 marriage.

In other words, trial ct. apportioned to the community the same share of service credit it would have received had H and W2 actually been married during those years of H's service to County. This failed to consider that the right to the 8.677 years of service credit was H's s/p, which preexisted the W2 marriage, inasmuch as the service credit was offered in consideration for that prior 8.677 years of service. (See *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 182-183, ABC Card Pen 065.00; *In re*

Marriage of Lucero (1981) 118 Cal.App.3d 836, 841, ABC Card Pen 125.00.) Court noted *Lucero* involved almost the "mirror image" of the present case.

Service credit here, by contrast to *Lucero*, was not attributable to employment during the W2 marriage. Rather, it was earned during the W1 marriage and was originally an asset of that community. 1991 stipulated judgment awarded all the community's CalPERS pension and retirement rights to H and they remained his s/p at the time of marriage to W2 in 1994. In 1995, H transferred 1/2 of the accumulated member contributions and service credit attributable to the W1 marriage to W1 to satisfy an outstanding obligation to her. W1's share was placed in a separate nonmember account (Gov. Code §21290), and it entitled her to receive "a retirement allowance based on the service retirement formula applicable to the service credited to the nonmember," which would "consist of a ••pension•• and an ••annuity••, the latter of which shall be derived from the nonmember's accumulated contributions." (Government Code former §21215.8; see now Gov. Code §21298 (b).)

H retained, as his s/p, a right to recoup that service credit in the event W1 were to withdraw the assets in her nonmember account. W1 did so (see Gov. Code §21292), and H elected to exercise his right to redeposit his member contributions plus interest. Had he made that redeposit with s/p funds, the recouped service credit would unquestionably have been his s/p. W2 erred in characterizing H's right to redeposit his member contributions as an investment opportunity governed by the interspousal fiduciary duty (see Fam. Code §1100 (e)), inasmuch as the right to recover the prior service credit was H's s/p.

Supreme Ct. therefore agreed with Court of Appeal that the service credit earned during the W1 marriage was H's s/p when he invoked his right to redeposit his member contributions plus interest. Remainder of Court of Appeal's analysis, however, was problematic. Court of Appeal's "commingling analysis" rested on the erroneous legal assumption that H's retirement benefit was a unitary and indivisible asset. Not so. As amicus curiae Barbara A. DiFranza, CFLS pointed out, H's retirement allowance under CalPERS (Government Code §20000 et seq.) consisted of two distinct components: an annuity and a pension. (Gov. Code §21350.)

Here, the community made a redeposit of a portion of H's accumulated contributions for the period of the W1 marriage. Those contributions were converted into an annuity upon H's retirement. Employer's obligation to contribute to the pension component, on the other hand, derived from H's service during the W1 marriage. Thus, the community had a claim only on the annuity component relating to the time period of the W1 marriage, and was entitled only to a *pro tanto* share of ••that portion•• of H's retirement allowance.

Court of Appeal concluded trial ct. chose not to credit the evidence that H had presented. But both trial ct. and Court of Appeal made an error of law in assuming H's redeposit of member contributions with community funds entitled the community to a corresponding fraction of the entire retirement allowance attributable to the years of the W1 marriage.

Trial ct. correct that "Wife is entitled to a *pro tanto* share of the appreciation of the [retirement benefit] in proportion to her community share of its purchase." But court abused its discretion in assuming that the community, by redepositing member contributions under Government Code section 20751, had any entitlement at all to the pension component of H's retirement benefit arising from the W1 service years. Court should instead have apportioned to the community only a *pro tanto* share of the annuity. Supreme Ct. noted amicus curiae proposed a calculation deriving the community's share of the retirement allowance by dividing the community's redeposit of member contributions by the actuarial present value of the total retirement allowance.

"[A] trial court in general has discretion in selecting its method of apportionment, so long as the result 'is "reasonable and fairly representative of the relative contributions of the community and separate estates."' [Citation.] Tracing the community's contributions (and accumulated interest thereon) in the annuity component of Husband's retirement allowance would satisfy that standard. We believe, though, that it is most prudent to grant the trial court the opportunity to exercise its discretion as to apportionment of the annuity component in the first instance, especially since the court did not take evidence at trial concerning the apportionment issue, the experts' posttrial letters on the issue were unsworn, and neither expert was available for cross-examination about their findings and opinions on the issue." (I*n re Marriage of Sonne, supra*, 48 Cal.4th at p. 129.)
Pen 368.01

Marriage of Sonne II

The method selected for apportionment of a retirement benefit must be reasonable and fairly representative of the relative contributions of the community and separate estates.
In re Marriage of Sonne [*Sonne II*] (2010) 185 Cal.App.4th 1564, 111 Cal.Rptr.3d 506
Mihara, J DCA6
FACTS: See Facts discussed on ABC Card Pen 368.01. On remand from the Supreme Ct., Court of Appeal reiterated the high court's factual and legal discussion and remanded case to the trial ct. for it to exercise its discretion as to the proper method of apportionment of the two employment benefits, considering the Courts' directives.

A. REACQUIRED SERVICE CREDIT: Trial ct. has discretion to select among different methods when apportioning retirement benefits between the em/ee spouse and the non-em/ee so that they receive their proper c/p share and the em/ee spouse receives his/her s/p share, if any.

"'Whatever the method that it may use, however, the superior court must arrive at a result that is "reasonable and fairly representative of the relative contributions of the community and separate estates."'" (Id. at p. 1574.)

Here, for reasons explained in the Supreme Ct.'s decision, the redeposit of member contributions for a prior period of service did not constitute consideration for the service credit for that period. What the c/p acquired was an interest in the "annuity" portion of the retirement benefit, not the "pension" portion, which was solely attributable to H's pre-marital s/p service.

B. SURVIVOR BENEFIT: H argued that the trial ct. abused its discretion by not requiring W to make an equalizing payment of half of the ••actuarial value•• of the survivor benefit, as opposed to the monthly cost of it, which she paid by a reduction in share of the pension benefit. While Court of Appeal did not agree the trial ct. was ••required•• to order a payment equal to the actuarial value, the payment that it did require did not fairly apportion the benefit in a manner that was "'reasonable and fairly representative of the relative contributions of the community and separate estates.'"

"This allocation necessarily equated the ••cost•• of the survivor benefit with its ••value••. Yet the undisputed evidence at trial established that the ••value•• of the survivor benefit far exceeded its ••cost••. The actuarial value of the survivor benefit payments was $403,291; the actuarial value of the reduction in Husband's retirement allowance payments, which the court characterized as the ••cost•• of the survivor benefit, was $121,875. Hence, the trial court's allocation was based on a faulty premise. By compensating Husband for only the ••cost•• of the survivor benefit, when its ••value•• far exceeded its cost, the trial court failed to reach a result that was fairly representative of the

relative contributions of the separate and community estates." (Id. at p. 1577.)

While trial ct. properly concluded the various contingencies surrounding the survivor benefit weighed against charging W with its present actuarial value, nevertheless it had to come up with a division that reasonably reflected the relative contribution of the s/p and c/p estates.

One possible solution was to order the payments made into a trust and thereafter W could receive her share of the community interest in each payment and the remainder of each payment would to go to H's estate, heirs, or other designee.

While the trial ct. has wide discretion, the method selected below did not comply with the law. The issue was remanded for the trial ct. to use its discretion to order a fair division.
Pen 378.00

IV. Stock Options

Summary of Law: Characterization and division of stock options.

Summary of Law: Characterization and division of stock options
SUMMARY OF LAW: Stock options are a form of compensation commonly used by businesses for many reasons, including attracting and retaining key employees. Many emerging companies use stock options as a supplement to cash compensation. To the extent they are earned during marriage, they are properly characterized as community property and considered by the Court in the community property division. Determining when a stock option is "earned," however, is a fact-specific inquiry, requiring consideration of the corporation's motives for granting the options and the type of options awarded. (See, *In re Marriage of Hug* (1984) 154 Cal.App.3d 780, 201 Cal.Rptr. 676, ABC Card EmBe 012.00.)

The most prevalent theory is that stock options are a form of deferred compensation, akin to pension benefits, and thus the nonemployee spouse has an interest in options that were granted during marriage but vest after separation. (See *In re Marriage of Harrison* (1986) 179 Cal.App.3d 1216, 225 Cal.Rptr. 234, ABC Card EmBe 016.01.) An alternative theory has been advanced by George Norton in Apportionment of Stock Options, Family Law News (Fall 1998), in which it is argued that, in some cases, a sequential rather than cumulative theory should be used and that options vesting after separation should be viewed as deferred compensation for the period in which the options vest, not the entire period from the date of grant.

Most "stock options" seen today are granted to an employee on a specific date and permit the employee to either buy stock in the future at a given price ("striking price") or to buy stock now, but subject to a condition that they be sold back to the corporation at a given price if the employee leaves the company prior to a given date. Options that are granted and vest during marriage are community property, even if they are not exercised until after the parties' separation. If the employee leaves the company's employ for any reason (usually except death) prior to the date of vesting, then the options in that block are lost.

If options are granted during marriage but require that the employee remain with the company after separation in order for them to vest, then the prevalent theory is that they must be apportioned between community and separate property interests. Although there is more than one way to allocate stock options granted during marriage but exercisable after the date of separation and the trial court retains broad discretion to arrive at an equitable method, most judges recognize the "time

rule" as being an accepted means of accomplishing that end.

The options are usually granted in "blocks," with each block vesting on a certain date. For example, an employee might be granted 5,000 options, vesting 1,000 a year for five years. Each block of 1,000 options would be analyzed separately. As each block of options vests on a different date, a separate time rule calculation must be made for each block.

The "time rule" formula that is used is a variation of the formula which was approved in *In re Marriage of Judd* (1977) 68 Cal.App.3d 515, 137 Cal.Rptr. 318, ABC Card Pen 039.00. Thus, as to each block of options exercisable on a given date, the formula would be:

$$\frac{\text{DOG to DOS}}{\text{DOG to DOV}} \times \text{\# of Shares Exercisable} = \text{C/P shares}$$

DOG = Date of Grant
DOS = Date of Separation (Fam. Code §771)
DOV = Date of Vesting

Note that the date the options are exercised is not a consideration in determining the community share.

It will be a very rare case in which a date earlier than the date of grant would be used in the formula. In *In re Marriage of Hug, supra*, 54 Cal.App.3d 780, ABC Card EmBe 012.00, a date earlier than the date of grant was approved. In that case, however, the options replaced an earlier set which had been granted to the husband to lure him to the company, but had turned out to be worthless. Thus, the Court of Appeal affirmed a trial court decision to start the community's interest running at the date of employment, rather than the date of grant of the options. In most cases, however, the date of grant will be the earliest date on which the community's interest will begin to run.

As emphasized in *In re Marriage of Hug*, the time rule is not the only method which may be used to allocate options between separate and community interests. It may be that all of the work to earn them was done during marriage and all the employee has to do is survive in order for them to vest. In situations such as this, a method which allocates a greater share to the community may well be the more equitable manner of division.

Stock options which are granted after the date of separation are generally held to be separate property, even if they are related to work done during marriage. (*In re Marriage of Hug*, *supra*, 154 Cal.App.3d 793, n. 4.)

Although there are many reported opinions in California that define the "date of vesting" differently depending upon the structure of the option grant, for the purposes of the time rule, "vesting" can generally be considered to occur when the employee has the unfettered right to sell the underlying stock. For example, if the stock being divided is subject to forfeiture or mandatory buy back at a predetermined price if the employee leaves the employment prematurely, with the restrictions lapsing over a period of time after separation, then the proper method of dividing them is the time rule, except that the important date in the denominator is the date on which the stock is no longer subject to a risk of forfeiture. (See *In re Marriage of Harrison* (1986) 179 Cal.App.3d 1216, 225 Cal.Rptr. 234, ABC Card EmBe 016.01.) Thus the proper formula for determining the community's interest in the stock is the length of service during marriage between the date of grant and the date of separation, divided by the period between the date of grant and the date on which the stock is no longer subject to a risk of forfeiture. The nonemployee spouse would be awarded

one half of these shares, subject to the same restrictions and risks as the employee.

You should ensure that the parties' intent is correctly interpreted and applied through use of a timeline formula, particularly with stock of different vesting periods.

It is also possible to value the stock options and assign them to the employee spouse at their fair market value. (See *In re Marriage of Harriso, supra,*) 179 Cal.App.3d at p. 1225.) This requires the use of an expert and very technical mathematical models. (See discussion at ABC Card EmBe 051.00.)

As it is unlikely that the stock will be transferable, the employee will hold the spouse's share as trustee and either transfer them to him or her after the risk of forfeiture has lapsed or sell them at the direction of the nonemployee spouse. Remember to provide for the allocation of the associated income tax consequences. Unlike most assets, income tax consequences are usually taken into consideration when valuing and/or dividing stock options. (See *In re Marriage of Nelson* (1986) 177 Cal.App.3d 150, 222 Cal.Rptr. 790, ABC Card EmBe 017.00 and *In re Marriage of Harrison, supra*, 179 Cal.App.3d 1216, ABC Card EmBe 018.01.) You'll want to consult a CPA knowledgeable about stock options for advice on the appropriateness of considering tax consequences in your situation and the appropriate rate thereof.

A related benefit is a stock appreciation rights plan that allows the holders of stock options to surrender their rights to exercise their options and receive cash or shares in an amount equal to the difference between the option price and the fair market value of the common stock on the date of surrender.
EmBe 054.03

Family Code recognizes stock options as a form of employee benefit plan.
Fam. Code §80
STATUTE PROVIDES: "'Employee benefit plan' includes public and private retirement, pension, annuity, savings, profit sharing, stock bonus, stock option, thrift, vacation pay, and similar plans of deferred or fringe benefit compensation, whether of the defined contribution or defined benefit type whether or not such plan is qualified under the Employee Retirement Income Security Act of 1974 (P.L. 93-406) (ERISA), as amended. The term also includes "employee benefit plan" as defined in Section 3 of ERISA (29 U.S.C.A. sec. 1002 (3))." (Fam. Code §80.)
EmBe 055.00

Marriage of Harrison

Nonqualified options found to be "golden handcuffs" and apportioned by time rule commencing at date of grant.
In re Marriage of Harrison (1986) 179 Cal.App.3d 1216, 225 Cal.Rptr. 234
Wiener, Acting P.J. DCA4
FACTS: H was awarded nonqualified options in Loral stock (option to buy stock immediately, but stock subject to restrictions, i.e., forfeiture if employee left employment prematurely). Restrictions on stock lapsed over period of years after separation. Trial ct. apportioned based on period from date of grant to date of vesting. Court of Appeal corrected judgment to reflect the fact that the options were fully vested when granted. The operative date was when stock no longer subject to risk of forfeiture. Formula apportioning options starting at date of grant rather than date of employment

affirmed, because no evidence that options were issued as compensation for past employment.

As modified by the Court of Appeal, the approved formula was as follows:

"[Katherine's] share is to be obtained by creating a fraction, the numerator of which will be the total number of days between the signing or granting of the option agreement and the date of separation, the denominator of which will be the total number of days from the signing or granting of the option agreement and the day on which each portion of the [stock received pursuant to the exercise of the option] became fully vested and not subject to divestment. The ratio created by such fraction will be divided into the gain on the stock option on the date of exercise to determine the community property interest therein after reimbursement for the purchase of the option and any taxes paid by [Eugene] thereon in connection with the exercise of the option. All remaining interest in any stock option agreement not a part of this said ratio is confirmed as the sole and separate property of [Eugene]. . . . The basis for determining [Katherine's] interest goes only to the gain on the stock option plan after the costs of the purchase of the stock option by [Eugene] and any taxes paid thereon are repaid to [Eugene]." (Id. at p. 1223, fn.1, modified by Opinion on page 1225.)
EmBe 016.01

Marriage of Hug

Apportionment of stock options determined by purpose for which granted.
In re Marriage of Hug (1984) 154 Cal.App.3d 780, 201 Cal.Rptr. 676
King, J. DCA1
FACTS: H was granted a series of Amdahl stock options during marriage. Some could be exercised during marriage and balance after separation. Trial ct. apportioned based upon time formula which commenced on his date of employment. (See following card.) H argued that options were issued for future services, thus apportionment should start to run on date of grant of options. Court of Appeal affirmed, holding that stock options may be granted for many purposes, some of which are incentive for future services and others compensation for past services. Must look at facts of each case to determine purpose behind options. These options were, in part, an incentive for H to come to work for Amdahl, and replaced retirement benefits which he gave up when he left former employer to take job. They were thus compensation for past services and apportionment formula should begin at date of employment.
NOTES: But see *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 186, 74 Cal.Rptr.2d 825, 955 P.2d 451, *In re Marriage of Gram* (1994) 25 Cal.App.4th 859, 30 Cal.Rptr.2d 792, disapproved in part *In re Marriage of Lehman, supra*, and *In re Marriage of Frahm* (1996) 45 Cal.App.4th 536, 53 Cal.Rptr.2d 31, which held that the motivation of the employer in granting an employment benefit is unimportant. What it does is important. Why it does so is not.
EmBe 012.00

Stock options apportioned by time rule commencing at date of employment when were inducement to take job.
In re Marriage of Hug (1984) 154 Cal.App.3d 780, 201 Cal.Rptr. 676
King, J. DCA1
FACTS: During marriage, H was granted a series of Amdahl stock options. Some could be exercised

during marriage and balance after separation. Trial ct. apportioned unexercised options based upon time rule: c/p share being product of fraction, the numerator being time from date of employment to date of separation and denominator being date of employment to date option could be exercised, multiplied by the number of shares that could be exercised. H argued that options were issued for future services, thus apportionment should start to run on date of grant of options. Court of Appeal affirmed, holding that it was necessary to look at purpose for which options had been issued. Upon doing so, it felt that options were inducement to get H to leave prior employer and work for Amdahl. Thus, implied finding that options were earned from commencement of employment was supported by evidence.

"[I]n marital dissolution actions, the trial court has broad discretion to select an equitable method of allocating community and separate property interests in stock options granted prior to the date of separation of the parties, which become exercisable after the date of separation." (Id. at p. 782.)
EmBe 013.00

Stock options granted after separation are s/p.
In re Marriage of Hug (1984) 154 Cal.App.3d 780, 201 Cal.Rptr. 676
King, J. DCA1
FACTS: (See Facts from previous cards, this subtopic.) In discussing general aspects of stock option characterization and division, Justice King, in dictum, stated that stock options granted after separation would be s/p even if services prior to marriage contributed to their acquisition:

"Claims of a community interest in employee stock options granted to the employee spouse after the dissolution of the marriage would appear too speculative and would lack the immediacy and specificity necessary for exercise of jurisdiction over them." (Id. at p. 793, fn. 4.)
NOTES: See also *In re Marriage of Nelson* (1986) 177 Cal.App.3d 150, ABC Card EmBe 015.00 [1,750 postseparation options H received concurrent with his promotion to treasurer of Ampex, as approved by its board of directors on October 28, 1980 (25 days after separation), properly held to be his s/p].
EmBe 014.01

Marriage of Lehman

Nonemployee spouse who owns c/p interest in employee spouse's retirement benefits under a defined benefit plan owns c/p interest in retirement benefits as enhanced.
In re Marriage of Lehman (1998) 18 Cal.4th 169, 74 Cal.Rptr.2d 825, 955 P.2d 451
Mosk, J.
FACTS: H began working for PG&E in 6/59 and participating in its retirement plan in 5/62. H and W married 6/60, separated in 10/77. Final dissolution judgment, filed 2/79, reserved jurisdiction over pension. H continued to work for PG&E until he opted for early retirement in 1/95 at age 54. H eligible to participate in voluntary retirement incentive program (VRI) in order to reduce PG&E's work force. If employee met age and service qualifications, he was credited with 3 extra years of service and normal actuarial reduction for early retirement would be waived, resulting in higher monthly pension payments than under normal (age 55) early retirement plan. If he worked until age

65, however, monthly pension payments would be higher than both early retirement and VRI. H opted for VRI.

W filed various motions to obtain 1/2 community property (c/p) interest in enhanced portion of VRI benefit [$709/mo. more than H would have gotten under PG&E's regular early retirement]. Trial ct. awarded W c/p interest in VRI enhanced portion and H appealed, contending enhanced portion was his separate property (s/p). As enhanced retirement benefit not part of original employment contract and he had no enforceable right to receive it during marriage, it was not c/p. As PG&E's purpose to encourage early retirement and reduce work force, it was not deferred compensation for past services rendered but a severance package. Court of Appeal disagreed and affirmed, as did Cal. Supreme Ct.

HELD: W owns c/p interest in retirement benefits as enhanced.

The right to retirement benefits is a right to draw from stream of income that begins to flow on retirement, as stream then defined. Stream's volume at retirement may depend on various events or conditions after separation or dissolution.

"That the nonemployee spouse might happen to enjoy an increase, or suffer a decrease, in retirement benefits because of post-separation or even post-dissolution events or conditions is justified by the nature of the right to retirement benefits as a right to draw from a stream of income that begins to flow, and is defined, on retirement [citations], with the nonemployee spouse, at one and the same time, holding the chance of more [citations], and bearing the risk of less [citation], equally with the employee spouse. Because the nonemployee spouse is compelled to share the bad with the employee spouse [citation], he or she must be allowed to share the good as well." (Id. at p. 179.)

Regardless how employee spouse might choose to exercise freedom to change or terminate employment or modify terms, nonemployee spouse owns an interest in what he or she chooses by owning an interest in the community. It follows that nonemployee spouse who owns a community property interest in employee spouse's retirement benefits owns a c/p interest in latter's retirement benefits as enhanced. Right to retirement benefits that accrues, at least in part, during marriage before separation underlies any right to an enhancement.

Fact that nonemployee spouse who owns a c/p interest in an employee spouse's retirement benefits owns a c/p interest in the latter's retirement benefits as enhanced does ••not•• mean that the enhancement is a community asset ••in its entirety••. Issue is one of apportionment, not characterization.

Court found, on respective facts, each *In re Marriage of Frahm* (1996) 45 Cal.App.4th 536, 53 Cal.Rptr.2d 31 and *In re Marriage of Gram* (1994) 25 Cal.App.4th 859, 30 Cal.Rptr.2d 792 "correct in its result as to characterization...." However, *Frahm* sounder in reasoning because it "cleaves closely to *In re Marriage of Brown", supra,* 15 Cal.3d 838 [To extent an employee spouse accrues right to property during marriage, property in question is community asset." *Gram* weaker as "it wanders away in the direction of ad hoc decisionmaking."

Super. ct. did not err in its apportionment of H's retirement benefits as enhanced between c/p and s/p interests through application of time rule. Court found "unsound" suggestion of Gram that, in applying time rule to apportion an employee spouse's retirement benefits as enhanced between c/p and s/p interests, super. ct. must add any putative years credited to employee spouse's service to denominator of time-rule fraction. Such years are ••fictive•• - they have no independent existence, but are merely a means by which the employer effects the enhancement.

"When ... the superior court uses the time rule, with the employee spouse's length of service

during marriage before separation in the numerator, and with the employee spouse's length of service in total in the denominator, it arrives at a result that is 'reasonable and fairly representative of the relative contributions of the community and separate estates. [Citation.] The superior court would disturb the balance if it were to add to the denominator any putative years credited to the employee spouse's service: the employee spouse did not supply this fiction. ... It must, accordingly, leave the balance as it finds it, without adding any putative years credited to the employee spouse's service to either the numerator or the denominator." (*In re Marriage of Lehman, supra*, 18 Cal.4th at p. 188.)

NOTES: (1) To the extent that *In re Marriage of Gram* (1994) 25 Cal.App.4th 859, 30 Cal.Rptr.2d 792, ABC Card Pen 296.01 was inconsistent [it added putative years to the denominator], it was disapproved.

(2) Dissenting opinion by Baxter, J., joined by Chin, J.

Pen 065.01

Marriage of Nelson

Stock options designed to reward future services apportioned so as to put more emphasis on period following grant.

In re Marriage of Nelson (1986) 177 Cal.App.3d 150, 222 Cal.Rptr. 790

Anderson, P.J. DCA1

FACTS: During marriage, H was awarded blocks of options to buy Ampex stock. Options vested at various dates in future. Price of options was fair market value of stock when options issued. H argued should all be s/p because had no value unless stock went up after separation, which would be his s/p. Trial ct. apportioned, assigning c/p a fraction of each block of options issued before separation, the numerator of which was months from date of grant of each block of options to date of parties' separation. Denominator was time from each grant to date of exercisability. Fraction was then multiplied by number of shares which could be purchased in each block to determine c/p interest. Court of Appeal affirmed, holding no need to follow *Hug* formula [which measured c/p interest from date of employment] because purpose for which these options were issued was different. *Hug* options were designed to attract new employees to company while Nelson's were to reward future effort.

"[O]nly prospective increases in the value of Ampex stock could result in a profit to the Ampex option holders. It was therefore appropriate to place more emphasis on the period following each grant to the date of separation ... than on the employee's entire tenure with the company up to the time of separation as the ••*Hug*•• court did." (Id. at p. 155, fn. 4.)

EmBe 015.00

Marriage of Pearlstein

Nature of stock options discussed.

In re Marriage of Pearlstein (2006) 137 Cal.App.4th 1361, 40 Cal.Rptr.3d 910

Ruvolo, J. DCA1

FACTS: In a general discussion of the difference between stock options and stock received for one's

ownership interest in a company upon sale, the Court stated:

"Unlike actual shares of stock, stock options do not represent an ownership interest in the underlying business, but are merely a contractual right to purchase stock at a set price (the 'strike price'). This right to purchase stock is usually subject to conditions, such as limitations on when the options may be exercised, and a requirement that the option holder continue employment with the issuing company. The value of unexercised stock options is inherently speculative, because it lies in the potential that a difference may arise, by the time the options are exercised, between the strike price and the market price. If the market price climbs higher than the strike price, the holder of the options will be able to realize income, in the form of the difference between the two prices, if he or she purchases the underlying stock and then immediately sells it. Only if the option holder chooses to purchase the stock at the strike price, but does not sell it, will he or she have acquired an equity interest in the underlying business. In order to do that, however, the option holder must invest funds in the amount of the strike price times the number of shares purchased. (See generally *Scully v. US WATS, Inc.* (2001) 238 F.3d 497, 507-508 [explaining nature of executive stock options generally]; Karns & Hunt, Should Unexercised Stock Options Be Considered "Gross Income" Under State Law for Purposes of Calculating Monthly Child Support Payments? (2000) 33 Creighton L.Rev. 235, 253.)

As already noted, stock options are often given to corporate executives and higher-level employees as part of their incentive compensation packages. (See generally *In re Marriage of Hug* (1984) 154 Cal.App.3d 780, 784-787; Note, Acting in the Best Interests of the Child: A Solution to the Problem of Characterizing Stock Options as Income (2001) 69 Fordham L.Rev. 1523, 1534-1535.) By contrast, the USSI stock that Irwin received in the merger was not given to him as compensation for his past, present, or future services. Rather, it was part of the consideration for his sale of an existing capital asset, i.e., his stock in PRSI. In this regard, the unliquidated stock received for equity, rather than as compensation, is indistinguishable from other types of acquired non-liquid assets that are not normally considered income for support purposes. (Citations.)" [Fn. omitted.] (Id. at pp. 1374-1375.)
EmBe 073.00

Marriage of Steinberger

Increased stock option rights accruing due to a new deal made after separation may be allocated so as to benefit s/p.
In re Marriage of Steinberger (2001) 91 Cal.App.4th 1449, 111 Cal.Rptr.2d 521
Cottle, P.J. DCA6
FACTS: See Facts discussed on ABC Card EmBe 066.00. W's original and supplementary employment agreements (EA) also provided for stock options vesting over time. When W terminated in 11/97, her unvested stock options would have been lost per EA. However, her severance package included one additional year of stock option vesting if she waived her right to sue over her termination and declined to work for specified competitors. H argued that additional year that W received credit for after her termination should not accrue to her s/p benefit by being included in denominator of stock option time rule formula. Trial ct. disagreed and included the additional year in the denominator. Court of Appeal affirmed.

HELD: Trial court has broad discretion to fashion an apportionment of interests that is

equitable under the circumstances of the case.

H argued that the period after W's departure from Compuware did not represent any actual service to company and therefore should not be counted in the denominator of the time rule fraction. Relying on *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 74 Cal.Rptr.2d 825, 955 P.2d 451, ABC Card Pen 065.01, he argued that utilizing any "fictive" later time after the end of W's service would be unfair to the community's interest.

However, trial ct. found extra year of stock option vesting was not derived from anything earned during marriage because W had absolutely no right to have stock options vest after employment termination. Additional year of vesting was part of negotiation that W was able to evolve with Compuware. For same reasons that court found W's severance pay to be s/p (see discussion on ABC Card EmBe 066.00), Court of Appeal found that substantial evidence supported factual finding that the stock options, like the severance pay, were part of a "new deal" entered at the time W's employment was terminated.

In Lehman, enhancement at issue was not a severance payment but an enhancement to retirement benefits based on number of years of service, where part of the service occurred during marriage. Under those facts, court held the enhancement was partially c/p. Here, in contrast, W was allowed to receive vesting of stock options in question not based on her prior service, but because she entered a "new deal" with her employer after date of marital separation. Options in question not the result of W's original contract nor her prior years of service, but part of a separate, new severance package. W had not previously accrued any right whatsoever to this payment. Under these circumstances, trial ct. within its discretion to apply time rule in manner that gave W the benefit of these stock options.
EmBe 065.00

Marriage of Walker

Stock options which were subject to forfeiture should be characterized by dates of vesting rather than dates of exercisability.
In re Marriage of Walker (1989) 216 Cal.App.3d 644, 265 Cal.Rptr. 32
Sonenshine, J. DCA4
FACTS: In 1983, H went to work for Caremark (C). During employment and prior to separation, H was granted stock options in C's stock, all at the then market value. Options were exercisable at various times in future, but were subject to forfeiture if H left employment prior to specified dates. Parties separated in 1985. In 1987, C was sold and all of options vested immediately. Trial ct. found all options exercised by H after separation to be c/p, as well as 78% of unexercised options. H appealed, and Court of Appeal reversed. Trial ct. improperly relied on dates options were exercisable, rather than dates stock vested without risk of forfeiture. Proper formula was that set forth in *In re Marriage of Harrison* (1986) 179 Cal.App.3d 1216, 225 Cal.Rptr. 234 (this subtopic).

"Considerations of exercisability of the options and vesting of the stocks are, however, extremely significant.... To ignore this difference is to misconstrue the entire time rule concept.... [T]he community does not lose its interest in [employment benefits conferred during marriage] simply because they are ••received•• after separation. Conversely, however, when the parties separate before the benefits are vested, the community does not ••receive•• all of them. There must be an allocation taking into account the periods of time before and after separation." (Id. at p. 651.)

EmBe 046.01

V. C/P Interest in S/P Business

A. Business Fluctuates in Value

No c/p interest in business worth same on date of separation as on date of marriage, despite being rebuilt from zero value during marriage.
In re Marriage of Denney (1981) 115 Cal.App.3d 543, 171 Cal.Rptr. 440
Woods, J. DCA2
FACTS: H owned donut shop prior to marriage. During marriage, W worked in shop and at end was fully responsible for its management. Value of business same on date of marriage and date of separation. W attempted to show that, during the marriage, business became valueless due to H's alcoholism, and that she rebuilt it. Court of Appeal affirmed trial court's refusal to permit evidence.

"[W]here the value of the husband's separate property business was no greater at the time of separation than at the time of marriage, and where no bankruptcy occurred establishing that the business had a zero value at a precise time and was thereafter rebuilt, the trial court did not err in refusing to admit evidence concerning the decreased value of husband's business during this marriage." (Id. at p. 550.)
NOTES: See Notes to *In re Marriage of Winn* (1979) 98 Cal.App.3d 363, 159 Cal.Rptr. 554 (this subtopic).
BuIn 033.00

Where s/p business went bankrupt during marriage, finding that it was all c/p affirmed.
In re Marriage of Winn (1979) 98 Cal.App.3d 363, 159 Cal.Rptr. 554
Kingsley, J. DCA2
FACTS: H was in horse slaughter business for many years prior to 1971 marriage. In 1975, he declared bankruptcy, but later resumed business. In dissolution trial, court found business to be c/p, awarded to H for $15,000, and ordered him to pay W $7,500. H appealed.

HELD: Affirmed.

"In finding that the business and its goodwill was community property ... [the trial court] was entitled to determine that the value of the business in 1975, when bankruptcy occurred, was zero and that any present value was solely due to the husband's efforts in reestablishing it after the bankruptcy." (Id. at p. 365.)
NOTES: *Winn* limited to its facts in *In re Marriage of Denney* (1981) 115 Cal.App.3d 543, 171 Cal.Rptr. 440 (this subtopic), wherein court held that mere fluctuations in value of s/p businesses during marriage did not mean that any increase after a low point was c/p. It was only when business actually went bankrupt and was thereafter rebuilt during marriage that all of value was c/p. Trier of fact not "required to track the oscillations in growth or decline of a business throughout the marriage." (Id. at p. 550.)
BuIn 032.00

B. Determining C/P Interest
1. Apportionment Required: In Gen.

Apportionment required of s/p business operated during marriage. Commingling and lack of proof can result in business being held 100% c/p.
Millington v. Millington (1968) 259 Cal.App.2d 896, 67 Cal.Rptr. 128
Sims, J. DCA1
FACTS: 50% interest in business owned by H prior to marriage held to be 100% c/p based on H's efforts and commingling during marriage. H appealed, and Court of Appeal affirmed, holding evidence supported finding. In general discussion of law relating to c/p interest in s/p business based on efforts during marriage, Court of Appeal reaffirmed that when s/p business was operated during marriage, apportionment was required between c/p and s/p:

"'[W]hen a husband owns a business as his separate property and devotes his efforts to the enterprise, there must be an apportionment of the profits.'" (Id. at p. 907.)

NOTES: See ABC Card BuIn 040.00, for detailed discussion of complicated fact pattern.
BuIn 004.00

W entitled to 1/2 of the FMV of H's services expended on his s/p, but not an interest in the property itself.
Kenney v. Kenney (1954) 128 Cal.App.2d 128, 274 P.2d 951, disapproved on other grounds, *See v. See* (1966) 64 Cal.2d 778, 786, 51 Cal.Rptr. 888, 415 P.2d 776
Mosk, J. pro tem. DCA2
FACTS: See Facts discussed on ABC Card CmPr 449.00. From time oil wells acquired, H performed relatively minor services for them valued initially at $20/mo. and later at $50/mo. Math showed 168 mos. at $20 and 101 mos. at $50 totaled $8,410. W contended that if wells were found to be H's s/p she was entitled to at least 1/2 the value of those services. Court of Appeal agreed and modified judgment to reflect.

"It was the duty of the trial court to have found the value of [Husband's] services [citation] and to have considered this element in its allocation of property. [Husband] asks us to assume this has been done, but since no reference to these services appears in the findings, we are unable to indulge in such assumption, While the activities perhaps were comparatively insignificant, whatever their worth may have been, they deprived the community of that amount of time, effort and return, and cannot arbitrarily be claimed by the separate estate. [¶] Under some circumstances it would be appropriate to ascertain that proportion of profits from the enterprise attributable to respondent's personal services and to consider that proportion to be community property. (*Witaschek v. Witaschek*, 56 Cal.App.2d 277, 281 [ABC Card BuIn 008.00].) But in view of the nebulous character of the services rendered here, it would be extremely difficult, if not impossible, to ascribe any direct relationship between respondent's services and the production of oil from the land. (Estate of Pepper, 158 Cal. 619.) In this case, therefore, the community interest should be measured by the value of the services rendered. (*Cozzi v. Cozzi*, 81 Cal.App.2d 229, 232 [ABC Card BuIn 023.00].)" (*Kenney v. Kenney, supra*, 128 Cal.App.2d at p. 139.)

W should have been awarded 1/2 of the $8,410 in services expended on the s/p, or $4,205.
BuIn 306.00

Apportionment of increase in value of s/p business during marriage required.
Mueller v. Mueller (1956) 144 Cal.App.2d 245, 301 P.2d 90
Schottky, J. DCA3
FACTS: See Facts discussed on ABC Card BuIn 041.01. In holding that H had not met his burden of establishing the existence of a separate property interest in the dental lab, the Court reaffirmed the general rule that an apportionment is required of a business that was separate before marriage, but grew during marriage:

"'If, however, one of the spouses invests his or her separate property in a business and conducts that business during marriage, the resulting profits are community and separate property in proportion to the amounts attributable to that spouse's personal efforts and to capital investment, respectively. [¶] What amount of the profits of a business conducted by one of the spouses is due to the personal efforts of that spouse and what amount is attributable to his or her capital investment must, in each case, be determined from the surrounding facts and circumstances.'" (Id. at p. 249.)

However, as H failed to present evidence sufficient to support such an apportionment, trial ct. correctly held any s/p interest lost and business all c/p.
BuIn 290.00

Apportionment of profits required on s/p business unless owner devoted only minimal efforts or increase solely attributable to natural enhancement.
Estate of Neilson (1962) 57 Cal.2d 733, 22 Cal.Rptr. 1, 371 P.2d 745
Traynor, J.
FACTS: H and W#1 were married from 1907 until W#1's death in 1939. In 1939, H married W#2. Upon his remarriage, H owned 3 parcels of real property on which he raised grain. H made payments on all 3 before marriage. One parcel (24 acres) was paid for in full before marriage, but H paid $38,500 on other 2 during marriage. H died in 1958. His will specifically disinherited W#2, and left everything to children by first marriage. W#2 elected to take her share of c/p. Jury found all of 2 parcels and one-half of third parcel (24 acres) to be c/p. Children appealed, and Supreme Ct. reversed, because of inconsistent verdicts. In general discussion of law, court stated that when party devotes efforts during marriage to s/p business, apportionment of profits is required unless s/he devoted only minimal efforts or increase solely attributable to natural enhancement, i.e., factors other than owner's efforts.

"The proceeds and increment in value are apportioned entirely to the husband's separate estate only when they are attributable solely to the natural enhancement of the property [citations] or when the husband expended only minimal effort and the wife introduced no evidence attributing a value to his services." (Id. at p. 740.)
NOTES: The Court overruled Estate of Pepper (1910) 158 Cal. 619, 112 P. 62 which had held that crops grown on separate property land constituted the "issues" or "profits" of separate property. Neilson held as with any enterprise, when the profits were partially attributable to the owner's efforts, they were divisible.
BuIn 003.02

W not entitled to interest on c/p share of H's s/p business during postseparation accounting period.
Harrold v. Harrold [*Harrold II*] (1954) 43 Cal.2d 77, 271 P. 489
Shenk, J.
FACTS: H owned 2 automobile dealerships prior to his 12 yr. marriage to W. Property aspects of previous judgment reversed on appeal and remanded for redetermination of c/p division. Parties stipulated that accounting period covered period between prior judgment and 8/51. Trial ct. found that during that period, $89,904 accrued to c/p and $88,224 remained in community estate. H ordered to pay W $45,112 as her share (51% due to H's extreme cruelty). Among W's arguments on appeal was that she was entitled to interest on this sum during accounting period. Supreme Ct. affirmed.

HELD: W not entitled to interest on c/p share of H's s/p business during postseparation accounting period.

"It does not appear that the community funds here involved were invested or earned any interest or increment. The recovery sought is based upon the [husband's] control and use of the [wife's] 'present, existing and equal' interest in the community property as it was accumulated. [Citation.] While the [husband] had the community funds in his possession he did so by virtue of the power given him to manage and control such property for the benefit of the community. [Citations.] When a divorce is pending the power of a husband over the community property exists until the entry of a final decree." (Id. at p. 81.)

"Interest is defined in [Civ. Code §1915] as 'the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money.' It is apparent that the [husband] was not using the money of the [wife] within the meaning of that section and she is not entitled to interest thereon." (Id. at pp. 81-82.)
BuIn 304.00

Apportionment required for efforts spent managing s/p investments.
Margolis v. Margolis (1952) 115 Cal.App.2d 131, 251 P.2d 396
Moore, P.J. DCA2
FACTS: Trial ct. awarded H his s/p as of date of parties' reconciliation (after earlier separation and executed property agreement), plus 6% rate of return. Balance of parties' property held to be c/p and divided equally.

"[I]n allocating the ... respective interests of separate estate and community property, the court allowed [husband] a 6 per cent return on his separate property right ... and concluded that the balance was the fruit of his managerial wisdom. Thus, the court properly derived the portion belonging to the community. Such computations were proper and represent a fair and equitable allocation of the income." (Id. at p. 135.)
BuIn 007.00

Increased value of electrical company held to be W's s/p where largely due to growth of community and its economic development. Rules stated.
Logan v. Forster (1952) 114 Cal.App.2d 587, 250 P.2d 730
Fox, J. DCA2

FACTS: W owned electrical company (EC) in Mexicali, Mexico, she inherited from her first husband. W married H2 in 1923; she was 51 and H2 was 32. EC was small, poorly run and corrupt. In 1921, W had hired her nephew to run EC and he turned it around into a profitable business. He resigned in 1925 and W became president, general manager and treasurer, although she always had Mexican manager. W became Mexican citizen in 1929. H and W separated in 1934 and MSA confirmed EC as her sole and separate property. She obtained Mexican divorce in 1935. H was paid $10,000 as lump sum for all his claims, including alimony. Parties remarried in 1937, when W was 68 and in poor health. EC sold its physical assets in 1943 for $187,588. Proceeds, together with other co. funds, subsequently deposited in W's bank account, which totaled $224,000 in 1945. Between 1937 and 1944, W received attributed salary of $40,697. Parties lived well and all was expended for their living expenses. W died in 1949 and left nothing to H. H challenged her will, claiming that c/p had an interest in EC by virtue of her efforts during marriage. Trial ct. found EC was all s/p and Court of Appeal affirmed.

HELD: Enhancement in physical value and profits earned were essentially an enhancement characteristic of a capital investment in a stable and flourishing business and thus W's s/p.

1934 MSA was not set aside and established that EC was W's s/p. (Court rejected H's argument that their remarriage voided it.) Thus, operative period was 1937 to 1943. During this period, W was 68 to 74 yrs. of age. Growth of business was due to growth of city and its economic development. Other factors supporting trial ct.'s decision were: business run by Mexican managers; W was there only on sporadic intervals; W traveled frequently; W made no significant decisions affecting business; and W was content with long established routine.

"It is the general rule that the rents, issues and profits obtained from the separate property of one spouse are invested with the same character as the property which produced it. [Citation.] However, where such separate property is a business whose continued success and lucrativeness after the marriage depend on the contribution of the toil and talents of the husband or wife, then that portion of the increment, profits, or returns attributable to his or her labor is normally community property.... In making such apportionment between separate and community property our courts have developed no precise criterion or fixed standard, but have endeavored to adopt that yardstick which is most appropriate and equitable in a particular situation [citation], depending on whether the character of the capital investment in the separate property or the personal activity, ability, and capacity of the spouse is the chief contributing factor in the realization of income and profits. [Citation.] In *Pereira* v. *Pereira* ... [t]he increment being attributable to the personal efforts of the husband, belonged to the community estate.... Another approach to this problem ... is taken in the case of *Van Camp* v. *Van Camp*... [where the] court found that the husband's salary was commensurate with his labor for the corporation and this was an adequate return to the community." (Id. at pp. 598-600.)

It is primarily a question of fact for trial ct. to determine portion of profits that arise from use of s/p capital and what part arises from activity and personal ability of owner. Evidence supported trial ct.'s determination that W adequately compensated for her efforts and business her s/p.
BuIn 303.00

Income from s/p business is allocated to c/p or s/p in accordance with the extent to which it is allocable to spouse's efforts or capital investment.
Huber v. Huber (1946) 27 Cal.2d 784, 792, 167 P. 708

Carter, J.
FACTS: Parties married 5 yrs. W filed for divorce and court found parcels of real property acquired during marriage and title taken as joint tenants, but inasmuch as property purchased with H's separate funds, it was his separate property (s/p) and H took it in joint tenancy as matter of convenience to himself and in order that title would pass 1/2 to W only on his death if not otherwise directed during his life. Court found W had no interest in property or in rents, issues and profits. W appealed and Court of Appeal affirmed.

"'In regard to earnings, the rule is that where the husband is operating a business which is his separate property, income from such business is allocated to community or separate property in accordance with the extent to which it is allocable to the husband's efforts or his capital investment.'" (Id. at p. 792.)
NOTES: Accord, *Harrold v. Harrold* (1954) 43 Cal.2d 77, 80, 271 P. 489, ABC Card BuIn 301.00, quoting passage.
BuIn 302.00

C/P entitled to return on management of s/p portfolio.
Witaschek v. Witaschek (1942) 56 Cal.App.2d 277, 132 P.2d 600
Gould, J. pro tem. DCA2
FACTS: H had considerable s/p property prior to marriage. During marriage, he devoted himself to managing those properties. Trial ct. allocated $10,000 of H's securities to c/p. H appealed, and Court of Appeal affirmed, holding H's efforts during marriage were c/p.

"The capital which the husband brings to the marriage partnership is his own separate property, but it is a question for the court to determine what portion of the profits thereafter arises from the use of this capital and what part arises from the activity and personal ability of the husband. That portion of the income due to the 'personal character, energy, ability and capacity of the husband' is community property." (Id. at p. 281.)
BuIn 008.00

Parties' interest in business acquired during marriage should be measured by the capital contribution made by each to its purchase.
Estate of Caswell (1930) 105 Cal.App. 475, 288 P. 102
Jamison, J. DCA3
FACTS: W of deceased (H) sought to have all his property found to be c/p and distributed to her. H and W married 1911 and H died 1926. H owned an inchoate right to a billboard ad company that he acquired from his father (F). In 1907, F entered into a contract to sell his billboard company to sons (H and Brother (B)) for $15,000, payable $100/mo. As of date of marriage of H and W, F had been paid $4,600. F died in 1914 and bequeathed unpaid portion of said $15,000, namely $6,600, to his sons. Sons had paid F the sum of $3,800 from H's date of marriage until F's death. B leased business to H for $200/mo. with option to purchase. H exercised option for $22,000 and then sold to Foster & Kleiser (F&K) for $100,000, payable $25,000 in cash, $15,000 note and 600 shares of stock in F&K valued at $60,000. H held this stock when he died.

On marriage, W gave H $3,750 to assist him with business.

Probate ct. found F&K stock to be H's s/p and distributed it 1/2 to W and 1/2 to heirs. W

appealed and Court of Appeal reversed.

HELD: Parties' interest in business acquired during marriage should be measured by the capital contribution made by each to its purchase.

The $15,000 purchase price was paid $4,600 before marriage and $6,600 by F's forgiving balance of note. Thus, H contributed 1/2 of $11,200 with his s/p for $5,600. W should be credited with $3,750 of her s/p. Community received credit for the payments it made.

Quoting from *Vieux v. Vieux* (1926) 80 Cal. App. 222, 229, 251 P. 640, 643, Court stated:

"'In the instant case, the husband having acquired an inchoate right, on compliance with certain conditions, to become an absolute owner of the property in question, and the facts showing that the required conditions were met with funds furnished by the community, aided by other funds issuing directly from the property agreed to be purchased, justice demands that the rights of the parties should be measured by the direct contributions made by the respective parties to the purchase price of the property.'"

Thus, c/p interest was $3,800 paid during marriage plus W's $3,750 contribution, or 75/187 ($15,000 plus $3,750). H's s/p interest was $4,600 plus $6,600 or 112/187.

BuIn 322.00

2. C/P Funds Contributed

C/P receives interest in s/p commercial real property based upon payments made with c/p funds to reduce encumbrance.

In re Marriage of Frick (1986) 181 Cal.App.3d 997, 226 Cal.Rptr. 766

Johnson, J. DCA2

FACTS: H owned commercial real property prior to marriage on which he operated Mikado Hotel. C/P funds used during marriage to reduce encumbrance against real property. Trial ct. properly apportioned appreciation in real property using Moore formula, calculating separate and community property percentage based on purchase price.

NOTES: See *In re Marriage of Frick*, *supra*, 181 Cal.App.3d 997, ABC Card FaRe 131.00 and ABC Card FaRe 117.00 [discussion of application of Moore/Marsden formulas to apportion increase in value of s/p real estate, on which payments were made with c/p, during marriage].

BuIn 031.00

3. Community Living Expenses

When using *Van Camp* method, c/p living expenses must be deducted from c/p income to determine c/p interest.

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

The Court DCA2

FACTS: H owned *Van Camp* Sea Food Co. and substantial other s/p prior to marriage. During marriage, H received total compensation of $69,203 for his services. C/P expenses during same period were between $60,630 and $84,576. All other monies received during marriage were from his s/p holdings. Trial ct. awarded W $60,000 as her share of c/p. Court of Appeal reversed, holding that maximum c/p interest was $8,573, as c/p expenses had to be first deducted from c/p income before determining c/p interest.

"In the absence of any evidence showing a different practice, ... the rule is that the community earnings of husband and wife are chargeable with the family support. [Citation.] Hence any amounts of money expended for such purpose by either spouse during the existence of the marital relation are presumed to have been paid out of the community estate." (Id. at p. 25.)
NOTES: Accord *Tassi v. Tassi* (1958) 160 Cal.App.2d 680, 325 P.2d 872, ABC Card BuIn 018.00.
BuIn 026.00

When using *Van Camp* method, c/p living expenses must be deducted from c/p income to determine c/p interest.
Beam v. Bank of America (1971) 6 Cal.3d 12, 98 Cal.Rptr. 137, 490 P.2d 257
Tobriner, J.
FACTS: See Facts discussed on ABC Card BuIn 022.00.

"'When a husband devotes his services to and invests his separate property in an economic enterprise, the part of the profits or increment in value attributable to the husband's services must be apportioned to the community. If the amount apportioned to the community is less than the amount expended for family purposes, and if the presumption that family expenses are paid from community funds applies, all assets traceable to the investment are deemed to be the husband's separate property.'" (Id. at p. 21.)
BuIn 027.01

Do not deduct living expenses when utilizing *Pereira* approach.
In re Marriage of Frick (1986) 181 Cal.App.3d 997, 226 Cal.Rptr. 766
Johnson, J. DCA2
FACTS: H owned Mikado Hotel prior to marriage. Trial ct. utilized *Pereira* to apportion increase in value of business during marriage. Court then deducted family's living expenses and determined all c/p exhausted. Business awarded to H as his s/p. W appealed, and Court of Appeal reversed. Since withdrawals from business for living expenses would have been added to c/p interest under *Pereira*, it was improper to deduct them twice.

"During the course of the marriage, [husband] took out of the business whatever income he needed to meet the expenses of the community, i.e., disbursements from the business covered the community living expenses. These disbursements represented community income since had these disbursements not been made, the value of the corporation would have increased, and under the ••*Pereira*•• formula, all of this increased value would have been community property. As such, we are at a loss to understand why the community should be charged with community expenses twice. Community expenses were met with disbursements from the business. These disbursements in fact represented profits from the business which the community would have been entitled to under the ••*Pereira*•• formula had they not been withdrawn from the business. A second family expense deduction is unwarranted and unfair to the community." (Id. at pp. 1018-1019.)
BuIn 028.00

Deduct living expenses from reasonable value of owner's services in *Van Camp* approach.
Millington v. Millington (1968) 259 Cal.App.2d 896, 67 Cal.Rptr. 128

Sims, J. DCA1
FACTS: 50% interest in business owned by H prior to marriage held to be 100% c/p based on H's efforts and commingling during marriage. H appealed, and Court of Appeal affirmed, holding evidence supported finding. In general discussion of law relating to c/p interest in s/p business based on efforts during marriage, Court of Appeal reaffirmed that community living expenses had to be deducted from *Van Camp* formula [reasonable value of owner's services determines c/p interest].

"If the portion of the business earnings properly allocable as earnings of the husband, which as such is community property, is all consumed in the living expenses of the family, the remaining increment of the business at the time of the dissolution of the community will be considered separate property." (Id. at p. 909.)
NOTES: See ABC Card BuIn 040.00, for detailed discussion of complicated fact pattern.
BuIn 029.00

If c/p expenses exceed value of owner's services to s/p business, assets traceable therefrom are deemed s/p.
Estate of Neilson (1962) 57 Cal.2d 733, 22 Cal.Rptr. 1, 371 P.2d 745
Traynor, J.
FACTS: H and W#1 were married from 1907 until W#1's death in 1939. In 1939, H married W#2. Upon his remarriage, H owned 3 parcels of real property on which he raised grain. H made payments on all 3 before marriage. One parcel (24 acres) was paid for in full before marriage, but H paid $38,500 on other 2 during marriage. H died in 1958. His will specifically disinherited W#2 and left everything to children by first marriage. W#2 elected to take her share of c/p. Jury found all of 2 parcels and one-half of third parcel (24 acres) to be c/p. Court refused to give jury instruction requested by children that if c/p expenses exceed c/p income, then assets purchased in H's name were s/p. Although Court of Appeal reversed for inconsistent verdicts, it approved failure to give instruction because W alleged that H had orally transmuted his s/p to c/p. Otherwise, requested instruction was accurate:

"When a husband devotes his services to and invests his separate property in an economic enterprise, the part of the profits or increment in value attributable to the husband's services must be apportioned to the community. If the amount apportioned to the community is less than the amount expended for family purposes and if the presumption that family expenses are paid from community funds applies, all assets traceable to the investment are deemed to be the husband's separate property." (Id. at p. 742.)
BuIn 030.00

4. Equitable Apportionment

Once trial ct. determines a WC disability award must be apportioned, its responsibility is to determine proper apportionment method and it may use any method which fairly apportions between the c/p and s/p interests.
In re Marriage of Ruiz (2011) 194 Cal.App.4th 348, 122 Cal.Rptr.3d 914
McKinster, J. DCA4
FACTS: 3 years prior to separation, W received a net $172,364 lump sum worker's compensation

(WC) payment for injury sustained during marriage. Since neither party introduced evidence as to how it should be apportioned, W contended that it was all her s/p pursuant to *Raphael v. Bloomfield* (2003) 113 Cal.App.4th 617, ABC Card EmBe 071.00. Trial ct. apportioned equitably based on period W was disabled during marriage and her remaining working life after separation, assuming she would retire at age 62.5, resulting in $103,033 c/p and $71,311 s/p.

W appealed, arguing trial ct. erred by applying the general presumption that property acquired during marriage is c/p and placing the burden on her to produce evidence that the payout was s/p, and by devising a scheme of apportioning the funds absent evidence supporting the scheme. Court of Appeal affirmed as to court's apportionment.

HELD: Once trial ct. determines that an award needs to be apportioned, it is its responsibility to determine the proper method of apportionment and may use any method which fairly apportions between the c/p and s/p interests.

W interpreted *Raphael v. Bloomfield* to mean that there is a presumption that the entirety of a WC permanent disability award is s/p, regardless of when received, and that the burden is on the nondisabled spouse to prove otherwise. Court of Appeal noted this was a fair reading of *Raphael's* statement that "notwithstanding the section 760 community property presumption," only that portion of the award which is intended to compensate for the disabled spouse's reduced earnings during the marriage is community property. (*Raphael, supra*, 113 Cal.App.4th at pp. 623, 624.) If that is indeed what *Raphael* intended, however, Court here disagreed, because it was contrary to the legislatively expressed policy that all property acquired during marriage is presumed to be c/p. (Fam. Code §760.) However, Court presumed the *Raphael* court intended only to hold, consistent with In re Marriage of Jones (1975) 13 Cal.3d 457, ABC Card Pen 004.00, on which it relied, that a lump sum disability payment received during marriage is at least in part c/p because it is intended in part to compensate the community for the loss of the injured spouse's earnings. (*In re Marriage of Jones*, at pp. 462, 464; *Raphael*, at pp. 623-624.)

"[B]ecause one purpose of a permanent disability award is to compensate for lost earnings, the mere fact that the award was received three years before the parties separated mandates the conclusion that some portion of the award compensated for earnings lost during the marriage. (See In re Marriage of Jones, *supra*, 13 Cal.3d at p. 462.) Thus, the trial court's characterization of the award as partially community property and partially separate property was correct." (In re Marriage of Ruiz, *supra*, 194 Cal.App.4th at p. 356.)

APPORTIONMENT:

Once the trial ct. determines that the award is partially c/p and partially s/p, it is court's responsibility to determine an appropriate method of apportionment. (*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 187, ABC Card Pen 065.00.) Court may use any method which fairly apportions the asset or its value between c/p and s/p interests. (Ibid.) Trial. ct.'s apportionment is reviewed on appeal for substantial evidence. Because it is the court's obligation to make an equitable apportionment, "neither party has the burden of proof in the sense that a failure of proof will result in an award of the asset in its entirety to the other party. Accordingly, any failure of proof by husband in this case does not result in a default ruling that the award is entirely wife's separate property." (In re Marriage of Ruiz, *supra*, 194 Cal.App.4th at p. 357.)

Trial ct. apportioned the WC award pro rata from the date of W's injury to the DOS as c/p and the balance as her s/p. WC award for permanent disability is intended to compensate the worker for lost or diminished earning capacity from the time the injury becomes permanent and stable to the end of the worker's working life. (Labor Code §4650 et seq.; *Raphael, supra*, 113 Cal.App.4th at p.

625, fn. 6; *City of Martinez v. Workers' Comp. Appeals Bd.* (2000) 85 Cal.App.4th 601, 608-609.) Although W probably would have received temporary WC benefits during her disability period prior to the determination she was permanently disabled (see *City of Martinez v. Workers' Comp. Appeals Bd.*, at pp. 608-609), no evidence that she did. Consequently, Court could not say it was an abuse of discretion to conclude that the permanent disability lump sum was intended as her full compensation under her WC claim and to apportion the award as the trial ct. did.
NOTES: Court analogized worker's compensation benefits to pension benefits and applied same general allocation principles.
EmBe 081.00

Award of $600,000 to c/p to compensate for H's efforts which benefited his s/p stock affirmed. Doctrine of "equitable apportionment."
In re Marriage of Zaentz (1990) 218 Cal.App.3d 154, 267 Cal.Rptr. 31
Racanelli, P.J. DCA1
FACTS: In 1977, H formed movie production company (SZC), of which he owned 40% of stock. H then assigned 34.5% of stock to trusts of which he was a designated beneficiary. H and W married in 1978. SZC was in poor financial condition.

In 1982, H entered into K to make movie "Amadeus." H was guaranteed a fee of $300,000 for producing, $213,000 of which was actually earned during marriage. SZC was entitled to 1/3 of profits. Movie was financed in part by hypothecating H's c/p and s/p assets. When H and W separated, filming was completed and postproduction work was in progress. Film was very successful.

H argued W had no claim to any of profits as his share inured to SZC. Trial ct. held that community was entitled to remuneration, over and above $300,000, for H's production duties and financing contribution in amount of $600,000, and awarded W one-half. Trial ct. found H's net worth increased $2 million during marriage. H appealed, and Court of Appeal affirmed.

Although trial ct. did not specify how it arrived at $600,000 figure, there was substantial evidence on which calculation could have been made. H argued that his only compensation was producer's fee; that profits were property of SZC; and that court could not rewrite K to make SZC share with him. H also argued adequacy of his compensation was at issue only if his s/p increased in value as result of his efforts, an issue which trial ct. did not resolve. Appellate ct. held that substantial evidence supported judgment. Decision could be affirmed based upon discretion of court to achieve equity or "doctrine of equitable apportionment in connection with the increased value of his separate property stock interest." (218 Cal.App.3d at 165.)

Although appellate ct. reviewed both *Pereira* and *Van Camp* lines of authority, it affirmed despite trial court's having made no findings to support either approach.
NOTES: See also *In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339,ABC Card CmPr 912.00 [Trial court has discretion to fashion appropriate division of c/p].
BuIn 229.02

5. *Moore/Marsden*

***Moore/Marsden* does not apply to the apportionment of businesses.**
Patrick v. Alacer Corp. [*Patrick II*] (2011) 201 Cal.App.4th 1326, 136 Cal.Rptr.3d 669
Ikola, J. DCA4
FACTS: See Facts discussed on ABC Card CmPr 990.00. W argued she should receive a *pro tanto* interest in Alacer, H's s/p business, relying on case law giving the community a *pro tanto* interest in s/p purchased, paid down, or improved with community funds. Court of Appeal noted using the Moore/Marsden approach here would conflict with the prevailing approach used when a s/p business is improved by the devotion of community efforts—equitable apportionment using *Pereira* or *Van Camp*. (See, e.g., *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 852-853, ABC Card BuIn 270.00.)
BuIn 340.00

6. *Pereira* Method

S/P invested in business prior to marriage entitled to return in allocating increase in value during marriage; balance is c/p.
Pereira v. Pereira (1909) 156 Cal. 1, 103 P. 488
Shaw, J.
FACTS: Prior to marriage, H owned very profitable saloon and cigar business in which he had invested $15,500. Trial ct. awarded W 3/5 of increase in value of business after marriage. H appealed, and Supreme Ct. reversed, holding that H entitled to a return on his s/p capital prior to c/p's interest being calculated.

"[T]he principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property. But without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to [husband's] efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and as the business was profitable it would amount at least to the usual interest on a long investment well secured." (Id. at p. 7.)

In absence of other evidence, a fair rate of return is presumed to be the legal rate of interest. (Id. at pp. 11-12.)
NOTES: See Comment to *VanCamp v. VanCamp* (1921) 53 Cal.App. 17, 199 P. 885, ABC Card BuIn 012.00.
COMMENTS: The *Pereira* approach requires two valuations, one at the beginning and one at the date of separation. Assuming that the business has increased in value, the difference between the two valuations is apportioned. This method does not, however, account for annual variations in value. Thus, if the business has done well for most of the marriage and then suffers a sharp reversal near the end, the community is charged for 100% of that decrease. This result can be avoided by using an year-by-year analysis, wherein the community's interest is determined annually and then the following year's change in value is apportioned between the community and separate interests.

Although no reported Calif. decision has discussed this variation to *Pereira*, it was applied in *Cord v. Neuhoff* (Nev. 1978) 94 Nev. 21, 573 P.2d 1170 to give a wife a community interest in her husband's estate when a total recapitulation resulted in a zero interest.
BuIn 002.02

Even if company was H's s/p, W may have acquired a c/p interest through her joint devotion of time and effort to it during their marriage.
Patrick v. Alacer Corp. [*Patrick I*] (2008) 167 Cal.App.4th 995, 84 Cal.Rptr.3d 642
Ikola, J. DCA4
FACTS: See Facts discussed on ABC Card BuIn 333.00. As case involved an appeal from a demurrer, court assumed the truth of W's allegations that she had acquired a c/p interest in H's corp. during marriage through their joint efforts. The opinion noted that the law would support such a position:

"[E]ven if Alacer was initially her husband's separate property, [wife] may have acquired a community property interest in it through their alleged joint devotion of time and effort to it during their marriage." (Id. at p. 1011.)
BuIn 334.00

Fam. Code §2640 never designed to apply to s/p businesses, which require *Pereira* analysis
In re Marriage of Koester (1999) 73 Cal.App.4th 1032, 87 Cal.Rptr.2d 76
Sills, P.J. DCA4
FACTS: H and W married in 11/86. H owned sole proprietorship, Koester Electric, prior to marriage. In 10/89, business incorporated. No stock issued. At dissolution trial in 4/96, judge ruled incorporation of the business made it community property (c/p) because community "acquired" incorporated business during marriage. Court "reject[ed] a *Pereira* approach [*Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488, ABC Card BuIn 002.02] because in fact there was an acquisition. There was an acquisition in 1989 when they acquired this corporation." Parties agreed business worth about $622,000. H awarded business for $284,000 ($622,000 - $337,500 s/p value (sic)). Had property been characterized as H's s/p, H argued his investment appreciated from $337,500 to $558,000, based on 10% return since marriage, so he should only have been charged with $64,000 in c/p. H appealed and Court of Appeal reversed.

HELD: Trial ct. should have applied *Pereira* analysis (award value of s/p at time of marriage plus reasonable return to represent appreciation of separate capital, with balance going to community) rather than Fam. Code §2640 reimbursement approach (reimburse spouse for separate money contributed to what is now community asset): Section 2640 never designed to apply to s/p businesses and inherently not applicable thereto, at least where no compliance with rigorous requirements for transmutation set forth in Fam. Code §852. Further, mere incorporation of a business is not a change in character.

By contrast with *Pereira*, what is now Fam. Code §2640 arose out of ••residence•• which was purchased with s/p, but title taken in joint tenancy. Thus, published decisions involving reimbursement statute typically arise out of conveyances or acquisitions of residences relating to marital relationship.

Incorporation of sole proprietorship business typically done for reasons extrinsic to marital

relationship. Except in unusual case, "couples usually don't go around changing the way title is held in ongoing businesses to mark the occasion of a marriage." (*In re Marriage of Koester*, *supra*, 73 Cal.App.4th at p. 1037.)

Mere Incorporation Is Not Acquisition: S/p does not change its character because of change in form or identity. Here, nothing to indicate that incorporation of s/p business represented anything other than mere change in legal form under which business conducted. W herself testified that the customers and accounts receivable were the same after incorporation as before.

Court found *Kenney v. Kenney* (1950) 97 Cal.App.2d 60 on point. If fact that shares in business interest acquired before marriage but not issued to spouse until after marriage did not "transmute" them into c/p in *Kenney*, fact that s/p was not incorporated until after marriage should not transmute it here. In either case it might be said that ••something•• was "acquired" during marriage, but only by ignoring reality of what was really happening, i.e., that s/p asset was merely changing its legal form. To say in either case that an asset was "acquired" by the community because some aspect of corporate formation took place during marriage elevates semantics over substance.

Remaining issue concerned forced sale of Lexus. Auto had been purchased by corp. for $19,071, and had FMV of $24,400 at trial. Trial ct. ordered H, on "behalf of Koester Electric," to transfer car to W for bargain price of $19,071. As transfer order premised on idea the business was c/p, order re Lexus also reversed. The car is property of s/p corp., not otherwise joined to dissolution.
BuIn 298.00

Where the personal efforts managing s/p are de minimis compared to the amount of s/p contribution, the whole will be treated as s/p.
Kershman v. Kershman (1961) 192 Cal.App.2d 18, 13 Cal.Rptr. 288
Fox, P.J. DCA2
FACTS: W owned securities as her s/p. At all times they stood in her former married name. All purchases during marriage were made from proceeds of sale of other of W's stock, from dividends thereon, or from loans for which W's stocks were pledged as security. No c/p funds were invested in securities. H claimed a c/p interest by virtue of W's personal skill and efforts during marriage managing the portfolio. Only credible evidence was that W spent very little time doing so. Trial ct.'s finding that stock was W's s/p affirmed on appeal.

HELD: Where the personal efforts managing s/p are *de minimis* compared to the amount of s/p contribution, the whole will be treated as s/p.

Court began by recognizing that

"It is axiomatic that the proceeds of the separate property of the wife are her separate property [citation], and the same is true with respect to the enhancement in value of separate property that takes place as a result of an enhancement of values generally." (Id. at p. 20.)

As W's efforts in managing her s/p were *de minimis* in compared to its value, c/p obtained no interest therein:

"To the extent that her skill and effort can be said to have contributed to the enhanced value of the securities, the amount of that contribution would be so small compared to the factors of income and natural appreciation that it is not worthy of consideration. When the community factor in commingled separate and community property is inconsiderable in amount compared with the separate property contribution, then the whole will be treated as separate property." (Id. at p. 21.)

Pereira does not apply absent a substantial community contribution:

"[Husband] cites [*Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488, ABC Card BuIn 002.02] for the proposition that there should be an apportionment. The principle of apportionment is based upon a substantial community contribution. Since that element is lacking here, *Pereira* is not applicable." (Id. at p. 21.)

BuIn 319.00

Pereira doesn't control where increase in value of s/p not due to efforts of owner.

Gilmore v. Gilmore (1955) 45 Cal.2d 142, 287 P.2d 769

Traynor, J.

FACTS: During 6 year marriage, H's net worth, consisting mainly of 3 auto dealerships, increased from $182,010 to $786,046. Trial ct., finding that salary paid to H was sufficient for his services and that all salaries were expended for community purposes during marriage, held auto dealerships to be H's s/p. W appealed, and Supreme Ct. affirmed. During marriage there was tremendous increase in automobile business and corresponding rise in value of all dealerships, including H's. H was seldom there and businesses were run by employees. H's salary was proper measure of community interest in earnings of businesses. *Pereira* approach need not always be applied:

"[The *Pereira* approach] is to be applied only 'In the absence of circumstances showing a different result,' and the court clearly recognized that if the husband could prove that a larger return on his capital had in fact been realized the allocation should be made differently. [Citation.] In the present case defendant introduced substantial evidence that the salaries he received were a proper measure of the community interest in the earnings of the businesses, and the trial court's finding based thereon cannot be disturbed on appeal." (Id. at pp. 150-151.)

NOTES: The court was applying what is generally referred to as the "*Van Camp*" approach. (See ABC Cards BuIn 012.00 et seq.)

BuIn 006.01

Pereira controls except where owner proves profits from s/p higher than well secured investment.

Randolph v. Randolph (1953) 118 Cal.App.2d 584, 258 P.2d 547

Nourse, P.J. DCA1

FACTS: H owned one-half of a floral shop prior to marriage. Court allowed him return of 7% on s/p capital and held balance to be c/p per *Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488. H appealed, but Court of Appeal affirmed.

"Only when the profits and accruals actually attributable to the separate property are proved to differ from [the usual interest rate for a well-secured investment] ... is there reason to depart from [the *Pereira* approach]." (Id. at p. 587.)

COMMENTS: There is no reason why *Pereira* cannot be used in this situation. The rate of return attributed to the separate property investment should be adjusted upwards or downwards from the legal rate, based upon the actual circumstances of the business.

BuIn 005.00

Where increased value of real property due to natural enhancement of real estate values, and not to any improvements made thereon during marriage, c/p acquires no interest.
McDuff v. McDuff (1920) 48 Cal.App. 175, 191 P. 957
Knight, J. DCA1
FACTS: H purchased farm in Kansas in 1885. Parties married in 1889. Parties lived there until 1905. While parties lived there, no permanent improvements of any substance were made. H planted orchard, which was lost to insects. House burned down but was rebuilt with insurance proceeds. H leased property from 1905 until 1913, when he sold it and netted $8,000. W claimed a c/p interest in property acquired with sales proceeds. Trial ct. held proceeds to be H's s/p and Court of Appeal affirmed.

HELD: Where parties' efforts do not add to value of property, c/p acquires no interest therein.

From the time H and W moved on to the farm in 1885 until they vacated it in 1905, "they worked thereon as farmers usually do, but the proceeds were used not to improve the property, but to pay the living expenses of the family and the taxes and interest, and at times there was scarcely enough produced by the farm to meet the ordinary expenses, [husband] being obliged to engage in outside enterprises, the proceeds from which he devoted to the support of his family." (Id. at p. 177.)

Moreover, even if the *Pereira* rule were applied, there still would have been no c/p interest in the property:

"[T]he proper method of determining the value of a husband's interest in a business in which he was engaged at the time of his marriage is to allow the usual interest to the husband on the amount invested on the basis of a long investment, well secured. [Citations.] Measuring the instant case by that rule, the allowance of a moderate rate of interest on the sum of two thousand five hundred dollars, which represented the net value of the farm at the time of its purchase, for a period of twenty-eight years, would bring the entire investment up to as much as, if not more, than [husband] received net for the property in 1913, and by such computation no allowance is made for the natural enhancement in the value of the property." (Id. at p. 178.)
BuIn 320.00

7. Pereira: Rate of Return

Rate of return on s/p not compounded.
In re Marriage of Folb (1975) 53 Cal.App.3d 862, 126 Cal.Rptr. 306, disapproved on other grounds, *In re Marriage of* Fonstein (1976) 17 Cal.3d 738, 749, fn. 5., 131 Cal.Rptr. 873, 552 P.2d 1169
Jefferson, J. DCA2
FACTS: H acquired s/p lot in 11/62 for $156,036. Prior to 6/63, H contributed lot to partnership in which he had 97% interest for $161,065. At trial, H argued lot worth $3.45 million in 6/63 due to efforts he had made for zoning, architectural plans, etc., and that he was entitled to compounded 14-22% rate of return on value of lot as s/p per *Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488. Trial ct. allowed 12% rate of return without compounding. H appealed, and Court of Appeal affirmed.

"It is also contended by husband, without citation of case authority, that the annual rate of interest should have been compounded. Such treatment of the separate capital would have substantially diminished the interest of the community. The 'substantial justice' referred to in [*Beam v. Bank of America* (1971) 6 Cal.3d 12, 18, 98 Cal.Rptr. 137, 490 P.2d 257] would not have been

achieved by such a result." (Id. at pp. 873-874.)
NOTES: The legal rate of interest is also not compounded. (Code Civ. Proc. §685.010.)
COMMENTS: From an accounting sense, the Court is incorrect. The rationale behind the *Pereira* approach is that the owner's separate property should be entitled to "the usual interest on a long investment well secured." (*Pereira* v. *Pereira*, *supra*, 156 Cal. at p. 7.) A long-term well-secured investment receives compound interest. In Folb, the trial court took a look at the result if the separate interest was compounded and felt that it did not give the community a fair return. It thus permitted only simple interest and the Court of Appeal affirmed. Although compounding decreases the community's interest in the previously separate property business, so does permitting any rate of growth to the separate property interest, simple or compound. The fact that compounding reduces the community's interest is not a logical reason to deny it.
BuIn 034.03

Rate of return on s/p of 12% affirmed.
In re Marriage of Folb (1975) 53 Cal.App.3d 862, 126 Cal.Rptr. 306, disapproved on other grounds, *In re Marriage of* Fonstein (1976) 17 Cal.3d 738, 749, fn. 5., 131 Cal.Rptr. 873, 552 P.2d 1169
Jefferson, J. DCA2
FACTS: See Facts from prior card. H argued he was entitled to compounded 14-22% rate of return on value of lot as s/p per *Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488. Trial ct. allowed 12% rate of return without compounding. H appealed, and Court of Appeal affirmed, holding court was justified in reducing rate of return to compensate c/p for H's efforts expended during marriage in improving lot.
BuIn 009.00

Legal rate of interest is proper rate of return on s/p capital in absence of other evidence.
Weinberg v. Weinberg (1967) 67 Cal.2d 557, 63 Cal.Rptr. 13, 432 P.2d 709
Traynor, C.J.
FACTS: H owned company prior to marriage. During marriage, trial ct. found value increased $225,000, of which $95,000 was attributed to growth of 7% per annum as fair return on investment. H argued that 7% was too low a rate of return on risk capital invested in small, closely held corporation, and that trial ct. failed to consider effect of inflation and other business factors. Court of Appeal affirmed, noting that H failed to offer evidence of any of the above and that absent other evidence, trial ct. properly adopted legal rate of return.
NOTES: (1) See also *Beam v. Bank of America* (1971) 6 Cal.3d 12, 98 Cal.Rptr. 137, 490 P.2d 257, ABC Card BuIn 022.00, quoting Weinberg:

"[I]n the absence of [evidence of an appropriate 'reasonable rate of return' on husband's separate property] 'the trial court correctly adopted the rate of legal interest.'" (Id. at p. 19.)

(2) See *Price v. Price* (1963) 217 Cal.App.2d 1, 7, 31 Cal.Rptr. 350: "The rate of 7 percent has been recognized as 'usual interest on a long investment well secured' unless the husband introduces 'evidence to show that the capital invested was entitled to a greater return than legal interest' or the wife introduces evidence to prove that 'it earned a smaller proportion of the profits than legal interest.'"

(3) Legal rate of interest increased from 7% to 10%, effective 1/1/83. (See discussion on ABC

Card Enf 002.00.
COMMENT: The lesson here is that one should be prepared to accept the legal rate of interest, unless one can present evidence as to why it should not be applied in a given case. This requires expert testimony as to what the appropriate rate of return should be, considering such factors as: risk, inflation, rates of return in similar businesses and rates of return on long-term secure investments.

Given the major economic swings in recent years, trial courts may be reluctant to follow Weinberg and adopt the legal rate of return in the absence of specific evidence, especially if they are presented with any reasonable alternative.
BuIn 201.03

Return on s/p business not limited to 7%.
Todd v. McColgan (1949) 89 Cal.App.2d 509, 201 P.2d 414
Peek, J. DCA3
FACTS: See Facts discussed on ABC Card BuIn 021.00.
BuIn 011.01

8. Selection of Method

Apportion s/p and c/p interests in s/p business using whichever formula will achieve substantial justice.
Beam v. Bank of America (1971) 6 Cal.3d 12, 98 Cal.Rptr. 137, 490 P.2d 257
Tobriner, J.
FACTS: H managed s/p estate during marriage. Estate grew from $1.63 million to $1.85 million in 29 years. W claimed interest in estate due to H's efforts managing it during marriage. Trial ct. used *Pereira* formula and awarded to H as s/p, since actual growth of estate well below fair rate of return on s/p investment. W appealed, arguing that *Van Camp* formula should have been used. Supreme Ct. affirmed, holding court should use whichever approach will achieve substantial justice. Since c/p living expenses exceeded attributed income to H under *Van Camp*, remaining estate would be s/p under *Van Camp* as well.

"'In making such apportionment between separate and community property our courts have developed no precise criterion or fixed standard, but have endeavored to adopt that yardstick which is most appropriate and equitable in a particular situation ... depending on whether the character of the capital investment in the separate property or the personal activity, ability, and capacity of the spouse is the chief contributing factor in the realization of income and profits [citations] ... [Par.] In applying this principle of apportionment the court is not bound either to adopt a predetermined percentage as a fair return on business capital which is separate property [the ••*Pereira*•• approach] nor need it limit the community interest only to [a] salary fixed as the reward for a spouse's service [the ••*Van Camp*•• method] but may select [whichever] formula will achieve substantial justice between the parties. [Citations.]'" (Id. at p. 18.)
NOTES: See also *Millington v. Millington* (1968) 259 Cal.App.2d 896, 67 Cal.Rptr. 128, ABC Card BuIn 040.00 [Business owned one-half by H prior to marriage held to be c/p based, in part, on H's efforts during marriage. Trial court's finding that business c/p upheld based, in part, on H's efforts

during marriage.]
BuIn 022.00

Usually *Pereira* formula used if c/p effort is primary contributor to value increase; *Van Camp* if s/p investment is primary contributor; court may select formula which will achieve substantial justice.
In re Marriage of Dekker (1993) 17 Cal.App.4th 842, 21 Cal.Rptr.2d 642
Nares, J. DCA4
FACTS: See Facts discussed on ABC Card BuIn 270.00.
COMMENTS: Although Decker gives some guidance in the selection of the appropriate apportionment formula, "substantial justice" is in the eye of the beholder. Further, what is the reasonable rate of return to venture capital when the landscape is covered with failed dreams and spiked with the occasional immense success? What return should be rendered to the community in terms of increased business value when the laboring spouse has already been properly compensated for his/her labors? Clearly, this is an area that cries out for imaginative and inventive lawyering and forensic accounting.
BuIn 271.00

Court must allocate profits of s/p business between s/p and c/p.
Cozzi v. Cozzi (1947) 81 Cal.App.2d 229, 183 P.2d 739
Kincaid, J. pro tem. DCA2
FACTS: H owned real property, stocks and bonds prior to marriage. During parties' 5 1/2 year marriage, H's only income came from s/p. Trial ct. found all H's s/p, and W appealed, arguing that she acquired an interest because H fully, and W partially, engaged themselves in maintenance of his s/p. Court of Appeal affirmed. Trial ct. has broad discretion, and Court of Appeal could not say that it had been abused.

""The capital which the husband brings to the marriage partnership is his own separate property, but it is a question for the court to determine what portion of the profits thereafter arises from the use of this capital and what part arises from the activity and personal ability of the husband. That portion of the income due to the "personal character, energy, ability and capacity of the husband" is community property. [Citations.]'" (Id. at p. 232.)
BuIn 023.00

Court has duty to apportion earnings of s/p business operated during marriage; If increase primarily due to market pressures, *Van Camp* formula appropriate.
Tassi v. Tassi (1958) 160 Cal.App.2d 680, 325 P.2d 872
Dooling, J. DCA1
FACTS: Trial ct., in allocating profits from wholesale meat business owned by decedent H prior to marriage and operated by him during marriage, stated:

"It is the duty of the court to allocate earnings from a business which is the separate property of a husband and in which the husband is actively employed, finding as separate property the portion of the earnings properly attributable to the business, and as community property the portion

of the earnings properly attributable to the husband's efforts." (Id. at p. 690.)

Trial ct. utilized *Van Camp* [reasonable value of services] approach. Among its reasons for adopting that approach was evidence that large amount of increase due to pressures from World War II and Korean War.

"From this evidence the court was justified in finding that the business earnings were chiefly attributable to the business as such rather than to [husband's] services." (Id. at pp. 691-692.)
BuIn 024.01

Court may select whatever formula to determine c/p interest in s/p business that will do substantial justice.
Logan v. Forster (1952) 114 Cal.App.2d 587, 250 P.2d 730
Fox, J. DCA 2
FACTS: See Facts discussed on ABC Card BuIn 300.00. Before deciding that trial ct. properly selected formula that allocated nothing to c/p in probate proceeding, Court of Appeal made following preliminary holdings:

"In making such apportionment between separate and community property our courts have developed no precise criterion or fixed standard, but have endeavored to adopt that yardstick which is most appropriate and equitable in a particular situation (*Todd v. McColgan* [(1949) 89 Cal.App.2d 509, 201 P.2d 414, ABC Card BuIn 021.00].) depending on whether the character of the capital investment in the separate property or the personal activity, ability, and capacity of the spouse is the chief contributing factor in the realization of income and profits." (*Logan v. Forster*, *supra*, 114 Cal.App.2d at p. 599.)

"In applying this principle of apportionment the court is not bound either to adopt a predetermined percentage as a fair return on business capital which is separate property nor need it limit the community interest only to the salary fixed as the reward for a spouse's service but may select whatever formula will achieve substantial justice between the parties. (Todd v. McColgan, [*supra*, 89 Cal.App.2d at] pp. 513-514.) [¶] It is primarily a question of fact 'for the court to determine what portion of the profits thereafter arises from the use of this (separate) capital and what part arises from the activity and the personal ability of the husband' (Citation.)" (*Logan v. Forster*, *supra*, 114 Cal.App.2d at p. 600.)
BuIn 307.00

9. *Todd* Method

Compromise formula between *Pereira* and *Van Camp*.
Todd v. C.I.R. (9th Cir. 1945) 153 F.2d 553
Denman, Cir. J.
FACTS: Taxpayers (TP) and Commissioner (CIR) disagreed as to allocation of income from partnership (Western Door & Sash Company). On appeal, CIR's position affirmed. TP had allocated large portion of income to their wives. CIR reallocated greater share of earnings to TP, thereby increasing their tax liability and creating tax deficiencies. CIR's formula allocated each year's net profits between income from capital and income from services as follows: First, average capital for the year was multiplied times a reasonable rate of return to give base capital earnings. To this was

added a reasonable base c/p salary for TP's services. The 2 figures were added together and the percentage each bore to the total constituted the proportion of the total net profits attributable to capital and to services. If the withdrawals for c/p purposes were less than the portion of profits allocated to c/p by the above formula, then excess was deemed to be community capital in the business. In succeeding years, if withdrawals for c/p purposes exceeded c/p share of profits, community capital was debited.

TP's argument that rate of return on capital could not exceed legal rate of 7% denied. Return of 8% permitted.
BuIn 020.00

***Todd* formula approved. Return on s/p business not limited to 7%.**
Todd v. McColgan (1949) 89 Cal.App.2d 509, 201 P.2d 414
Peek, J. DCA3
FACTS: Taxpayers (TP) sued Franchise Tax Commissioner (D) for refunds of taxes assessed against them and paid under protest. TP formed partnership (Western Door & Sash Company) in 1914 with $1,500 capital contribution. D assessed taxes on TP using formula from earlier federal case (Todd v. C.I.R. (9th Cir. 1945) 153 F.2d 553 [this subtopic]).

"First the defendant commissioner estimated what would constitute a fair rate of return upon the separate capital investment under the particular circumstances of this case and next estimated what would be a fair salary for the taxpayers for each of the years in question. These figures so obtained were totaled and the percentage of each to the total constituted the proportion of the distributable income attributable to capital and to services." (Id. at p. 512.)

Trial ct. found 8% return on s/p capital investment reasonable and allocated net distributable income between separate income and community income accordingly. TP appealed, arguing that, based upon *Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488, ABC Card BuIn 002.00, portion of income derived from s/p business conducted during marriage cannot exceed 7% rate of return. Court of Appeal affirmed, holding that there was no such legal limitation on rate of return and that all cases had to be decided from all circumstances of the case.

""The probable contribution of the capital to the income should have been determined from all of the circumstances of the case, and as the business was profitable it would amount at least to the usual interest on a long investment well secured.' [¶] ... Flexibility ... is not only a desirable but an essential element of any workable system for [the] allocation of income." (Id. at pp. 513-514.)
BuIn 021.00

10. *Van Camp* Method

C/P interest in services of owner in capital intensive business equal to reasonable compensation; balance is s/p.
Van Camp v. *Van Camp* (1921) 53 Cal.App. 17, 199 P. 885
The Court DCA2
FACTS: H owned *Van Camp* Sea Food Co. and substantial other s/p prior to marriage. W alleged that value of business increased substantially during marriage and that she was entitled to one-half of increase after crediting H's s/p with 7% increase pursuant to *Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488. Trial ct. found c/p to be worth $90,000 and awarded W $60,000 based upon H's fault. H

appealed, and Court of Appeal reversed, holding that *Pereira* did not apply to capital intensive business wherein H received adequate compensation for his services.

"While it may be true that the success of the corporation of which [husband] was president and manager was to a large extent due to his capacity and ability, nevertheless without the investment of his and other capital in the corporation he could not have conducted the business, and while he devoted his energies and personal efforts to making it a success, he was by the corporation paid what the evidence shows was an adequate salary, and for which another than himself with equal capacity could have been secured." (Id. at p. 28.)

NOTES: Although court should utilize whichever approach will do "substantial justice" (*Beam v. Bank of America* (1971) 6 Cal.3d 12, 18, 98 Cal.Rptr. 137, 490 P.2d 257, this subtopic), case law suggests that the *Van Camp* formula should be used for capital intensive businesses and *Pereira* for labor intensive businesses. (See Gilmore v. Gilmore (1955) 45 Cal.2d 142, 287 P.2d 769 (this subtopic).)

COMMENTS: The *Van Camp* approach would seem to be appropriate when the increase in the value of the asset is primarily due to factors other than the skill or hard work of the owner. Examples would be growth due to inflation or general market pressures. (See *Gilmore v. Gilmore* (1955) 45 Cal.2d 142, 287 P.2d 769 (this subtopic).)

BuIn 012.00

Factors trial ct. looked to in determining that H's income from s/p business was adequate.

Harrold v. Harrold [*Harrold II*] (1954) 43 Cal.2d 77, 271 P. 489

Shenk, J.

FACTS: H owned 2 automobile dealerships prior to his 12 yr. marriage to W. Substantial evidence showed that company owed its prosperity in large part to a Ford dealer's franchise; company was staffed with competent administrative personnel; H did not take an active part in routine operation; H frequently absented himself on personal matters; and was primarily concerned with policy matters. W appealed from trial ct. determination of allocation of earnings from H's companies, arguing that c/p was entitled to a greater share of total earnings from companies. H received $89,904 in salary and bonuses from companies, all of which was held to be c/p. Profits varied between $100,000 and $135,000 during the accounting period. H was sole owner of business and could have set a higher salary for himself had he wanted to. W argued that court could not accept as conclusive H's arbitrary determination of amount of his salary. Supreme Ct. affirmed.

HELD: Substantial evidence supported trial court's decision.

In addition, Court noted that income attributed to c/p earnings increased towards end of accounting period even though businesses' earnings decreased.

BuIn 301.00

***Van Camp* approach used where increase in value of s/p not due to efforts of owner.**

Gilmore v. Gilmore (1955) 45 Cal.2d 142, 287 P.2d 769

Traynor, J.

FACTS: See Facts discussed on ABC Card BuIn 006.00.

BuIn 013.00

Large increase in s/p business confirmed as s/p.
Somps v. Somps (1967) 250 Cal.App.2d 328, 58 Cal.Rptr. 304
Brown (H.C.), J. DCA1
FACTS: One year prior to start of 9 year marriage, H started engineering business. H owned 50%. H's share of business grew from FMV of $16,000 on date of marriage to $222,433 at trial. Trial ct. found that increase mainly due to market pressures, and efforts of his partner and employees. H's income from business found to be fair and adequate compensation for his efforts. Trial ct. awarded business to H as s/p. W appealed, arguing that *Pereira* formula should have been used.

HELD: Affirmed.

"'"It has frequently been held that a proper method of making such allocation [between separate and community property] is to deduct from the total earnings of the business the value of the husband's services to it. The remainder, if any, represents the earnings attributable to the separate property invested in the business." [Citation.] ... [Citations.] ... The court found that the salaries paid by the corporation to defendant for his services during the marriage were sufficient to fully compensate both defendant and the community....'" (Id. at p. 335.)
BuIn 014.01

Trial court finding that H was adequately compensated for his services during marriage to his s/p tool corporation and thus no c/p interest affirmed; no need to separately evaluate corp. goodwill.
Owens v. Owens (1963) 219 Cal.App.2d 856, 33 Cal.Rptr. 599
Jefferson, J. DCA2
FACTS: H owned 94% of stock of tool co. prior to marriage. Parties married in 1947 and separated 1961. H was president of corp. and devoted full time to it. Corp. had book value of $42,000 at marriage and $174,000 at separation, exclusive of goodwill. H's compensation during marriage averaged $14,461/yr. plus entertainment allowance and company car. H's salary last 8 yrs. was $18,000/yr. Trial ct. found increase in value of H's stock was reasonable return on his s/p investment and result of "faithful, loyal, and effective service of other employees of the corporation and to the inflation which has occurred during the period of the marriage of the parties." (Id. at p. 857.) It also found that H's salary was "adequate and fair compensation" for his services. W appealed, arguing that since increase in value of business was due to H's labor, skill and management, some part of increase must be allocated to community. The Court of Appeal disagreed, and affirmed.

HELD: Trial court finding that H was adequately compensated for his services during marriage to his s/p tool corporation and thus no c/p interest affirmed.

"'[A] proper method of making such an allocation is to deduct from the total earnings of the business the value of the husband's services to it. The remainder, if any, represents the earnings attributable to the separate property invested in the business." (Id. at p. 858.)

Since stock was H's s/p, no need to evaluate corporate goodwill.
BuIn 299.00

Where increased value of mature business due to natural growth and not efforts of owner, it

is not profits of business but actual value of owner's services that is c/p.
Logan v. Forster (1952) 114 Cal.App.2d 587, 250 P.2d 730
Fox, J. DCA 2
FACTS: See Facts discussed on ABC Card BuIn 303.00. Business was in an "advanced stage of development" prior to W's 2d marriage. Increased value was due to gradual expansion in physical size and economic development of city. Although W held offices of president, general manager and treasurer, she had no office at business, which was run by local managers and visited it only sporadically. She made no significant decisions affecting business and spent most of her time traveling. She was 68 at marriage and 74 when business sold. Court of Appeal affirmed probate ct. order finding that proceeds from sale of business were W's s/p and that H had no interest therein.

HELD: Where increased value of mature business due to natural growth and not efforts of owner, it is not profits of business but actual value of owner's services that is c/p.

Where postmarital efforts of a spouse are a primary factor in the success of a s/p business, then the c/p is entitled to compensation for those efforts:

"[W]here such separate property is a business whose continued success and lucrativeness after the marriage depend on the contributions of the toil and talents of the husband or wife, then that portion of the increment, profits, or returns attributable to his or her labor is normally community property." (Id. at p. 599.)

Here, W's efforts were not a contributing factor in the success of the business. W received $47,808 in dividends from her stock during second marriage. The dividends paid were found to be a reasonable return on her investment. She received $40,697 in salary, which adequately compensated the community for the efforts she expended.

"'[I]t is not the profits of the business of the business, but only the ascertained earnings of the defendant from his individual efforts in managing, laboring on, or caring for such property, in the nature of salary, wages or the equivalent thereof, which would be community property....'" (Id. at p. 601.)

Trial ct. properly found that "the enhancement in the physical value and the amount of the profits earned was essentially an enhancement characteristic of a capital investment in a stable and flourishing business." (Id. at p. 601.)
BuIn 300.00

C/P interest in employment agency determined by value of W's services.
Mears v. Mears (1960) 180 Cal.App.2d 484, 4 Cal.Rptr. 618, disapproved on other grounds, *See v. See* (1966) 64 Cal.2d 778, 785, 51 Cal.Rptr. 888, 415 P.2d 776
Molinari, J. pro tem. DCA1
FACTS: W inherited $1,500 during marriage and used it to form employment agency partnership. W worked in business during marriage but took no income. She testified her services worth between $200 and $500/mo. Trial ct. found to be c/p, and W appealed. Court of Appeal reversed, holding that c/p's interest in business was limited to value of W's services.

"The income from such separate business is allocable to community or separate property in accordance to which it is allocable to the spouse's efforts or his or her capital investment. The proper method of making such allocation is to deduct from the total earnings of the business the value of the spouse's services to it. The remainder, if any, represents the earnings attributable to the separate property invested in the business." (Id. at pp. 506-507.)

BuIn 015.01

No fixed rules for determining income of owner of s/p business.
Harrold v. Harrold (1950) 100 Cal.App.2d 601, 224 P.2d 66
Peek, J. DCA3
FACTS: H owned 2 s/p auto dealerships during parties' 12 year marriage. H took salaries totaling $3,000/mo, and trial ct. adopted salaries as value of H's c/p services during marriage. W objected that amount allocated to c/p was too low and should be the going rate of interest on value of s/p businesses which a well-secured long-term investment would earn. Court of Appeal disagreed and affirmed, holding that there were no fixed rules which could be established.

"[I]t is quite apparent from the many and varied situations in the reported cases that in the segregation of income from capital and personal earnings as between the business of one spouse, wholly his own separate property, and the community earnings, no fixed rule can be laid down which would be equitable in all cases." (Id. at p. 607.)

NOTES: In its discussion, Court of Appeal relied on *Huber v. Huber* (1946) 27 Cal.2d 784, 792, 167 P.2d 708:

"'Where the husband is operating a business which is his separate property, income from such business is allocated to the community or separate property in accordance with the extent to which it is allocable to the husband's efforts or his capital investment.'" (*Harrold v. Harrold*, *supra*, 100 Cal.App.2d at p. 607.)
BuIn 016.01

Increase in value of s/p assets apportioned solely to s/p despite substantial efforts to maintain.
Cozzi v. Cozzi (1947) 81 Cal.App.2d 229, 183 P.2d 739
Kincaid, J. pro tem. DCA2
FACTS: H owned real property, stocks and bonds prior to marriage. During parties' 5-1/2 year marriage, H's only income came from s/p. Trial ct. found all H's s/p, and W appealed, arguing that she acquired an interest because H fully, and W partially, employed themselves in maintenance of his s/p. Court of Appeal affirmed.

"Assuming the care and maintenance of income properties owned by [husband] to be a 'business,' it is not the profits of the business, but only the ascertained earnings of the [husband] from his individual efforts in managing, laboring on and caring for such property, in the nature of salary, wages or the equivalent thereof, which would be community property." (Id. at p. 232.)

As W failed to introduce any evidence as to what H's "earnings" should have been, trial ct. entitled to conclude that, to the extent there were earnings from the business, they were expended for support of the community.

NOTES: See also *Estate of Barnes* (1932) 128 Cal.App. 489, 17 P.2d 1046 [H's farm property found to be s/p upon his death. H owned property prior to marriage and engaged in very little farming during marriage. Most of H's income attributable to rents received from land.]
BuIn 017.00

***Van Camp* formula appropriate when increase due primarily to market pressures.**
Tassi v. Tassi (1958) 160 Cal.App.2d 680, 325 P.2d 872
Dooling, J. DCA1
FACTS: Trial ct., in allocating profits from wholesale meat business owned by decedent H prior to marriage and operated by him during marriage, utilized *Van Camp* [reasonable value of services] approach. Among its reasons for adopting that approach was evidence that large amount of increase due to pressures from World War II and Korean War.

"From this evidence the court was justified in finding that the business earnings were chiefly attributable to the business as such rather than to [husband's] services." (Id. at pp. 691-692.)
BuIn 018.00

Test for reasonable value of services is what independent employers pay others to perform similar services.
Tassi v. Tassi (1958) 160 Cal.App.2d 680, 325 P.2d 872
Dooling, J. DCA1
FACTS: Trial ct., in allocating profits from wholesale meat business owned by decedent H prior to marriage and operated by him during marriage, utilized *Van Camp* [reasonable value of services] approach. Experts testified that reasonable salary for general manager would be $10,000 to $15,000/yr. Trial ct. adopted $15,000/yr. W objected that this did not include factor that this was small, wholly owned business. H had ability to pay self whatever he wanted. Court of Appeal affirmed, holding:

"The salary allowed by such owners to themselves lies entirely in their own discretion and the surest standard would not be what such owners were accustomed to allow to themselves but rather what independent employers were in the habit of paying others for similar services in the free give and take of the open market." (Id. at p. 691.)
COMMENTS: *Tassi* is an example of the court's applying *Van Camp* to a wholesale meat business, which is probably better characterized as primarily a service business, as opposed to a capital intensive business.
BuIn 019.00

C. Efforts of Nonowner Spouse

No c/p interest in H's s/p business despite W's efforts during marriage.
In re Marriage of Denney (1981) 115 Cal.App.3d 543, 171 Cal.Rptr. 440
Woods, J. DCA2
FACTS: H owned donut shop prior to marriage. During marriage, W worked in shop and at end, due to H's alcoholism, she was fully responsible for its management. Value of business same on date of marriage as on date of separation. W denied any interest notwithstanding her efforts during marriage.
NOTES: Primary issue in Denney involved fluctuation in value of business during marriage and W's attempts to show that it became valueless and she rebuilt. Court of Appeal affirmed trial court's refusal to permit evidence. (See *In re Marriage of Denney*, *supra*, 115 Cal.App.3d 543, ABC Card BuIn 033.00.)

BuIn 035.00

D. Increase Not Due to C/P Efforts

If increase in value of s/p asset not due to efforts of owner spouse during marriage, all s/p; no apportionment.
Millington v. Millington (1968) 259 Cal.App.2d 896, 67 Cal.Rptr. 128
Sims, J. DCA1
FACTS: 50% interest in business owned by H prior to marriage held to be 100% c/p based on H's efforts and commingling during marriage. H appealed, and Court of Appeal affirmed, holding evidence supported finding. In general discussion of law relating to c/p interest in s/p business based on efforts during marriage, Court of Appeal reaffirmed that community would have no interest in s/p asset which increased in value during marriage due to factors other than efforts of owner spouse.

"[I]f the increase in value of the separate property is solely due to the natural enhancement of the property, the entire property will be considered separate property at its value at the time of the dissolution of the community." (Id. at p. 909.)
NOTES: See ABC Card BuIn 040.00, for detailed discussion of complicated fact pattern.
BuIn 036.00

Minimal time spent on s/p stock portfolio doesn't require apportionment. Natural enhancement of s/p is s/p.
Estate of Ney (1963) 212 Cal.App.2d 891, 28 Cal.Rptr. 442
Bray, P.J. DCA1
FACTS: H and W married when they were over 60. Both had retired. H had stocks, bonds and cash worth $39,464. H died 14 years later, leaving will which declared estate, consisting almost entirely of stocks then worth $73,266, to be s/p; H left most to others. W claimed stocks were c/p, but trial ct. found to be s/p, and Court of Appeal affirmed. During marriage, Dow Jones average increased 280% while H's stock values increased 185%. H watched his stocks closely but was shown to have no special ability or skill. Court agreed that increase in H's portfolio due mainly to natural enhancement of s/p, thus all properly held to be H's s/p.
BuIn 037.01

Orange grove owned by H prior to marriage and operated by him during marriage held s/p. H's efforts insubstantial.
Estate of Updegraph (1962) 199 Cal.App.2d 419, 18 Cal.Rptr. 591
Coughlin, J. DCA4
FACTS: 10 year marriage. H owned orange grove prior to marriage. During marriage, H supervised operation of grove, but bulk of work was done by others. Grove did not produce a profit and H's services were found to be "'insubstantial.'" Probate ct. held to be H's s/p and W appealed.

HELD: Affirmed. Evidence supported findings.
BuIn 230.00

S/P business interest does not become c/p simply because little was invested.
Kenney v. Kenney (1950) 97 Cal.App.2d 60, 217 P.2d 151
Moore, J. DCA2
FACTS: One month prior to marriage, H obtained a 1/8 interest in an oil drilling partnership. Partners incorporated and H received 125 shares of stock. Parties then married. He also received $200/mo. for his services as its bookkeeper. In subsequent divorce, W claimed stock and partnership assets were c/p because H had not invested anything of value to obtain them. Trial ct. found c/p and H appealed. Court of Appeal reversed.

HELD: "What was invested prior to the marriage is not material to a determination of the question. If the title to it or right in it was his prior to [marriage], the stock and all revenues derived therefrom continued to be his separate property." (Id. at p. 64.)

H owned his interest in drilling p/ship prior to marriage. Because they had no ascertainable value at the time of their issuance was not sufficient reason for transmutation into c/p.

"Many a fortune is laid in the 'shoe strings' of a bold adventurer which may for years appear hopeless as a commercial enterprise." (Id. at pp. 64-65.)

The shares H received for his interest in the drilling p/ship became of value subsequent to marriage but not by virtue of his efforts. H gave corp. no discount on his services. The transformation of his stock into a security of value "was due to the fortuitous event of the drill's penetrating oil-bearing sands." (Id. at p. 65.)
BuIn 318.00

E. Nature of Interest

W's c/p interest in company renders her a beneficial shareholder.
Patrick v. Alacer Corp. [*Patrick I*] (2008) 167 Cal.App.4th 995, 84 Cal.Rptr.3d 642
Ikola, J. DCA4
FACTS: (Alleged or implied by W's complaint and taken as true for demurrer.) H and W formed Alacer in mid-1970's to manufacture vitamin supplements. H was sole record owner of stock. Together, they created vitamin supplement formulas, served as corporate officers, and financially supported Alacer during their marriage. Alacer flourished under their care, attaining market value of $70M.

In 2000, H transferred all of the shares to his revocable trust, which then became Alacer's only shareholder of record. Trust documents directed trustees to distribute up to 46% of Trust's Alacer stock to W upon H's death to satisfy any c/p interest she might have in Alacer.

Trust amendment noted there was pending action for dissolution of their marriage and H's intent was that W not obtain a majority of the shareholder interest of Alacer because of her inability to properly run the business. He stated his intention that W receive nothing of his s/p and only receive her community share, if any. It directed the trustees to "distribute not more than 46% of the shares now held in [H's] name to [W], as her community share of my entire estate."

Shortly before H died, while he was deathly ill, trustees of H's trust met with W and convinced her to name them to Alacer's board of directors. W then named VP of sales and marketing. H died 3 weeks later. Trust continued to hold 100% of stock and did not distribute any shares to W.

One month later, BOD ousted W from board and company. All of her salary and benefits terminated. W alleged directors began looting the company. Board ignored W's demands to investigate misconduct. She filed a shareholder's derivative suit against 3 of the directors and Alacer. In her complaint, she alleged the increased value of Alacer, over a fair return on H's original investment, was c/p.

Alacer's demurrer sustained and W appealed. Court of Appeal reversed, holding, in part, that Alacer could not demur to complaint filed for its benefit.

HELD: W's c/p interest in company renders her a beneficial shareholder.

The opinion begins with an interesting discussion of the nature of shareholder derivative suits and ultimately holds that while a corporation can dispute a shareholder's status to bring a derivative suit, it cannot defend against it, as it is being brought for the corporation's benefit. The opinion then discusses W's status to bring the lawsuit, since she was not a named shareholder.

Since this was an appeal from a demurrer, Court of Appeal assumed that all allegations in W's complaint were true.

While the Trust was the only record shareholder, W's alleged c/p interest in Alacer, if true, essentially made her an unregistered shareholder. While no court had yet adjudicated her c/p claim, that was not required: "'The respective interests of the husband and wife in community property during continuance of the marriage relation are ••present••, existing, and equal interests.'" (Ibid.)

"[Wife's] alleged community property interest was created during their marriage. She allegedly has a present and existing interest in Alacer stock already—she does not need to do anything to trigger her interest. And while a court may ••confirm•• her community property interest, it cannot ••create•• it." (Ibid.)

Ds argued that W was not a trust "beneficiary." Court agreed, but for a different reason. W not a beneficiary because provision in trust was not a result of H's "donative intent." If W already had a c/p interest in Alacer, provision in H's trust was not giving W any more than that to which she was already entitled.

"Transferring trust assets to satisfy an existing obligation is the antithesis of a ••donative•• transfer." [As modified.] (Id. at p. 1013.)

Trust directed trustees not to permit W to acquire any more than 46% of Alacer's stock regardless of W's ultimate interest in stock and instructed that if her interest exceeded 46%, excess was to be satisfied from other assets, not from stock. Court of Appeal declined to opine on the enforceability of such a limitation. (Id. at p. 1013, fn. 9.)

NOTES: But note *Patrick v. Alacer, Corp.* [*Patrick II*] (2011) 201 1326, 136 669, came to the opposite conclusion, that W's c/p interest was only in Alacer stock's increased value, and she had no shareholder interest in the stock itself.

BuIn 333.01

F. S/P Interest Lost by Commingling

Business H started before marriage all c/p due to parties' efforts during marriage.

In re Marriage of House (1980) 106 Cal.App.3d 434, 165 Cal.Rptr. 145

Wiener, J. DCA4

FACTS: One month before marriage, H started business using $1,500 he received from W. W worked in business during marriage. Trial ct. found business a joint undertaking of the parties and all c/p. H appealed. Court of Appeal agreed that business technically H's s/p on date of marriage but,

due to H's efforts during marriage, finding that it was all c/p affirmed.
BuIn 039.00

S/P business found to have been transmuted into c/p by H's actions.
Millington v. Millington (1968) 259 Cal.App.2d 896, 67 Cal.Rptr. 128
Sims, J. DCA1
FACTS: When parties married in 1949, H owned 1/2 of business (FMV $20,462). H and W worked in business. H did not withdraw full amount of his salary and excess went back into business. In 1956, H bought out other shareholder for $52,500. In 1961, state paid H $33,150 for portion of property. H used to pay off ex-partners' shares and loan on business property. In 1961, H built new building, borrowing money and repaying from business. Parties separated in 1963. W contended business all c/p, with FMV of $250,000. H contended it was all s/p, with FMV of $120,000. Trial ct. found business to be all c/p, and H appealed. Court of Appeal affirmed, holding there was sufficient evidence to support trial court's determination, hence it would not reweigh evidence. H argued that he was at least entitled to $20,462 as his s/p since that was FMV as of date of marriage. Court of Appeal agreed that it would have been appropriate for trial ct. to have allocated this interest to H, but sustained trial court's finding that it had been transmuted into c/p by parties' actions, not by an executed oral agreement. Among factors court looked to were: failure of H to "segregate on a realistic basis the fruits of that [separate property] investment and the fruits of [husband's] personal efforts" (id. at p. 914); the commingling by turnover of inventory and assets in the business; and W's testimony of H's declarations and conduct.
NOTES: For transactions occurring after 1/1/84, the owner spouse may rely on Fam. Code §2640 to get at least reimbursement for the equity in the business as of the date the transmutation. (See *In re Marriage of Neal* (1984) 153 Cal.App.3d 117, 200 Cal.Rptr. 341, disapproved on other grounds, *In re Marriage of Buol* (1985) 39 Cal.3d 751, 763, 218 Cal.Rptr. 31, 705 P.2d 354 and *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451, 224 Cal.Rptr. 333, 715 P.2d 253, ABC Card FaRe 123.00.)
COMMENTS: In cases such as *Millington*, where the transmutation is based upon a course of conduct throughout the marriage, it will be difficult to establish "the" date on which the transmutation occurred. At the very least, of course, the owner spouse will be entitled to the equity in the business as of the parties' date of marriage.
BuIn 040.01

S/P interest in dental lab lost over 18 years of marriage; H failed to trace s/p interest in business.
Mueller v. Mueller (1956) 144 Cal.App.2d 245, 301 P.2d 90
Schottky, J. DCA3
FACTS: H acquired dental lab in 1926 for $6,500. In 1935, he married W. There was very little increase in value premarriage. W worked in business part-time throughout 18 year marriage doing general bookkeeping, stenography and general office work. During marriage the size and income of business increased greatly. Business changed locations and added furniture, fixtures and equipment. Parties used income from lab to buy substantial property, which H stipulated was c/p.

Trial ct. found lab all c/p and awarded to H. H appealed, arguing that he should at least be given $6,500 as s/p. Court of Appeal affirmed, holding that burden was on H to have traced that s/p into assets which still existed.

"In the absence of any evidence in the record to trace any of the property that was in the business at the time of the marriage, and in view of the manner in which the proceeds of the business were invested and regarded by [husband and wife], the court may well have concluded that any portion of the present value of the dental laboratory business that could be said to be traceable back to [the] original investment was so intermingled with undisputed community property that it should be regarded as community property." (Id. at p. 250.)
BuIn 041.01

VI. Postseparation Change in Value

A. Decrease in Value

Error not to consider damage done to business by managing spouse.
In re Marriage of Rives (1982) 130 Cal.App.3d 138, 181 Cal.Rptr. 572
Reynoso, J., by assign. DCA3
FACTS: During separation, by court order, W operated queen bee business, which H had owned prior to marriage. During that time, W permitted one-third of bees to die of starvation, hives to become invested with moths, and failed to run business properly, while building up her own separate business. After trial ct. awarded business to H at exorbitant price over his objection, H moved to reopen to introduce evidence of damage W had done to business while she operated it. Trial ct. denied motion, and Court of Appeal reversed, holding that trial court's order rewarded W by giving H his business at inflated value, while awarding inventory W built up in her business during separation to her as her s/p.

"The property division in this case ... was neither fair in principle nor equal in result.... Such a result may not be condoned." (Id. at pp. 152-153.)
BuIn 010.00

Stock which had decreased in value between date of separation and date of trial valued at date of trial.
In re Marriage of Priddis (1982) 132 Cal.App.3d 349, 183 Cal.Rptr. 37
Scott, J. DCA1
FACTS: H and W separated in 1967, but did not file for dissolution for 10 years. Trial in 1979. In 1967, parties owned stock, which H controlled. Stock decreased in value between date of separation and trial. Trial ct. valued stock (and residence) as of date of separation. Court of Appeal reversed. Absent evidence of mismanagement, stocks should be valued "as near as practicable to the time of trial." (Former Civil Code section 4800 (a), replaced by Fam. Code §2552.)
BuIn 051.00

Decrease in value due to misappropriation.
Fam. Code §2602
STATUTE PROVIDES: "As an additional award or offset against existing property, the court may award, from a party's share, the amount the court determines to have been deliberately misappropriated by the party to the exclusion of the interest of the other party in the community

estate." (Fam. Code §2602.)
NOTES: Fam. Code §2602 continues without substantive change the relevant language of the former Civil Code section 4800, which section was repealed 1/1/94.
BuIn 054.01

Valuation of medical practice reversed for failure to apportion postseparation decrease in value.
In re Marriage of Barnert (1978) 85 Cal.App.3d 413, 149 Cal.Rptr. 616
Stephens, J. DCA2
FACTS: Trial ct. valued H's medical practice 6 months before trial. H objected, arguing that valuation should have occurred as close to trial as possible due to postseparation decrease in value. Trial ct. found that H had intentionally decreased his income. Court of Appeal remanded, holding that decrease in value after separation must be allocated between c/p and H's s/p per *In re Marriage of Imperato* (1975) 45 Cal.App.3d 432, 119 Cal.Rptr. 590, ABC Card BuIn 132.00.

"We reaffirm the holding in *Imperato* that the valuation of an income producing asset which is under the control of a spouse, such as a medical or legal practice, is governed by [former] Civil Code section 5118 which makes any portion of the practice assets attributable to the earnings and accumulations of a spouse while living separate and apart the separate property of that spouse, subject to the application in reverse of the *Van Camp-Pereira* rules." (Id. at p. 424.)
BuIn 129.01

B. Increase in Value

Change in value after separation due to efforts of operating spouse must be apportioned.
In re Marriage of Imperato (1975) 45 Cal.App.3d 432, 119 Cal.Rptr. 590
Hastings, J. DCA2
FACTS: H continued to operate c/p corporation, Personalized Data Delivery Service (PDD), between date of separation, when value was $1,666, and date of trial, when value had increased to $17,614. Trial ct. valued as of later date and H appealed, arguing that increase in value was his s/p per former Civil Code section 5118 [replaced by Fam. Code §771]. Court of Appeal reversed, holding that if corporation were to be disregarded and business treated as a sole proprietorship, then the increase in value, to the extent that it was due to H's postseparation efforts, would be apportioned between c/p and s/p by applying either the *Pereira* [*Pereira* v. *Pereira* (1909) 156 Cal. 1, 103 P. 488, ABC Card BuIn 002.00] or *Van Camp* [*Van Camp* v. *Van Camp* (1921) 53 Cal.App. 17, 199 P. 885, ABC Card BuIn 012.00] formulas in reverse.

"Assuming the trial court treats PDD as a sole proprietorship, the ••*Pereira*•• approach would allocate a fair return of the increase to the community property and the excess would be husband's separate property. The ••*Van Camp*•• formula would determine the reasonable value of husband's services (less the draws or salary taken) and allocate this additional sum, if any, to husband as his separate property and the balance of the increase to the community property." (*In re Marriage of* Imperato, *supra*, 45 Cal.App.3d at p. 439.)

The case was remanded to determine the proper method of allocation.
NOTES: (1) It was critical to H's argument that the court disregard the corporate form of business

for purposes of allocating the increase in its value, because increases in value of a corporation are not the earnings of the shareholder.

"'The word 'earnings' is broader in scope than 'wages' and 'salary.' It can encompass income derived from carrying on a business as a sole proprietor where the earnings are the fruit or award for labor and services without the aid of capital.... [¶] In contrast, the earnings of a corporation are not, generally speaking, the earnings of the individual stockholder or stockholders, but are 'profits' of the corporation to be distributed usually in the form of dividends. A stockholder-employee takes his earnings in salary, bonuses and other forms of benefits." (Id. at pp. 437-438.)

(2) See *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, ABC Card CmPr 901.00, discussing the impact of Fam. Code §2552 alternate date of separation motion on *Imperato* as another way courts could ameliorate the effects of a trial date valuation so as to equitably apportion a spouse's postseparation efforts between community and separate interests.
BuIn 132.01

Increase in value of shares in corporation apportioned if similar to sole-proprietorship.
In re Marriage of Imperato (1975) 45 Cal.App.3d 432, 119 Cal.Rptr. 590
Hastings, J. DCA2
FACTS: See Facts on preceding card. If corporate entity can be disregarded and the business treated as sole proprietorship, then court may apportion increase in value of business postseparation. If not, then increase in value takes same character as underlying stock.

"[T]he earnings of a corporation are not, generally speaking, the earnings of the individual stockholder or stockholders, but are 'profits' of the corporation to be distributed usually in the form of dividends. A stockholder-employee takes his earnings in salary, bonuses and other forms of benefits." (Id. at p. 438.)
BuIn 133.00

Increase in value of shares in corporation not apportioned.
In re Marriage of Aufmuth (1979) 89 Cal.App.3d 446, 152 Cal.Rptr. 668, disapproved on other grounds, *In re Marriage of Lucas* (1980) 27 Cal.3d 808, 166 Cal.Rptr. 853, 614 P.2d 285
McGuire, J., by assign. DCA1
FACTS: H had been stockholder in law firm for 2 years when parties separated. Court found that due to H's youth and comparative inexperience, "he had not contributed in any substantial way to whatever goodwill the law firm might possess." (Id. at p. 463.) Value of H's shares on date of separation $23,549 and $35,096 as of date of trial. Trial ct. awarded stock to H for $35,096. H appealed date of valuation. Court of Appeal affirmed, holding that H was merely stockholder in the law corporation and that increase in value was due to earnings of corporation, not of H, who had been compensated for his efforts by way of salary.
COMMENTS: *Aufmuth's* logic would seem to apply to a large partnership as well as to a professional corporation. If the professional's efforts were not directly related to the increase in the value of the firm after separation, then former Civil Code section 5118 [replaced by Fam. Code §771] would not seem to apply.
BuIn 134.01

C. S/P Interest in C/P Business

All income earned in c/p business after separation held s/p of owner spouse, where due to her efforts.
Romanchek v. Romanchek (1967) 248 Cal.App.2d 337, 56 Cal.Rptr. 360
Stephens, J. DCA2
FACTS: Before and during marriage, W operated dress design school in which she was sole worker. School's income was result of W's "personal character, ability, energy and capacity." W filed for divorce and W and H lived separate and apart thereafter. Court of Appeal held W's income from school was her s/p following separation.
BuIn 263.00