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Never Marry a Rich Man: The Lesson of Beam v. Bank of America, a California Apportionment Case

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COMMENTS

NEVER MARRY A RICH MAN: THE LESSON OF BEAM v. BANK OF AMERICA, A CALIFORNIA APPORTIONMENT CASE

Never marry a rich man. This advice to any prospective bride is required by present California community property law because marriage to a wealthy man will not necessarily afford her with financial security after termination of the marriage. For example, a husband and wife married for over a quarter of a century may enjoy a luxurious standard of living. Yet on dissolution of the marriage, the wife may find herself penniless. The California community property system must be amended to protect the wife of the wealthy man and to preclude this anomalous result.

California and seven other states maintain statutes and promulgate judicial decisions classifying property owned by husband and wife as community property; that is, it belongs to both spouses equally. The objective of the community property system is to promote the economic security of the family members both during the marriage and after its termination. In California, upon termination of a marriage, either by death or dissolution, the assets of the spouses must be characterized as either separate or community property. Characterization is necessary

2. The principle statutes now defining the system are partly in the Civil Code and partly in the Probate Code. See CAL. CIV. CODE §§ 4516-18, 4525-03, 4800-5138 and CAL. PROB. CODE §§ 205-03, 228-30.
4. "Actually there is no community property 'system.' Each of the eight traditional community property states . . . has by statutes and judicial interpretation evolved its own set of legal rules." Clark, MANAGEMENT AND CONTROL OF COMMUNITY PROPERTY IN NEW MEXICO, 26 TUL. L. REV. 324 n.1 (1952).
5. DE FUNIAK § 1; The relevant California statute provides, in part: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests. . . ." CAL. CIV. CODE § 5105 (West 1970).
6. H. VERRALL & A. SAMMIS, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 3 (2d ed. 1971) [hereinafter cited as VERRALL].
7. Separate property is defined as all the "property owned by the spouse before marriage, and that acquired afterwards by gift, bequest, devise, or
if one spouse has died because the surviving spouse is entitled to one-half of the community assets; the other half is subject to testamentary disposition by the decedent.9 If termination is by judicial process, dissolution or legal separation, the court must divide the community property equally between the parties.10

Presumptions have been devised to aid courts in characterizing assets as separate or community property. The basic presumption is that all property acquired during the marriage is community property.11 The reason behind this rebuttable presumption is to ensure the achievement of the basic goal of the community property system: the equal distribution of property acquired during marriage to provide protection for the parties after the marriage is terminated. However, this goal has been undermined consistently through judicial application of another presumption, the family living expense presumption.12 This requires a court to charge all family living expenses against the community property upon termination of the marriage. The court's application of this presumption may deny the wife her proper share in the community assets. The most recent case applying the family living expense presumption in this manner is Beam v. Bank of America.13 This comment discusses the validity of the Beam decision in light of the present goals of the California community property system.

RELEVANT PRINCIPLES OF COMMUNITY PROPERTY—IN BRIEF

Traditionally, under the Spanish-Mexican system of community property from which all modern community property statutes were derived,14 the fruits, rents, and profits of separate prop-

8. "All other real property situated in this state and all other personal property wherever situated acquired during the marriage . . . is community property. . . ." CAL. CIV. CODE § 5110 (West 1970).
9. "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other one-half is subject to testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, . . . ." CAL. PROB. CODE § 201 (West 1956).
14. DE FUNIAK § 1.
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Property were classified as community property. Idaho, Louisiana, and Texas retain this view. The first California legislation dealing with this topic followed the Spanish law, but the provision was subsequently declared unconstitutional in George v. Ransom. Therefore, California and four other community property states now provide that fruits, rents, and profits of separate property remain separate.

Having deviated from the Spanish system which favors the community, the California Supreme Court in In re Estate of Cudworth recognized the peril for the wife in California's community property system:

In nearly all other civilized countries marriage immediately vests in the wife some estate in the property owned by the husband at the time of marriage; but such is not the law here, and if he chooses, as in the case at bar, to afterward do nothing except to collect his rents and profits, he may, after a long period of faithful wifehood, leave her penniless. Her only chance to acquire by marriage any interest in property is to marry a man who has nothing, with the hope that he may afterwards earn something in which she will have a community right.

**Protection by Apportionment**

In order to protect the wife and to alleviate the peril envisioned in Cudworth, the courts have devised numerous forms...
mulas to apportion the gains between the husband's separate estate and the community. This apportioning is necessary only when the skills of the husband, a community resource, are combined with his separate assets to produce business profits. Profits will be apportioned entirely to the husband's separate estate only when they are attributable solely to the natural enhancement of the separate property or when the husband has expended minimal effort while the wife has offered no evidence as to the value of the husband's services. In other words, the duty is upon the wife to show the value of the husband's services.

Once it is determined that the doctrine of apportionment of business profits is applicable, the next step is to determine which method of apportionment should be used.

The Pereira Rule. The first decision apportioning profits in a community property state was Pereira v. Pereira in which the California Supreme Court apportioned proceeds from the husband's separately owned cigar store-saloon. The Court held that unless the contrary could be shown, it must be presumed that the property investment was responsible for part of the profits, and that this share would amount at least to the reasonable interest rate on a long-term investment. This holding has been interpreted to mean that interest on a capital investment should be credited to the separate estate and that the remaining profits are attributable to the husband's efforts, skills, and services and should be credited to the community.

The Van Camp Method. Van Camp v. Van Camp established another method of apportionment. In this case, the husband was the controlling shareholder of a large corporation and devoted his efforts exclusively to the management of the business. The court held that although the husband's salary belonged to the community as reasonable compensation for his services, all the dividends were the husband's separate property. The reason-

27. In re Estate of Cudworth, 133 Cal. 462, 468, 65 P. 1041, 1044 (1901).
29. It should be noted that the rules of apportionment apply not only when the husband owns a separate business, but also when the husband invests his separate funds in real estate or securities. Margolis v. Margolis, 115 Cal. App. 2d 131, 251 P.2d 396 (1952); Witaschek v. Witaschek, 56 Cal. App. 2d 277, 132 P.2d 600 (1942).
32. 53 Cal. App. 17, 199 P. 885 (1921).
The underlying the Van Camp decision and its progeny is the presumption that a greater share of profits is allocable to separate property because a greater proportion of the profits usually derives from the separate resources rather than from the husband's time, skill, and labor. The use of the Van Camp formula usually means that the community is credited with that proportion of the profits derived from the husband's services and the balance is credited to the separate property of the husband.\(^3\)

**The Tax Formula.** The tax formula of apportionment is used less often than the Pereira or Van Camp formulas. This formula was adopted in the California case of Todd v. McCollan.\(^4\) The court there estimated a fair return on a capital investment and added to this amount a reasonable salary for the owner's services. This sum serves as the denominator. In order to determine the community share, a fraction is formed by using the reasonable salary as the numerator. This fraction is then multiplied by the total profits. The product derived is the amount which is to be credited to the community. The share of the separate estate is determined by using the fair rate of return as the numerator (the denominator remaining the same) and again multiplying the fraction by the total profits. For example, assume that a fair return on capital is $6,000, that a fair salary for the husband's efforts is $12,000, and that the actual profits of the business are $12,000. By the tax formula of apportionment, $6/18 of the profits, or $4,000, would be allocated to the husband's separate property. The community property would receive $8,000.

A good summary of these formulas is presented in Logan v. Forster.\(^5\) In Logan, the district court of appeals indicated that a court was not bound to any one test but that the court must consider all of the circumstances in order to "achieve substantial justice between the parties" before determining which apportionment formula to apply.

In re Estate of Neilson,\(^6\) however, has cast doubt on the flexible rule of Logan. Citing Pereira, the opinion stated that the usual "rule" of apportionment of profits is to allocate a fair return on the investment to the separate property and to credit any

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\(^4\) 89 Cal. App. 2d 509, 201 P.2d 414 (1949); this formula has not been adopted in civil cases, however.


\(^6\) Id. at 600, 250 P.2d at 738.
excess to the community property as reimbursement for the husband's efforts.

As these cases demonstrate, there is no simple, ideal formula upon which the California courts have agreed. The problem of which apportionment formula is appropriate seems to vary inexplicably from case to case. Similar confusion regarding apportionment exists in other states which have altered the Spanish rule on rents and profits. However, each of those states seems to favor the community by putting the burden of proof on the one seeking to establish that some part of the income is separate. On the other hand, the California cases generally put the burden of proof on the party seeking to establish that some part of the income should be credited to the community. Such placement of the burden of proof is inconsistent with the substantive presumption that all property acquired during marriage is community; hence, the wife is afforded no advantage in the characterization of the assets when the marriage is terminated. Furthermore, even having overcome the perplexities of apportionment, the wife who seeks characterization of the assets as community property must still confront the family living expense presumption.

The Family Living Expense Presumption

A long line of decisions has established the presumption that the expenses of the family are paid from community rather than from separate funds. In the absence of any evidence showing a different practice, these expenses are charged to community earnings. This presumption applies even when the community earnings are derived solely through application of an apportionment formula.

Application of the presumption has a serious effect on the characterization of assets upon dissolution of marriage since it

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38. See Note, 36 S. Cal. L. Rev. 481 (1963) for a brief comparative analysis of apportionment in states which have deviated from the Spanish rule on rents, issues, and profits. See also De Funiak § 72.
39. De Funiak § 72.
42. Cases cited note 12, supra.
43. In re Estate of Neilson, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962); In re Estate of Arstein, 56 Cal. 2d 236, 364 P.2d 33, 14 Cal. Rptr. 809 (1962); Van Camp v. Van Camp, 56 Cal. App. 17, 199 P. 885 (1921). This presumption has evolved even though the earliest apportionment case, Pereira v. Pereira, made no express provision for the use of a family living expense presumption.
44. This presumption affects characterization of assets only if the nature of the funds used to acquire an asset during the marriage is in doubt.
negates the effect of the basic presumption that all property acquired during marriage is community. If the family living expense presumption is applied, any asset acquired during a period in which the community living expenses exceeded the community income is presumed to have been acquired by expenditures of separate funds. Because the asset acquired assumes the character of its source, any asset acquired with separate property is separate and not subject to distribution on termination of the marriage. For example, assume that the character of a certain $10,000 asset is in dispute upon dissolution. Assume also that this asset was acquired in an accounting period during which community income and community expenses were each $50,000. The law presumes that the community income of $50,000 was used to meet the family living expense obligations of $50,000. Since all the community income was expended in retiring family living expense debts, there was no community income with which the $10,000 asset could have been purchased. Hence, the $10,000 asset is presumed to be separate property and therefore not divisible on termination of the marriage.

The original justification for the presumption was that the debts accruing during marriage were for the benefit of the community and were therefore an obligation of that community. This fails to consider any possible abuses which may arise because the husband has the statutory authority to establish the family style and mode of living. There also is a statutory requirement that a husband support his family and if necessary use separate funds to do so. These statutory grants of authority interact with the family living expense presumption. The result is that a husband with separate income may establish a style of living for the community which may, applying the family living expense presumption, expend all community income. Once community income has been exhausted, any assets acquired during the period are separate and not available to the wife on termination of the marriage. Such a result is legally permissible. Thus, the wife finds herself in the frustrating position of having no legal right to prevent the husband, as manager of the community and director of the life-style, from incurring community debts which may obliterate community income.

45. See note 11 and accompanying text, supra.
46. See note 56 and accompanying text, infra.
48. De Funiak § 159.
The advocates of the family living expense presumption may argue that the wife benefits when the husband establishes an affluent standard of living and that she does not need title to assets on termination. However, this argument is invalid in light of the community property policy of protecting the partners financially after termination of the marriage. A support order is not the answer to financial stability for it is a conditional grant which ceases on the death of the obligor or on remarriage of the obligee. Such conditional payments are an inadequate substitute for the fee title to assets which one would expect a wife with a present, choate interest in property to receive.

Thus, the plight of the "penniless" wife described in Cudworth is real and substantial under current California law. The family living expense presumption exists as a mighty protector of the husband. The husband who owns separate property will be aided by the presumption in his quest to have assets characterized as separate upon termination of the marriage. This assistance to the owner of the separate property is in opposition to the established presumption in the statutory law which favors characterization of the assets as community.

See v. See—A Glimmer of Hope?

 Critics of the family living expense presumption applauded the California Supreme Court decision in See v. See as an attempt to mitigate the hardship of the presumption on the wife whose husband controlled both his separate and their community incomes. In See, a divorce case, Mr. See was employed by the family industries. He was paid a salary for his time, effort, and skills, and this amount was therefore community income. The husband had commingled this community asset and his separate assets in two commercial accounts.

The court did not need to discuss any of the apportionment cases, for Mr. See's time, effort, and skills were used to produce actual community property during the course of the marriage. Apportionment is necessary only when the husband foregoes a salaried job to manage his separate assets and hence denies the

51. See note 6 and accompanying text, supra.
54. 15 Cal. 322 (1860). See text accompanying note 24, supra.
56. 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).
community of income from his time, effort, and skills during the marriage.  

Over the wife's objection, the trial court applied the family living expense presumption and ascertained that because total family living expenses exceeded the total community income for the period of the marriage, no assets acquired during the marriage could have been acquired with community funds. The Supreme Court reversed, holding that the family living expense presumption, which relies on a recapitulation of total community expenses and total community income, throughout the marriage, is not to be applied in all cases. The court found the presumption applicable only when, through no fault of the husband, it is not possible to ascertain the balance of community income and expenditures at the time property was acquired. Hence, the case was remanded for retrial on the property issues.

On retrial of the property issues, the husband has the burden of proving that the community expenses exceeded community income at the times the assets purchased during the marriage were acquired. If the husband meets this burden the assets are characterized as separate property and are not subject to distribution on dissolution of the marriage.

Justice Traynor's opinion clearly recognized the hardship that mandatory application of the family living expense presumption would bring:

Automatic application of the family living expense presumption would transform a wife's interest in community property from a 'present, existing, and equal interest' as specified by Civil Code section 161a, into an inchoate expectancy to be realized only if upon termination of the marriage the [total] community income fortuitously exceeded [total] community expenditures.

Application of the See holding is proper if the husband commingles his separate and community income, if the husband expends his separate property when community funds are exhausted, and if the husband "faults" by failing to keep adequate records regarding asset acquisition so that the character of the asset is in doubt. If these conditions are present, then the family living expense presumption based upon total recapitulation for the marriage period will not be applied. As a corollary to the primary holding, the party who used his separate property for community purposes is entitled to reimbursement from the community if there is an agreement between the parties to that effect. If no

58. See note 26 and accompanying text, supra.
59. 64 Cal. at 785, 415 P.2d at 781, 51 Cal. Rptr. at 893.
60. Id. at 782, 415 P.2d at 779, 51 Cal. Rptr. at 891.
agreement exists, the amount expended is deemed to have been a gift to the community.51

Thus, determination of whether application of the family living expense presumption is proper depends, along with other prerequisites, upon whether the party seeking reimbursement has through “fault” failed to keep adequate records. But what is “faulty” record keeping? The court in See did not define the term and indeed it can be interpreted many ways. Consequently, the ultimate question raised by See is, “What circumstances will require a court to find ‘fault’ and to apply the See exception to the use of the family living expense presumption?”

Summary

Because strict application of the California law which provides that rents, income, and profits of separate property are separate may lead to inequitable results, the courts have devised formulas to allocate the profits between community and separate property. Even when community property is apportioned, there is a distinct possibility that no assets will be characterized as community property on termination of the marriage because of the application of the family living expense presumption. This presumption assumes that separate property is used to meet family living expenses only after community assets are totally expended. See provides an exception to this rule if the partner seeking reimbursement from the community funds has committed “fault” in his record keeping; expenditures of his separate property are then deemed to be a gift to the community.

BEAM v. BANK OF AMERICA62—DEMISE OF THE WIFE’S PROTECTION

Beam v. Bank of America shows that the See ruling is to be construed narrowly and limited closely to its facts. The protection which might have accrued to the wife through liberal application of the See ruling has thus been removed by the California Supreme Court. In Beam, the court held that the ruling in See does not apply to cases where community property is derived by one of the apportionment theories. The opinion reaffirms the

61. Id. at 784, 415 P.2d at 781, 51 Cal. Rptr. at 893. For a recent decision applying See v. See, see Bare v. Bare, 256 Cal. App. 2d 684, 64 Cal. Rptr. 335 (1967).
62. Mrs. Beam died subsequent to the filing of the appeal and the name of Bank of America, executor of her estate, was substituted. For convenience and clarity, the appellant in the action is referred to as Mrs. Beam.
64. 6 Cal. 3d at 22, 490 P.2d at 264, 98 Cal. Rptr. at 144.
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propriety of the family living expense presumption in apportionment cases.65

Facts of Beam v. Bank of America66

Mr. and Mrs. Beam were married for 29 years; a divorce was granted in 1968. Prior to and during the marriage, Mr. Beam inherited approximately $1.6 million in cash and securities. From 1946 to 1953, these assets were invested in tax-free municipal bonds yielding a one percent income. Except for brief and insignificant intervals, the husband was not employed during the marriage; instead he devoted his time to handling the separate estate and engaging in private business ventures with his own capital. While Mrs. Beam claimed that the separate assets were worth approximately $1.8 million at the time of the divorce, Mr. Beam claimed their worth to be approximately $1.7 million.

Income, rents, and profits from Mr. Beam's separate property were the only moneys received and spent by the parties during their marriage. The total income and profits, before taxes, from these investments were approximately $2.4 million. Mrs. Beam's sole occupation was that of housewife and mother to the couple's four children and hence her time, effort and skills yielded no community income. The family living expenses over the entire period of the marriage averaged $2,000 per month. The family also incurred extraordinary expenses (travel, weddings, gifts) of $22,000 per year for the last eight years of the marriage. Total expenses for the marriage, were, therefore, $872,000.

The wife contended that family living expenses were not chargeable to any apportioned community income resulting from the husband's time, effort and skills. The trial court disagreed and held that there was no community property for distribution on dissolution. The Supreme Court in a unanimous decision affirmed the trial court decision.

Automatic Application of the Family Living Expense Presumption Required in Apportionment Cases

The Supreme Court found that apportionment of profits was clearly required because Mr. Beam's efforts in managing his sep-

65. Id.; The court also decided issues on transmutation of various assets acquired during the marriage and on the effect of certain gifts on the valuation of the separate estate. One $38,000 promissory note was awarded to the wife. This was the total community property estate. These subsidiary issues of the case are not the subject matter of this comment on the apportionment issue.

66. See also Brief for Appellant at 4-18, Brief for Respondent at 4-9, Beam v. Beam, 10 Cal. App. 3d 973, 89 Cal. Rptr. 280 (1970).
arate property were more than minimal. Referring to the *Pereira*\(^67\) approach and the *Van Camp*\(^68\) formula, the court proceeded to discuss “two quite distinct, alternative approaches to allocating earnings between separate and community income."\(^69\) While the “substantial justice” test required in *Logan v. Forster*\(^70\) was reaffirmed, the court concluded that the trial court’s application of the *Pereira* rule was not offensive to the *Logan* doctrine. The legal rate of interest, seven percent,\(^71\) was held to be a reasonable rate of return and the gains derived from application of this inter-

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67. See note 30 and accompanying text, supra.
68. See note 32 and accompanying text, supra.
69. Beam v. Beam, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137, 141 (1971). No mention is made of the tax formula established in *Todd v. McColgan*; see note 34 and accompanying text, supra. The court’s statement also ignores the inherent difficulties which arise upon the use of either of the formulas. The *Pereira* formula seems to be best suited to a marriage in which the spouse’s time, effort, and skills are a major factor in producing the new asset. According to the *Pereira* formula as interpreted by the courts to date, after the spouse’s separate property is reimbursed, the remaining increase in value is apportioned to the community. The community property may fall heir to a large allocation only if the increase in value is greater than the reimbursement due to the separate property. This is the fatal flaw of the *Pereira* approach. When the marriage has endured for a long period and when the spouse’s separate property is considerable, e.g., the instant case, it seems unlikely in light of the cyclical nature of the business world that the increase in value of the separate assets will sustain a growth rate sufficient to reimburse the spouse’s separate estate at the legal rate of interest, i.e., seven per cent. If the separate property does not increase this seven per cent per year, there can be no apportionment to the community estate. Intuitively, it seems that the use of the *Pereira* formula to such apportionment cases cannot effectuate substantial protection to both parties after the end of the marriage.

The *Van Camp* formula is not without its weaknesses. Paradoxically, the *Van Camp* formula was designed for use when a reasonable return on the husband’s separate property contributed more to the asset’s increase in value than did the husband’s investment of time, effort, and skill. It is perhaps this rationale which has caused the courts applying *Van Camp* to first ascertain the value due to the community property and then to apportion the remainder of the increase in value to the separate estate of the husband.

Potentially, in the *Van Camp* line of cases, the separate estate stands to gain the greater allocation of the increase in value, for the allocation to the community property is fixed at the value of the husband’s time, effort, and skills. While the *Van Camp* formula ascertains a fixed return to the community and the *Pereira* formula allows a variable return to the community, the use of the former insures that there will be apportionment to the community. The *Pereira* formula cannot yield such a result. Inherently, the insurance provided by the *Van Camp* formula seems more in line with the basic purpose of the community property system. It is unfortunate that the court has not yet critically analyzed these problems of the “two quite distinct, alternative approaches to allocating earnings between separate and community income.” Beam v. Beam, 6 Cal. 3d 12, 18, 490 P.2d 257, 261, 98 Cal. Rptr. 137, 141 (1971).

70. See note 35 and accompanying text, supra.
71. See Justice Brown’s dissenting opinion in *Beam v. Beam*, 10 Cal. App. 3d 973, —, 89 Cal. Rptr. 280, 287 (1970). He criticizes the use of the *Pereira* formula in the instant case because Mr. Beam’s assets were invested for many years yielding one percent rather than the seven percent credit given by the Court’s application of *Pereira*. 
est rate were allocated to the husband's separate property. The court affirmed the findings of the trial court that the burden of proof was on the partner seeking to characterize the property as community and that this burden had not been discharged.

Such application of the *Pereira* rule in *Beam* resulted in a finding that the entire increase in value of the separate estate was attributable to the normal growth factor of the separate property. The actual increase in value of the separate estate was less than the amount which was to be credited to the husband's separate property through application of the seven percent interest. In using this seven percent figure as the reasonable interest rate on a long term investment, the court failed to consider that Mr. Beam had purposefully chosen, for tax purposes, to invest his estate in assets yielding only one percent annually. Thus, the court credited the separate property with seven times the maximum increase the assets could have earned.

Additionally, the court found that even if it applied the *Van Camp* rule of evaluating the reasonable value of the service performed by the husband in the management of his separate estate, there was still no community property for apportionment. The annual value of Mr. Beam's services was determined to be one percent of the corpus of $1.7 million, or $17,000 per year. Computed over the term of the marriage from 1946 to 1967, the court found that $357,000 was the amount to be apportioned to community property under the *Van Camp* rule.

Having derived an amount of community income, the court applied the family living expense presumption, finding no reason why it should not be applied. Community expenses for the total marriage period totalled $872,000 which completely extinguished the community income of $357,000.

The court held that *See* did not preclude an automatic application of the family living expense presumption in apportionment cases. The fact that the presumption is still valid is shown in the *See* opinion in three ways, according to the *Beam* court. First, the *See* decision did not expressly overrule any of the cases in which the family living expense presumption was used in conjunction with apportionment cases.

Second, *See* is distinguishable on its facts. *Beam* is an apportionment case because Mr. Beam chose to forego a salaried

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job and to manage his separate assets. In See, Mr. See expended his time, effort and skills on a job for which the community was compensated. Mr. See "elected" or "consciously chose" to use separate property when community income derived from his salary was consumed. Mr. Beam, however, did not earn any salary and did not "choose" between separate income and community income. The only community income in Beam was derived by an apportionment formula. Community income derived from apportionment cannot be commingled during the marriage as it is fictional and not ascertainable nor in legal existence until dissolution of the marriage. The opinion stated that there was no testimony to rebut the use of the family living expense presumption. The fact that Mr. Beam testified\(^7\) that he paid all family living expenses from separate property is insufficient as he testified based upon the assumption that there was no community income.

Third, the court in See acknowledged that a husband could prove that an asset purchased during marriage from a commingled account was separate if at the time of acquisition of the asset the family living expenses exceeded community income. These three interpretations implicitly acknowledge the continuing validity of the family living expense presumption in apportionment cases. Because the See opinion did not affect the application of the family living expense presumption, the Beam court applied it and found that there was no community property for division between the husband and wife.

**Validity of Beam in Light of See v. See**

The Beam court held that See was simply not "in point"\(^7^4\) on the cursory distinction that See dealt with a husband who "consciously chose" to spend separate funds for community expenses whereas Mr. Beam did not. The essence of the See decision, however, was the finding of faulty record keeping on the part of the spouse who chose to use his separate property to pay community expenses. While the See court did not define faulty record keeping, it did state what was not "fault." The court there found one such instance where the amount of community income was not ascertainable until the time of trial.\(^7^5\) Nevertheless,

\(^{73}\) Brief for Appellant at 13, Beam v. Beam, 10 Cal. App. 2d 973, 89 Cal. Rptr. 280 (1970) (citing trial court testimony of Mr. Beam).

\(^{74}\) 6 Cal. 3d at 22, 490 P.2d at 264, 98 Cal. Rptr. at 144.

\(^{75}\) 64 Cal. 2d at 783, 415 P.2d at 780, 51 Cal. Rptr. at 872 citing In re Estate of Arstein, 56 Cal. 2d 236, 364 P.2d 33, 14 Cal. Rptr. 809 (1962) and In re Estate of Ades, 81 Cal. App. 2d 334, 184 P.2d 1 (1947); However, in each of these cases, the party to be burdened with the record keeping was deceased and testimony as to the balances in various accounts would have been
less, nowhere in the *Beam* opinion is the issue of fault discussed, so the *Beam* court never addressed the keystone of the *See* opinion.

It is arguable that Mr. Beam’s failure to keep records on asset acquisitions is a type of “fault” which the *See* court addressed. Had the *Beam* court found “fault” in the apportionment framework, the court would have denied recapitulation of the total living expenses of the marriage. Application of the *See* rationale would have assured protection to the wife in an apportionment case. To avoid application of the *See* rule, the husband destined for apportionment as well as a husband who has a salaried job would be forced to keep copious records of all asset acquisitions and expenditures. A wealthy person’s failure to keep records could fairly be considered “fault.” Persons of means commonly have retained counsel and accountants throughout their business lives to maintain records. Even without full-time financial advice, the widespread use of checking accounts and credit cards provides the purchaser with significant records to overcome the *See* doctrine of faulty record keeping.

Assuming that failure to keep records in the apportionment situation is “fault,” *See* still requires that there be a commingled account. It is arguable that community income derived from an apportionment formula cannot be commingled because it is not in existence at the time of the asset acquisition and is ascertainable only at the end of the marriage. The whole notion of apportionment is a legal fiction to arrive at substantial justice. Hence, it is arguable that community property apportioned at the end of the marriage can be considered “fictionally commingled” with separate property for purposes of meeting the commingling requirement of *See*.

Having ignored the issue of “fault” in apportionment cases, the *Beam* court failed to discuss one of the more crucial requirements of the *See* decision. By distinguishing *Beam* on the facts, noting that Mr. See had actual salary and that Mr. Beam had only that “imputed” community income characterized by an apportionment formula, the *Beam* opinion negates any positive effect that *See* might have had on California apportionment cases.

**Summary**

*See* held that, where fault exists, a husband may not be reimbursed for expenditures of separate property used to meet fam-

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impossible to obtain. The facts of these cases make them clearly distinguishable from dissolution cases, and hence, the estate cases should not be controlling.
ily living expenses unless there is an agreement between the parties allowing such reimbursement. The *Beam* opinion makes it clear that the family living expense presumption is unaltered by *See* and that the *See* case is not controlling in apportionment cases. Therefore, a husband in an apportionment case may use the family living expense presumption to offset family living expenses, regardless of “fault” and without an agreement allowing such a reimbursement.

The crucial distinguishing fact between the *Beam* and *See* cases, according to the *Beam* court, is that Mr. *See* “consciously chose” to use his separate property while Mr. *Beam* did not make such a conscious choice. However, there can be no conscious choice until the property is apportioned between the separate and community estates at the end of the marriage. *Beam* thus holds that in apportionment cases no conscious choice to use one’s separate property can exist and the *See* case is not controlling.

The decision in *Beam* assumes that the husband did not know that his time, effort, and skills would necessitate an apportionment of income to the community at the end of the marriage. Thus, contrary to traditional jurisprudence which presumes that a man knows the law, this decision assumes that the husband is ignorant of the law. Because he is ignorant of the fact that community property will be apportioned on dissolution, the husband could not have “elected” to use separate funds as Mr. *See* did. The ignorant husband is thus rewarded in *Beam*, and need not comply with the requirements of the *See* decision.

Attorneys who have carefully read *Beam* can now counsel their wealthy male clients that they are protected from the *See* doctrine. The attorney can advise a wealthy man to avoid salaried jobs, to spend his time managing his separate assets, and to consciously increase family living expenses, which will be presumed paid from any community property apportioned when the marriage is terminated. Hence, the husband will be reimbursed from the community property without an agreement from the other spouse and regardless of “fault”—a result seemingly “outlawed” in *See*.

**Proposals for Change**

The persistence demonstrated in the *Beam* opinion for the family living expense presumption necessitates certain changes in California community property law to give additional protection to the wife. The system as it exists unduly burdens the wife of a wealthy man who chooses to manage his separate estate and to
deprive the community of its most likely source of increase—the husband’s salary.

Statutory Amendment

The most direct means of affording protection to the wife is to amend the statutes to change the existing method of characterizing assets. A repeal of that portion of the Civil Code which establishes fruits, profits, and income of separate property as separate property accompanied by enactment of a section reflecting the original Spanish-Mexican system would be a good means of protection for the wife who marries a wealthy husband. Such a statute might read:

Rents, fruits, and profits of either spouse’s separate property are community property belonging to both spouses by halves; separate property is defined as property owned by the spouse at the time of marriage or thereafter acquired by gift, devise, or descent.

This change would eliminate the complexities of apportionment as the wife would derive her interest by statutory grant. However, such a drastic change to the community property system is not expected. Furthermore, although such a statutory change would negate the problems of apportionment, it would not completely protect the wife from the adverse effect of the family living expense presumption. Therefore, to provide the wife with maximum protection, a method of allocating the family living expenses must be devised which achieves a more equitable result than the family living expense presumption. Such a method might be called the “family living expense allocation.”

The Family Living Expense Allocation

According to present community property principles, the husband may choose the family mode of living to blend with tastes he has acquired as a wealthy, unmarried man. The total living expenses may bear no realistic relationship to the standard of living which actual community income would dictate. Justice Traynor was aware of this problem when he created the See exception to the automatic application of the family living expense presumption. However, the Beam court made it clear that the See exception does not apply to apportionment cases so that automatic application of the family living expense presumption is required.

76. CAL. CIV. CODE § 5101 (West 1970).
77. See v. See, 64 Cal. 2d at 785, 415 P.2d at 781, 51 Cal. Rptr. at 893.
A simple solution to the adverse effect of the family living expense presumption on the wife's share of the community in apportionment cases would be the application of a pro rata method of charging expenses against the separate and community assets. The use of such pro rata distribution which could be labelled the "family living expense allocation" would negate the need for the family living expense presumption. In addition, a pro rata system of allocation is simple to apply. A court on dissolution of marriage need ascertain only the total living expenses for the marriage, the total separate property at dissolution, and the total community property derived from apportionment or from other sources. For example, in Beam, the total family living expenses were $872,000, total separate property was $1.7 million, and total community property by apportionment was $357,000. Adding the separate and community property values and using this number as the denominator, the separate property value is used as a numerator. This fraction is then multiplied by the total living expenses which gives the amount of the living expenses chargeable to the separate property. Similarly, the community property value is used as a numerator to establish the living expenses to be borne by the community property. Such a formula would charge the community in Beam with approximately $151,000, leaving $206,000 for equal distribution on dissolution. Approximately $721,000 would be charged to the $1.7 million separate estate.

A system of pro rata allocation such as the "family living expense allocation" would not be new in California. Such a system has been used in probate administration to divide expenses of administration and family allowances between separate and community estates and in divorce proceedings to allocate alimony (to a former wife) and child support payments between the two types of property.

78. Although an allocation could be made by charging community expenses against separate income and community income, allocation against assets is a superior method. Income, especially for the wealthy person, can be greatly affected by various tax planning devices, e.g., investment in tax free municipal bonds as in the instant case.

79. In re Estate of Coffee, 19 Cal. 2d 248, 120 P.2d 661 (1941); "[T]he portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and expenses of administration apportioned between the community and separate property in accordance with the value thereof. . . ." Id. at 252, 120 P.2d at 664.

80. In re Estate of Haselbud, 26 Cal. App. 2d 375, 79 P.2d 443 (1938); "[W]e are aware of no argument that can be made for exonerating the separate property of the deceased from bearing at least its pro rata share of both of these [debts, family allowance] and of the expenses of administration." Id. at 381-82, 79 P.2d at 447. Haselbud thus shows the variance between treatment before death, i.e. the family living expense presumption, and soon after death, i.e. pro rata allocation.

Summary

California law should be changed to reflect a policy of greater protection to the wife who marries a wealthy man. The statutes could be amended to provide that rents and profits from separate property are community property thus avoiding the necessity of apportionment. A better resolution of the problem would be for the courts to adopt a "family living expense allocation" system in place of the family living expense presumption. Such an allocation would charge living expense ratably to the separate and community property.

Conclusion

The family living expense presumption as affirmed in Beam works a harsh burden on a wife who seeks economic security upon dissolution of marriage from a wealthy husband who has managed his separate estate. The "family living expense allocation" of family living expenses is more equitable and is simple to compute. Unlike the family living expense presumption, a system of pro rata allocation is consistent with the presumption that all property acquired during marriage is community property and with the community property policy of protecting both parties of the marriage after dissolution. Furthermore, and most important, the "family living expense allocation" will aid the courts in effectuating fair, just, and equitable results upon dissolution of marriage.

Kenna J. Helms*

(1967); "An apportionment of defendant's alimony and child support obligations between his separate income and the community income is both practical and fair. Defendant's total separate and community income during the period of his second marriage should be used to determine the proportionate amounts that his separate and community property will be charged [on dissolution of his second marriage]. Id. at 564, 432 P.2d at 712, 63 Cal. Rptr. at 16.

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