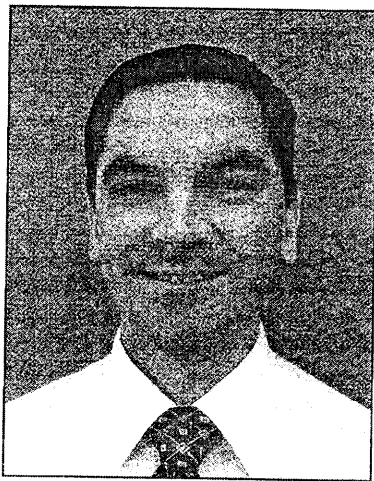


THE RISE AND FAULTS OF VAN CAMP

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Part 1: *Diefendorff*

The path to *Van Camp v. Van Camp* (1921) 53 Cal.App. 17, 199 P. 885 began in 1892. In *Diefendorff v. Hopkins* (1892) 95 Cal. 343, Wife operated a business that was her separate property. While the court recognized that her efforts gave rise, in part, to the income from business operations, the court recognized a right that has no place in the view of the partnership model of a marriage, but instead favored the separate estate: a spouse has the right to manage his or her separate property and the income therefrom is separate property. The *Diefendorff* court found as follows:

To begin with, she owned the Pine Street house and lot, where she carried on a business which was hers exclusively, and in which her husband *refused* to have any part. The proceeds of such business were, therefore, her separate estate, as being the profits of

her separate property. (Civ. Code, sec. 162.) It is true that they may have been, to some extent, the profits of her labor and personal attention, but so must, in some degree, be the rents, issues, and profits of any separate estate of either spouse, and the wife must have the same right to manage her separate estate, so as to turn it to profit, that the husband has to manage his separate estate. The proceeds of the business, therefore, belonged to her. What these amounted to and how they were expended does not appear, and neither is it shown how the Pine Street house was furnished. But the whole course of conduct of both husband and wife for years, and all their declarations, go to show that she managed the boarding-houses, bought and sold and exchanged furniture just as she pleased, and *in her own name, with her husband's full knowledge, and without any objection on his part*, except his objection to her engaging in a business at all, which he considered unprofitable and injurious to her health. (emphasis added; *Id.*, at pp. 351-352.)

The *Diefendorff* court adjudicated cases at a time in which the spouses were not equals in the management and control of the community property. It went to great lengths to protect Wife's separate estate because at the time Wife's community property rights were less than those of Husband, and the Court guarded her separate property from a claim of a community property interest in her business. *Van Camp* was decided in 1921, and was based on *Diefendorff*. The last time *Diefendorff* was cited for this same rule was 1926. (See *Gray v. Perlis* (1926) 76 Cal. App. 511 – the ownership of the business having been thus established as Wife's, proceeds of that business became her separate estate.)

Part 2: *Pepper*

In *Estate of Pepper* (1910) 158 Cal. 619, the Supreme Court held that where it is "impossible" to determine what portion of an increase in value was attributable to Husband's community efforts, the increase in value of the business is confirmed as Husband's separate property. As will be discussed, *post*, this rule was the direct basis of the *Van Camp* decision.

In *Pepper*, Husband had acquired 160 acres of real prop-

erty before marriage upon which he lived. He operated a tree nursery and orchard on his land and devoted part of it to pasturage and to the growing of grain. Later – but also prior to marriage – he acquired additional, adjoining land until his farm was about 291 acres. After marriage, he continued to cultivate his land and sell trees from his nursery. From the time of his marriage until his retirement, he lived upon his land and devoted his entire time and energy to the nursery and farming operations that he carried on there. When he retired, he sold his land and then died several years later. At the probate trial, all parties conceded that his entire estate was comprised of assets acquired either from the land's sale proceeds or from the income he earned from cultivating it. The issue at trial was how to characterize these assets.

Wife argued that the community had an interest in the assets because income from the land and the increase in the land's value were due to Husband's marital efforts. The trial court found otherwise, holding that the income and growth in value flowed from the underlying separate property asset. The *Pepper* court agreed, stating as follows:

There can be little question, on the evidence, that the principal part of such business consisted of the conduct of his nursery. The appellant argues with great earnestness that the profits and earnings of such nursery business after marriage, must, as matter of law, be held to be community property. We think this position cannot be sustained. Section 163 of the Civil Code provides that "all property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." The question here is whether the proceeds of the nursery conducted on the land can be considered as "issues" or "profits" of the land. Earnings, acquired by the exercise of the industry or skill of either husband or wife, are to be credited to the community. On the other hand, the products of land, separately owned by either spouse, and cultivated by either or both, become the separate property of the one owning the land. *The appellant does not dispute the proposition that, if Pepper had, year after year, sown his land to grain, the resulting crops would have formed a part of his separate estate.* But it is argued that, in the case of the nursery, the principal element in the success of the venture was the industry, skill, and attention of Pepper, and that the use of the land was merely incidental to what was, in effect, a commercial enterprise. We are unable to see that this argument furnishes a sufficient ground of distinction. In any agricultural enterprise, the labor and skill of man are essential to success. An orchard or a grain field must be cultivated and cared for. The resultant product is in part due to the processes of nature operating upon the land, and in part to the intelligent application of manual labor to the soil. *It is, in the nature of things, impossible to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man. The product must be treated as a whole,*

and, if it is the growth of land separately owned, it is the separate property of the owner of the land. (See *Diefendorff v. Hopkins*, 95 Cal. 343, 352, [28 Pac. 265, 30 Pac. 549].) ... (Emphasis added; *Id.*, at pp. 623-624.)

The so-called "impossibility rule" set forth in this passage is echoed in *Van Camp*. However, as will be noted in *Estate of Neilsen, post*, counsel for the Wife was too quick to concede that food grown from separate property is separate property.

Part 3: *Van Camp*

In *Van Camp v. Van Camp* (1921) 53 Cal. App. 17, Husband owned stock in a fish-packing business prior to marriage. The Court had to determine how to characterize the income he earned, the increased value of the business and the dividends he earned during marriage. In 1914, Husband moved to California; after his arrival he organized the Van Camp Sea Food Company. The company was capitalized with 2,000 shares of stock at a par value of \$100 each, of which Husband owned 1,300 shares. The parties married in 1916. Through a series of later transactions, he acquired additional shares but was never the sole owner of the corporation. It was duly organized and constituted an entity separate and distinct from Husband; he was paid a salary for his services, and certain personal expenses were paid for by the corporation.

Wife argued that *Pereira* required the court to determine what portion of the business growth and income (in excess of what Husband was paid) should be allocated to the community. The *Van Camp* court recognized that the success of the business was, "to a large extent due to his capacity and ability." Nevertheless, since the court found it "impossible" to determine how to allocate the growth and income to the community, the separate estate should receive the entire amount. The *Van Camp* court disregarded *Pereira* and instead relied on *Diefendorff* and *Pepper* to support its ruling as follows:

... The case presented is not unlike that involved in *Estate of Pepper*, [Citation.], wherein it was held that the profits and earnings made by the husband after marriage in conducting the business of a nursery upon property owned by him at the time of his marriage was his separate property, notwithstanding the success of the venture required industry, skill, and attention. "It is impossible," said the court, "to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man. The product must be treated as a whole, and, if it is the growth of land separately owned, it is the separate property of the owner of the land," citing *Diefendorff v. Hopkins*, 95 Cal. 343, [28 P. 265, 30 P. 549]. *So, in the instant case, it is impossible to say what part of the enormous dividends paid by the Van Camp Sea Food Company should be apportioned to the skill and management thereof and what part should be apportioned to the investment of the capital and the favorable conditions under which the business was conducted. ... (Id., at pp. 27-29.)*

... in view of the fact that he was adequately paid

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by the corporation for his services, such compensation, under the holding in the case of *Estate of Pepper, supra*, must be deemed the extent of his personal earnings, and the balance of the profits derived from the business accredited to the use of the capital invested therein, in the same manner as though he had not been employed by the corporation. (*Id.*, at p. 29.)

The *Van Camp* court reiterated a protectionist view of the separate estate that is not part of our modern jurisprudence. By not taking on the task of allocating a business's growth and profits between the community and the separate estates, *Van Camp* disregarded the rule set forth by *Pereira*. The lazy judicial rule of *Pepper* and *Van Camp* can be summarized as follows: Where there are substantial assets mixed with substantial efforts it is impossible to determine the character of the profit and growth, so it must all be separate property.

Part 4: *Neilson*

In *Estate of Neilson* (1962) 57 Cal. 2d 733, the California Supreme Court expressly overruled *Pepper*, thereby impliedly overruling *Van Camp*, which relied upon *Pepper*.

In *Neilson*, Husband owned real property that was acquired prior to marriage and partially paid for after marriage. He grew grain on his land and his income during marriage came almost exclusively from the sale of the grain. Husband later died and the matter went before a probate jury to determine the separate and community character of his assets. The trial court rejected a jury instruction based on *Pepper*, finding that *Pepper* had been "practically wrecked" by subsequent cases." (*Id.*, at p. 738.) The California Supreme Court went further and found that *Pepper* was wrongly decided. *Nielson* reaffirmed *Pereira* and instructed the trial court that the "impossibility rule," which was the basis of the opinions in *Pepper* and *Van Camp*, was an erroneous application of the law. Rather, the trial court must determine to what extent community efforts resulted in the growth, profits and income of a business owned by a spouse prior to marriage. It instructed that the efforts of the community must always be recognized in the apportionment of business interests. The *Nielson* court stated as follows:

... The usual method of apportionment is to allocate a fair return on the investment to the separate property and to allocate any excess to the community property as arising from the husband's efforts. (*Pereira v. Pereira* ...) "Only when the profits and accruals actually attributable to the separate property are proved to differ from [the usual interest rate for a well-secured investment] is there reason to depart from this system." [Citation.] Departures from the *Pereira* formula have been made when the husband introduced evidence that "a larger return on his capital had in fact been realized." [Citations.]

An apportionment of profits is required not only when the husband conducts a commercial enterprise

but also when he invests separate funds in real estate or securities. [Citations.] *The proceeds and increment in value are apportioned entirely to the husband's separate estate only when they are attributable solely to the natural enhancement of the property* [Citations.] *or when the husband expended only minimal effort and the wife introduced no evidence attributing a value to his services.* [Citations.]

There is no reason why a grain farmer or nursery operator who conducts his enterprise on separate real property should be exempted from the normal apportionment rule and not be required to account to the community for a portion of the profits. Accordingly, the *Pepper* case has been justly criticized. (See 1 Armstrong, California Family Law 480; 4 Witkin, Summary of California Law [7th ed.] 2725; Continuing Education of the Bar, Family Law for California Lawyers, 368-369; Evans, Primary Sources of Acquisition of Community Property, 10 Cal.L.Rev. 271, 284; cf. 14 Cal.L.Rev. 402, 404-405.)

In expressly overruling *Pepper*, the *Neilson* court stated:

The *Pepper* holding was based not only on the erroneous concession of counsel, but also on the ground that it is "impossible to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man." [Citation to *Pepper*, at p. 624.] Although it may be difficult to make an apportionment, it is "impossible" only in the sense that it cannot be mathematically certain. (See *Jenkins v. Jenkins*, 110 Cal.App.2d 663, 666 [243 P.2d 79], where 5/14 of 28 head of cattle bought with the husband's separate property were apportioned to the community.) The long line of cases starting with *Pereira* dispels any notion that such impossibility justifies a finding that none of the proceeds belongs to the community. These cases have established the rule that *when part of the proceeds from a separate property enterprise or investment arise from the husband's efforts, there must be an apportionment.* *Estate of Pepper, supra*, 158 Cal. 619, is therefore overruled... (Emphases added; *Id.*, at p. 741.)

The court in *Marriage of Cream* (1993) 13 Cal.App.4th 81, aptly recognized that sometimes the "impossible" task of judging is no excuse for *not* judging. In *Cream*, the trial court found the task of valuing a business difficult, so he forced an auction of the business between the parties. In reversing, the First District said that "(n)o matter how difficult the decision, the trial judge must bite the bullet, value the business and award it to one of the parties. No one ever said judging was easy. (*Ibid.*, at p. 90.)" *Nielson* similarly pointed out that sometimes the evidence may be extremely complex, but it is not "impossible" to determine the community value in a business. When the court is left with a difficult task, the court should not take the easy way out -- the *Van Camp* way -- by giving all the value in the underlying asset to the separate estate. Perhaps that is why no appellate decision has followed *Van Camp* since *Somps v. Somps* (1967) 250 Cal.App.2d 328, 58 Cal.Rptr. 304. ■