Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States

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The concepts of marital and nonmarital property that are employed in most equitable distribution states are indeed drawn from community property law1 and in general correspond respectively to community and separate property. Each such jurisdiction recognizes an economic partnership between husband and wife. Equitable distribution states give effect to this partnership only when the marital union dissolves. These states take a quite different approach, not based on community property theory, to sorting out property rights of spouses when a marriage ends by death—an approach which usually provides less economic benefit to a stay-at-home spouse with no earned income.2 Equitable distribution states do not, during the marriage, recognize any kind of economic partnership created by a legal regime of marital property (as opposed to a sharing arising out of a contract between the spouses).

Co-ownership of gains accrued during marriage is the heart of community property law. Its principle of equal sharing of certain

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2. Thus, at death of the stay-at-home spouse before the wage-earner spouse, there is no property to pass under the decedent’s will. When the stay-at-home spouse is the survivor, his or her share of the earner-spouse’s property is often one-third of all assets rather than the typical half of marital property at divorce. In the case of many marriages where there is no nonmarital property, the one-third share of all will be significantly less than the survivor spouse would have under the partnership recognized where marriage ends by divorce.
classes of acquisitions is usually given full effect when the marriage ends by death. In general, the survivor spouse leaves the marriage with just what he or she owned at its termination: a fixed half of the community property and his or her separate property. There are no adjustments based on particular equities. In California, Louisiana, and New Mexico, the same regime that operates during marriage is recognized at marriage termination by death and applies also at divorce. In Texas, Arizona, Nevada, and Idaho (and as to some subclasses in Wisconsin), the treatment of separate property at divorce is essentially the same as during marriage and at dissolution by death. Unlike California, Louisiana, and New Mexico, these states alter their treatment of community property at divorce so that the rights of spouses are based on equities such as need, ability to work, health, etc., departing from the 50-50 sharing of community assets that applies during marriage or at its termination by death of a spouse. (Upon divorce, Washington reverts to the minority position among equitable distribution states that all assets of the spouses, however owned, are equitably divisible.)

Because the concept of marital property in equitable distribution jurisdictions has its roots in the community property of Spanish-Mexican law adopted in the nine previously mentioned states, courts in the common-law jurisdictions, most of which are dealing with

3. The division of community property, with very few exceptions, must be 50-50, and separate property is not divisible. See Frunikes & Green, A Review of Florida's New Equitable Distribution Statute, 8 FairShare 13, 14 (Dec. 1988). See, e.g., CAL. CIV. CODE § 4800 (West 1983).

4. In Wisconsin, property acquired during marriage by gift or succession is divisible at divorce only upon a showing of extreme hardship, while properties earned before marriage are subject to the basic equitable division rule. Wis. Stat. Ann. § 767.255 (West 1981). However, Wisconsin also has two sets of rules for classifying property into what other community property states would call separate and community: one set applicable during the marriage and at death, and one set applicable at divorce. See Mausing v. Mausing, 146 Wis. 2d 92, 429 N.W.2d 768 (1988); Kuhlman v. Kuhlman, 146 Wis. 2d 588, 432 N.W.2d 295 (Cl. App. 1988).


7. See W. deFerinak & M. Vaughn, Principles of Community Property §§ 15, 26–52 (2d ed. 1971) [hereinafter cited as Principles]; W. McClanahan, Community Property Law in the United States §§ 3:7-3:10, 3:22-3:31 (1982); G. McKay, The Law of Community Property § 6 (2d ed. 1925); R. Ballinger, Property Rights of Husband and Wife, Under the Community or Ganancial System § 6 (1895). The above treatises also note that the community of property regime of Louisiana was also influenced by French law.
relatively new statutory schemes8 containing ambiguities or uncertainties yet to be fully resolved by judicial precedent, can reasonably look to how community property states have solved the problems of classifying various types of assets as community or separate. If analogy is appropriate, the community property jurisdiction's classification of an asset as separate property suggests a marital classification to the equitable distribution state (while separate property classification on similar facts by the community property state analogizes to a nonmarital characterization in the equitable distribution jurisdiction).

One purpose of this article is to point out that the suggested analogy may sometimes be inappropriate, despite existence in the equitable distribution forum of statutes defining "marital" and "nonmarital" property in language identical or nearly identical to the terms used in community property states to define "community" and "separate" property. The analogy should sometimes be rejected in a situation where the court in a community property state, obliged in a particular case to classify a type of asset as community or separate, had to take into account in making its decision not only the effect of a classification on the division of property at divorce, but also the effect of that same classification during the marriage (when issues involving management and creditors' rights arise) and at dissolution of the marriage by death.9 Thus, if a community property state has decided that a particular type of acquisition during marriage is not community property divisible at divorce because of inability to incorporate community ownership of the asset into the marital property regime the state applies during the marriage, such precedent would be inappropriately borrowed by an equitable distribution state where the problem sought to be avoided does not exist.

This article analyzes the reasons why the community property system in general or various groupings of American community property jurisdictions, judicially or legislatively, have decided to classify certain types of assets as community or separate. There have been hundreds of such classification decisions; this article examines only the most significant ones. Special focus is on those classification problems that have generated different results in the nine American community property states. The analysis seeks to determine whether

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9. Additionally, although this article does not explore the matter, it is possible that analogizing the classification process in equitable distribution states to that in California, Louisiana, and New Mexico is imperfect because those jurisdictions must take into account the inability to make equitable adjustments at divorce of property classified as community through unequal division that is available in the equitable distribution jurisdiction.
there is any reason why an equitable distribution state should not draw
an analogy in classifying assets as marital or nonmarital to the
community or separate classifications in their sister states whose
marital property law has Spanish-Mexican rather than common-law
roots.

I. Rejection of a Universal Community in
Favor of a Ganancial System

In a few equitable distribution states, all marital property, which
includes everything owned or co-owned by either spouse, is divisible at
divorce. 10 American community property law is not closely analogous
to that approach; the regime of a universal community once known to
Dutch law would be. 11 By 1255, with the promulgation of the Fuero
Real, Spain, the source of America’s community of property regimes,
had rejected the universal community in favor of the ganancial system
which recognizes classes of separate property. 12 The reason for old
Castille’s recognizing separate ownership of property owned before
marriage and that acquired during marriage by succession or gift is
fairly clear. Appreciation of that reason helps a student of marital
property law to understand the basis for some seemingly inexplicable
early American decisions classifying governmental land grants ac-
quired by a spouse during marriage in patently nondonative transac-
tions as separate property. This brief look at ages past should help
persons in equitable distribution states understand why the old land
grant cases from community property states having statutes nearly
identical to equitable distribution laws defining nonmarital property
should nevertheless not be accepted as precedent.

The idea of community sharing may have roots in tribal law of the
Visigoths of the Middle Ages, 13 but the rules in the Fuero Real for
classifying separate and community property were designed for the
only class of Spaniards having substantial property: the landed
gentry. 14 The most important item of property was the land—where the
noble family probably lived and from which it obtained wealth from
farming, ranching, or rental to others who engaged in these activities.
The Spanish marital property law was designed to keep this estate in
reality intact, protecting it from being divided up into smaller parcels
and to assure that such estate would remain in the family, passing along

10. See Levy, supra p. 159.
11. Principles, supra note 7, at § 16.
12. See Estate of Salvini, 65 Wash. 2d 442, 397 P.2d 811 (1964) (referring to Fuero Real
as a source of Washington community property law).
13. Principles, supra note 7, at §§ 8, 11, and 13; Vaughn, The Policy of Community
Property and Interspousal Transactions, 19 Baylor L. Rev. 20, 29 (1967).
the male bloodline generation after generation. To this end, an entailed estate, the mayorazgo, was legally sanctioned. It was similar to the English fee tail. Succession to unentailed land was by primogeniture: first-born males inherited. Still, if the family estate were not separate property of the husband but were community owned (under a general community), breaking up of unified ownership could occur. If the husband died childless and the estate were community property, his half of the land would pass to a brother or other male relative by blood. His widow would own her community half interest now as her separate property. She might remarry, and at her death her land (half the former estate of her first husband’s family) would pass to her son by the second husband.

Segundos, second sons, and third, fourth, etc., who would not inherit by succession based on primogeniture, might be able to obtain their own estate by gift from a childless relative owning unentailed land. Even if this acquisition was during marriage, the law made it separate property so it could pass from generation to generation like the primary family estate of the elder brother.

If a segundo came into enough wealth before marriage to contract to buy land, marrying before the full price was paid, the inception of title doctrine prevented breaking up of a unified separate ownership. Community income probably used after marriage to complete the payment did not “buy in” to title, but generated a right to reimbursement in favor of the community estate.

Landless segundo noblemen often pursued a military career as an officer under the king or other lord who sought to raise an army for a particular campaign. Two peculiar Spanish marital property law concepts, castrenses and casicastrenses, were used by these officers to obtain a family estate even though they were already married. Bienes castrenses consisted of booty, often very substantial in value, acquired by the nobleman while on a military campaign in Europe or more likely in the Americas or Africa. Bienes casicastrenses were gifts from the king to the officer in appreciation of his services. If the officer were married at the time of his military service, his castrenses would obviously be obtained onerously—by community labor; the casicastrenses...
renses are the clearest examples of remunerative gifts. Under standard community property theory, both such types of acquisitions should have been community. But the Spanish codes classified them, except in one circumstance, as his separate property to create a fund with which he could buy real estate that would remain in his bloodline.

Similar policies are the only explanation for a line of early cases classifying as separate property land granted to a husband during marriage upon payment of nominal fees and his commitment to apply community labor (and funds, usually) to improving it. Statements in such cases that the acquisition is lucrative and classified as separate because the grant is a gift from the sovereign are highly misleading. The correct approach to classification of remunerative gifts (community property) that equitable distribution states can usefully look to as precedent appears in cases more recently decided that deal usually with money, not land, given as a reward for services.

That a noncontractual expectancy should be viewed as earned by the labor of the married person receiving what in form is a gratuity is well-established and explains why tips given to a married waiter or waitress are community property. The concept of onerously acquired donation also helps explain why courts always classify federal military pensions as community property to the extent earned during marriage, despite the assumption that a member of the armed services has no legal right to retirement benefits because Congress has reserved the power to repeal all the legislation creating retirement benefits for persons in the armed services.

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19. If the husband served in the military without pay and used community funds to maintain himself while on a campaign, the unusual classification rule did not apply and the booty he acquired was classified as community property. *See* Hughry v. Barrow, 4 L.A. 712 (1890); *J. Escriva y Martin, Diccionario Razonado de Legislacion Civil, Penal, Commercial y Forense*, 72 (1st ed. Madrid, 1831); 1 J. Ferrero, Libreria de Escritanos, tit. II, cap. X, §§ 15, at 222–23 (E. Tapia, ed., Mejico 1834) (el Ferrero Mejicano); *Principles, supra* note 7, at § 75.


22. *See*, e.g., *Nee v. Card*, 14 Cal. 576 (1860); *Scott v. Ward*, 13 Cal. 459 (1859) (Mexican land grant would be separate property notwithstanding conditions grantee cultivate and occupy the land).


24. *See Principles, supra* note 7, at § 70; *McKay, supra* note 7, at §§ 263, 265.

A 1984 case involving land given as a reward for services ignored the old homestead grant cases and classified the acquisition as onerous.\textsuperscript{26} That result is correct since the reason for the \textit{bienes castrenses} doctrine no longer exists.\textsuperscript{27}

II. Classification of Rents and Profits of Separate Property

The basic question whether rents and profits of nonmarital property are marital is statutorily answered in some equitable distribution statutes, usually by a provision that they are nonmarital. Some states have reached this result by construing legislation that does not directly address the issue.\textsuperscript{28} Problems will arise as how to implement the rule in those states where rents and profits are nonmarital. It may be of interest to such states, aware that an apparently analogous treatment of rents and profits is part of the law of California, Arizona, New Mexico, Washington, and Nevada,\textsuperscript{29} that their major departure from historic community property law apparently stemmed from a concern as to how community property classification would affect wives during marriage, particularly in the area of management and control.


\textsuperscript{27} According to Basanoff, supra note 14, at 295, a New Mexico administrator as early as 1795 determined the reason for the odd doctrine had ceased to exist in the case of soldiers given modest stipends for military service, not adequate for the purchase of a family estate.

\textsuperscript{28} J. T. Oldham, \textit{Divorce, Separation and the Distribution of Property}, \textsection 6.05 (1988).


Strangers to the community property system should be aware that "American" rule apportionment problems can arise in the other four community property states that have a basic rule classifying rents and profits from separate property as community. In Louisiana and Wisconsin, each spouse owning separate capital has a statutory right to opt out of the "Civil Law" rule by filing a document claiming separate ownership of all or specified items of his or her separate property. \textit{La. Civ. Code Ann.} art. 2339 (1983); \textit{Wis. Stat. Ann} \textsection 766.59 (Supp. 1988). One of the more interesting "American" rule cases involving apportionment of business profits involves a Louisiana spouse who had so opted. \textit{Paxton v. Bramlette}, 228 So. 2d 161 (La. Ct. App. 1969) (wife who had separate property corporation she controlled pay her large salary not esquitted to claim part of denominator salary was separate property dividend). In Texas, where one spouse makes a gift to the other that becomes donee's separate property, the rents and profits are similarly separate unless the instrument provides differently. \textit{Tex. Const.} art. 16, \textsection 15 (1989 Supp.). An Idaho statute apparently gives effect to any instrument under which separate property is acquired that recites that rents and profits are to be separate property of the owner spouse. \textit{Idaho Code} \textsection 32-906(1) (1983).

Additionally, of course, in all four states couples will upon separation often formally agree that future earnings of each will be separate property but thereafter continue to labor at a business containing community capital. This situation requires courts to make "reverse" American rule apportionments, allocating some gain to separate labor and some gain to the community capital based on natural increase in value and some based on "profit" return for the community.
In Spain several hundred years ago, the rule classifying fruits, rents, and profits of separate property as community\textsuperscript{30} was essential if there was to be any substantial community wealth and avoided apportionment problems. Land was almost the only capital asset producing income, primarily by farming and renting out. The propertied nobility for whose families the marital property law was structured were themselves unlikely to work on the land but had servants or serfs who did this and who were paid or maintained out of gains arising from use of the land (which was, as noted, usually the husband's separate property). Old Spain's classification of rents and profits enabled a substantial community estate to be amassed for the typical propertied family and avoided the difficult apportionment problems well-known to students of American community property intimate with the Pereira and Van Camp\textsuperscript{31} apportionment formulae necessary where, as so often happens, a spouse's labor on separately owned capital is part of the reason rents or profits are generated. The present "American" rule, now in effect in the majority of this country's community property jurisdictions,\textsuperscript{32} classifies rents and profits from separately owned land also as separate property. All profits from the typical family estate would be separate unless some small fraction were apportioned out, attributed to the landowner spouse's modest activities as overseer, and classified as community property.

The Civil Law rule itself causes commingling and uncommingling problems avoided under the American rule when separate money is invested in a securities account, with gains reinvested, or deposited in an interest-earning bank account.\textsuperscript{33} As far as I know, none of the Spanish treatises on marital property law address such problems. Apparently corporate stock was unknown when the Civil Law rule for classification of rents and profits was created. Interest-earning bank accounts may have been unknown, or at least were then rare.

It is rather clear, however, that avoidance of commingling problems had nothing to do with the California Supreme Court's rejection of the Civil Law rule for the American rule in George v. Ransom,\textsuperscript{34} decided in

\textsuperscript{30} See Principles, supra note 7, at § 71; Pugh, supra note 17, at 8–10.


\textsuperscript{32} See supra note 29.

\textsuperscript{33} See, e.g., Duncan v. United States, 247 F.2d 845 (5th Cir. 1957); J. McKnight & W. Reppy, TEXAS MARRIAGE LAW 39–47 (1983); E. Oakes, SPEER'S MARRITAL RIGHTS IN TEXAS § 392 (4th ed. 1961) (collecting cases involving commingled bank accounts).

\textsuperscript{34} 15 Cal. 322 (1860).
1860, a time by which money had perhaps become about as important a resource as land for generating profits. (At least by 1860 a court could observe that the Civil Law rule for profits from separate capital was going to result in automatic commingling in several kinds of investment accounts where earnings were retained.) It was, instead, a perceived unfairness in the early management and control law of California that spawned *George*.

The initial California constitution (adopted in 1849) attempted to cast some protection on married women that the legislature could not withdraw by providing that property owned by a wife before marriage and acquired during marriage by gift, by will, and by inheritance "shall be her separate property" and that laws should "be passed more clearly defining the rights of the wife in relation as well to her separate property as that held in common with her husband." 35 It is rather clear from the debates that the constitutional convention intended to retain for California at least those aspects of Mexican marital property law that were favorable to married women and that treated the wife with respect to property better than wives fared under the coverture doctrine of English common law. 36

What the California legislature promptly did in 1850 was codify, with a limited exception added in 1853 for wives, 37 the Civil Law rule that rents and profits of separate property of either spouse are community. 38 It also made the husband the sole manager of all community assets, stating he could do with them anything he could do with his own separate property, seemingly implying that he could give away community assets. The husband was also given management power over the wife’s separate property, although he could not alienate it or encumber it without her consent. 39

In 1860, the California Supreme Court held the statute classifying rents and profits of a wife’s separate property as community violative of the constitutional provision recognizing a wife’s right to own

37. 1853 *Cal. Stats.* ch. 116 § 1, p. 165. This law empowered the wife’s donor or deviser to provide in the instrument passing title to her that rents and profits would be her separate property. If this were done, the wife had exclusive management of such separate property, contrary to the normal rule giving husband basic management power at that time. See infra note 39 and accompanying text.
38. 1849–50 *Cal. Stats.* ch. 103, § 9, p. 254, providing that "[t]he rents and profits of the separate estate of either husband or wife shall be deemed common property."
39. *Id.* at § 6.
separate property. 40 The statutory management provision giving unlimited control to the husband divested the wife of all beneficial use, leaving her with the "barren right to hold." This was an "anomaly" the state constitution could not have contemplated; hence, the husband's creditor in the case could not reach the property at issue, which all assumed had to be the wife's separate property by force of the opinion. 41 Legislation followed making rents of the husband's separate capital his separate property as well, and California had created the phenomenon of a marital union without community property for couples who do not work but live off the revenues of inherited property or capital brought to the marriage that is managed by a person paid out of the profits he or she generates. 42 Washington, Nevada, Arizona, and New Mexico soon legislatively copied California's answer to the problem of classifying rents and profits from separate capital, and these states struck out on a quite different path toward development of basic principles of community property law from that followed generally in the states adhering to the Spanish rule.

Analogy seekers from equitable distribution states, where rents and profits of nonmarital property are marital, should be warned that, although Texas nominally is a jurisdiction where rents and profits of separate property are community, 43 some of its judicial decisions are inconsistent with that rule. A 1953 Texas Supreme Court decision holds that all of the profits from an oil and gas business at which the husband labored were of the same character as the natural resources he was developing; his separate property. 44 Even the states following the California rule for classifying rents and profits would have allocated some community return for the husband's labor at the business, 45 but the Texas court found no community gain from labor because it was "reasonable" in amount "to put [his separate property] to productive

41. To a contemporary scholar of constitutional law, the obvious "cure" for the constitutional violation would be to give the wife management power over the subclass of community property constituting rents and profits from her separate estate. Apparently, for reasons explored in Frager, supra note 36, community property was so associated by the judiciary with a male spouse that this was unthinkable.
42. Legal writers have opined that wives would fare better under the Civil Law rule classifying such profits as community property, which is correct if men bring to and/or amass during marriage more separate property than do women. See Bodenheimer, The Community Without Community Property: The Need for Legislative Attention to Separate Property Marriages under Community Property Laws, 8 Cal. West. L. Rev. 381 (1972); Younger, Community Property, Women, and the Law School Curriculum, 48 N.Y.U. L. Rev. 211 (1973).
44. Norris v. Vaughn, 152 Tex. 491, 260 S.W.2d 676 (1953).
use.\textsuperscript{46} More recently, where a husband operated a separately owned and incorporated printing business, the Texas Supreme Court did recognize that the community was entitled to a remedy if the salary he had the corporation pay him was inadequate to compensate for labor "other than that reasonably necessary to manage and preserve the separate estate. . . ."\textsuperscript{47} However, said the court, a finding of fact that such salary was adequate, "if sustained, precludes" the wife from any recovery.\textsuperscript{48} In other words, she could make no claim based on inadequate payment of dividends to reward the community for "profit" arising out of the separate capital, which would be the only contention available if salaried employees ran the business and the husband contributed no labor.\textsuperscript{49}

Texas has also copied from states classifying rents and profits from separate property a formula for prorating based on time on the job the community and separate interests in a pension plan where a spouse begins earning the pension through labor or payroll deductions while single and continues to earn pension benefits after marriage. This approach treats each month on the job while single, many years before the apportionment is made, as producing the same fractional interest as a month at work while married very recently.\textsuperscript{50} This "achieves a rough justice"\textsuperscript{51} in California because, most likely, the worker's earliest payroll deductions while single (or the concomitant value of his labor the employer takes into account in a defined benefit retirement plan) is relatively small, but the plan operator has many years to make profits from the contribution through investments. Due to steady increase in pay, the recent contributions by the worker while married are larger, but the plan operator has had little time to invest them for profits. In Texas, unlike California, the worker's marriage ends the increase of the separate property component in the plan by way of investment of it; instead, future returns from investing the separate property contributions ought to be community. Thus the simple time apportionment does not do rough justice in a state following the Civil Law's rule for classifying rents and profits but instead undervalues the community share in the plan.

\textsuperscript{46} Norris v. Vaughn, 152 Tex. 499, 260 S.W.2d at 681 (1953).

\textsuperscript{47} Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex. 1984). See the perceptive criticism of this decision in Paulsen, Jensen III and Beyond: Exploring the Community Property Aspects of Closely Held Corporate Stock in Texas, 37 Baylor L. Rev. 653 (1985).

\textsuperscript{48} Jensen v. Jensen 665 S.W.2d at 110 (Tex. 1984).

\textsuperscript{49} In identical language, the trial court in Jensen had found both the salary and dividends paid "adequate and reasonable." Id. at 108. Whether the wife attacked the finding concerning dividends as unsupported is not stated by the court.

\textsuperscript{50} See, e.g., Taggart v. Taggart, 552 S.W.2d 422, 424 (Tex. 1977).

\textsuperscript{51} Reppy & Samuel, supra note 25, at 86.
III. Development of Formulae for Apportioning Business Profits Where Capitol Is Separately Owned into Separate and Community Shares

Some, but not all, of the "American" rule states—those following California's lead by classifying rents and profits of separate capital as similarly separate—soon realized they had created a new problem unknown to civil law: the need to apportion business profits. When a spouse owning a farm as his or her separate property plants, cultivates, and harvests it, resulting profits have two components: a return on community labor and a separate "profit" under the American rule generated by the separate capital (land). The same situation arises when the spouse works at a factory he or she owns separately. Equitable distribution states where rents and profits of nonmarital property are also nonmarital face the same apportionment problem. They will find the most useful analogous case law in California and recent Nevada decisions.

As noted above, one of two formulae, named after California's Pereira and Van Camp decisions, are most often used in American rule states to apportion business profits in cases of community labor applied to separate capital. Pereira calculates a fair return for the separate

52. Arizona and Nevada declared early that it was impossible to make an apportionment and that when community labor was applied to make separate capital productive, all of the gain had to be either 100 percent community or 100 percent separate (the same character as the capital). See Rundle v. Winters, 38 Ariz. 239, 298 P. 929 (1931); Lake v. Lake, 18 Nev. 361, 4 P. 711 (1884). Anderson v. Anderson, 65 Ariz. 184, 177 P.2d 227 (1947), contains an amusing list of "all or nothing" decisions. For example, all gain from running a separately owned hotel or plant nursery was held to be separate but if the business were a pool hall, cigar store, or cleaners, all gain was classified as community. Nevada abandoned all-or-nothing in 1973, Arizona in 1979. Johnson v. Johnson, 89 Nev. 244, 510 P.2d 625 (1973); Cockrill v. Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979). Equitable distribution states that classify rents and profits of nonmarital property as also nonmarital should not consult precedents decided in Arizona and Nevada prior to abandoning the all-or-nothing approach in looking for analogies from community property states when dealing with problems of apportioning business profits. The apportionment law of Washington is not well-developed and most likely would confuse observers from common-law jurisdictions. See Reppy & Samuel, supra note 25, at 138–39. For more recent (and still simplistic) Washington law on the problem, see In re Marriage of Brooks, 51 Wash. App. 882, 756 P.2d 161 (1983). 53. In Civil Law rule states, the apportionment problem could have arisen, but I am confident it was never faced in a reported case prior to the development of apportionment approaches in American rule jurisdictions. For example, if one year a married Idaho business operator had gains from selling stock in trade and also gain from sale of a separately owned capital asset not in the ordinary course of business, the latter gain—"natural increase" rather than profit from property held for sale—can be classified as separate property. Arguably, if more than minimal labor was employed by the married person to find a buyer for the capital asset, a portion of the apparent capital gain could be classified as community property.

54. See supra note 32 and accompanying text.

55. In California, Civ. Code § 5118, providing that postseparation earnings are the acquiring spouse’s separate property, has the effect of making the labor of a spouse who
estate; the rest of the gain is community. Therefore, it is the community share that "floats," and Pereira is the formula the community wants when the gain is unusually large. The return is based on the legal interest rate, in effect at the time of trial, unless, as usually happens in recent cases, the separate property owner proves that a higher rate is appropriate.\footnote{56} According to a California court, interest will not be compounded unless this is necessary to achieve substantial justice.\footnote{57}

Van Camp calculates a fair salary for the community labor. To the extent the business did not pay that amount to the laboring spouse, a portion of the gain on hand is classified as community; the rest is separate property "profit" for the capital. Under this approach, the separate share "floats," and hence, Van Camp is the formula the separate estate wants when gain is large, but under which the community benefits when gain is small.

Whether to use Pereira or Van Camp depends on whether labor or capital is the chief contributing factor in the production of gain.\footnote{58} If it is labor, the formula more favorable to the community is used; if capital, that which produces the larger separate property gain.\footnote{59} Where continues to work after separation at a business containing community capital the "separate labor" of that spouse. This common fact pattern requires application of the Pereira and Van Camp formulae in reverse, i.e., to determine an appropriate separate return for labor and community share of the gain for capital. \textit{See In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975).}

56. In Gillespie \textit{v.} Gillespie, 84 N.M. 618, 506 P.2d 775 (1973), the spouse owning the separate capital got the court to use in lieu of the legal interest rate the substantially higher interest his business would have had to pay during the period of apportionment if it had borrowed money for capital expansion from a commercial lender. In \textit{In re Marriage of Folb, 35 Cal. App. 3d 862, 126 Cal. Rptr. 306 (1975)}, the court employed Pereira with a 12 percent interest rate—far higher than legal interest—after the owner-spouse proved that the annual rate of return for similar businesses was 14 to 22 percent. The stated reason for the reduction—that the owner-spouse's labor was increasing the value of the separate capital—makes no sense. Pereira rather than Van Camp was chosen as the formula for apportioning the very large gain in Folb to hold down the separate property return and let the community enjoy the bulk of the gain. In all apportionment cases, the owner-spouse's labor has increased the value of the separate property. Choosing an interest rate below 14 percent in Folb was correct only if the evidence concerning a rate of return for similar businesses of 14 to 22 percent did not refer to a return after paying costs of labor but included a profit that ought to be attributed to labor rather than capital.

57. \textit{In re Marriage of Folb, 35 Cal. App. 3d 862, 873, 126 Cal. Rptr. 306, 313 (1975)}. If it is known that all the gain was held in the business and profitably invested, refusal to compound the interest seems clearly wrong. If labor was the chief contributing factor and compounding interest allocates almost all the gain to the separate capital, the court should view the matter as a "small gain" case and use the Van Camp formula that favors the community in such a situation rather than illogically denying compound interest.

58. \textit{In re Marriage of Lopez, 38 Cal. App. 3d 93, 106, 113 Cal. Rptr. 58, 66 (1974)}, \textit{but see} Lucini \textit{v. Lucini, 97 Nev. 213, 626 P.2d 269 (1981)}, declaring Pereira will be used unless the party benefited by Van Camp proves it or some other formula is more appropriate.

59. \textit{In re Marriage of Lopez, 38 Cal. App. 3d 93, 106, 113 Cal. Rptr. 58, 66 (1974)}, erroneously states that if capital is the chief contributing factor, Van Camp should be used. The court was assuming there was a large gain to apportion. If the gain were small, the separate return might be zero under Van Camp, with all the gain allocated to pay the
neither labor nor capital can be viewed as a chief contributing factor. California and Nevada unhelpfully direct courts to pick the test that will do "substantial justice."60 In Arizona, the general presumption in favor of a community property classification should compel use of the formula favoring the community.61

In California, the fact that the business paid the laboring spouse a fair salary does not prevent a court from using the Pereira formula to find there is an additional component of community gain in the retained earnings of the business.62 Decisions in other states to the contrary63 should not find favor with equitable distribution jurisdictions seeking appropriate analogies in community property case law. They should, like California, conclude it is for the court, not the husband or wife controlling the separate property business, to determine the appropriate apportionment formula.

Equitable distribution states also ought to consider with keen interest a compromise formula that reaches a result midway between Pereira and Van Camp and was used in one 1949 reported decision64 from California that, strangely, has fallen out of favor there. I will be surprised if one or more equitable distribution states do not soon resurrect it.

California’s implementation of Pereira and Van Camp is fairly simplistic and can be called total recapitulation. At the end of the marriage,65 one lump of fair salary seems to be calculated under Van Camp for the entire period of operation of the business; one interest rate is used under Pereira for that whole period. If there is net gain, the fact that some years produced large losses in the business is ignored.

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60. Beem v. Bank of America, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137 (1978), the most useful article analyzing the apportionment problem.
61. See Cockrell v. Cockrell, 124 Ariz. 50, 591 P.2d 1334 (1979), declaring the burden of proof is on the spouse who claims increase in value of separately owned business property is also separate to show what part of the gain is not due to community labor. Later in the opinion, the court refers to the "substantial justice" test of California and Nevada (id. at 54, 591 P.2d at 1338), but that cannot dilute the significant impact of the placement of the burden of proof.
65. California has yet to decide whether an apportionment will be made during marriage at the behest of a creditor of the spouse who has no separate property interest in the business where, as is usually the case, the creditor can reach all community property under California Civil Code section 5125.
A more fine-tuned approach, which can be called annual accounting, was used by the Nevada Supreme Court in a case where *Pereira* had been held to be the appropriate apportionment formula. The overall gain over thirty-seven years of operation by the husband of his separate property business was so small that under California-style total recapitulation, it was less than the separate estate’s share under the low legal interest rate. In at least one year, however, the gain for the business substantially exceeded legal interest. The Nevada court calculated the excess as a community gain and, since it was not paid out in salary or otherwise withdrawn from the business, treated that sum as becoming part of the capital for subsequent years’ calculation of gain under *Pereira*.

While California has not squarely rejected the detailed apportionment accounting of the Nevada case, a spouse’s request for something very similar was rejected in a 1981 California decision. After several years of marriage, the donut shop where the spouses in that case worked, the capital of which the husband owned prior to the marriage, became insolvent. Thereafter the business was built back up to the positive net worth it had at the time of marriage. Under the Nevada approach, there obviously was a gain after the year of insolvency to be apportioned. But the California court insisted on a total recapitulation—resulting in zero gain—stating that the accounting requested by the wife was "exceedingly complex."

There may be a quite different reason why California declines to make the obviously more accurate apportionments of gain achieved in Nevada—a fear that the Nevada approach will produce undesirable consequences because it requires treating the community as acquiring a co-tenancy interest with the separate estate in the business during marriage. If this occurred, the spouse of the separate property owner would obtain equal management power over the community’s fractional interest if he or she worked at the business. That spouse could encumber the community interest and possibly frustrate the separate property owner’s plans to sell the business. Even if the spouse having

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68. *Denney* was rather plainly a case where labor was the chief contributing factor, and possibly all the postinsolvency gain would have been community in Nevada under *Van Camp*. Whether the amount of living expenses the couple withdrew from the business exceeded fair salary for the both of them was not, of course, calculated by the California court.
69. *In re Marriage of Denney*, 115 Cal. App. 3d 543; 550, 171 Cal. Rptr. 440, 443 (1981). Had the donut business been declared bankrupt in the year of insolvency, then started up anew successfully, all gain would have been community, the court said in dictum, citing *In re Marriage of Winn*, 98 Cal. App. 3d 363, 159 Cal. Rptr. 554 (1979), where that happened. That is not necessarily so if the husband was able to exempt in the bankruptcy separately owned tools of the trade that were used to begin the new business.
no separate property interest in the business did not work there, his or her creditors could levy on the community’s fractional interest in the business and ultimately force a partition sale of the whole thing (unless the separate property owner chose to pay this creditor). In equitable distribution states, recognition of a marital property interest at divorce has no effect on the property rights of the spouses and their creditors during marriage. Nevada’s fine-tuned apportionment accounting may therefore be more appealing in the common-law states where rents and profits of nonmarital property are also nonmarital than it has been in other American rule community property jurisdictions.

Equitable distribution states, where rents and profits accrued during marriage from nonmarital property are marital, will find almost no useful precedents to employ by analogy in the civil law rule community property states of Texas, Louisiana, Idaho, and Wisconsin. As noted above, Texas has proceeded as if it were an American rule state when faced with apportionment problems. Until quite recently, Louisiana had an all-or-nothing statute precluding apportioning community gain attributable to labor and to “profit” from separate capital from separate gain due to natural increase in value of the separate capital (e.g., due to inflation and other market factors). Wisconsin’s applicable law is also recent, and in the only case I have found that presented an apportionment issue, the Wisconsin court apparently failed to see it.

72. California could avoid these results by a holding that no apportionment is made until divorce or death of a spouse, but at that time the Nevada approach is employed and a community interest hypothetically created retroactively to the first year of gain.
73. See supra notes 43–49 and accompanying text.
74. Former Louisiana Civil Code article 2408 provided that all gain was community unless the separate property owner proved the sole cause of gain was “the ordinary course of things.” See application of this statute—superseded in 1979 by article 2368, which does not bar apportionment—in Abraham v. Abraham, 230 La. 78, 87 So. 2d 735 (1956). Beals v. Fontenot, 111 F.2d 956 (5th Cir. 1940), apparently unaware that a statute barred making an apportionment, examined the salary paid for community labor and the “profit” to the community from separately owned stock of the company through dividends and found them adequate. This approach is analogous to Van Camp in that the community interest is fixed by precise calculations and the separate share of gain “floats.” It is like Van Camp as employed in New Mexico and Washington (see supra note 63), which decline to consider another apportionment approach more favorable to the community if the spouse controlling the business is careful to make sure the return to the community is what Van Camp requires.
75. See In re Marriage of Weirman, 130 Wis. 2d 425, 387 N.W.2d 744 (1986), holding there was no marital gain arising out of a wife’s nonmarital share in a partnership because she performed no labor for it. Ordinarily at divorce in Wisconsin, profits from nonmarital property are classified as marital. See In re Marriage of Arneson, 120 Wis. 2d 236, 355 N.W.2d 16 (App. 1984). In Weirman there were substantial partnership gains due to the labor of wife’s father, part of which were a marital “profit” arising out of the wife’s
The only useful case was decided by the Idaho Supreme Court in 1973. The husband owned separately 65 percent of the stock of a close corporation where he worked as chief executive officer. The Idaho court at his divorce held that if the salary he had the company pay him was inadequate, "the community would be entitled to a judgment against the owner-spouse equivalent to the difference between the income actually received by the community in the form of compensation from the business, and the income which the community would have received had the owner-spouse been justly compensated." The corporation had never paid a dividend and had amassed during the marriage some $340,000 in retained after-tax net earnings. Even though the retention was reasonable from a business standpoint and the husband had no actual intent to defeat his wife's property rights, the community had, due to the nonpayment of dividends, suffered a loss. The court suggested unequal division of the community property as the remedy in the case before it. Surely, however, if the issue had arisen at death of one of the spouses rather than at divorce or if there had been insufficient community property to award to the wife to make her whole, a money judgment like that arising out of inadequate salary would be appropriate.

The Idaho court's solution to the apportionment problem in a Civil Law rule state calculates what the community is entitled to (by way of salary and profit from separate capital) and lets the separate estate keep the rest of the gain. This is analogous to the Van Camp approach in American rule states. Although it has yet to be noted in a reported decision, a Pereira analogue for states where rents and profits of separate property are community can be formulated (and picked up by common-law states that classify profits from nonmarital property as marital). A share of net gain is allocated to the separate estate based on natural increase—due to inflation and other market factors—in the value of the separate capital. The balance of the gain is community, to compensate it for labor and the profits it is entitled to from separate capital in Civil Law rule states.

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interest and part of which apparently on the facts were due to natural increase in value of land held by the partnership.


77. Id. at 128, 525 P.2d at 323. Hopefully, the Idaho court will clarify in the future that the remedy includes interest on each year's inadequate sum from the date of inadequate payment until the date of judgment. The court's statement that the community has the claim rather than the nonowner-spouse as to half suggests the possibility that the wife's creditor could garnish the full amount of what the court described as owing to the community by the husband in the Speer case.

78. The fact that salary and dividends (or other form of profit) received by the community during the marriage both appear adequate should not bar use of this Pereira analogue, just as payment of an adequate salary does not preclude use of Pereira itself in California. See supra note 62 and accompanying text. If the Van Camp analogue used by the Idaho court in Speer leaves the separate capital with a "floating" share of net gain
IV. Decline and Restructuring of the Inception of Title Doctrine

It is probably no mere coincidence that California, the state which created the American rule for separate property classification of rents and profits, also fashioned the pro-rata shared ownership doctrine as an alternative to the inception of title rule of Spanish-Mexican law. As noted above, inception of title caused an asset to be wholly owned as separate property where a person, while single, entered into a contract for its acquisition and completed it after marriage by making payments of community funds. The remedy for the community, given no share of the ownership, was reimbursement in the amount of community funds advanced for the benefit of the separate estate—i.e., no interest was owing—payable at dissolution of the marriage by death or divorce. The nonpayment of interest was fair in almost all situations where the doctrine applied. The community usually either occupied or used the asset during the period of time community funds were used to make contract payments. If the property was farmed or rented, all resulting gains would be community under the Civil Law rule for classifying such rents and profits of separate capital.

In American rule states, however, the interest-free loan aspect of the civil law’s inception of title doctrine was plainly unfair to the community which did not make use of the asset, because it was instead rented or otherwise developed to generate separate property profits. In 1926, a California court of appeal stated that inception of title should not be implied into California community property law because to vest separately in one spouse “the right of use and possession” of land greatly in excess of the rate of inflation—or of natural increase in the value of separate capital caused by any market forces—employment of the Pereira analogy might be appropriate. Additionally, a court can fashion a compromise formula to reach a result midway between those of the Van Camp and Pereira analogies designed for use in Civil Law rule states. See supra note 64 and accompanying text.

79. The doctrine also applies to make an acquisition by adverse possession separate property where the person enters land under color of title, but employs community labor after marriage to satisfy the statutory requirements for obtaining title by prescription. See Principles, supra note 7, at § 65. A corollary of the doctrine provides that if a married person initiates an acquisition and completes it after death or divorce has terminated his or her marriage, employing separate funds or separate labor (in the case of title by prescription), the asset is 100 percent tenancy in common property of the acquiring person and his ex-spouse or the estate of the ex-spouse. It could not be community property because the community has been extinguished: termination of marriage converts community property into tenancy in common property. See deCarteret v. deCarteret, 26 Wash. App. 907, 615 P.2d 513 (1980).

80. See Dakon v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

81. In both Civil Law and American rule states, inception of title without calculation of interest on the sum reimbursed was unfair where the separate estate simply held the asset for resale so that all gain was a natural increase and separate property. This must have happened very seldom in Spain and Mexico, or else their laws would have devised a remedy for the problem.
based on a small premarriage downpayment followed by substantial community installment payments would be a "disastrous and unjust consequence."

The earliest pro rata sharing cases dealt with installment land contracts where title did not pass until all payments had been made. Subsequently, California extended that approach to acquisitions where title passed upon payment of the full purchase price in the form of borrowed money or a promissory note, with subsequent payments by the purchaser not serving to acquire title but to remove an encumbrance on the land placed there to secure payment of the purchase-money debt. This was in contravention of the fundamental principle of community property law that the separate or community character of an asset is fixed no later than the time of acquisition.

Apparently only a minority of community property jurisdictions accepts in full California's use of the pro rata shared-ownership theory in cases of "mixed" contract or loan payments. The other states may balk at this development because of the complex problems it causes when the ownership rules must be applied during marriage rather than just at its dissolution. For example, in all of the other states but Texas,

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82. Vieux v. Vieux, 80 Cal. App. 222, 228, 251 P. 640, 642 (1926). That pro rata sharing should apply rather than inception of title in such a case was an alternative holding in Vieux, the court also relying on an intention of the spouses that community funds used for installment payments should buy in to title. It soon became established that application of the pro rata shared-ownership rule was not dependent on the intention of the parties. Maskuns v. Maskuns, 93 Cal. App. 27, 268 P. 1093 (1928). The pro rata approach had, prior to Vieux, been mentioned in dicta by courts appearing not to be aware that it conflicted with the historic Spanish-Mexican rule of inception of title, which the courts did not criticize. Barrett v. Franke, 46 Nev. 170, 218 P. 435 (1922); Guye v. Guye, 63 Wash. 340, 351, 115 P. 731, 735 (1911). These dicta are traceable to Heintz v. Brown, 46 Wash. 387, 90 P. 211 (1907), where during marriage a wife made the first three installment payments on a land contract with separate funds and the last two with community funds. The court held there was pro rata shared ownership by the separate and community estates, but at Spanish-Mexican law it was unmarried status at the time the installment contract was entered into that created a separate inception of title, not the use of separate funds. See Huie, Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana, 26 Tulane L. Rev. 427 (1952). If Guye is the first case to reject inception of title, this occurred without the court realizing what it was doing. The possibility of the acquisition being entirely community because of the grantee's marital status when she entered into the contract was never alluded to.

83. A leading case is In re Marriage of Moore, 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d (1980). The parties stipulated that purchase money mortgage payments bought into a share of title, but the point seems now well-established as a rule of law. E.g., In re Marriage of Marsden, 130 Cal. App. 3d 426, 181 Cal. Rptr. 910 (1982).

84. See Reppy, Repayment with Community Funds of Consumer Loans Secured by Separate Realty: Seeking the Appropriate Remedy, 14 Cons. Proc. J. 1 (Jan. 1988). The last California case to apply this rule where the acquisition was by way of purchase money mortgage may be Wedemeyer v. Elmer, 33 Cal. App. 2d 336, 91 P.2d 642 (1939).

85. See In re Marriage of Elam, 97 Wash. 2d 811, 650 P.2d 213 (1982), discussing in dictum the appropriate treatment of mixed purchase money mortgage payment. See also Wis. Stat. Ann. § 766.63 (West 1981), which could be construed as adopting the California approach.
a community "buy in" to a small share of title to land, in a situation
where the inception of title doctrine would recognize 100 percent
separate ownership, prevents the spouse owning most but not all
interests in the asset from alienating good title without the joinder of
the other spouse. It also allows a creditor who can reach community
property (of the type used to make the "buy in"), but not the separate
property of the principal owner of the asset, to levy execution on the
community's fractional interest, buy it at execution sale, and then, as
cotenant owner with the separate estate, force a partition sale.

Additionally, if payments on the loan or contract are made monthly,
under the California approach the fractional shares of the community
and separate estates change monthly. If the property is rented out or
otherwise used as capital to make gains, the result in American rule
states is that the fractional interests of the community and separate
estates in such gains also shift monthly. The accounting and apportion-
ment problems are of nightmarish proportions.

Arizona and apparently New Mexico take an approach that
combines the best elements of inception of title and of California law.
Use of the former doctrine to determine the legal title prevents
fragmentation of ownership and allows the spouse obtaining the
separate title to manage the asset himself or herself. Presumably all the
rentals and other profits from the property follow the legal title and are
also separately owned. The community right to reimbursement arising
from use of community funds to make contract or purchase money
mortgage payments is, however, calculated by exactly the same
process California calculates the degree that such payments buy in to
title. This allows the community to benefit from unusual gains caused
by market forces, resulting in a return to the community that could be
greatly in excess of what the community would obtain if unfairness in
inception of title were corrected by giving the community legal interest
on the amount it advanced and later claims by way of reimbursement.

Equitable distribution states can borrow from these developments in
community property jurisdictions comforted by the knowledge that if the
"mix" of payments consists of marital and nonmarital property
owned by just one spouse, complexities relating to management and
control and creditors' rights during marriage cannot arise no matter

86. See McClanahan, supra note 7, at § 9.10.
describes the legal issue it is addressing as being the appropriate amount of reimburse-
ment and then adopts the California buy-in-to-title formula).
89. If the jurisdiction, like Arizona, secures the right of reimbursement by a lien
arising when community payments are made, and a vendee or lessee knows about those
payments (and hence about the lien), the separate property owner cannot unilaterally
convey clear title.
what solution to the problem is adopted. Calculating the share of marital property at divorce as if each contract or mortgage payment had bought into title is fair, if equitable offsets for "use" benefits received are also made. In the equitable distribution states where rents and profits of nonmarital property are also nonmarital, retroactive reconstruction of shared ownership of such gains on hand at divorce can be made.\(^{90}\) The only fair way to avoid this complex calculation is to pay compound interest on the "buy in" payments in lieu of a share of the profits generated by the capital asset. In any event, all equitable distribution states should realize that the reasons for maintaining the original Spanish-Mexican version of inception of title in some of the community property jurisdictions, the version recognizing no buy-in and no interest earned by the payments from a source different than the estate in which inception of title vested, do not obtain there.

V. Treatment of Professional Goodwill, College Degrees, and Licenses to Practice

Treatment by community property jurisdictions of "career assets" is curious. The issue of whether professional goodwill, a college degree, or a license to practice a profession or other business is to be classified as community property if acquired during marriage must be separate property of the acquiring spouse because of the peculiar nature of the asset or is not property at all for marital property purposes has only been recently faced. With respect to goodwill, there is general agreement that it is property capable of community ownership, at least in some circumstances. The areas of disagreement are:

1. whether a sole practitioner can develop goodwill that is community property, with Texas holding he or she cannot\(^{91}\) and the other states to have considered the matter disagreeing;\(^{92}\)

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\(^{90}\) Arizona and New Mexico cannot wait until dissolution to characterize the gains and thus appear to be forced by the logic of their version of inception of title to classify them as 100 percent separate of the title of the productive capital is separate.

\(^{91}\) See Nail v. Nail, 486 S.W.2d 761 (Tex. 1972). If the form of business is a partnership or professional incorporation, Texas cases hold there can be goodwill that is community property. See Finn v. Finn, 658 S.W.2d 735 (Tex. Ct. App. Dallas 1983, writ ref'd n.r.e.); Geestbret v. Geestbret, 570 S.W.2d 427 (Tex. Civ. App. Fort Worth 1978, writ denied).

\(^{92}\) It is not clear from Nail whether goodwill of a sole practitioner is not considered marital property at all or is separate property. We shall know when Texas courts must classify the proceeds of sale of a solo medical or accounting practice upon retirement of the professional spouse, with the agreement negotiated at arms-length allocating a specific sum as consideration for the transfer of goodwill (which the spouse developed during marriage). Perhaps that cash will actually be held to be community property because only the existence of the solo practice bars recognition of a community interest under Nail. See, e.g., In re Marriage of Freedman, 35 Wash. App. 49, 665 P.2d 902 (1983) (legal sole practitioner).
2. whether the existence of a bona fide buy-sell agreement or valuation-on-termination agreement among partners or professional shareholders that values a participant’s interest without taking into account any goodwill establishes that there is no community good- 

3. whether the nonsaleability of goodwill or absence of any market for it means there is no community asset involved or that its value is zero;  

4. whether in valuing community goodwill the court should de- 

duct from overall intangible attractions of the business the value of the professional spouse’s giving a covenant not to compete to a purchaser of the business and the value of “personal” goodwill of the professional spouse, i.e., the drop in value due to intangible benefits occurring by his departure from the business.  

On the other hand, all the community property jurisdictions to 

have considered whether a college degree or license to practice a profession or business acquired by endeavors during marriage is community property have held it is not, for various reasons. New Mexico has held a license to practice medicine cannot be community property because it is incapable of co-ownership, implying it is separate property of the licensed spouse even though it clearly does not fit the statutory definition of separate property.  A Texas court made this point about a college medical degree a husband obtained during marriage, adding that something referring to education was not a property right at all (at least for marital property law purposes). A 1969 California case suggested that maybe a law degree could be community property, but its value as an inalienable asset had to be zero. Other California decisions say that a college degree or license to practice a profession are property rights not capable of being owned in a community, 


94. Compare Peerenboom v. Peerenboom, 147 Wis. 2d 547, 433 N.W.2d 282 (Ct. App. 1988), and Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 352 (1981) (no property right if goodwill not alienable), with In re Marriage of Watts, 171 Cal. App. 3d 360, 217 Cal. Rptr. 301 (1985) (nonalienability is ignored in valuing the goodwill—one assumes the professional spouse will remain at the business).  


implying as in New Mexico that they are separately owned by the acquiring spouse. 99

It is hard to reconcile the goodwill cases with those involving college degrees and licenses to practice. The latter two kinds of assets are obviously “property” for many purposes. Thus, the protection given to “property” by the due process clause of the federal and most state constitutions would bar a state university from revoking a degree on the ground there were too many individuals in the profession, or a state from revoking a license to practice a profession on the same ground. Surely professional goodwill of a lawyer or physician is no more capable of co-ownership (especially if the other spouse is not in the same profession) than is a college degree or license to practice. How can the same jurisdiction hold goodwill is community property having value even if inalienable and at that some time invoke inalienability as a basis for finding no community asset or an asset with a value of zero?

To date, all of the cases in appellate courts in community property states presenting the issue whether goodwill, a college degree, or a license to practice should be classified as community property have arisen at divorce in the context of division of property. 100 It may be that the justices have realized in the cases concerning degrees and licenses—but not those involving professional goodwill—that, except in Wisconsin, 101 if such an asset is property at divorce it must also be

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100. I have yet to encounter a case where community goodwill is the most valuable asset existing at divorce. Of course, all states will recognize it as a type of community property that can be awarded only to one of the spouses (the professional). Compare *Cluck v. Cluck*, 647 S.W.2d 338 (Tex. Ct. App. San Antonio 1982, writ dcm'd) (community-owned nontransferable country club membership acquired by husband could not be transferred to wife at divorce because club could not be compelled to take wife as member). Where its value is more than half of all the community property, equal division states are compelled to make the professional individual give his spouse a promissory note to make up the differential (equitable distribution states will often also want to use this device to make the division more just where all the goodwill has to go to the professional spouse). Unfortunately, such unsecured obligations are readily dischargeable in bankruptcy, although occasionally bankruptcy courts have (erroneously, in my view) treated debts created in the property division process as in the nature of support and nondischargeable for that reason. See *Repy, Discharge in Bankruptcy of Awards of Money or Property at Divorce: Analyzing the Risk and Some Steps to Avoid It*, 15 COM. PROP. J. 1 (July 1988).

101. See *supra* note 4, noting that Wisconsin has a regime for classifying properties as marital and nonmarital at divorce distinct from that applicable during marriage (and at dissolution of the community by death). The *Peerenboom* case, *supra* note 94, recognizes that goodwill is marital property at divorce. Wisconsin courts could later hold that during marriage it is not property at all, avoiding the problem of apportioning a share of gains to the nonmarital (separate) goodwill brought to the marriage by a professional
property during the marriage and at death of the person married to the professional.

Consider the death dissolution scenario. A dying husband is entitled to bequeath half the community property. Much of it is tied up in the goodwill of the practice of his professional wife. If the state were to recognize her professional degree and license to practice as community assets having value, obviously the husband cannot bequeath to someone other than his widow a half interest in her goodwill, degree, or license. Can his will direct that these items be valued and her half interest in other community assets equal in value to the interest in her career assets he cannot bequeath pass to the legatee of his choice in lieu? That would be quite inconsistent with the “item” theory of community property that so far has been scrupulously adhered to in most community property states. Under it, the decedent can exercise testamentary control only over a half interest in each community asset and cannot select one entire asset to go to his legatee with an offset of equal value from his share of the community going to his surviving spouse.

If the decedent cannot make such a compensating will, it appears to be necessary to revive the discredited “terminable interest” doctrine to explain how the surviving spouse can be sole owner of the entire interest in what had been, during marriage, community-owned goodwill, degrees, and licenses, and a half interest in all other community assets, yet the decedent was able to bequeath half of the community estate to his legatee.

spouse who has opted under Wisconsin law (see supra note 29) to have profits from his separate property classified as separate.

102. A recently enacted and very useful statute of Wisconsin (the state where the problem may not exist, depending on whether recognition of goodwill is to be confined to the property regime employed there at divorce, see supra note 99), has a solution like this: the husband, in his will or other formal document, may direct that the estate of the surviving professional buy out at fair market value his interest in her professional corporation, partnership, or joint venture. The rule also applies to tangible assets of such a business. The professional spouse as survivor can buy out the decedent spouse’s community share of the business as well. See Wis. Stat. Ann. §§ 857.015, 861.015 (Supp. 1988). The latter applies to assets described in § 766.70(3)(a)(b) and (d) but not (c), which refers to an unincorporated business operated by one spouse alone. The latter could have goodwill, of course, so a statute broader than Wisconsin's is needed to deal with the problem arising at death of the person married to the professional concerning the decedent’s right to bequeath half the assets.


104. See Reppy, Update on the Terminable Interest Doctrine: Abolished in California: Adopted and Expanded in Arizona, 14 COM. PROF. J. 1 (July 1987). Under one of two prongs of this doctrine, when the nonemployee spouse dies survived by the employee spouse, the former's community interest in the pension plan earned by the survivor's
Except perhaps in Wisconsin, a holding that goodwill, a college
degree, or a professional license is community property at divorce
means that when a spouse brings such an asset to the marriage, it is his
or her separate property. The whole theory of goodwill is that it helps
produce gains for a business or professional activity beyond that
generated by labor and tangible capital. In apportioning gains as
traceable to labor or capital, goodwill ought to be treated as capital.
The college degree and license to practice are essential to the profitable
pursuit of many professions and businesses, but it is less clear that they
generate profits and should be treated as capital in the same manner as
manufacturing equipment, buildings, computers, and other tangible
assets. Courts in community property states reasonably could hold,
nevertheless, that such career assets must be treated as business
capital in the same manner as goodwill.

Goodwill has a feature not present with the college degree or license
that complicates the apportionment process if it is treated as capital.
The degree and license are conferred at a particular point in time; if it
is before marriage, such assets must remain separate property. That is
not true of goodwill; where it exists, it is usually constantly being
acquired. Consider the case of a physician in private practice who is
divorced. The court values his professional goodwill as a community
asset of the marriage worth $200,000 and awards it to the physician,
giving his spouse other community assets equal in value (or equitably
balancing the award of the goodwill in states where community
property divisions need not be equal). A year later the physician
marries a second spouse; the value of the goodwill may now be
$225,000 due to increase during the year between divorce and remar-
riage. As he labors at his medical practice during the second marriage,
the value of the goodwill may increase to $250,000, but more than the
$25,000 increase is likely to be traceable to postmarriage labors, and
thus classifiable as community property. Patients he developed before
the remarriage will tend to die off or move away and other patients will
tend to return to the medical practice for additional treatment because
of successful interaction with physician after the remarriage, as
memories of premarriage treatment dim. It is quite possible that, a year
after the remarriage, 50 percent of the formerly separate goodwill has
turned into community goodwill.

In jurisdictions where rents and profits from separate property
during marriage are likewise separate, gains withdrawn from the

community labor simply terminates. See Estate of Allen, 108 Cal. App. 3d 614, 166 Cal.
Rptr. 653 (1980).

105. And also in Louisiana and Wisconsin, if it is to treat goodwill as property during
marriage, where the physician opts to be governed by the American rule approach to
classifying rents and profits. See supra note 29.
practice must be apportioned at the behest of creditors of the other spouse, who can reach community but not the physician’s separate property, into a community component traceable to labor and to any capital that is community (including the community fraction of goodwill, which increases over time) and a separate component constituting a return on separate property capital, including the decreasing separate property fraction of goodwill. Recognizing goodwill as property means a Pereira or Van Camp apportionment has to be made even if all the medical equipment and other tangible assets of the practice are community property of the second marriage.

I am aware of only one reported case where goodwill was asserted at a time other than division of the community at divorce as being property capable of generating gain. In a 1981 Louisiana case, the husband, who had been operating a community business as distributor of Exxon oil products, died. The surviving wife made a new contract with Exxon. Apparently she captured the customers of the husband’s former business, because she was sued by the husband’s succession upon an allegation she had seized for herself her husband’s half of community goodwill, an allegation the lower court found to be true. The basis for the appellate court’s reversal is not clear. Apparently the court was of the view that if the succession did not want to contract with Exxon, the goodwill was essentially “up for grabs” by anyone who made such a contract because the estate had abandoned its half of the goodwill. What the court would have held had the estate advised Exxon it wished to sell the goodwill to anyone who approached the oil company about taking over the decedent’s contract rights is unknown.

106. In Texas, assume a tort creditor, see Tex. Fam. Code § 5.61(d) (all community property liable to tort creditors of either spouse), since the profits are likely to be sole management community property of the physician. see Tex. Fam. Code § 5.22(a), not liable to the ordinary (i.e., non-necessaries) non-tort creditors of his spouse.

107. Succession of Acosta, 396 So. 2d 499 (La. App. 1981). Cf. Martinez v. Posner, Martinez and Padgett, 385 So. 2d 525 (La. App. 1980). There is a divorce property settlement recognized that husband’s interest in a medical partnership was community property. Whether it involved any goodwill is not stated, but most likely it did. The court did not award the goodwill to the husband, which meant the divorcing spouses became tenants in common owners of the interest in the partnership (owners in indivision in Louisiana parlance). The ex-wife sued for an accounting, demanding she be paid half of the net profits from the practice earned by her ex-husband after the divorce. (The opinion does not say so, but she must have conceded that her claim was to half of the net profits after ex-husband got to skim off a fair sum to compensate him for postdivorce labor.) The court held she was entitled to no gain at all, only to recover half the value of the community interest at the time of divorce. In other words, the community interest was not regarded as capital. It is true the nonphysician ex-wife could not be a partner in the partnership, but it hardly follows from this that what she does own half of is not a productive asset. The decision is erroneous. Surely, if the former community asset of which the spouses became tenants in common was an apartment building and ex-husband managed it and collected rents, the ex-wife would be entitled to a share of those gains. The difference in the case of the medical practice is merely one of form.
The opinion does not declare that goodwill exists in Louisiana as property only at division at divorce.

Equitable distribution states where rents and profits of nonmarital property are also nonmarital will have to grapple with all of the issues discussed above concerning recognition of goodwill as property, except the apportionment problem cannot be raised during marriage by a creditor of the spouse of the professional having goodwill. It arises at dissolution when the professional spouse asserts that a fraction of gains on hand traceable to his business are nonmarital. Any state, whether community property or common-law, that can find solutions for the problems arising when goodwill is recognized as a capital asset capable of being community or separate marital or nonmarital property can certainly deal with whatever similar problems arise out of recognizing a college degree or license to practice as property of value not only for purposes of valuing it at divorce but at death and as capital capable of producing rents and profits to be dealt with appropriately at dissolution either by divorce or death.

The equitable distribution states should not assume that because community property jurisdictions have all recognized community ownership of goodwill, there are not serious problems in doing so. I have shown what those problems are; apparently the appellate courts in community property states are unaware of them or believe that when these issues arise acceptable solutions can be found.

Equitable distribution states should not assume that because the same community property states that recognize community ownership of goodwill decline to recognize college degrees and licenses to practice as community property, to do so would create more serious problems than arise out of the treatment given to goodwill in those jurisdictions. The problems are, in fact, the same or less troublesome if a degree or license is not viewed as generating business profits, as goodwill undeniably does.

The equitable distribution states are going to have to work out these problems on their own without guidance from the community property states.

VI. The Struggle with Choice of Law Problems

Community property states began dealing with the more difficult\(^{108}\) conflict of laws problems concerning marital property in a "nearly

\(^{108}\) The earliest conflicts of laws decisions were from Louisiana and dealt with relatively easy issues such as whether the law of the original matrimonial domicile applied to all future acquisitions, even though the couple had long since moved away from it, and whether a change of domicile altered the property interests of husband and wife in assets owned by either or both at the time of the move. See, e.g., Saul v. His Creditors, 5 Mart. (N.S.) 569 (1827).
absurd manner because an early leading case had to address an issue that does not arise in equitable distribution states: liability of earnings of a spouse, co-owned in community with the other spouse, for a debt governed by the law of a separate property state where property rights of the nondebtor spouse are not liable for such a debt. The Washington Supreme Court in 1896 held that under the governing law only the separate property of the obligor spouse was liable. The state did not recognize community property. The common-law state’s role that the obligor’s separate property meant that all his property interests were liable. This meant his earnings in his Washington domicile, community property, were not liable—only his separate property as defined in Washington. The court blinded itself to the fact that the term “separate property” in the common-law state where the debt was incurred meant something quite different than it did in Washington.

Subsequently, courts dealing with property rights of spouses at dissolution of marriage employed this silly “play on words” approach. A spouse’s earnings during marriage brought to the community property state were his separate property under the law of the domicile at the time of acquisition and were subject to any law of the new community property domicile granting the divorce that separate property was nondivisible at divorce and wholly subject to the acquiring spouse’s testamentary power at his death.

A number of community property states saw the absurdity and unfairness of the “play on words” approach to solving the change-of-domicile conflict of laws problem presented at dissolution of marriage and avoided it by applying at divorce the property division law of the former domicile where the couple lived when an asset at issue was acquired. I have noted elsewhere how this “borrowed law” ap-

109. Pacific States Cut Stone Co. v. Goble, 70 Wash. 2d 907, 910, 425 P.2d 631, 635 (1967). That court proceeded to make a similar error, declaring that since Oregon law applied in a debt liability case and Oregon was not a community property state, all Washington marital property except the nondebtor spouse’s separate property was liable. That included the nondebtor’s spouse’s earnings, which were not liable for the other spouse’s debts under Oregon law. See Pacific Gamble Robinson Co. v. Lapp, 95 Wash. 2d 341, 345 n. 1, 622 P.2d 850, 854 n. 1 (1980) (recognizing the error in Goble).

110. La Selle v. Woolery, 14 Wash. 70, 44 P. 115 (1896).

111. See Lattner v. Lattner, 121 Cal. App. 298, 8 P.2d 870 (1932). California’s contemporary quasi-community property scheme directs the divorce court to treat such earnings from a former common-law domicile as if they were community property. Cal. Civ. Code §§ 4803, 4800(a) (West 1983).

112. See Gilchrist, Washington Disinherits the Non-Native Wife, 46 WASH. L. REV. 283 (1971). Washington now has quasi-community property legislation applicable at death of the acquiring spouse directing the court to look to the source of the property (e.g., was it earnings during marriage?) rather than the “separate” label put on it by a former domicile. Wash. Rev. Code Ann. §§ 26.16, 220, 26.16.240 (1986).

proach causes very difficult problems of tracing, of apportionment, and of effect of postacquisition change in former domicile division law.\footnote{Reppy, Conflict of Laws Problems in Division of Marital Property § 10.02 in Valuation & Distribution of Marital Property (1984, 1988).} Statutes in some community property states solve the problem by directing their courts to consider only the source of property before it—is it salary earned during marriage or a rental from an inheritance, etc.? This approach, often called quasi-community property legislation, disregards both how the domicile of the couple at the time of acquisition views the property as being owned by the spouses and how it would distribute the property at dissolution of marriage.\footnote{See California statutes cited in supra note 111; Ariz. Rev. Stat. Ann. § 25-318 (1976); Weisberger, Selected Conflict of Laws Issues in Wisconsin's New Marital Property (Community) Act, 35 Am. J. Comp. Law 295 (1987). Texas is the only state to have judicially settled on the quasi-community property approach at divorce. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982), apparently impelled by a recently enacted but nonretroactive quasi-community property statute, Texas Family Code § 3.63(b) (Vernon 1975). Insanely, the Texas Supreme Court refused to apply the judicially created quasi-community property rule of Cameron to property rights problems arising at dissolution by death of a spouse. Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987).}

Almost all equitable distribution states to have considered the question construe their division at divorce statutes as containing a directive to apply only forum division law, even where assets were acquired by husband, wife, or both while domiciled in a former domicile with different law.\footnote{See Reppy, supra note 114; Comment, Migrating Couples and Wisconsin's Marital Property Act, 68 Marq. L. Rev. 488 (1985).} No decision from such a jurisdiction has borrowed the silly "play-on-words" approach from community property jurisprudence since it is obvious that divorce courts are, in applying forum law, using the forum's definition of "marital" and "nonmarital" and that it is irrelevant to the issue of divisibility that a spouse awarded an asset had no proprietary interest in it before the court's decree. At least one jurisdiction, the District of Columbia, has, however, employed the "borrowed law" approach, although its use has been limited so far to assets acquired while the couple were domiciled in another jurisdiction, in which the assets were still located at the time the District of Columbia granted a divorce.\footnote{See Anderson v. Anderson, 449 A.2d 334 (D.C. App. 1982); Williams v. Williams, 390 A.2d 4 (D.C. App. 1978). Each case dealt with land outside the forum and applied the law of the former domicile. Neither decision is based on a lex sitae approach. Indeed, American divorce courts today freely deal with out of state land; see, e.g., Bell v. Bell, 509 So. 2d 912 (Ala. Civ. App. 1987) (New York land); Jolis v. Jolis, 111 Misc. 2d 955, 446 N.Y.S.2d 138 (Sup. Ct. 1981), aff'd, 98 A.D.2d 692, 470 N.Y.S.2d 584 (1983) (French land); and situs states routinely enforce such degrees. See, e.g., Willis v. Willis, 104 N.M. 233, 719 P.2d 811 (1986); Reppy, supra note 114, at § 10.01[2].} Equitable distribution states asked to decide whether to follow the District of Columbia or the majority approach on the choice of law issue should realize that the source of the "borrowed law" theory is in
community property courts’ struggling to find some substitute for the foolish “play on words” approach, which in turn arose out of a choice of law problem concerning marital property rights in the context of a creditor’s claim during marriage that cannot arise in noncommunity property states. Almost all of the conflict of laws case law from such states is simply irrelevant to the application of equitable distribution statutes.

VII. Conclusion

This article has been able to consider only few of the many issues involving marital property that can arise in common-law equitable distribution states, and as to which there is facially pertinent jurisprudence in community property jurisdictions. In some cases, useful analogies can be drawn; but in other situations, the community property jurisprudence has responded to special needs of a regime that recognizes co-ownership of marital property earned by one spouse alone during the marriage, not just the divisibility of such property at dissolution. Caution must be used when the equitable distribution states are urged to borrow solutions crafted for issues that look similar but have arisen under community property regimes.