CALIFORNIA BAR PAST EXAMS

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⑪ COMMUNITY PROPERTY

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Community Property

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2002 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

QUESTION 6

In 1997, Hank and Wanda, both domiciled in Illinois, a non-community property state, began dating regularly. Hank, an attorney, told Wanda that Illinois permits common-law marriage. Hank knew this statement was false, but Wanda reasonably believed him. In 1998, Wanda moved in with Hank and thought she was validly married to him. They used Hank's earnings to cover living expenses. Wanda deposited all her earnings in a savings account she opened and maintained in her name alone.

In February 2000, Hank and Wanda moved to California and became domiciled here. By that time Wanda's account contained $40,000. She used the $40,000 to buy a parcel of land in Illinois and took title in her name alone.

Shortly after their arrival in California, Wanda inherited an expensive sculpture. Hank bought a marble pedestal for their apartment and told Wanda it was "so we can display our sculpture." They both frequently referred to the sculpture as "our collector's prize."

In March 2000, a woman who claimed Hank was the father of her 6 year-old child filed a paternity suit against Hank in California. In September 2000, the court determined Hank was the child's father and ordered him to pay $800 per month as child support.

In January 2002, Wanda discovered that she never has been validly married to Hank. Hank moved out of the apartment he shared with Wanda.

Hank has not paid the attorney who defended him in the paternity case. Hank paid the ordered child support for three months from his earnings but has paid nothing since.

1. What are Hank's and Wanda's respective rights in the parcel of land and the sculpture? Discuss.

2. Which of the property set forth in the facts can be reached to satisfy the obligations to pay child support and the attorney's fees? Discuss.

Answer according to California law.

ANSWER A TO ESSAY QUESTION 6

1. Hank (H) and Wanda's (W) Rights to the Parcel of Land and the Sculpture

Hank and Wanda's rights to the parcel of land and the sculpture will be determined according to their status as married couples.

Putative Spouse

A putative spouse is one who reasonably believes they are married to another but for some reason their marriage is invalid. Here W believed she was married to H because she believed a common-law marriage was permitted in Illinois. Because H lied to W only he knows they were not really married and thus W's status as a putative spouse should be established.

The courts have yet to determine whether H would be considered a putative spouse under these circumstances because he knew no common-law marriage was established, however in this case the court should find that H and W are in a Putative Marriage because of W's reasonable belief that she was married in Illinois via a common-law marriage due to H's (an attorney) representation that they were married. California recognized Putative Marriages as an alternative to common-law marriages, and because H and W are currently domiciled in California a punitive marriage is established.

Quasi-Marital Property (Q-MP)

In California all property acquired during the putative marriage is deemed marital property and treated the same as community property. Such property acquired by gift or inheritance during the marriage is the spouse's separate property (SP) as well as any property acquired before the putative marriage and after permanent separation is the SP of the acquiring spouse.

In determining the character of any property the court will consider the above general presumptions as well as the source of funds used to acquire any property, any actions taken by the parties, and any special presumptions that may apply to the property. Property acquired outside California is treated as quasi-marital property and the court will treat it as community property or marital property I[f] such property were to be community property if acquired in California.

With these general principles in mind we can now examine the properties at issue.

Illinois Parcel of Land

The source of the Illinois parcel of land was the $40,000 W had earned from her earnings during marriage to buy the land. Thus, since the earning[s] were earned during the marriage it is Q-MP earnings and so the parcel is Q-MP in which both H and W have a ½ interest in.

Wanda took title in her name alone which could be deemed as a valid transmutation, which after 1985 requires a writing expressly stating that such property is the spouse's SP. If H knew and consented to W taking title in her name alone this could be SP, however, absent such consent the land would still be Q-MP.

Married Women's special presumption gives W a presumption of SP if title is taken in her name alone, however, such a presumption would not apply here because it is only applicable to property acquired before 1975 by W. Here the general presumption would apply and since the source was Q-MP and it was acquired during marriage the land should also be Q-MP.

Sculpture

The source of the sculpture was W's inheritance and so it should be deemed her SP under the general presumptions. W's statement to H that the sculpture was "our sculpture" could suffice as a valid transmutation. However, this was not in writing and a transmutation to be valid after 1985 requires that there be a writing clearly expressing a transmutation. Since there was no writing the general presumption will control and the sculpture is entirely W's SP.

2) Which Property Set Forth in the Facts Can Be Reached to Satisfy the Obligations to Pay Child Support and the Attorney's Fees?

Child Support Claim

Generally creditors' claims against either spouse are determined to be SP or Q-MP of the liable spouse depending on when such claim arose.

If the debt is SP debt then the creditor must satisfy his claim from the spouse's SP first before seeking satisfaction from the CP (here Q-MP). If the debt is a MP debt then the creditor will seek satisfaction from any MP (or Q-MP) first before seeking satisfaction of the claim from the SP of the debtor spouse.

Singe Hank's obligation to pay child support of $800 per month was a debt of H's personally and was not acquired for any benefit to the marital community such obligation is H's separate obligation. The child support claim must be satisfied from H's SP before seeking the MP.

If H is unable to pay from his SP, woman can seek satisfaction from the land as MP. However, an exception to reaching the MP earnings of the nondebtor spouse (W) arises if she has kept her earning separate with no accessibility to H.

Here W's earnings uses to buy land were deposited in an account in her own name of which presumably H had no access to, then such earnings were used to buy the land which was titled in W's name alone. Thus under this exception the claim of child support could not be reached by woman.

However still another exception arises when the debtor spouse's debt[s] are for "necessaries" which the court could deem child support payments to be. Spouses are liable to each other for necessary debts because of their duty to support each other.

Thus under this exception the child support could be satisfied from the land even if the court determined the land was entirely W's SP. She could still be liable if the child support claim were a necessary debt obligation of H.

Otherwise, if the debt is not necessary it could not be satisfied from the land because of the action's taken by W to separate her MP earning or if it was deemed entirely W's SP.

Attorney's Fees

The court provides that attorneys' fee's can if not paid give the attorney a right to a real property lien and any of the SP of the debtor spouse of the MP of the spouses. This is known as the family lawyer's real property lien.

Further if such debt were deemed necessary the fee could be satisfied from either the sculpture or the land.

If should be noted, however, that generally creditors' claims cannot reach the SP of the nondebtor spouse unless such was a necessary debt, thus as to the child support claim the sculpture which is W's SP should not be subject to the child support claim unless it is deemed necessary. The same rule would apply to any Attorney's fees owed by H.

ANSWER B TO ESSAY QUESTION 6

CA is a community property state. All property acquired while domiciled in CA is presumed to be community property. All property acquired before marriage and when the economic community has come to an end and all property acquired by gift and inheritance is separate property.

Property acquired while a married couple is domiciled in a non-community property state, becomes quasi-community property when the couple moves to California so long as it would have been community property if acquired while domiciled in California.

Before discussing Hank and Wanda's respective rights, it is important to determine the status of their relationship.

In 1997, Hank and Wanda, both domiciled in Illinois, a non-community property state, began dating. Hank told Wanda that Illinois permits common-law marriages. Hank knew the statement was false, but Wanda reasonably believed him. In 1998, Wanda moved in with Hank, thinking they were validly married. As a result of Wanda's mistaken belief that she was validly married to Hank, Wanda is a putative spouse.

Because Wanda is a putative spouse, quasi-marital property law will apply. Quasi-marital property law will apply. Quasi-marital property law is the same as community property law. As a result, the moment Wanda and Hank moved to California, all the property acquired by either of them while living in Illinois will be quasi-community property (so long as if it would've been community property if acquired while domiciled in California).

1. Hank's and Wanda's Respective Rights In The Parcel of Land and the Sculpture

Parcel of Land

Wanda used $40,000 from a savings account to purchase the parcel of land. The source of the money in the account was all of Wanda's earnings acquired while domiciled in Illinois. Because the $40,000 would have been community property if it was acquired while the couple was domiciled in California, it is considered quasi-community property.

The $40,000 of quasi-community property was used to purchase the parcel of land. In order to determine the character of a piece of property, a party must trace to the source. The land was purchased with quasi-community property and is therefore quasi-community property.

Wanda, however, took title in her name alone. Because this took place post-1974, Wanda will not be entitled to the Married Women's Special Presumption (applies pre-1975 and presumes that property is the woman's separate property so long as title is in her name alone). Wanda will try to argue that it was a gift of quasi-community property to her as separate property. The gift argument will fail, however, because she made the "gift" to herself.

Moreover, all property acquired during marriage is presumed to be community property. Unless Wanda can rebut the presumption, the parcel of land is quasi-community property. At separation, Wanda and Hank will each take ½ of the land (or proceeds from the sale of the land).

The Sculpture

Wanda inherited the sculpture. As a result, the sculpture was Wanda's separate property in the beginning. However, Hank bought a marble pedestal and told Wanda it was "so we can display our sculpture." Moreover, both Hank and Wanda referred to the sculpture as "our collector's prize."

Hank will argue that the parties' actions transformed the character of the sculpture from separate property into community property. By referring to the sculpture as "ours," Wanda intended that the sculpture be a gift to the community.

If the court finds that Wanda intended the sculpture to be a gift to the community, then Wanda and Hank will each take ½ of the value of the proceeds.

However, any transmutation that takes place post–1984 must be in writing. There is an exception, however, for interspousal occasions, etc. Because this alleged transmutation took place in 2000, a writing is required. Because there is no writing and the sculpture was not given as a birthday or

anniversary gift (and is likely to be very valuable), then transmutation was not valid. As a result, Wanda will take the entire sculpture.

2. Which Property Can Be Reached to Satisfy the Obligations to Pay Child Support and The Attorney's Fees?

Child Support

Quasi-Community Property can be reached to satisfy the obligations to pay a creditor even when the obligation arose prior to the marriage. However, if the nondebtor spouse placed his/her earnings into a separate account in his/her name alone, creditors cannot reach the money in the account so long as the account is not accessible by the debtor spouse.

Hank's child support obligations arose 6 years ago when his child was born. Wanda and Hank were not together at the time the obligation arose. However, because the parcel of land is quasi-community property, it can be reached to satisfy the child support obligations. Wanda's sculpture, however, is her separate property. Then nondebtor spouse's separate property can't be reached to pay an obligation that arose prior to marriage.

Attorney's Fees

The attorney's fees were incurred in 2000, (during the period of time Hank and Wanda were "married"). All debts incurred during marriage may be satisfied by quasi-community property (and of course community property), the debtor spouse's separate property, and the nondebtor spouse's separate property, so long as the debt was incurred for necessaries.

Because the parcel of land is quasi-community property, it can be reached to satisfy the attorney's fees. The sculpture, however, is Wanda's separate property. The issue is whether the attorney's fees were incurred for "necessaries." Hank will argue that defending himself if in a child paternity suit should be considered a "necessary". A necessary of life, however, is [sic] food, clothing and shelter. As a result, the sculpture cannot be reached to satisfy the attorney's fees.

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QUESTION 6

Henry and Wanda married in 1980 when both were students at State X University. State X is a non-community property state. Shortly after the marriage, Henry graduated and obtained employment with a State X engineering firm. Wanda gave birth to the couple's only child, and Henry and Wanda agreed that Wanda would quit her job and remain home to care for the child. They bought a house in State X using their savings for the down payment and obtained a loan secured by a twenty-year mortgage for the balance of the purchase price. Mortgage payments were subsequently paid from Henry's earnings. The title to the State X house was in Henry's name alone.

In 1990, Henry accepted a job offer from a California engineering firm. The couple moved to California with their child and rented out the State X house.

In 1992, Wanda's uncle died and left her an oil painting with an appraised value of $5,000 and a small cabin located on a lake in California. Wanda took the painting to the cabin and hung it over the fireplace.

In 1993, after reading a book entitled "How to Avoid Probate," Henry persuaded Wanda to execute and record a deed conveying the lake cabin to "Henry and Wanda, as joint tenants with right of survivorship." Wanda did so, believing that the only effect of the conveyance would be to avoid probate.

In 1995, after three years of study paid for out of Henry's earnings, Wanda obtained a degree in podiatry and opened her own podiatry practice. Her practice became quite successful because of her enthusiasm, skill, and willingness to work long hours. Henry continued to work for the engineering firm.

In 2002, Henry and Wanda separated and filed for dissolution of marriage. Wanda had the painting reappraised. The artist, now deceased, has become immensely popular, and the painting is now worth $50,000.

Upon dissolution, what are Henry's and Wanda's respective rights in:

1. The lake cabin? Discuss.

2. The painting? Discuss.

3. The State X house? Discuss.

4. Wanda's professional education and podiatry practice? Discuss.

Answer according to California law.

Answer A to Question 6

HENRY & WANDA'S RIGHTS

1. The Lake Cabin

California is a community property state. All assets acquired by earnings during the marriage are presumed to be community property. Assets acquired by gift, inheritance or devise or otherwise acquired before the marriage or after a permanent separation are separate property.

Property can change form and be transmuted from community or separate property and courts will consider the source of funds if they can be traced.

Here, the lake cabin was initially separate property because Wanda acquired the lake cabin from her inheritance. When Wanda transferred the lake cabin to Henry a transmutation occurred and the house was placed in joint names. This occurred in California.

Previously in California, a gift would be presumed to Henry based on the Lucas case. After 1987, however, any property in any joint title is presumed community property. Wanda can, however, receive the initial separate property value of the lake cabin back if she can trace the assets, such as through the title and probate documents and show it was hers. Then, if it is traced properly, any value over the separate property contribution would be divided equally. Henry would alternatively argue a gift and that each spouse receive ½ but Wanda could rebut this and rebut the community property presumption with her testimony that Henry told her it was jut to avoid probate without donative intent.

2. The Painting

Wanda inherited the oil painting so it is separate property. Wanda kept the painting at the cabin, so it could be argued that she intended to keep the painting as her separate property. No community earnings or funds were used to enhance the value of the painting and no skill or labor was used to enhance the value of the painting. Wanda should keep the painting as her separate property.

3. The State X House

The community property laws of California create a presumption that all property acquired with earnings during the marriage is community property.

Quasi community property is property acquired in another state that would be considered community property if it were acquired in a community property state. Quasi community property is treated the same as community property in the event of a divorce.

Here the house was bought in another state — non-community property with earnings, a loan and savings that were all acquired during the marriage. Although the house was in Henry's name, all contributions to the house were community contributions. Henry's earnings were community earnings, the loan was acquired by both after the marriage, so the lender's intent was to rely on the community for repayment. Also the savings were their joint savings; it appeared they were acquired during the marriage. If the house would be community property in California, since it was acquired from all community sources, then it is quasi community property and would be treated as community property in a divorce. Each spouse received one-half of community property in a divorce unless there is some exception that applies (one spouse cares for a minor child in the house, one spouse misappropriates funds, one spouse is injured and should receive personal injury proceeds). No exceptions apply here, so each spouse receives one-half of the quasi community property State X house.

4. Wanda's Education & Practice

Wanda's education is not community property. However, the community estate is entitled to repayment of her educational expenses if there is a time of 10 years or less. If less than ten years has passed there is a presumption the community has not yet received all the benefits of the enhanced earning capacity from the education.

If, however, Wanda can show the community has already received sufficient benefits, she would not have to repay the community. If she cannot prove this, then she would have to repay the education expenses (½) to Henry.

The podiatry practice was acquired exclusively from community funds (Henry's earnings) and from Wanda's enthusiasm, skill, and labor during the marriage. These are all community sources so that the practice and the goodwill of the practice should be valued and divided one-half to each spouse.

Because all sources of labor and capital are community sources, the Pereira and Van Camp methods of accounting do not apply. Pereira would allow a spouse their initial investment back if it is separate property plus a reasonable rate of return (10%) on the initial investment. Because Henry's investment in Wanda's education was community earnings, there is no initial separate property to return and Pereira does not apply, for either Henry or Wanda, since Wanda's labor was all during the marriage and was all community labor.

Similarly Van Camp accounting does not apply because this principle allows a reasonable salary to be deducted from the business, multiplied by all years of the marriage, less any community expenses paid from the business and that would be considered community property with the balance of the value of the business returned as separate property. It is inapplicable because all community labor and earnings were used for the business, resulting in a community property podiatry business.

Van Camp is used where a unique separate property business has appreciated during

the marriage due to circumstances rather than community labor. It does not apply here because there was no separate property contribution to the podiatry practice, so each spouse receives one-half of Wanda's practice.

Answer B to Question 6

1. Quasi Community Property

The threshold issue is whether the laws of California community property govern property that Harry and Wanda acquired in State X, a non-community property state. Property acquired in another state that would be considered community property if acquired in California is treated as quasi community property and is treated as community property on the dissolution of marriage.

Here, at the dissolution of Harry and Wanda's marriage, the property they acquired in State X will be treated exactly under the same principles as the property they acquired in California. Both will be governed by California community property laws.

As mentioned, California is a community property state. All property acquired during the course of marriage is presumptively community property (CP). All property acquired prior to marriage or after separation is presumptively separate property. In addition, a gift, devisee, or bequest is presumptively separate property (SP).

In order to determine the character of a property, courts will trace back the source of funding used to acquire the property. A mere change in the form of a property will not change its characterization. At divorce, each item of community property is split equally, absent special circumstances.

With these principles in mind, we can turn to the specific assets involved.

2. The Lake Cabin

The lake cabin was a gift to Wanda from her uncle and as such is SP.

Henry will argue that Wanda made a gift of the property to him in 1993 and therefore the property became CP.

Prior to 1985, gifts to a spouse did not have to be in writing. Post 1985, however, transmutations of property required writing. Henry will argue the execution and recording of the deed was a writing satisfying this requirement and, therefore, the gift should be treated as CP and he should have half of the she [sic].

Henry will also argue that, under Lucas, taking time in joint and equal form creates a presumption of community property and a relinquishment of the separate property rights. Moreover, the Anti-Lucas statutes provide that this presumption of CP holds true even for property taken as joint tenants on dissolution. While joint tenancy would not creat[e] a presumption of CP on death, it does on dissolution. Therefore, Henry will argue the fact that the property was in joint tenancy is further indication that it is community property.
Wanda, however, will counter that the only reason she put the property in her and

Henry's name was to avoid probate of the cabin. The courts have held under the Married Women's Presumption that a gift is not presumed when a party does so for improper purposes, such a shielding from creditors. By analogy, in this context the court may nor presume a gift or title in joint and equal form because it was done for an improper purpose.

In sum, if Wanda had given Henry a share in the lake cabin for a proper purpose, the Lake Cabin would be CP. But since it was done for an improper purpose, a court will probably hold it is SP and that Wanda should keep it.

3. The Painting

The painting was a gift to Wanda from her uncle, and as such was SP. Wanda is entitled to the appreciation of the painting that is now worth $50,000. This appreciation was not in any way commingled because the painting was never sold. Moreover, Wanda committed no labor in the appreciation of the painting. Therefore, Wanda is entitled to the entire appreciation of $50,000 which is simply a capital return on separate property.

4. The State X House

The State X house was bought using savings (quasi CP) and payed off using Henry's earnings (quasi CP). Therefore, it is presumptively quasi CP which is treated as CP for the purpose of dissolution. There is no need to apply Marriage of Moore because the house was entirely purchased by CP, and there is no division of CP and SP in acquiring the interest.

Henry will argue, though, that the fact that he took title alone creates the presumption of a gift to him. Prior to 1975, when a women took title alone in a property, that property was presumptively considered a gift to the women. But, this presumption did not apply to men. It also does not apply post 1975. But, Henry will still argue that this property was a gift because he was the sole title owner.

This argument is unlikely to succeed because Wanda remained in the home and cared for the child in the home. Courts will look beyond the facade of sole title, and will not interp[r]et the title as a gift to Henry. Instead, they will loo[k] at the property as jointly owned by Wanda and Henry who lived there together.

The question, then, becomes if the house is quasi CP how can it be split given that it is in a different state. California, after all, does not have juri[s]diction over property that is in State X.

Courts, however, will either give Wanda and [sic] equivalent amount of resources from other assets to compensate for the State X house, or they will force Henry, given their personal jurisdiction over him, to sign over half of the property to Wanda.

In short, Wanda is entitled to her share of half the house despite the problems of jurisdiction given that California has personal jurisdiction over Henry.

5. Wanda's Professional Education

The issue is whether Wanda's podiatry degree is community property.

The law is that an educational accreditation is not CP. However, the community is entitled to reimbursement for the education expenses unless: (1) 10 years have passed since the spouse acquired the degree creating a presumption that the community has reaped its benefits; (2) the other spouse also received a professional degree or (3) the education that the spouse receive[s] will lessen the need for spousal support[.]

Here, seven years passed after Wanda acquired the property, so the community is not presumed to have benefitted. Also, there is no indication that Henry received an education.

Wanda may argue that her education helped her open a successful practice and lessened her need for spousal support. Thus, the community should not receive any reimbursement. This will be persuasive only if Wanda can show that she would have been entitled to significant spousal support, absent the degree, which is a dubious proposition considering she had a job prior to giving birth. In other words, it is not clear that she would not have been capable of earning a good income, even without the degree.

A fair solution would probably be to reimburse the community 3/10 of the money it spent on Wanda's education. This would represent amount of benefit the community did not receive, under the 10 year presumption.

Henry then would be entitled to ½ of 1/3 or 1/6 of the expenses spent on Wanda's education degree.

6. Podiatry Practice: Accounting and Goodwill

The issue is whether Wanda's podiatry practice is community property or separate property. Here, Wanda did not inherit a business, but rather opened the business during the marriage. Therefore, the earnings are presumptively all community property since the entire business was a result of her "enthusiasm, skill, and willingness to work long hours."

Pereira and Van Camp accounting principles **do not** seem to apply to this situation. Under Pereira, an independent business's rate of return at 10% is SP, and the rest is CP. This test applies when the growth of a business is primarily the result of a spouse's labor. Under Van Camp, CP is determined by subtracting a community's family expenses from the FMV of the spouse's labor, and the rest of the business value is SP. This test is appropriate when a large part of the business is a result of capital as

opposed to community labor.

Wanda may try to argue that the business is her separate property. She may concede that it grew as a result of her labor, but may argue that the Pereira principles must govern, entit[ling] her to a 10% per annum share as SP.
But, Henry will counter that Wanda started the practice while they were married, and as such, the entire business is a result of her labor. She did not inherit the business, Hen[r]y will argue, but rather opened it during the course of marriage. As such, all of the business earnings are presumptively CP.

Given that Wanda opened the practice after marriage and her labor is solely responsible for the practice, Henry is entitled to half of the practice.

If the court gives Wanda the practice, then it must compensate Henry for half the value. In such a scenario, Henry is also entitled to the value of the **goodwill** of the business. The goodwill is calculated by looking at the total revenue and subtracting the value of Wanda's services as well as cost. The remainder can be attributed to goodwill. In short, if the court decides to grant Wanda control of the business because she is responsible for managing it, it must grant Henry half the value of the business, including the value of goodwill for the foreseeable future discounted to present value.

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Question 2

In 1989, Herb and Wendy married while domiciled in Montana, a non-community property state. Prior to the marriage, Wendy had borrowed $25,000 from a Montana bank and had executed a promissory note in that amount in favor of the bank. Herb and Wendy, using savings from their salaries during their marriage, bought a residence, and took title to the residence as tenants in common.

In 1998, Herb and Wendy moved to California and became domiciled here. They did not sell their Montana house.

In 1999, Herb began having an affair with Ann. Herb told Ann that he intended to divorce Wendy and marry her (Ann), and suggested that they live together until dissolution proceedings were concluded. Ann agreed, and Herb moved in with her. Herb told Wendy that he was going to move into his own apartment because he "needed some space." Ann assumed Herb's last name, and Herb introduced her to his friends as his wife. Herb and Ann bought an automobile with a loan. They listed themselves as husband and wife on the loan application, and took title as husband and wife. Herb paid off the automobile loan out of his earnings.

In the meantime, Herb continued to spend occasional weekends with Wendy, who was unaware of Herb's relationship with Ann. Wendy urged Herb to consult a marriage counselor with her, which he did, but Herb did not disclose his relationship with Ann.

In 2003, Wendy and Ann learned the facts set forth in the preceding paragraphs. Wendy promptly filed a petition for dissolution of marriage, asserting a 50% interest in the Montana house and in the automobile. At the time of filing, the Montana bank was demanding payment of $8,000 as the past-due balance on Wendy's promissory note which has been reduced to a judgment. Also at the time of filing, Ann had a $15,000 bank account in her name alone, comprised solely of her earnings while she was living with Herb.

1. What rights do Herb, Wendy, and Ann each have in:
    a. The residence in Montana? Discuss.

    b. The automobile? Discuss.

    c. The $15,000 bank account? Discuss.

2. What property may the Montana bank reach to satisfy the past-due balance on Wendy's promissory note? Discuss.

Answer according to California law.

Answer A to Question 2

2)

1. Rights of Herb, Wendy and Ann

Herb married Wendy in 1989 while both were domiciled in Montana. In 1998 they moved to California, and California law applies here. One year later, in 1999, Herb began having an affair with Ann and moved out, telling his wife he "needed more space" but saw a marriage counselor with Wendy. When she discovered the relationship in 2003, she filed for dis[s]olution.

Community Property

Except as otherwise provided by statute, all property, real or person, whenever situated, acquired by a married person, during the marriage, while domiciled in California, is community property.

Quasi-Community Property

California law holds that real or personal property acquired before the couple was domiciled in California, or real property held outside of California is quasi-community property.

In California, quasi-community property is treated as follows: 1) For purposes of management and control, quasi-community property is treated as separate property; 2) In cases of death or divorce, or the rights of creditors[,] it is treated as community property.

Putative Spouse

Under the putative spouse doctrine, an otherwise valid marriage that is voidable for some reason (here, bigamy) may allow the putative spouse--who reasonably and objectively believes there is a valid marriage--to have rights similar to community property.

Herb moved out in 1999 and began having an affair with Ann, who knew that Herb was married to Wendy, but was told he intended to divorce her. She took Herb's last name, was known as his wife, and took title to a car as his wife. However, Ann knew Herb was still married to Wendy and that the "marriage" was not valid.

The putative spouse doctrine does not apply.

Marvin Relationship

Under the Marvin case, courts may enforce contracts between couples who are not

married, so long as they are not expressly based on performance of illicit sexual acts.

There is no mention of an express contract between Herb and Ann. The only possible "implied" contract is that Ann allowed Herb to move in with her in her apartment because he promised to divorce Wendy and marry her. Such an agreement was explicitly based on a meretricious relationship (committing adultery and divorcing his wife). Public policy requires that this contract not be enforced since it is a contract in derogation of marriage.

There is a small chance courts will enforce the promise as one merely for "housing" since Ann said Herb could live in her apartment. But this is highly unlikely.

The courts will not enforce any promise.

A. Residence in Montana

General Presumption

Under the general presumption, property acquired during the marriage is community or quasi-community property. The Montana residence was acquired during the marriage, with community funds (savings from salaries earned during the marriage). It was acquired in Montana, however, before they moved to California. Therefore, it will be presumed quasi-community.

Titled as Tenants in Common - Presumption (pre-1985)

Prior to 1985, it was presumed that when title was given to a husband and wife as "joint tenants" that they held property as joint tenants. To find community property, the couple had to 1) intend that it be taken as community, and 2) have a writing stating such. Since Herb and Wendy were not married until 1989, this presumption cannot apply.

Post-1985

After 1985, jointly titled property was considered community absent a desire to hold it jointly. No writing was required.

Here, there is nothing to indicate that Herb and Wendy desired the residence to be community. They were not even domiciled in a community property state. However, in such cases where they moved to California afterwards, California law will apply. The courts will probably consider the residence to be community. But this conclusion is not certain.

No Transmutation of Property

After the marriage, the property may be transmuted by a writing. There is no evidence of

such here.

Disposition

Depending on which way the court decides, the residence in Montana may be considered as owned by the community or by Husband and wife as tenants in common. Either way, at dissolution, it will be divided equally between Herb and Wendy.

B. Automobile

While married to Wendy, but during his relationship with Anne, Herb bought an automobile, with a loan, acquiring title with Ann as "husband and wife." Both Herb and Ann signed the loan application. Herb paid off the automobile out of his earnings.

General Presumption

Since the automobile was acquired during his marriage to Wendy, it will be presumed community property.

Possible Exception - Living Separate and Apart

Earnings while living separate and apart are not considered community property.

In 1999, Herb moved out of the dwelling he shared with Wendy and began living with Ann. He told Ann he intended to divorce Wendy, but never took affirmative steps to complete the divorce. During this time, he told Wendy he merely "needed some space" and let her believe he would return at some point. He spent occasional weekends with Wendy, attended marriage counseling with her, and never informed her of his relationship with Ann.

Herb will attempt to show he is living "separate and apart" because he intended the separation to be permanent and was going to divorce Wendy and marry Ann.

Wendy will contend, however, that it was not separate and apart. She will cite Herb's failure to tell her about Ann, his occasional weekends with Wendy, his attendance at marriage counseling, and his act of living this way for 4 years without ever filing for divorce.

The court will probably hold that the spouses were not living separate and apart, and that the earnings of Herb during this time were community property.

Herb and Anne's Title and Husband and Wife - Presumption

Herb and Ann will argue that they took title to car as husband and wife, and that this should control.

Wendy will argue several reasons the car should be community property.

Management and Control - Husband may not make a gift without written consent

As discussed supra, the courts should hold that Herb and Wendy were not living separate and apart, and that his income was community property. While husband and wife generally have equal management and control neither may give property away without the written consent of the other.

Herb attempted to give community funds to Ann by paying for a car and naming her as a joint tenant. This will not be allowed and the car will be considered community property.

Disposition at Divorce.

The car is community and will be divi[d]ed between Herb and Wendy. Ann will get nothing.

C. $15,000 Bank Account

Ann had a $15,000 bank account in her name alone comprised of her earnings while living with Herb. If they were husband and wife, or Herb was a putative spouse, this is presumed community. However, since they are living in a meretricious relationship, the funds were in an account in Ann's name, and were not commingled, they are separate property.

2. What property may the Montana bank reach to satisfy the past-due balance of Wendy's promis[s]ory note?

Prior to marriage, Wendy borrowed $25,000 from Montana Bank and executed a promis[s]ory note for that amount in the bank's favor. At the time Wendy filed for divorce, Montana Bank was demanding payment of $8,000 as the past-due balance on Wendy's promis[s]ory note which has been reduced to a judgment. This is a separate debt.

Time Judgment Was Entered

If the judgment was entered before Wendy and Herb were living separate and apart, i.e., before she filed for divorce, the bank may reach Wendy's separate property or the community.

Herb's Separate Property

Generally, the separate property of one spouse may not be reached to satisfy the separate debt of the other.

Community

If the judgment was reached before legal separation, then community is liable on the debt. However, the bank must first attempt to recover the judgment from Wendy's separate property.

Answer B to Question 2

2)

California is a community property state. All property acquired during marriage is presumed to be community property (CP). All property acquired before marriage or after permanent separation, or by gift, bequest, or devise during marriage, is separate property (SP). All property acquired while parties were domiciled in a non-CP state, that would have been CP if the couple had been domiciled in CA, is quasi-community property (QCP). The source of the funds for a purchase can be traced in determining whether an asset is CP or SP.

At divorce, each CP and quasi-CP asset is split 50-50 between each spouse, and each keeps their own SP.

State of Marriages

This is a complicated situation involving two supposed marriages. Two issues that will determine rights in the property are when H & W's marriage ended, and whether Ann & H have [sic].

The Residence in Montana

Hank (H) & Wendy (W) purchased the Montana home with savings from salaries during their marriage. Salaries acquired during marriage are all considered community property, and thus the home was entirely acquired with CP. In addition, H & W took title as tenants in common, a joint form of title. Under CA law, taking title in a joint form, such as tenants in common, creates a presumption that property is CO [sic]. Since H & W were domiciled outside CA in a non-CP state at the time of the acquisition, the home would be considered quasi-CP because it would have been CP if they had been domiciled in CA.

There is no information indicating the source of payments for principal & improvements, but presumably that has been the earnings of the couple & thus CP. Thus under CA law, the home would be classified entirely as quasi-CP.

<u>Effect of Separation</u>

However, any earnings from either spouse after "permanent separation" are considered to be SP. Here, the issue is whether there was a permanent separation when H moved in with Ann in 1999, or if it occurred in 2003, when W filed for dissolution. If the couple permanently separated before 1999, then any of H's or W's earnings used for principal payments or improvements on the house might be considered to be a SP contribution to a CP asset. Under CA law, such contributions are entitled to reimbursement at divorce.

Permanent separation occurs when the spouses are living permanently apart and when one spouse intends to permanently end the marriage. Here, W will argue that permanent separation did not occur until 2003. Prior to that, although H moved in with Ann, he continued to spend occasional weekends with W, and thus did not permanently live apart from her. Also, the fact that he continued to spend weekends with her is evidence that he did not intend to end the marriage; he was keeping his options open. H, however, will argue that he intended to permanently separate when he moved in with Ann in 2003. He told Ann that he was divorcing his wife, bought a car with Ann, listed themselves as husband & wife, & took title as husband as [sic] wife. He also refused to see a counselor with W [sic]. Hence, he intended to move out permanently.

On balance, because H never filed for divorce & continued to visit W, his intent to end the marriage is not clear; it appears that he was keeping his options open. Hence, permanent separation did not occur until 2003.

In that case, all of the contributions to the house are CP, and the house is classified as quasi-CP to H & W. Ann has no rights to the house on any theory (see discussion below).

The Automobile

The Automobile was purchased with a loan obtained by H & Ann. Thus the source of the loan was one-half H's credit, & one-half Ann's. However, H paid off the loan entirely with his own earnings, however [sic]. Since H was still married to W at the time (see discussion above), H's earnings were CP, because all earnings are considered CP. Thus the car was paid for entirely with CP.

All property purchased during marriage by either spouse is presumed CP. W will argue that since H purchased the car with CP, it remains CP, and thus she is entitled to a 50% interest in it. H may respond, however, that by putting title in his & Ann's name, he considered the car to be a gift from CP to his SP & Ann.

W will respond, however, that, under CA law, a spouse cannot make a gift of community property outside the marriage without the written consent of the other spouse. Here, W certainly did not give her consent. A gift of personal property made without the other party's consent may be reclaimed at any time, with any statute of limitations. Here, since H made the gift to A without W's consent, W may reclaim her share of the community property even after 4 years. In addition, since 1985, no gift changing the character of property has been presumed unless the adversely affected spouse consents in writing. If H asserts that he changed the character of the CP by putting it in his & Ann's name, the transmutation will be unsuccessful because W did not consent in writing.

Here, W will prevail, and the car will be considered as H & W's CP. The issue is A's interest in the car.

Putative Spouse Theory

Although A & H were living together, California does not recognize common law marriage. Thus, any rights Ann may have must be asserted under either a putative spouse theory or contract theory.

A may assert that she is a putative spouse. A putative spouse is one who reasonably believed in good faith that she was married. If the court concluded that one was a putative spouse, all property acquired during the putative marriage is entitled quasi-marital property (QMP) & treated like CP at separation or divorce. Although there has not been a definite decision, if one spouse believed in good faith there was a marriage even the bad faith spouse may be able to treat the property like QMP.

Here, H clearly did not reasonably believe that he was married to A because he knew that he had not divorced W & continued to see her. It would not be reasonable for him to believe that he was married to A.

A, however, may argue that she believed in good faith that she & H were married because [t]hey lived together, she assumed H's last name, they bought a car together, and H introduced her to his friends as his wife. She was unaware of his continued relationship with W. Nonetheless, H had told A when they moved in together only that he "intended" to divorce W & that he had not concluded dissolution proceedings. However, putative spouse status also requires that the belief be reasonable. While any belief of A in the marriage may have been in good faith, a reasonable person would verify that the dissolution proceedings had been concluded. In addition, A & H did not take out a marriage licence or have a wedding ceremony, nor did H tell her that they had a valid common law marriage; he simply suggested they move in together. Consequently, A had a good faith but unreasonable belief in the marriage, and is not a putative spouse. Consequently, none of the property she & Hal acquired while they lived together can be considered quasi-marital property.

Contract Theory

A may be entitled to reimbursement from H on a fraud or breach of contract theory for a share of the car. She may argue that the loan application and title constitute a contract between them [and] that she would have a one-half interest in the car. Although the car appears to be a gift, and none of her money went into the car, she may be able to recover from H on a contract theory.

The $15,000 Bank Account

The $15,000 bank account is in Ann's name alone and consists entirely of her earnings while she was living with H. If they were considered to be putative spouses, then the account would be quasi-marital property, and H & A would each be [e]ntitled to a one-half

share. Since they were not putative spouses, the account is Ann's separate property, and neither H nor W have any rights to it.

Property to Satisfy the Note

W's note is a debt that she entered into before marriage. Debts entered into before marriage are CP. The creditor may attach all CP and the debtor spouse's SP. Quasi-CP is treated like CP for the purpose of satisfying debts.

Here, neither H nor W have any rights to Ann's $15,000 bank account. Thus it may not be attached by any debtor. The car is CP, and thus the debtor may repossess the car to satisfy the judgment. The house is quasi-CP, and thus may be also be entirely attached by the debtor.

However, because the house is in Montana, a California court cannot directly order judgement on the house. W, however is subject to the jurisdiction of the CA court, and the court can therefore order her to transfer title to the house if needed to satisfy the judgment. Thus the debtor can reach the house.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

In 1998, Henry and Wilma, residents of California, married. Henry had purchased shares of stock before marriage and kept these shares in his brokerage account. The shares in the account paid him an annual cash dividend of $3,000. Henry deposited this income in a savings account held in his name alone.

In 1999, Wilma was hired by Tech Co. Wilma was induced to work for Tech Co. by the representation that successful employees would receive bonuses of company stock options. Later that year, Wilma was given options on 1,000 shares of Tech Co. stock. These stock options are exercisable in 2006, as long as Wilma is still working for Tech Co.

In 2003, because of marital difficulties, Wilma moved out of the home she had shared with Henry. Nevertheless, the couple continued to attend marriage counseling sessions that they had been attending for several months. Later that year, Henry was injured in an automobile accident. Afterwards, Henry and Wilma discontinued marriage counseling and filed for dissolution of marriage.

In 2004, Henry settled his personal injury claim from the automobile accident for $20,000. The settlement included reimbursement for $5,000 of medical expenses that had been paid with community funds.

Henry had a child by a prior marriage and, over the course of his marriage to Wilma, had paid out of community funds a total of $18,000 as child support.

1. When making the final property division in Henry and Wilma's dissolution proceeding, how should the court characterize the following items:
    a. Henry's savings account? Discuss.
    b. Henry's personal injury settlement? Discuss.
    c. Wilma's stock options? Discuss.

2. Should the court require Henry to reimburse the community for his child support payments and, if so, in what amount? Discuss.

Answer according to California law.

Answer A to Question 1

1)

Califor[n]ia is a community property state. All property acquired during marriage is presumptively community property (CP). All property acquired before marriage or after permanent physical separation, or during marriage by gift, will, or inheritance, is separate property (SP). Upon divorce, marital CP assets are distributed 50-50 unless certain exceptions apply.

In determining the time for final property division, the probate court will look at when there was a permanent physical separation and an intent not to resume marital relations. This is when the economic community is considered to be at an end.

Here, the economic community did not end when W first moved out of the home due to marital difficulties, early in 2003. The couple continued to attend marriage counseling sessions, suggesting that they were still hopeful of a possible reconciliation. At the point, they did not have the requisite intent to not resume marital relations. The economic community ended later in 2003 when H & W discontinued marriage counseling and filed for divorce. Only at that time was it clear that there was a permanent physical separation and an intent not to resume marital relations.

1.a. Henry's savings account

Property acquired before marriage is that spouse's SP. All income, rents, and profits from SP earned during marriage is also that spouse's SP. Upon dissolution of marriage, the spouse who owns the SP will take it in its entirety. Although the character of property might change, what was initially SP will remain SP unless there has been a transmutation. No transmutation occurred here.

Henry purchased shares of stock before marriage and kept these shares in a brokerage account. Because the shares were purchased before marriage, they are his SP. The income from these shares, the annual cash divided of $3,000, is also Henry's SP. Furthermore, the income from the shares was deposited into a savings account held in his name alone. This suggests that the funds were not commingled with CP. In addition, it is assumed that W had no rights to withdrawal on the account.

Because the income deposited into H's savings account had as its source the stock he had purchased before marriage, all income in the savings account--assuming it was solely for such income and did not contain any commingled CP funds - - is H's upon divorce. W has no right to the income in the savings account.

b. Henry's personal injury settlement

A personal injury settlement that results from an injury sustained during marriage is presumptively CP. Legal relevance is placed upon when the injury occurred, and not on when settlement was awarded. Upon divorce, however, the injury settlement belongs to the injured spouse: it is treated as the injured spouse's SP. The community is, however, entitled to reimbursement for medical expenses paid with CP when SP was available.

Here, H was injured in an automobile accident that occur[r]ed in 2003, while he was still married to W. As stated above, at the time of the accident, H & W were no longer living together but were still attending marriage counseling sessions. Because there is no indication that H & W intended not to resume marital relations at this point, the economic community was not yet at an end. There was, at this point, no permanent physical separation. Because of these facts, the injury occurred at a time when H & W were still married and the settlement is thus CP during marriage.

On the given facts, the settlement was paid to H in 2004, after H & W had discontinued counseling and had filed for divorce. Thus, the economic community was at an end. Nevertheless, what is legally relevant is that the injury arose during marriage, and not the time the settlement was paid.

At the outset, upon divorce, the $20,000 will be awarded to H as the injured spouse. It is treated as his SP. However, because $5,000 of medical expenses were paid with CP, the community is entitled to reimbursement. Because H received an annual cash dividend of $3,000, it can be assumed that he had $5,000 in his separate savings account at the time the medical expenses were paid. Thus, because CP funds were used to pay his medical expenses at a time when H had SP available, the community is entitled to reimbursement.

The net result is that H will receive $15,000 of the settlement. The community receives a reimbursement of $5,000 which will be divided 50-50 between H & W.

c. Wilma's stock options

Stock options earned during marriage are CP to the extent that CP contributed to them. The court will apply the time rule to determine the pro rata share of contribution of CP and SP. Applying the time rule, a fraction is given whereby the numerator is the number of years that have elapsed between the granting of the options and the date the economic community of the marriage ended. The denominator is the number of years that have elapsed between the granting of the options and the year in which they are exercisable.

Here, the 1,000 shares of Tech Co. stock were awarded to W in 1999. The economic community of H & W ended in 2003. Thus, four (4) years of CP labor creates the numerator. The options are exercisable in 2006. Thus, the denominator will be 7.

The remaining 3 years, from 2004 to 2006, will be treated as W's SP.

Because 4 years out of 7 are attributable to CP, upon dissolution of marriage the community will be entitled to 4/7 of value of the stock options, while 3/4 will be W's SP.

2. Henry's reimbursing the community for his child support payments

Child support payments from a prior marriage are considered a spouse's premarital debt, regardless of whether the payments started before marriage or began during the marriage. Although CP and the debtor spouse's SP are both liable for any premarital debts of the debtor spouse, if CP funds are used during the marriage to make child support payments arising out of a prior marriage, and it is determined that the debtor spouse had available SP funds at the time, then the community may be entitled to a reimbursement upon divorce.

Here, H's child support payments arose out of a prior marriage. H had a child by a prior marriage – not the marriage to W. During the course of his marriage to W, H had paid out of CP funds a total of $18,000 as child support. However, on the given facts, H had SP available to make those payments. He received $3,000 annually in cash dividends from his stocks. Between 1998 and 2004, that amounted to $15,000 ($3,000 multiplied by 5 years). Moreover, he received $20,000 as settlement for the personal injury claim which, although CP at the time received, is treated as his SP upon divorce.

Thus, because CP funds were used to make the child support payments, the community is entitled to reimbursement. H should be required to reimburse the community at least $15,000 which is the amount he had accrued in his personal savings account during the course of the marriage. This amount can be offset from his personal injury settlement claim which will be treated as SP upon divorce. The amount is also $15,000, after the $5,000 has been deducted to reimburse the community. Furthermore, because half of the $5,000 will go to H, that makes an additional $2,500 available to reimburse the community for the child support payments.

In summary, on the given facts, H should be required to reimburse the community for $17,500 for his child support payments.

Answer B to Question 1

1)

California is a community property state. As such, all things acquired between the date of marriage and date of separation are community property and are subject to a 50/50 division upon divorce. Separate property consists of assets acquired before the marriage or after the separation, as well as gifts, inheritances, and devises, and all the profits or rents thereon. Henry and Wilma were married in California in 1998, thus their divorce is subject to the community property system. In analyzing each of their assets it is important to keep in mind the source of the property and whether any subsequent changes in the character of the asset may have transmuted the property from community to separate or separate to community.

Henry's Savings Account

Henry purchased shares of stock before his marriage to Wilma and kept these shares in a brokerage account. These shares were thus Henry's separate property b/c he acquired them before marriage. The shares in the account paid him an annual cash dividend of $3,000, which he deposited into a savings account in his name alone. The cash dividends are also Henry's separate property b/c all rents and profits garnered from separate property are separate property as well. This is true even though there is a presumption that all things acquired between the date of marriage and the date of separation are community property. The rule that rents and profits upon separate property is separate in nature trumps that presumption.

An asset which begins as community property may be transmuted into community property if a spouse manifests an intent to change the asset's character. Here[,] however, Henry has kept both the stock and the cash dividends in an account in his name alone. Therefore, he has not manifested an intent to transmute these stocks from separate to community property. Furthermore, after 1985 a transmutation must be in writing, signed by the spouse losing their interest, and state expressly that they are transmuting the property. Since none of that happened here, everything in Henry's savings account is his separate property.

Personal Injury Settlement

Personal injury settlements awarded during the marriage are community property. However, upon divorce the personal injury settlement will be awarded solely to the injured spouse unless equity demands otherwise. Here, Henry's right to his personal injury settlement arose during the marriage b/c Henry and Wilma were not legally separated at the time he was injured. To be legally separated, the couple must be living physically apart and manifest an intent not to resume the marital relationship.

Here, Henry and Wilma were living apart as of 2003. However, the couple continued to attend marital counseling sessions. Because the couple was still in marital counseling, they obviously did not have an intent not to resume the marital relationship. Rather, counseling suggests that they were trying to work things out. During this time period, Henry was injured. Henry may argue that he did not receive the actual settlement until 2004, at which point he and Wilma had filed for dissolution. However, since his injury and therefore his right to a claim arose during the marriage, the personal injury award will be considered to have arisen during the marriage.

Luckily for Henry, upon dissolution the personal injury award will be awarded to him entirely despite its initial community property characterization, unless equity demands otherwise. Wilma will argue that equity demands otherwise here b/c the community paid for $5,000 of Henry's medical expenses. The community is obligated to pay for all of a spouse's "necessaries." This includes food, shelter, and medical expenses. Because the community had no choice but to pay for Henry's medical bills, a court would probably find that $5,000 of the settlement should be awarded as community property. Under such an analysis, Wilma is entitled to $2,500 (one half of $5,000). Henry is entitled to $2,500 and the remaining $15,000 of the $20,000 as his separate property.

Wilma's Stock Options

If a stock option is awarded during the marriage, then the community has an interest in it. This is b/c stock options are considered incentive compensation, meaning that they reward work currently going on. Therefore, if a stock option is awarded during marriage it is based at least in part upon past and present work in the hope that the employee will keep up the good job. Where the spouse is awarded the stock option during the marriage but exercisability occurs after the date of separation, a special formula must be used to extract the community's interest.

Here, Wilma was awarded the stock option in 1999 in recognition of her success as a new employee for Tech Co. She was married to Henry at that time and thus the community has an interest. Henry and Wilma separated in 2003 and the date of exercisability is 2006 (so long as Wilma is still working for the company.) The formula for extracting the community's interest mandates that the years between the date of the award and the date of separation be used as a numerator while the total number of years between the date of the award and the date of exercisability be used as a denominator. That comes to 4/7. Therefore, the community will be entitled to a 4/7 interest in the 1,000 stocks should they become exercisable.

Another issue is whether Henry can compel Wilma to exercise her stock options. In order to exercise them, Wilma must still be working for Tech Co. in 2006. At some point before 2006, Wilma may decide she no longer wishes to work for Tech Co. and therefore lose her interest. A court will not compel Wilma to continue working for Tech Co. The community merely has an expectancy in the stock options should she decide to eventually exercise them.

Whether the court should require Henry to reimburse the community for his child support payments

Where one spouse owes child support or alimony from a prior marriage, separate property funds should be used first to pay these costs. However, if separate property funds are not available, then the community is responsible for making these payments. Here, Henry had a child by a prior marriage and over the course of his marriage to Wilma he paid out $18,000 in child support from community funds. That comes to $3,600 per year. Since Henry had $3,000 cash dividends coming to him each year as separate property, those funds should have gone to the child support payments first. Only $600 per year of community funds should have been used (for a total of $3,000 during the marriage). Therefore, the community is entitled to $15,000 reimbursement for these child support payments. This means that Henry is entitled to $7,000 and Wilma is entitled to $7,000.

Henry may counter that the community is not entitled to reimbursement b/c he had co-equal powers to spend and incur debt with Wilma over the community property. This is true, however equity still demands that the community receive reimbursement since Henry should have depleted his separate property funds first.

Wilma could also make the argument that one spouse may not unilaterally make a gift of community property and that she may void such gifts while Henry is still alive. This is true. However, child support is more in the nature of an obligation than a gift. Therefore, this argument will be less successful.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

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Question 6

Husband and Wife married in 1997 in California. Neither of them brought any significant assets to the marriage, and they were both employed. Husband and Wife agreed that Husband should go to law school after they had saved up some money. Husband put his earnings in a savings account in his name alone. Wife deposited her earnings into a joint checking account in both of their names, which was used for their living expenses. Husband had a child support obligation from a previous marriage. Every month, Husband paid his child support by check from the joint checking account.

Husband began law school in 1998. Wife continued to work to support the couple. Husband took out a student loan to pay his tuition. Husband graduated in 2001 and obtained his law degree. He passed the bar exam and got a position with a large law firm.

In 2004 Husband became a partner in the firm. Husband's partnership earnings were substantial. He paid off his student loan using these earnings. Although the actual value of Husband's share of the firm's goodwill was substantially greater, the partnership agreement provided that its value was $3,000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage.

In 2006, Husband and Wife filed for dissolution of marriage.

1. Is the community entitled to reimbursement for
(a) The child support? Discuss.
(b) The payments on the student loan? Discuss.

2. Does the community have an interest in
(c) Husband's law degree? Discuss.
(d) The goodwill in Husband's law firm and, if so, is the community bound by the firm's valuation? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. All amounts earned through the community labor of married California residents are presumptively community property, which means that they are owned together, equally, by the husband and wife (or by the domestic partners). All items earned through gift, bequest or devise to an individual spouse remain that spouse's separate property. Community property continues to accrue until the end of the economic community, which occurs with physical separation and an intent not to resume the marriage. Certain presumptions arise from form of title, and CP may be transferred to separate property and vice versa.

Community's Reimbursement Claims

Child Support

The community remains liable for all credit obligations of each individual spouse, whether acquired before or during the marriage. Thus, Husband's ("H") child support obligations, although they arose before marriage, may still be satisfied from the community property jointly owned by the couple. However, by statute, the community is entitled to reimbursement for child support payments that arise from a prior marriage of one of the spouses, if that spouse's separate property was available at the time to satisfy the obligation. Here, H and W married when neither of them had any significant assets, although they were both employed. If H had no available separate property at the time he made the child support payments, those obligations were legitimately paid out of community funds, and the community has no right to reimbursement. The payments were made from H and W's joint checking account, which is funded entirely with W's earnings. Since W's earnings are CP, the payments on the child support were made with CP (by H writing checks drawing on the joint checking account).

Savings account in H's name alone

The fact that H opened a savings account in his name alone does not defeat the presumption that his earnings remain community property. Title in one spouse's name, if the name on the bank account can be considered title, does not prohibit tracing to the source of the funds. It may, in certain circumstances, be evidence of a gift from the community to that spouse. However, when the spouse takes title in his or her own name, no inference of a gift will arise. Also, it may serve as a bar to the other spouse's premarital creditors, if the non-debtor spouse's CP earnings are placed in the separate account and the debtor spouse has no access to it. However, here it is H who has the obligation. Thus, because the separate savings account was funded only with H's earnings, it will be deemed to be community property, since the earnings of one spouse through labor are community property. And, because any profit from community property remains community property, whatever interest H has earned will remain CP. Of course, the facts do indicate that H and W were both employed when the entered the marriage. Thus, it is possible that some of the earnings H used to fill the savings account were his premarital earnings. H might attempt to trace some of the value of the savings

account to those funds. However, where assets have been commingled, they are presumptively community property and W will have a hard time asserting the amount of separate property in H's account. If she were able to trace, the community would be reimbursed to the extent that those separate property funds (if any) were available to pay for the child support.

Transmutation and the savings account

In order for the separate account to constitute a transmutation of CP to H's separate property, the agreement would need to be in writing, with W (as the adversely affected) spouse expressly conveying the interest to H and signing the writing. Here, H's name on the bank account does not constitute a transmutation.

Thus, community property was properly used to pay for the child support payments, even if they were a premarital obligation of H. Because H had no apparent separate property available when the payments were made, the community is not entitled to reimbursement.

Payments on student loan

A loan constitutes community property to the extent that the lender relied on community property in making it. Here, H decided to go to law school and take out loans while he was married to W. The lender presumably relied on the future earnings of H and W's current income, all community property at the time. Thus, the "intent of the lender" makes this a community loan. Moreover, H used his earnings as a lawyer to pay off this loan, thus it was paid for entirely with community property. By statute, the community is entitled to reimbursement, with interest, when community funds are used to pay for the education of one spouse which greatly enhances that spouse's earning capacity. Here, H's law degree has resulted in him becoming a lawyer at a large law firm, with a presumably generous salary. Thus, the degree has greatly enhanced H's earning capacity. The community is therefore entitled to reimbursement for the amount of the student loan used for the education itself (not for the amount used for ordinary living expenses), with interest. However, if H can establish an equitable defense, reimbursement will not apply.

Equitable defenses to community reimbursement

Where the community has already substantially benefited from the increased earnings due to one spouse's education, there will be no reimbursement to the community at divorce. Substantial benefit is presumed where the community has benefited from the increased earnings for 10 years. Here, H began working in 2001, as an associate presumably, and became a partner in 2004. The couple is now seeking a divorce in 2006. Thus, at most, it has benefited from H's earnings for 5 years, which does not constitute a substantial benefit.

Also, where community funds have been used to pay for an education for the other spouse as well, the community is not entitled to reimbursement. Here, W worked the entire time H was in law school, and did not benefit from an education. Thus, this

defense will not apply.

Finally, where the degree has lessened the obligations of one spouse to pay for support of the educated spouse post-divorce, reimbursement may not apply. Here, it is unclear what W's earning capacity is. If she is extremely well paid (a CEO perhaps) then she might still be under an obligation to pay spousal support to H post-divorce, and this obligation might be lessened by H's ability to earn a lawyer's salary. However, there are no facts indicating what W makes, so this defense presumably does not apply.

Community's Interest in H's Law Degree and the Goodwill of H's Law Firm

Law degree

By statute, professional degrees earned by one spouse during the marriage are not community property, although as noted above the community may be entitled to reimbursement for the cost of acquiring that education. That one spouse worked to pay for the education is irrelevant to the ownership of the degree. The reimbursement interest does not amount to a community interest in the degree itself – meaning an interest in the present discounted value of the future earnings attributable to the degree. Thus, the law degree remains H's separate property going forward, and the community is entitled only to reimbursement with interest for the cost of acquiring the degree.

Goodwill

Goodwill is the value of a business over the expected normal rate of return on the capital invested in that business. In essence, it constitutes the intangible value of the business' reputation above and beyond the raw liquidation value of the business. When the goodwill is generated by community labor, it is a community property asset. Here, H's share of the goodwill was earned entirely while he was married to W. Thus, the goodwill itself is a community property asset.

Valuation and the Partnership Agreement

The valuation of goodwill occurs by one of two methods. First, it can be valued by capitalizing the future stream of income to a present fixed sum (according to varying calculations). Second, it can be valued by looking to the "market price" of the interest. The latter is established by bona fide offers to purchase the business or concern. Here, the partnership agreement of H's firm specifies that the value of H's share in the firm's goodwill is valued at $3,000, but only "in the event of a dissolution of a partner's marriage." However, the community is not bound by this valuation, because it does not constitute a valid market valuation of H's goodwill interest. Buy/sell options in a partnership agreement created by the relevant spouse's firm will not control the valuation of that spouse's interest at divorce. This is because of the obvious risk of abuse inherent in such a valuation. The partner-spouse could agree with his or her other partners to create a very low valuation only for purposes of divorce, in order to deprive the non-partner spouse of his or her rightful share of the partner spouse's interest. Here, that seems to be exactly what has occurred, especially given that the agreement expressly provides that it only applies when one of the partners gets divorced. Thus, the $3,000

valuation will not control, and the court will apply the capitalization (or some other) method.

Valuation of a SP business

The Van Camp and Pereira doctrines would not apply here, since H did not enter into the marriage with a SP business interest. Thus, to the extent the law firm is considered a business, and H considered an owner, H's interest will be entirely community property, as noted above.

Answer B to Question 6

Community Property

California is a community property state. All property acquired during marriage is presumed to be community property (CP). All property acquired before marriage or after legal separation is considered separate property (SP). Further, all property acquired by either spouse during marriage by gift, bequest or devise is that spouse's separate property. Upon dissolution of marriage, all community property assets are subject to equal division in kind unless statute or policy requires otherwise.

(1)(a) Is the community entitled to reimbursement for the child support payments?

Child Support

Child support obligations from a previous marriage are considered the separate property obligation of the acquiring spouse. However, during marriage, community funds may be reached to satisfy any payments. Upon divorce, the community is entitled to reimbursement for any child support payments made with community property funds when separate property funds were available.

Here, H had a child support obligation from a previous marriage. Every month he paid his child support by check from the joint checking account held in both H and W's names. The checking account contained W's earnings during marriage; thus the checking account contained community property, because all earnings during marriage are considered community property. The issue is whether H had separate property funds available at the time the payments were made.

Bank Account titled in H's name alone – transmutation?

The fact that a bank account is titled in one spouse's name alone does not automatically rebut the community property presumption. Any change to the character of a community property asset after 1985 is required to be in a signed writing, specifically indicating that the nature of the asset is being transmuted.

Here, H opened a bank account in his own name in 1997; however, he deposits into that account his earnings. All earnings during marriage are presumed to be CP. There is no indication that there was a written transmutation of these funds from CP to H's SP; thus the CP presumption cannot be rebutted and all of H's earnings in his savings account will be considered CP.

Also, neither H nor W brought any significant assets to the marriage. Thus, it does not appear that H had any SP assets available at the time the CP funds were used to pay the child support payments. As such, the community will not be reimbursed for any payments made.

(1)(b) Is the community entitled to reimbursement for the payments on the student loan?

Debts

Generally, all debts acquired during marriage are considered community property. However, if it was the intent of the lender to only look to satisfaction of the debt by one spouse's SP, then the debt will be a SP debt.

Here, H took out educational loans to obtain a law degree. Any educational debt acquired during marriage is CP; however, upon divorce, it will be assigned to the acquiring spouse. Thus, it is likely that the lender only looked to H's SP to satisfy the debt knowing that if H and W were divorced, only H would be liable on the debt. However, there are no specific facts to support this argument.

Education

Any education acquired during marriage is the SP of the acquiring spouse. However, upon dissolution of marriage, the community is entitled to reimbursement for any payments made to finance the education if the education substantially increased the spouses' earning capacity unless (1) the community has already substantially benefited from the education; (2) the other spouse also received a community funded education; or (3) obtaining the education offset the need for spousal support.

Here, H obtained a law degree. H began law school in 1998 and W continued to work to support the couple. H took out a student loan to pay his tuition. H graduated in 2001, passed the bar and got a job with a big law firm. Being a lawyer substantially enhanced his earning capacity because in 2004, he became a partner and his earnings were substantial. H paid off his student loan using these earnings. Because H used his earnings during marriage to pay off the loan, the loan was paid off with community funds. Thus, the community financed H's education. As such, the community is entitled to reimbursement unless an exception applies.

Has the community already benefited?

If the spouse has had the education for more than 10 years, there is a presumption that the community has already benefited from the education and no reimbursement is required. Here, H got his law degree in 2001 and H and W filed for dissolution in 2006. Thus, H has only had the job for 5 years at the time of dissolution and the presumption will not apply.

On the facts, no other exception applies. W did not receive a community funded education, and there is no indication that without the education, H would have needed substantial child support. Thus, the community is entitled to reimbursement of the community funds spent to pay off H's student loan.

(2)(c) Does the community have an interest in H's law degree?

Education

Any education acquired during marriage is the SP of the acquiring spouse. As discussed above, the community is only entitled to reimbursement for any community funds spent to finance the education if the education substantially enhanced the spouses' earning capacity. Further, educational debt remaining at the time of dissolution is assigned to the acquiring spouse.

Here, there is no debt remaining on H's education. The community will take no interest in H's education, but as explained above, will be reimbursed for the funds expended to pay off H's loans.

(2)(d) Does the community have an interest in the goodwill of H's law firm and, if so, is the community bound by the firm's valuation?

Goodwill

All assets acquired during marriage by the labor and efforts of a spouse are community property, and goodwill is no exception. The goodwill of a professional practice is a community asset. Goodwill is the value of the continued patronage to the practice. It is the value of the business that is not derived from personal skill or the value of the assets of the business. It can be valued by expert testimony or by capitalizing the excess earnings of the practice.

Here, H will argue that no valuation is necessary because the partnership provides that its value was $3000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage. However, this argument is likely to fail. In a similar case, the California Supreme Court held that any valuation provided for in a partnership agreement may be considered in valuing the goodwill of a professional practice, however, it is not conclusive as to the value. Further, the court indicated an unwillingness to let partners contract with each other in order to defeat the community property system.

Thus, the court may consider the agreement as evidence of value, but ultimately will allow W to put on evidence of an expert to explain what the goodwill of the business is really valued at. This will be considered CP and subject to equal division in kind.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Harvey and Fiona, both residents of State X, married in 1995. Harvey abandoned Fiona after two months. Harvey then met Wendy, who was also a State X resident. He told her that he was single, and they married in State X in 1997. They orally agreed that they would live on Harvey's salary and that Wendy's salary would be saved for emergencies. They opened a checking account in both their names, into which Harvey's salary checks were deposited. Wendy opened a savings account in her name alone, into which she deposited her salary.

Harvey and Wendy moved to California in 1998. Other than closing out their State X checking account and opening a new checking account in both their names in a California bank, they maintained their original financial arrangement. In February 1999, Harvey inherited $25,000 and deposited the money into a California savings account in his name alone.

In 2004, Wendy was struck and injured by an automobile driven by Dan. Harvey and Wendy had no medical insurance. Wendy's medical bills totaled $15,000, which Harvey paid from the savings account containing his inheritance. In 2005, Wendy settled with Dan's insurance carrier for $50,000, which she deposited into the savings account that she still maintained in State X.

Very recently, Harvey learned that Fiona had died in 2006. He then told Wendy that he and Fiona had never been divorced. Wendy immediately left Harvey and moved back to State X. The savings account in State X currently contains $100,000. Under the laws of both State X and California, the marriage of Harvey and Wendy was and remained void.

1. What are Harvey's and Wendy's respective rights in:
    a) The State X savings account? Discuss.
    b) The California checking account? Discuss.
    c) The California savings account? Discuss.

2. Is Harvey entitled to reimbursement for the $15,000 that he paid for Wendy's medical expenses? Discuss.

Answer according to California law.

Answer A to Question 5

California is a community property state. Property acquired during the marriage is community property (CP), while property acquired before marriage, after the end of the marital economic community or by gift or inheritance is separate property (SP). When couples who are not domiciled in California acquire property in a non-community property state and then later relocate to California, such property is treated as quasi-community property (QCP) if it would have been CP had the couple been domiciled in California at the time of acquisition.

In order to determine the character of any asset, the court will look at (i) the source of the asset, (ii) any actions of the parties that may have changed the nature of the asset, and (iii) any presumptions affecting the asset.

With these general principles in mind, I now turn to the specific items of property.

1. Harvey's and Wendy's Respective Rights

Prior to determining Harvey's (H) and Wendy's (W) respective rights in the various items, it is important to determine the nature of their marital relationship, as well as the effect of their oral premarital agreement. Putative spouses are entitled to "quasi-marital" property (QMP) rights, while unmarried cohabitants' property rights are governed by contract. QMP rights are treated the same as CP.

Putative Spouse

In order to be considered a putative spouse, the spouse must have a good faith reasonable belief that he or she is lawfully married. While H knew that he had never divorced Fiona prior to marrying W, W had a good faith reasonable belief that she was lawfully married to H because H told her that he was single, and it appears that they married in 1997. Thus, W qualifies as a putative spouse. The putative marriage, and QMP rights accrue, until such time as the putative spouse learns that he or she is not lawfully married. Here, the facts indicate that H only told W in 2006 that he and Fiona had never divorced, at which time she learned that she was not lawfully married. Thus, the putative marriage existed from 1997 until 2006, at which point it ended when W learned that she was not lawfully married, and QMP rights ceased to accrue.

Oral Arrangement between H and W

While generally parties may orally agree how to handle their affairs, premarital or marital agreements and agreements changing the character of marital property rights must be in writing. Thus, although H and W orally agreed that they would live on H's salary and save W's for emergencies, this "oral transmutation" of their QMP rights is invalid. Further, if their oral agreement was akin to a prenuptial

arrangement, it would only be valid if (i) it was in writing, (ii) each had disclosed to the other the full nature of his or her property, and (iii) [each] was represented by independent counsel. None of these elements appear to be present. W may try to argue that she should still get the benefit of the oral arrangement, however, because her savings account has $100,000, and she was the putative spouse and that H will benefit under QMP rights; however, the court can find that even if W's State X savings account was to be "saved for emergencies", this still indicates an intent to use it for the benefit of the putative marital economic community (and not keep it as W's SP). Thus, the court should not give effect to the oral agreement between H and W regarding the treatment of their QMP. All of the QMP should be treated as CP (for property acquired while domiciled in California) and QCP for property acquired while domiciled in State X.

a. The State X Savings Account

The source of the $100,000 State X savings account is W's earnings and [a] $50,000 settlement with Dan's insurance carrier (resulting from a 2004 injury W suffered when she was struck and injured by an automobile driven by Dan). Earnings during marriage are CP, which would be considered QMP in the present case. Further, the $50,000 settlement would also be considered CP, or QMP in the present case, because the cause of action arose during the putative marriage and H was not the tortfeasor. Thus, the entire State X savings account is QMP.

The court will then look to the actions of the parties to determine if they have changed the character of the asset. W may then try to argue that because the bank account is in her name alone that it is her SP. However, taking title in one spouse's name alone does not defeat the QMP interest. Nothing indicates that H intended the savings account to be W's SP, only that they intended it to be available for "emergencies." Plus, as discussed above, the court will not enforce the oral agreement regarding the treatment of the QMP. Thus, the State X savings account is QMP, and should be treated as QCP (for earnings deposited while not domiciled in California) and CP (for earnings and tort settlement deposited while domiciled in California).

Upon the end of the putative marriage (similar to divorce), QCP and CP are treated the same and each spouse generally has an equal undivided ½ interest in the QCP/CP. However, an exception to this general rule exists for tort settlements and judgments, which the court will award solely to the injured spouse unless the interests of justice require otherwise. Here, nothing indicates that it would be unfair to let W keep the $50,000 tort settlement, subject to reimbursing H for the $15,000 expended (see below). Thus, of the $100,000 in the State X savings account, W will take $50,000 (as the injured spouse taking the tort settlement), subject to reimbursement of $15,000 to H, and will take $25,000 as her QCP/CP interest and H will take the $25,000 as his QCP/CP interest.

b. The California Checking Account

The source of the California checking account is H's salary checks (and presumably the funds from their State X checking account, which were also H's salary checks). As noted above, earnings are CP and thus the source of the California checking account is CP/QCP and would qualify as QMP.

The court will then look to see if the parties have taken any actions to change the character of the assets. Here, H and W have done nothing to defeat the putative marital economic community interest in the property. As discussed above, the oral agreement will be given no effect. Moreover, even though the oral agreement of the parties won't be given effect, the oral agreement is evidence of an intent that H and W intended H's earnings to be used to benefit the putative marital economic community. Further, H and W took title to the checking account in both their names. Thus, the California checking account is QMP.

As noted above, as QMP will be treated like CP upon end of the putative marriage. Thus, each of H and W has an undivided ½ interest in the California checking account.

c. The California Savings Account

The source of the California savings account is H's $25,000 inheritance. Inheritance is SP. Thus, the California savings account is H's SP. Because the parties have taken no actions that would change the nature of H's SP to CP (or QMP in this case), the California savings account remains his SP. This is further evidenced by the fact that H took title to the account in his name alone. Upon the end of H's and W's putative marriage, H takes the remaining funds in the California savings account as his SP and W has no rights in the California savings account.

2. Reimbursement to Harvey of $15,000 for Wendy's Medical Expenses

When a spouse (or putative spouse) expends SP on the medical expenses of the other spouse, he or she is entitled to reimbursement to the extent that the community had sufficient funds available or that the debtor spouse had sufficient SP available at such time. Here, it appears that H expended $15,000 of his SP, while the putative marriage may have had sufficient QMP funds to handle the "emergency" medical expenses in the State X savings account (which now has $100,000 [only $50,000 of which is the insurance settlement]), or even in the California checking account (QMP), for which we have no information. To the extent that there was sufficient QMP available or that W had sufficient SP available at the time H paid the $15,000 of medical expenses out of his SP, H is entitled to reimbursement.

Answer B to Question 5

General community property rules

California is a community property state. Under California law, all property acquired during marriage is presumed to be community property (CP). All property acquired before marriage, after marriage, or during marriage through inheritance, bequest, or devise is presumed separate property (SP). Three factors determine the characterization of property as CP or SP: the source of the asset; what actions the parties took that may have changed the asset's character; and what special presumptions apply, if any, that might change the asset's character.

Quasi-community property

Under California law, quasi-community property (QCP) is any property acquired during marriage that would have been CP had the acquiring spouse lived in California at the time of acquisition. The QCP designation generally only becomes relevant at divorce or death. At divorce, QCP is treated like CP; at death, the surviving spouse has a ½ interest in the deceased acquiring spouse's QCP, but a nonacquiring spouse who predeceases an acquiring spouse has no rights to QCP.

Here, because H and W acquired property while married but living outside California, any such property that would otherwise be designated as CP will be designated as QCP.

W's status as putative spouse

California does not recognize common-law marriage, but recognizes putative spouses. For a party to claim putative spouse status, the aggrieved party must have been acting under the good faith belief that she was married during the period claimed. As soon as the party becomes aware that the marriage is invalid, or upon dissolution of the relationship, her rights as a putative spouse terminate. California treats all property acquired during putative marriage as quasi-marital property (QMP), which is treated the same as CP for purposes of disposition at death or divorce.

Here, W was under the mistaken good-faith belief that she and H were validly married. H told her he was single, and they had some kind of marriage that led W to believe they were married. Thus, between 1997 and "very recently," W will have putative spouse rights from their putative marriage through the time she found out that H and Fiona had never been divorced. Thus, all property acquired by W and H during this period that would otherwise be QCP or CP under California law will be designated as QMP.

It should be noted that while some states bar a non-innocent putative spouse from any recovery of QMP, California law permits both spouses to recover their respective shares of QMP notwithstanding fraud or bad faith of one of the parties. Thus, if QMP should be treated as CP, H will recover his share accordingly.

1. Harvey and Wendy's rights

a. State X savings account

Source: W's QMP earnings

W opened a savings account in State X during her putative marriage to H. She deposited her salary earned during her putative marriage into this account. Because all earnings acquired during marriage are presumptively community property if the couple lives in California, this property would be QCP/QMP and treated as CP for purposes of divorce.

Form of title

W would argue that because she opened the savings account in her name alone, the form of title should make the deposits her SP, rather than community earnings. If W could prove that H knew that she took title in her name alone and consented to it, such a showing could strengthen a presumption that H intended to make a gift to W of community earnings. However, H would successfully rebut any potential gift presumption through evidence of their oral agreement that the earnings were to be used "for emergencies"; i.e., this was intended to be a community nest egg in the event of an emergency.

Oral transmutation

A transmutation is an agreement by a married couple to change the form of property from SP to CP or vice versa. Any oral agreements by a married couple before 1985 are admissible to prove transmutation; however, after 1985 a writing is required. Here, because the oral agreement is one that supports an argument for CP, W would not be able to use this evidence to strengthen her SP assertion. Additionally, because the property is presumptively CP under California law, H would not need to introduce this oral agreement as evidence of transmutation.

Married woman's special presumption

The married woman's special presumption states that any property taken in a married woman's name alone before 1975 is presumed to be her SP. However, here, no married woman's special presumption applies, because the property was taken in W's name after 1975. Additionally, the presumption does not apply to bank accounts.

Personal injury award

As a general rule a personal injury settlement for a cause of action that arose during the marriage is considered CP unless the other spouse was the tortfeasor.

However, upon divorce, the proceeds are awarded to the injured spouse unless the interests of justice require otherwise.

Here, W was injured by Dan, a non-spouse, and ultimately received a $50,000 settlement, which she deposited into the State X savings account in 2005. H would argue that the settlement was QMP, and thus should be split equally between H and W. However, as noted, at divorce, the $50,000 will be awarded to W unless the interests of justice require otherwise. Here, no facts indicate that the interests of justice require otherwise, so W should be entitled to the $50,000.

Disposition

Thus, W should be entitled to $50,000 of the State X savings account unless the interests of justice require otherwise. W and H each have a ½ QMP/CP interest in the remaining $50,000, so they should get an additional $25,000 each.

b. The California checking account

State X earnings

H's earnings in State X occurred during his putative marriage to W; thus, these earnings would be considered QCP under California law, characterized as QMP, and treated as CP upon dissolution of his relationship with W.

California earnings

H's California earnings also occurred during his putative marriage to W; thus, these earnings would be considered CP under California law, characterized as QMP, and treated as CP upon dissolution.

Form of title

Here, there is no form of title to rebut the presumption that all marital earnings are CP. The bank account was in joint and equal form, and as such, strengthens the presumption that his was a community asset.

Presumptions

No special presumptions apply.

Disposition

Because all of the contents of the California checking account were either QCP or QMP under California law, they will be treated as CP upon dissolution to the extent the money was earned during H and W's putative marriage. Thus, H and W are entitled to a ½ share each of the balance of the account as of the date of W's departure/the dissolution of the putative marriage.

c. The California savings account

H's inheritance

H inherited $25,000, which he deposited in the California savings account. Property acquired during marriage through inheritance is considered the inheriting spouse's SP; thus, the $25,000 is considered H's SP.

Form of title: In H's name alone

H kept his inheritance separate in an account in his name only and did not commingle any QMP earnings during the putative marriage. Thus, the form of title combined with the source of the account funds will be sufficient to sustain a finding that the property remained H's SP at all times.

H's expenditures for W's medical bills

H expended $15,000 of his SP for W's benefit during their putative marriage. The effect of this expenditure on H's potential rights to reimbursement is discussed below. For purposes of the remainder of H's California savings account, this expenditure will have no effect on the characterization of the asset.

Presumptions

No special presumptions apply.

Thus, H retained an SP interest in the California savings account and is entitled to the entire contents. Because H expended some of his SP for community benefit, he may be entitled to reimbursement from the community. Regardless, H takes the remaining $10,000 as his SP.

2. H's potential right to reimbursement for W's medical expenses

As a general rule, all debts incurred during marriage are community obligations. Where one spouse expends SP to pay a community obligation, he may be entitled to reimbursement from the community if he did not intend a gift and there were sufficient CP funds available at the time, and no other special presumptions apply.

Here, H expended $15,000 of his SP to pay W's medical expenses. H will argue that he is entitled to reimbursement from the community because W's expenses were a community obligation.

To the extent CP funds were available at the time to pay W's medical expenses, H will be entitled to reimbursement from the community.

However, a spouse's SP may be reached to the extent the other spouse incurs expenses for "necessaries" during marriage. The contributing spouse remains liable for expenses for "necessaries" until the dissolution of the marriage.

Here, H would argue that because W's savings account was expressly created as a community asset "for emergencies," and because the balance after receiving W's settlement deposit was $100,000, sufficient CP funds existed at the time W incurred her medical expenses and he should be reimbursed for his SP expenditures.

In the alternative, H would argue that because W subsequently received a $50,000 settlement, which was considered QMP during marriage and which would more than cover her direct medical expenses, the interests of justice should require that $15,000 of that $50,000 should be treated as the community's property to pay her medical expenses and he should be reimbursed.

Thus, under either argument, because sufficient QMP funds existed at or near the time of W's medical expenses, H should be entitled to reimbursement for his $15,000 payment of W's medical expenses.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

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Question 6

Herb and Wendy, residents of California, married in 2001. Herb worked as an accountant. Wendy was an avid coin collector who hoped someday to turn her hobby into a profitable business. Prior to marriage, they had entered into a prenuptial agreement providing that each spouse's wages would be his or her separate property.

On Wendy's birthday in 2002, Herb gave Wendy a drawing by a famous artist. Herb paid for the drawing with $15,000 that his parents had given him. Wendy hung the drawing in their bedroom.

In 2003, Wendy opened CoinCo, a shop specializing in rare coins. She capitalized the business with a $10,000 inheritance that she had received when her grandfather died. Wendy worked at the shop alone every day. Customers appreciated her enthusiasm about coin collecting and her ability to obtain special coins at reasonable prices. Over time, Wendy learned that she had acquired a number of highly valuable coins. There was also a renewed interest in coin collecting due to the discovery of several boxes of old coins found buried in the area.

Although Wendy's services at the shop were worth $40,000 per year, she took an annual salary of $25,000. She also paid $5,000 in household expenses from the business earnings each year.

In 2008, Herb and Wendy separated, and Wendy filed for dissolution of marriage. At that time, CoinCo was worth $150,000, and the drawing was worth $30,000.

In 2009, before trial of the dissolution proceeding, Wendy was disabled by a serious illness and had to be hospitalized. She closed CoinCo while she was in the hospital, and the value of the business fell to $100,000 by the time of trial. Her hospital bill was not covered by health insurance.

In the dissolution proceeding, Wendy claims that the prenuptial agreement is valid and Herb claims that it is not.

What are Herb's and Wendy's respective rights and liabilities in:

1. The drawing? Discuss.

2. CoinCo? Discuss.

3. The hospital bill? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. All property acquired during marriage is community property (CP). Property acquired prior to marriage or after permanent separation, and any property received during the marriage by gift, bequest , or devise, is separate property (SP). In order to determine the character of property, we must trace back to the funds used to acquire the property, then apply any special exceptions or conditions under the law. Both spouses are entitled to a one-half share of CP. At divorce, the CP is divided equally unless there are special considerations that apply.

1. The drawing

To determine the character of a piece of property we trace back to the funds used to acquire it. Here, we are told that H paid for the drawing with $15,000 that his parents gave him as a gift. Property acquired during marriage as a gift to one spouse is SP; therefore the $15,000 was SP, and by tracing we determine that the drawing was SP at the time it was purchased.

Transmutation

Prior to 1985, the character of property could be more easily changed or transmuted from SP to CP or vice versa. After 1985, however, any transmutation of property had to be in writing to be valid. An exception to this is where a spouse gives the other spouse a gift of relatively insubstantial value, in which case the gift between spouses can be transmuted from CP to SP or from SP to CP or even from one spouse's SP to the other spouse's SP.

Here, we are told that the drawing was by a famous artist, and that H purchased it in 2002 in honor of W's birthday for the substantial sum of $15,000. We are also told that Wendy hung the drawing in the couple's bedroom. Under these facts, the drawing was of substantial value and would not ordinarily come within the transmutation exception for gifts of insubstantial value. But we are also told that it was bought on Wendy's birthday, H gave it to her, and W hung it in their bedroom. Those facts appear to show an intent

that the painting was either given to the community from H's SP, or possibly even given to W as her SP, but hanging the painting in their bedroom looks more like a potential transmutation from H's SP to CP. However, because the drawing was clearly valuable and there was no writing, no transmutation occurred. The painting remained H's SP at the time of permanent separation.

End of economic community upon permanent separation.

A marriage ends upon dissolution/divorce, but the economic community of a marriage ends upon permanent separation, where the couple separates with the intent to not reconcile and to stay permanently separated and dissolve the marriage. Here, we are told that H and W separated in 2008, and W filed for dissolution of marriage at that time. Therefore, the economic community ended in 2008. We are also told that in 2008 the painting was worth $30,000. Because there was no transmutation, the painting was still H's SP, and now worth $30,000.

2. CoinCo

Separate property business enhanced by community labor. Where a SP business is enhanced by community labor during marriage, for the purposes of dissolution the courts will use one of two formulas in order to determine the CP's interest and share in the SP business.

Pereira: Where the SP business growth is due predominately to the spouse's labor and abilities, the Pereira method is used. Under Pereira accounting, the SP business spouse is entitled to the original principal value of the business, plus an annual rate of return calculated at 10%, both of which are SP. The remaining value of the business is CP.

Van Camp: Where the value of the SP business derives mostly from the character and nature of the business itself, the Van Camp method of accounting is used. Under Van Camp, the community is entitled to the reasonable salary value of the spouse's labor,

minus any mount received by the community, and minus any community expenses paid. All else is SP.

Pereira analysis:

Here, we are told that we can trace the beginning of CoinCo in 2003 to W using a $10,000 inheritance. This inheritance is SP; therefore CoinCo is a SP business belonging to W. We are also told that W had prior to marriage been an avid coin collector, therefore she had skill and expertise used to increase the value of the business. We are also told customers appreciated her enthusiasm about coin collecting and her ability to obtain special coins at good prices and had in fact obtained highly valuable coins. We are also told that after permanent separation with W became ill, the value of CoinCo fell from $150,000 in 2008 to $100,000 in 2009, because W was not available to lend her skills to the business. All of these factors point to W's skill and expertise as being the reason for CoinCo's success, and point to a Pereira analysis. Under Pereira, the initial value of CoinCo of $10,000 is SP, and 10% per year from 2003 when it started to 2008 upon permanent separation is $1,000 per year or $5,000. Therefore $15,000 would be W's SP, and the remainder would be CP. At permanent separation CoinCo was worth $150,000, so $135,000 was CP, and H would be entitled to half of that. We are told that in 2009, CoinCo's value fell to $100,000. If that figure is used, then we deduct the $15,000 SP and the $85,000 remaining is CP.

Van Camp analysis:

On the other hand, we are also told that there was a renewed interest in coin collecting due to the discovery of old coins found buried in the area. This would point to CoinCo being inherently valuable because of the type of business it was, and not entirely due to W's expertise skill and labor. If a court decided that was the predominant factor, then under Van Camp analysis we are told the W's services at CoinCo were worth $40,000 per year. Over five years that is $200,000. We are told that W took an actual salary of $25,000 per year, and W also paid $5,000 per year of household community expenses. So the community already received $125,000 of salary over five years from 2003 to 2008 and $25,000 in expenses totaling $150,000. Under Van Camp, the community is

still entitled to $50,000, the difference between the $200,000 value and the $150,000 actually received. The initial $10,000 investment is W's SP. We are told that by the time of 2009 divorce trial the value of CoinCo fell to $100,000. Thus $50,000 of that is CP and the rest is SP.

Prenuptial agreement:

A prenuptial agreement is valid so long as it is in writing. Here we are told that prior to marriage W and H entered into a prenuptial agreement providing that each spouse's wages would be his or her SP. The agreement is valid; therefore W's wages from CoinCo are her SP and the community is not entitled to them. Therefore, the above Van Camp analysis is altered by the prenuptial agreement. The $125,000 in salary will not be credited to the community, but the expenses (which are not mentioned in the prenup) will still be credited. Thus under Van Camp and under the prenup wages of W are not credited to the community.

This does not affect the Pereira analysis which is not based on wages. Overall, the facts show that the increase of value of CoinCo was due primarily to W's skill so because Pereira does not take wages into the analysis there is no change under Pereira. H will want Pereira used, and W will want Van Camp used, because it is based on her wages, which are SP under prenup. But a court is likely to apply Pereira.

3. The hospital bill

Debts after permanent separation

After permanent separation the economic community ends. Any debts that are incurred by either spouse post-separation are SP debts, and creditors will have to go after the SP of the spouse who incurred the debt. An exception exists, however, for debts related to the necessities of life, such as food, clothing, shelter, and, arguably, health care expenses. In that event, a creditor may go after the debtor spouse's SP, the CP, and also the SP of the other spouse.

Here, we are told that in 2009, after the permanent separation but before the divorce trial, W was disabled by a serious illness and in hospital, and that her hospital bill was not covered by insurance. Because the hospital bill is for a necessity of life and they are not divorced yet, the hospital can go after W's SP, the CP, and H's SP for this necessity of life debt.

Answer B to Question 6

California is a community property state. In California, property acquired during marriage is presumed to be community property (CP). Property acquired before marriage and after legal separation is deemed separate property (SP). Additionally, property acquired by gift, bequest and devise is also SP.

The name of the title is not determinative of the property's characteristics. Courts may trace the funds used to acquire the property to determine the characteristics of the property. With these things in mend, we can understand how a court will assess the distribution of the following assets.

Prenuptial agreement

The determination of the distribution of assets at the divorce of Wendy and Herb all depend on the validity of the prenuptial agreement. A prenuptial agreement is an agreement that allows [a] party to contract out of California community property law. To be valid, there must be a writing signed by both parties, each of whom are represented by independent counsel, there must be a valid waiver in writing, a full disclosure of all assets, and a minimum of 7 days before the parties sign the agreement. Additionally, the parties must have the capacity to enter such [an] agreement, including no undue influence from either party. Also, it must be voluntary. Here the only facts we are given was that in 2001, Herb and Wendy married in California. Prior to their marriage a prenuptial agreement was entered into. The agreement stated that wages of each spouse would be his or her separate property. However, at the divorce proceedings, Wendy claims that the agreement is valid while Henry argues it is not. Without facts demonstrating the validity of the agreement, the following distribution analysis will show the results of the distribution with or without a valid prenuptial agreement.

1. The drawing

Items acquired during marriage are presumed to be CP unless tracing the assets or actions of the parties shows otherwise. Here, on Wendy's birthday in 2002, she

acquired a drawing from a famous artist. Wendy acquired this painting from her husband Herb. Herb paid $15,000 dollars for the painting using money his parents gave him. As stated above, property and money received as a gift is the SP of the party receiving the gift. When Herb acquired the painting, tracing shows that it was his SP. However, in 2002, as a birthday present, Herb gave the painting to Wendy. Wendy will argue that since she received the property as a gift, it is presumed that gifts become the SP of the receiver.

However, in 2008 the painting was worth $30,000 dollars. Herb will argue that the property should still be his property because it was an invalid transmutation of his SP to Wendy's SP.

Transmutation

Transmutation is the doctrine of transferring one person's SP into another person's SP. After 1985, stricter requirements were necessary for property to be validly transmuted. After 1985, in order to successfully transmute the property a party needed to show there was 1) a writing, 2) signed by the party who is giving up the SP and 3) expressively states the transmutation of the property. Under these facts we do not see a valid transmutation under the 1985 documents.

Here, in 2002, Herb gave the drawing as a birth gift. We are not given any other facts. If Wendy can show that she was given the drawing and was given a birthday card, that said possibly "I know you love this drawing, now it's yours! Love, Herb" we may have a valid transmutation. The card in itself is a writing, as would be his statement explaining the gift. Additionally, people usually sign birthday cards. Since we do not get the facts stating this or anything like this happened, the painting was invalidly transmuted and Herb will be able to trace the drawing back to the Parents' $15K gift. Also, the actions of the parties, Wendy hanging the drawing in the bedroom does not show the property was SP. Wendy will have to return the painting.

Pre-nup?

Since this drawing was not purchased using either party's earnings, the pre-nup has no effect on the distribution of the drawing.

2. CoinCo

The next issue is the distribution of the CoinCo business. Since, under California law, earnings acquired through the effort, intelligence, and skill of either part is deemed CP, the validity of the pre-nup is vital to the distribution of Coinco.

Invalid pre-nup

The following analysis presumes that a court will believe Hank and find that the 2001 pre-nup is invalid.

The courts use two tests to determine the property interests of a self-employed company owned and worked out by a spouse during marriage. A court may use either the Pereira analysis while Wendy would desire the Van Camp if it is shown that the pre-nup is invalid.

Pereira Analysis

Under Pereira, courts conclude that the company's value is based upon the effort, hard work, and skill of the working spouse. Since we are working with the assumption of an invalid pre-nup, the earnings by a spouse during marriage are presumed CP. Under Pereira, the working party keeps their SP and receives a reasonable rate of interest on the investment (10%) multiplied by the years worked. Here, the company was capitalized by a $10K inheritance of Wendy that she received when her grandfather died. As described above, in heritance is SP.

Herb will argue that her business thrived because of her work, enthusiasm and her ability to collect special coins as reasonable prices. If the court believes this to be true,

under Pereira, Wendy would be entitled to her initial $10K + 10% of $10K multiplied by her years worked, which look to be 5 (2003 – 2008). This number would go to Wendy's SP and the rest would go to the CP estate.

Van Camp

Under Van Camp, courts conclude that it was not the work of the spouse, but certain circumstances outside their control resulted in the increase of the business value. Here, Wendy will argue that because of a discovery of boxes of old coins, a renewed interest in coin collecting caused her business to boom. She will argue that she was lucky since she always wanted to start a coin business but fortunately came in at the right time. If a court believes this to be the reason why the business flourished, a court uses a different formula than the one used above. Under Van Camp, the community receives a reasonable salary minus whatever was already received minus household expenses multiplied by the number of years worked. The rest would go to the SP of the working spouse.

Under these facts, a reasonable salary would be about $40K per year. Wendy only took out $25K per year and also spent $5K in household expenses per year. So $10K would be multiplied by the 5 years she worked, resulting in $50K going to CP. Since at the time of dissolution the company was worth $100K, Wendy would receive $50K as SP and her half of CP resulting in her receiving $75K.

Court Discretion

Although Wendy will argue for a Van Camp analysis and Herb will argue for a Pereira analysis, a court has the discretion to choose whichever one they like. Courts will look to whichever method is intrinsically fair to both parties in making their determination.

Valid pre-nup

If the court finds that the pre-nup is valid, as Wendy claims, the property will be distributed differently. Since the pre-nup rebuts the presumption that the earnings during marriage are CP, Herb may not recover anything under either test.

Presumably, income derived from one's SP is deemed to also be SP.

Under Pereira, courts conclude that the company increases based upon the skill and effort of the other party. Here, since the skill and effort are considered earnings, Herb would not receive anything under Pereira. Both the initial down payment as well as the earnings acquired during Wendy's years working would be her SP and would result in her obtaining the full $100K. Since Wendy would be able to argue that income from the company is both her earnings and investment, Herb would acquire nothing.

Also, under Van Camp, Herb would get nothing. Just like the analysis above, since the company was financed by SP and her earnings under the Pre-nup are SP, the entire $100K would be characterized as SP.

Goodwill

Herb's last ditch effort is to argue that goodwill is a community asset. Goodwill is a community property interest that increases customer retention in a business. Here Herb will argue through her enthusiasm Wendy created goodwill for the community. However, goodwill is created by the skill and effort of the working party. As stated above this is deemed part of one's earnings. Under the pre-nup, earnings are one's SP. Herb has no valid claim on receiving CP money for goodwill.

If the pre-nup is valid, Herb has no claims of CoinCo.

3. The Hospital Bill

Traditionally, a party has no financial obligations after legal separation and/or divorce. Legal separation is defined as the mutual intent to no longer continue marital relations with a physical separation. Here, the facts stated that in 2008, Herb and Wendy did separate. Without other facts, it is presumed that their separation had the required intent.

An exception to the statement above states that a spouse's SP and CP is liable for necessities acquired by the other spouse. Here, in 2009, Wendy became disabled and had to be hospitalized. The facts also state that this occurred before the dissolution proceeding. Because Herb and Wendy are not divorced, Herb retains some liabilities as it pertains to Wendy's hospital bills.

Since Wendy's bill was not covered by insurance, 3 types of property may be used for fulfill the hospital obligations. First, Wendy's SP may be used. Additionally, since medical bills are deemed a necessity by California law, both the CP and Herb's SP may be used to fulfill this obligation. If in this instance Wendy is not able to use her SP to pay the bill Herb is liable to use his own property.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

In 2000, Harry and Wanda, California residents, married. Harry was from a wealthy family and was the beneficiary of a large trust. After their marriage, Harry received income from the trust on a monthly basis, and deposited it into a checking account in his name alone. Harry remained unemployed throughout the marriage. Wanda began working as a travel agent. She deposited her earnings into a savings account in her name alone.

In 2003, Harry and Wanda purchased a vacation condo in Hawaii. They took title in both their names, specifying that they were "joint tenants with the right of survivorship." Harry paid the entire purchase price from his checking account, which contained only funds from the trust. Harry and Wanda orally agreed that the condo belonged to Harry.

In 2004, Harry purchased a cabin in the California Mountains to use when he went skiing. He paid the entire purchase price of the cabin from his checking account, and took title to the cabin in his name alone.

In 2005, Wanda commenced a secret romance with Oscar. During a rendezvous with Oscar, Wanda negligently operated Oscar's car, causing serious personal injuries to Paul, another driver.

In 2006, Wanda received an e-mail advertisement inviting her to invest in stock in a bioengineering company. She discussed the investment with Harry, who thought it was too risky. Wanda nevertheless bought 200 shares of stock, using $20,000 from her savings account to make the purchase. She put the stock in her name alone.

In 2007, Harry and Wanda separated. Shortly thereafter, as a result of the car accident, Paul obtained a money judgment against Wanda.

Harry and Wanda are now considering dissolving their marriage. The condo and cabin have increased in value. The stock has lost almost all of its value.

1. In the event of a dissolution, how should the court rule on Harry's and Wanda's respective rights and liabilities with regard to:
    a. The condo in Hawaii? Discuss.
    b. The cabin in the California Mountains? Discuss.
    c. The stock in the bioengineering company? Discuss.

2. What property can Paul reach to satisfy his judgment against Wanda? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. There is a presumption that all property acquired during marriage is community property (CP). In general, community property is defined by what it is not – it is not separate property. Separate property (SP) is all property acquired by either spouse before marriage so after dissolution or acquired by inheritance. The rents and income from SP are also considered SP.

In the event of a divorce, CA requires all CP to be distributed equally between both spouses. This applies to all CP property as well as CP liabilities. Each item of CP should be distributed 50/50, unless economic circumstances warrant a different distribution. At divorce, the court has no jurisdiction to award SP. Each spouse keeps his or her own SP.

In determining whether an asset is classified as CP or SP, one must look to the source of the asset. One must also determine if either spouse has taken any action to recharacterize the property or if any presumption applies to the property.

1. Rights and Liabilities of Harry (H) and Wanda (W)

In determining the rights of H and W in all of the property at dissolution, each asset must be classified as either CP or SP.

(a) The Condo in Hawaii

Funds used to Purchase the Condo

The condo in Hawaii was purchased in 2003, while H and W were married. Since this was acquired during marriage, the general CP presumption is raised. H will attempt to rebut this CP presumption by tracing the purchase price of the condo. The condo purchased with money from H's checking account. This checking account contained only income from H's trust. These funds came from his inheritance only and (as mentioned above), money received during marriage from inheritance is characterized as SP and income from SP is characterized as SP. This checking account was never commingled with any CP funds and thus, all of the money in the account (the income

and any principal) would be SP. Further, H evidenced his intent to keep his money as his SP since he took title to the account in his name alone. Thus, the condo was purchased with SP funds.

Titled as "Joint Tenants with the Right of Survivorship"

Purchasing an item of property with SP funds does not alone classify the item as SP. One must also look to the title taken on the property. In this case, H and W took title as "joint tenants with the right of survivorship." In Lucas, the CA court held that any taking of property in joint and equal form evidences an intent to take the property as CP. The CA legislature passed a statute known as the anti-Lucas statute, which has been in effect since 1984. Under this law, joint title is still considered CP (as in Lucas) but the court dictated how SP purchase money must be treated. Absent any written agreement between the spouses, the SP proponent will not have [been] apportioned into the joint tenancy property. If no written agreement is established, the SP proponent will only be able to assert a right to reimbursement for the amount paid towards the purchase price.

Therefore, in this case, although SP was used to purchase the condo, the condo would be characterized as CP. H and W orally agreed that the condo was H's SP, but this agreement was not in writing and is thus unenforceable under the anti-Lucas statute. In the event of dissolution, H and W will each own a 1/2 interest in the condo and, thus, they will each be entitled to 1/2 of its appreciation amount. H will be reimbursed from the community for his SP contribution to the purchase price. Thus, he will be reimbursed the entire price of the cabin when it was purchased since his SP paid the entire amount.

(b) The Cabin in CA

The cabin was purchased in 2004 while H and W were married and, thus, the general CP presumption is raised. Again, H would attempt to rebut the CP presumption by tracing the purchase funds back to his SP checking account (discussed above). H paid for the entire purchase price of the cabin with SP funds.

He would also show his intent to keep his SP interest by showing that he took title to the property in his name alone. Taking title in one's name alone is not enough to rebut the

CP presumption but when this is coupled with a purely SP purchase price, the SP proponent will be able to rebut the presumption and prove the property is SP.

Therefore, at dissolution, the cabin will be characterized as H's SP and it, along with its increase in value, will be awarded entirely to H. Since H did not use his cabin for any business purpose during the marriage, the community does not receive any ownership interest as a result of its increase in value during the marriage.

(c) The Stock

Funds used to Purchase the Stock

In 2006, W purchased stock in a bioengineering company. This stock was purchased during marriage and is presumed to be CP. The source of the funds used to purchase the stock came from W's savings account. The money in this savings account came entirely from W's earnings as a travel agent. The earnings of each spouse during marriage are considered CP. Thus, the money in the savings account was all CP.

W would attempt to show the money was actually her SP since the account was titled in her name alone. But, as mentioned, title in one spouse's name alone is not enough to evidence a SP interest. The SP proponent must also be able to trace the funds to SP monies or must be able to show that the other spouse gave a gift of his or her CP share. In this case, there is no evidence that H intended to gift away his CP interest in W's earnings. Further since 1985, any transmutation, which is any agreement to change the character of property during the marriage, must be in writing. There is no writing to evidence the intent to transmute these earnings from CP to W's SP. Therefore, the stock is considered all CP.

Management and Control of CP

Under CA CP laws, each spouse is given equal rights to manage and control the CP, unless a specific exception applies. Exceptions are realized for the sale of real property, for any gift of CP, or for any sale of the necessities within the home (such as furniture). If any of these exceptions do not apply, either spouse is permitted to unilaterally make decisions regarding the CP.

In this case, H might argue that he told W the investment was too risky and thus, the liability for the loss in the stock value should be hers alone. But this would not be a winning argument since W was permitted to unilaterally spend CP monies. None of the exceptions above apply to this situation. Stock is not real property. This was not a gift since W paid $20,000 for the stock and the stock is not a necessity of the home.

Therefore, at dissolution, the liability for the loss in the stock value should be distributed equally between H and W.

Breach of Fiduciary Duty

H might also claim that W breached her fiduciary duty when she purchased this stock. In all marriages in CA, both spouses are considered fiduciaries of each other. They owe each other a duty of care and loyalty regarding CP funds. One spouse is permitted to make decisions regarding purchases and sales, but the spouse will breach his or her duty if he or she is grossly negligent or reckless in some CP transaction.

H will argue that W was at least grossly negligent when she refused to listen to his complaints regarding the purchase of the stock. He told her it was too risky and she was grossly negligent when she ignored this fact.

W would counter-argue that this was just a typical investment and there was no gross negligence. First, she had no knowledge that this stock was actually risky. All she had was H's opinion that the stock was too risky but this is not enough to show she was grossly negligent when she decided to purchase it. Second, even if she had some knowledge that the stock was risky, this is typical in most stock purchases. No stocks are guaranteed to make money and in almost all stock purchases, the buyer takes some sort of risk. This inherent risk does not equal gross negligence at all times. Since this was not a grossly negligent or reckless use of CP funds, H cannot prove that W breached a fiduciary duty and H cannot collect any losses in the value of the stock from W.

2. Property to satisfy Paul's Judgment

In general, a creditor of either spouse can reach the CP of the couple and the creditor spouse's SP to collect on the debt. This general rule applies to debts incurred during marriage as well as debts incurred prior to the marriage.

For certain kinds of judgments, there are rules that dictate how the creditor can collect from the spouse. For tort judgments, the rules depend on whether or not the tortfeasor spouse committed the tort while she was benefiting the community. If the tort was committed while the spouse was engaging in activity that benefits the community, the creditor must collect from the couple's CP first and then, if necessary, collect from the tortfeasor's SP. If the tort was committed while the spouse was not engaged in activity that benefited the community, the tort creditor must first collect from the tortfeasor's SP and then collect from the couple's CP if necessary to satisfy the entire judgment.

In this case, W committed a tort against P while she was married. This tort was committed while W was having a secret rendezvous with her lover Oscar. Thus, W was not engaging in an activity the benefited the community at this time. H had no knowledge of this activity and this activity certainly cannot be said to have benefited H. Therefore, P must first collect from W's SP to satisfy his judgment and then, if necessary, he can collect from the couple's CP. At no point is he permitted to collect from H's SP.

H may argue that this debt should be considered entirely W's SP debt because P obtained the judgment against W after H and W separated. Thus, he would argue that the debt was incurred after separation, when the community is no longer liable. H's argument would not be a winning argument. In determining liability for a tort, the liability will attach at the time the tort is committed, not at the time the judgment is actually obtained. Thus, a court will determine that W incurred this liability in 2005 when she injured P, not in 2007 when P finally obtained the judgment.

Thus, since this debt was incurred during marriage, the rules discussed regarding the order of satisfaction apply. P must first collect from W's SP but, at dissolution, W has no SP. Then, P must collect from the couple's CP. Here, the only property

characterized as CP is the stock and the Condo in Hawaii. P can reach the stock (even though it has almost no value) and then he can reach the increased value of the condo. In reaching the condo, he cannot collect from the share that H is entitled to for reimbursement of the purchase price.

Answer B to Question 6

Introduction

Because Harry and Wanda are residents of California, California law is applicable. California is a community property state. All property acquired during marriage by either spouse is presumptively community property. All property acquired by either spouse before marriage or after permanent separation, or by gift, will, or inheritance, is presumptively separate property. In determining the characterization of an asset, a court will look to the source of funds used to purchase that asset. A court will also consider any actions taken by the parties that may have affected its characterization, as well as any presumptions of law that affect the asset's character. Finally, the mere fact that an asset has changed form will not change its character. With the above principles in mind, we will now look at each asset in turn.

The Condo in Hawaii

Source

The source of funds used to purchase the vacation condo in Hawaii was from Harry's checking account. Harry's checking account is entirely composed of money that he received from a family trust. The money received from this family trust is considered a gift or inheritance. Thus, the money is his separate property. In addition, he did not commingle his separate property with the funds of the community, which might have given rise to a presumption that family expenses paid from those assets are community property. The title to the condo was taken in both spouses' names, and was taken as a joint tenancy with a right of survivorship. Thus, it was taken in joint and equal form.

Presumption: Joint and Equal Form

Where joint and equal title is taken to property which was acquired through a spouse's separate property funds, the Lucas and Anti-Lucas principles apply. The property itself is presumptively community property. Upon death, Lucas applies to hold that absent an express agreement to the contrary, the separate property which was used to acquire title in the property in question will be deemed to have been made as a gift to the community. Thus, the donor spouse has no claim of ownership or reimbursement. Upon divorce, the principles of Anti-Lucas apply. These provide that absent some

express agreement to the contrary or express wording in the deed, upon dissolution of marriage, the spouse who gave separate property toward the purchase of an asset that was acquired in joint and equal form is entitled to reimbursement for the down payment, improvements, and principal, but not an ownership interest.

Actions: Oral Agreement that the Condo Belonged to Harry

Spouses may make agreements or gifts that transfer property from one form to another, whether from separate to community or community to separate. This is called a transmutation. Since January 1, 1985, all transmutations must be in writing, signed by the party to be adversely affected, and must clearly indicate that a change in characterization is intended. In this case, the agreement between Harry and Wanda that Harry would own the condo was made orally. Thus, it is not a valid transmutation and this agreement did not change the characterization of the condo.

Disposition: Community Property with Right of Reimbursement

In this case, the parties are considering dissolution of marriage. Anti-Lucas will apply. This means that upon divorce, the condo is community property and Harry can claim a right to reimbursement for the purchase price of the vacation condo, since he paid this purchase price with his separate property funds. However, he is not entitled to an ownership interest in the condo. Therefore, any increase in the value of the condo belongs to the community and will be split evenly between Harry and Wanda.

The Cabin in the California Mountains

Harry purchased the cabin in the California mountains with money from his checking account. The money in his checking account was derived solely from the trust that he inherited. Because these funds are derived from inheritance, they were his separate property. He took title to the cabin in his name alone. Separate property includes all assets purchased entirely from separate property, unless some presumption such as that of joint and equal form applies. Because Harry did not take title in any joint and equal form, a presumption of a gift to the community does not arise under Lucas or Anti-Lucas. Thus, the cabin is Harry's separate property. Upon dissolution of marriage, Harry alone will take the entire cabin, including any increase in its value.

The Stock in the Bioengineering Company

Source

Wanda purchased stock in a bioengineering company using $20,000 from her savings account. The money from her savings account was derived from her work as a travel agent. Salary that either spouse earns during the time of marriage is community property. Although Wanda kept her earnings in a separate account in her name alone, this does not change the fact that the funds are community property. Form of title is generally inconclusive. This fact might have been relevant if Harry had sought to use those funds to pay his own premarital debt. However, since that is not the case, then funds are community property. Thus, the stock was purchased with community property funds and will be presumptively community property.

Action: Title Taken in Wanda's Name Alone

Wanda took title to the stock in her name alone. Generally, the fact that a spouse takes title to an asset in his or her name alone does not change the presumption of community property, if the funds used to purchase that asset were community funds. In this case, the fact that Wanda took title to the stock in her name alone does not make the stock her separate property, unless it can be shown that some gift was intended. Wanda will likely argue that Harry intended to make a gift of the stock to her as her separate property, since he did not think the investment was a good idea and therefore did not want the investment for the community. However, it is unlikely that Harry's disapproval meant that he intended to make a gift of community assets to purchase the stock. Instead, Harry did not want Wanda to purchase the stock at all. Thus, he did not make a gift to her of the stock, and it will therefore remain as community property.

Action: Purchase without Harry's Permission

Under the equal management powers doctrine, either spouse alone may encumber, sell, or otherwise dispose of community assets. Thus, the fact that Wanda purchased the stock without Harry's permission will not change its characterization. In addition, Harry is not necessarily entitled to reimbursement for the community property that Wanda used to purchase the stock, since she had the power to use that money to purchase stock.

Duty of Loyalty

Each spouse owes a duty of the highest good faith, loyalty, and fair dealing to the other spouse. Neither may gain a financial advantage at the expense of the other. Also, neither may make a grossly negligent or reckless investment of the community's funds. In this case, Harry thought that the stock was too risky. If the stock was in fact so risky that investing in it was grossly negligent and reckless, Wanda will be said to have breached a duty of loyalty to her husband. If that is the case, she may have to reimburse him for his share of the community funds that were used to purchase the stock. However, the mere fact that Harry thought the investment was risky does not alone make it a reckless investment. Thus, it is unlikely that Wanda breached the duty of loyalty to her husband.

Disposition: Community Property

Because the stock was purchased with community funds and form of title did not change this, the stock is community property. It and its loss in value will be equally divided upon dissolution of marriage.

What Property can Paul reach to Satisfy his Judgment against Wanda?

Tort Liability

Where a spouse commits a tort during the marriage, the injured party can reach community assets and the separate property assets of the tortfeasor spouse. The order in which these items will be used to satisfy the obligation will depend on whether the tortfeasor spouse committed the tort to "benefit" the community. In this case, Wanda committed the negligent act while meeting Oscar, with whom she was having a secret romance. Having a secret romance with another man was not an action taken to benefit the community. Thus, the tort was not committed for the benefit of the community. This means that Paul may first reach Wanda's separate property, and then Paul may reach community property. Paul may not reach any of Harry's separate property, because Harry is not personally liable, and this is not a contract for necessities.

The Condo

The condo is community property upon divorce. However, where title is taken in the form of a joint tenancy with the right of survivorship, during marriage each spouse will own a 1/2 separate property interest in this property. This means that creditors of one spouse can only reach the 1/2 separate property interest of that debtor spouse. In this case, Paul may reach only Wanda's 1/2 separate property interest in the condo. This will be the first item that will be used to satisfy Paul's judgment, since it appears to be the only asset that is Wanda's separate property. Paul may not reach Harry's 1/2 separate property interest in the condo.

The Cabin

The cabin is Harry's separate property because it was purchased with his separate property funds and title was not taken in joint and equal form. Thus, Paul may not reach the cabin, since Harry is not personally liable and this is not a contract for necessities.

Harry's Checking Account and Trust Fund

Harry's checking account and his trust fund are his separate property. They may not be used to pay Paul.

The Stock

The stock is community property. Thus, once Paul has exhausted Wanda's separate property, if he has not satisfied his judgment he may proceed to use the stock as well.

Wanda's Savings Account

The savings account in Wanda's name is community property. Thus, it may be reached to satisfy Paul's judgment.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

In 2003, Wendy and Hank were engaged to be married. They discovered that the $10,000 monthly income Wendy derived from a trust fund would terminate upon her marriage or upon her reaching the age of 25, whichever came first. Therefore, they decided to postpone their wedding until Wendy's 25th birthday, in 2006, and instead began to live together.

Also in 2003, Wendy and Hank agreed that Wendy would pursue a master's degree in education and that Hank would quit his job and stay home, taking care of the household chores. Wendy opened a checking account in both of their names, into which she deposited her $10,000 monthly trust income. Wendy used funds in the checking account to pay living expenses for Hank and herself. Wendy also used funds in the checking account to buy a new car. She put title to the car in both of their names.

In 2006, Wendy and Hank married. Wendy's $10,000 monthly trust income terminated. Afterwards, Wendy began teaching at a local college.

In 2008, Wendy learned that her compensation was less than that of her male counterparts and made a claim against the college.

In 2009, Wendy separated from Hank and filed an action for dissolution of marriage. Shortly afterwards, she settled her claim against the college in return for additional salary in the amount of $10,000 per year for the next three years.

Unbeknownst to Wendy, Hank had run up a gambling debt to a casino during their marriage. At the time of their separation, Hank owed the casino $50,000.

Upon dissolution of marriage, what are Wendy's and Hank's rights and liabilities with respect to:

1. The car? Discuss.

2. The $30,000 in additional salary under the settlement? Discuss.

3. The $50,000 owed to the casino? Discuss.

Answer according to California law.

Answer A to Question 6

California is a community property state. The community property system applies to people who are legally married or registered as domestic partners. All property acquired before or after marriage or separation and all property acquired by gift, bequeath, devise, or descent is presumptivelt the acquiring spouse's separate property (SP). All other property acquired during marriage is presumptively community property (CP). This question involved the dissolution of a marriage. Upon dissolution, each spouse is entitled to all of their separate property and community property should be divided equally between them.

The Car

CP Principles do not apply

Unmarried cohabitants are not included under the CP system, even if they are engaged and plan to marry. However, under Marvin, cohabitants may have some rights under contract theories where there are agreements between the parties regarding income and expenses.

Here, H and W were engaged and postponed their wedding until she turned 25 so W would continue to receive payments under her trust fund. They then moved in together. As unmarried cohabitants, they are outside the CP system even though they were engaged and had planned to married. There must be a valid marriage for any property to be CP. However, they may have contract rights under Marvin.

Contract Formed between H and W

An enforceable contract may be found between cohabitants when there is an agreement supported by consideration of each party and the consideration is more than sexual services.

H will argue that there was an enforceable agreement between him and W. H will show the joint bank account that the trust funds were deposited and the use of the trust funds to pay living expenses as evidence of this agreement. H may also argue that the agreement constitutes a valid contract as his household duties were consideration for

W's contribution of her income to support the couple so that W could attend school and earn her master's degree. This argument would likely be effective in most courts as it seems to be established under the facts that there was a meeting of the minds and the consideration on both sides was valid.

Interests in the Car under a valid agreement

Where there is a valid agreement between cohabitants, they may be able to acquire property interests under its terms.

W purchased the car while she and H were cohabitating before marriage. W paid for the car with her trust income, which is undisputably her SP as she has not yet married. The car was title in both H and W's names and the funds used were from a joint bank account. While certain title presumptions would control under CP system, here the interests in the car are governed by principles of contract and equity. H will argue that he has an interest in the car because he and W agreed that she would attend school and he would stay home and they would live off of her trust income until it expired when she turned 25. Further, the car was purchased with funds from a joint bank account to which H would have had a right to withdraw, showing an intent that the funds benefit both H and W. Further, W put the car in both names, confirming her intent that there be a joint interest. Therefore, H should be given an equitable interest in the car. W will argue that while they agree to use her income to support themselves, she never intended to agree to give H any interest in the car that would exist beyond their relationship and only put his name on the title for convenience while they were living together. At dissolution, then, the car should be treated as a gift and not as something to which H as an interest. However, because there is clear evidence of an agreement regarding the use of the trust income to support H and W in exchange for H's household duties and it was W who opened a joint checking account and deposited the trust funds there and then put the car in H and W's name, H will likely be found to have some interest in the car, likely one-half of its now depreciated value as the agreement and form of title indicate a desire to share equally, despite the fact that the purchase funds are traceable to W's SP.

The $30,000 Salary Under the Settlement

Termination of the Marital Economic Community

The marital economic community is formed at marriage and determinates upon permanent separation, which occurs when the parties live separate and apart and at least one spouse does not intend to return to the marriage.

W separated from H in 2009 and filed for dissolution of marriage. This evidences an intent not to return to the marriage and thus constitutes permanent separation and terminates the marital economic community.

What to the proceeds of the settlement replace?

Any labor performed by a married person is considered community labor and any salary earned during marriage is CP. However, salary earned following permanent separation is SP. Courts have found that when funds received following permanent separation are intended to replace wages that were earned during marriage, those funds are CP because they are traceable to community labor.

Here, W began working at a local college in 2006, after marriage to H. All salary earned prior to separation is therefore CP. In 2008 she discovered she was being paid less than male colleagues and filed suit. In 2009 and post-separation, she settled for $10,000 additional salary for the next three years. H will argue that the settlement is CP because it is intended to replace the salary that W should have been paid and was earning during marriage. W will argue that because the funds are going to be distributed as post-separation salary, they are her SP. Here, replacement analysis favors H and will result in the CP characterization as the settlement related to a claim for wages that should have been paid during marriage, as the claim was filed during marriage, and therefore are intended to replace CP earnings.

Distribution of Settlement Funds

In cases of personal injury settlement, courts have classified the settlement proceeds for injuries occurring during marriage as CP but strongly favor awarding such funds to the injured spouse upon dissolution in a rare exception to the presumption that CP should be divided equally.

W will likely try an analogize to these cases, arguing that the discrimination was an injury during marriage and even if the proceeds are CP she is entitled to them upon dissolution as they are compensation for her injuries. This argument will likely be unsuccessful. Personal injury funds are awarded because they typically compensate for the injured spouse's present and future suffering and medical expenses and as such should be given to the injured spouse both because he or she will have an continued increase need and because the injury was personal to the spouse. Further, even with personal injury damages, the award will be divided to the extent equity requires, including when there has been loss to the community. Here, the loss compensated was entirely the community's as W was underpaid for her community labor and thus did not receive the salary she should have, which would have been entirely CP. Therefore, H and W will each have a one-half interest in the proceeds at dissolution.

Rights of H and W to the settlement

The settlement is CP and so H and W each have a right to one-half the amount, or $15,000. This amount could be paid to H now by giving him a CP share in an amount that accounts for his $15,000 or by imposing a remedial trust on the funds such that H and W are each entitled to one-half of the payments over the next three years.

H's Gambling Debt

Liability During Marriage

During marriage, debts acquired before or during marriage are community debts and any CP and the acquiring spouse's SP will be liable for the debt. Therefore, whether H acquired the debt entirely during marriage or not, the CP would have been liable during marriage.

Liability Upon Dissolution

At dissolution, the community property is divided and thus no longer exists. While CP is divided equally, courts have more discretion in the division of liabilities acquired during marriage. Where one spouse has acquired a debt and the debt was not for the benefit of the community, it would likely be assigned to the debtor spouse upon dissolution.

H ran up a gambling debt of $50,000. This was without W's knowledge and not for the benefit of the community and therefore upon dissolution, a court would likely assign the remaining debt to H as that would be the equitable result and is within the court's discretion.

If a Creditor Makes a Claim post-separation and prior to property distribution

While separation terminates the marital economic community, it does not automatically terminate the CP estate. If a creditor makes a claim while the CP estate is still in existence, then the CP estate can be reached prior to the CP being distributed. In cases of contract debt, the creditor may opt to recover from the CP or the debtor spouse's SP.

In this case, even though W was not aware of the debt at the time of separation, the CP estate would still be liable. The casino could opt, at any time before property distribution, to seek recovery from CP or H's SP. However, any of W's SP would not be reachable to satisfy H's debt.

Answer B to Question 6

California is a community property state. All property acquired during marriage, other than separate property, is presumed to be community property. All property acquired before marriage or during marriage by gift or inheritance is presumed to be separate property. Further, all property acquired during marriage with the use of separate property funds is presumed to be separate property.

To determine the character of property upon divorce, the court will look to the source of the funds used to acquire the property. A mere change in form of the property will not change its character. Further the courts will also look to the actions of the parties which may have an effect on the character of the property and any presumptions that apply. Upon divorce, the court will divide all community property equally, unless the interest of justice require otherwise.

With these principles in mind, we can turn to the property in issue.

1) The Car?

No marriage- Separate property funds used to acquire

Here the car was acquired before marriage. In 2003 Wendy and Hank were engaged to be married. They discovered that the $10,000 monthly income Wendy derived from a trust fund would terminate upon her marriage or upon her reaching the age of 25, whichever came first. Therefore they decided to postpone their wedding until Wendy's 25th birthday, in 2006, and instead began living together. Also, Wendy in 2003 opened a checking account in both of their names, into which she deposited her $10,000 (which would be considered her separate property as there is no marriage) into an account in both of their names. Wendy also used the funds to buy a new car.

Thus at this point, their relationship would not be governed by community property law.

Hank will assert that he is entitled to a portion of the car because Wendy opened a checking account in both of their names, into which she deposited her $10,000 monthly trust income. Thus, Hank will assert that she made a gift of the trust property,

which before marriage, and even after marriage would have been considered separate property (as trust income is usually characterized as a gift or inheritance). However, Hank would have to satisfy the requirements of a contract under California's view on meritricious relationships.

Meritricous Relationship

California does not recognize common law marriage, but will recognize one that was contracted in another state that does recognize a common law marriage. Because there is no marriage at this point, any funds used would be separate property. Thus, as there is no community, any agreements the parties have as to any property would be governed by contract law, unless the main thrust of the contract is sexual relations. Here because instead of marrying one another and terminating the trust income payments, Hank and Wendy decided to move in together, there is no valid marriage and any agreements they have as to property would be governed by contract law.

Title to the car in both of their names

Accordingly, here Hank will assert that they had an agreement as to the car that it was to be in both of their names and thus he has a right to distribution of the car as partially his property. This would require that Hank prove that there was a contract between the two, as community property principles would not apply in this situation as, at this point there is no marriage.

Wendy will assert that she owns the car as her own separate property. She will assert that she used her funds prior to marriage, and thus the court should trace back the source of the property to her earnings prior to marriage. However, as noted above, if Hank is able to show that they had an agreement as to property acquired during the time pending their marriage and he is able to show that taking title in joint names evidences this agreement, he will be able to assert an interest in the car based on contract law. Further he will point to the fact that he quit his job in reliance upon their agreement to take title jointly to her trust income and thus there was valid consideration.

Further he will attempt to assert that the consideration for the contract was not sexual relations, rather it was the agreement that she would pursue an education, while

he would take care of the household chores. If Hank is successful, the car would be distributed pursuant to a contract between the parties, likely here equally as title was taken in both of their names.

Lucas- Anti Lucas

Alternatively Wendy will assert that Lucas decision and Anti Lucas apply here. Under Lucas, when a spouse expends separate property to take title jointly, a presumption arises that for the purposes of divorce, it is treated as community property. Under Lucas, all separate property expended for the acquisition of property in joint form would be presumed a gift. However California enacted Anti Lucas statutes to overturn this decision and entitle the separate property to be reimbursed in the form of an interest free loan. Thus she will assert that because title was taken in both of their names, the Anti Lucas statutes apply and she should be entitled to her down payment for the property in the form of interest free loan. However, because there is no community, this is not applicable here.

Wendy's use of trust income to pay living expenses for Hank and herself

It should be noted that Wendy's use of separate property, her trust income prior to marriage, for the living expense for Hank and herself will not entitle her to any reimbursement, unless they had an agreement to the contrary. It is presumed that when one party uses separate property for the expenses of another party, that it was intended as a gift. Thus, unless Wendy can show an agreement to the contrary, she will not be entitled to reimbursement for such expenditures.

2) The $30,000 in additional salary under the settlement?

Cause of actions that arise during marriage

A cause of action that arises during marriage is deemed to be a community property asset, subject to division upon divorce. Here in 2006, Wendy and Hank married. Thus the community commenced and all community property principles will attach to the relationship.

Wendy's $10,000 monthly trust income terminated. Afterwards, Wendy began teaching at a local college. In 2008, Wendy learned that her compensation was less than that of her male counterparts and made a claim against the college.

Consequently, because the cause of action arose during marriage, likely the court will find that any subsequent award is deemed community property.

Wendy will assert that because shortly after her separation, she settled her claim against the college in return for additional salary in the amount of $10,000 per year for the next three years, she will claim that this settlement was meant not as a settlement for past wages but as wage replacement for future years.

Wage replacement

Wendy will claim the settlement is meant as a form of wage replacement for the future years. Wage replacement under community property law are characterized upon receipt. Thus if received during marriage, will be deemed community property, however if received after marriage, will be deemed the working spouse's separate property. Here, Wendy will assert that as such, the $10,000 should be deemed her separate property. She will argue that wage replacements are characterized at the time they are received rather than at the time the cause of action arose. Thus she will assert that because she will receive the $10,000 after marriage, they should properly be deemed wage replacements characterized upon receipt.

Community property right to settlement

However, Hank will likely prevail in his assertion that the payments are for past services that occurred during marriage. All time labor and skill expended during a marriage is considered a valuable community property asset. Further all wages earned during marriage are considered community property. Here Hank will point to the fact that Wendy in 2008, learned that her compensation was less than that of her male counterparts and made a claim against the college. The following year, Wendy and the college settlement for an additional $10,000 per year for the next three years. Because this settlement was likely due because of the fact that during the marriage she was

earning less than her male counterparts, the intent of the college was to compensate her for her labor expended in the past.

Thus because Hank will successfully assert that the settlement was entered into to pay Wendy for past services, namely her years of employment at the college from 2006 to 2009, he will be entitled to a community property interest in the $30,000. Thus each will likely be awarded $15,000.

Education expenses

It should also be noted that if the community pays down the loans incurred to gain an education and that spouses earning capacity has been enhanced, the community will be entitled to reimbursement for such expenses made from community funds even if the education was gained prior to marriage, unless 1) the community has already substantially benefitted from the education, 2) the other spouse has gained a community funded education and 3) if it lessens the need for spousal support upon dissolution. Here there are no facts to indicate whether the education that Wendy received was at all funded by the community during marriage. However, in the case that the community did pay part of her education, she will assert the exceptions.

Community has already substantially benefitted

There is a presumption that arises if the education was gained 10 years before the end of a marriage, the community has already substantially benefitted and is not entitled to reimbursement. Here this is exception is inapplicable because Wendy earned the education in 2003, they married in 2006, and the community ended in 2008.

Other spouses Community funded education

There are no facts to indicate that Hank has received an education.

Lessen the need for spousal support

Wendy will likely assert that although she gained the education prior to marriage, it lessened her need for spousal support upon dissolution. She will assert that she was living off of a trust which expired in 2006, thus her education enabled her to gain

employment which lessened the need for spousal support. Thus she will claim that H is not entitled to reimbursement.

3) The $50,000 owed to the casino?

Debts during marriage

All parties during the marriage have equal right to manage and control the community. Thus each spouse is allowed to incur debt and borrow money. Such debt incurred during marriage is generally presumed to be community property. However, debt acquired during the marriage will likely be awarded to the debt incurring spouse. The non debt acquiring spouse's separate property will not be liable on the debt incurred by the other spouse. Here Unbeknownst to Wendy, Hank had run up a gambling debt to a casino during their marriage. At the time of their separation, Hank owed the casino $50,000.

Thus this debt during marriage would properly be characterized as community property debt. However, upon dissolution, the court will likely award the debt to the debt incurring spouse.

Necessaries

There is an exception to the general rule that one spouse's separate property will be unavailable to the other spouse's creditors. This exception applies for all debt incurred during marriage and even during the separation if the debt is incurred for a necessary. A necessary is one that is a requirement of life, such as medical care and food and water. Here because the debt was incurred by Hank for gambling at a casino, likely this exception would not apply. Debt incurred at a casino is not a necessary of life and as such Wendy's separate property will not be available to the casino.

Interest of justice require different allocation

The court may however, in the interest of justice require that different debt allocation be made upon divorce. The rationale is that at this point, the interest is in protecting the creditors. Thus the court may look to see which spouse is in a better position to repay the debt and may allocate the debt to such a spouse. Here the facts

indicate that Wendy was working for a college and actually earning a salary. However, Hank and Wendy agreed that Hank would quit his job and stay home taking care of the household chores. Thus if Hank is unable to repay the debt, it may be that the court will assign the debt to Wendy to assure that the Casino is repaid.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

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Question 2

Wendy and Hal are married and live in California.

A year ago, Wendy told Hal that she would not tolerate his drinking any longer. She insisted that he move out of the family home and not return until he completed an alcohol treatment program. He moved out but did not obtain treatment.

Last month, Hal went on a drinking spree, started driving, and struck a pedestrian. When Wendy learned of the accident, she told Hal that she wanted a divorce.

Hal has consulted Lawyer about defending him in a civil action filed by the pedestrian. He is currently unemployed. His only asset is his interest in the family home, which he and Wendy purchased during their marriage. Lawyer offered to represent Hal if Hal were to give him a promissory note, secured by a lien on the family home, for his fees. Hal immediately accepted.

1. Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian? Discuss. Answer according to California law.

2. Is Wendy's interest in the family home subject to payment of Hal's legal fees? Discuss. Answer according to California Law.

3. What, if any, ethical violations has Lawyer committed? Discuss. Answer according to California and ABA authorities.

ANSWER A TO QUESTION 2

1. **Is Wendy's Interest in the Family Home Subject to Damages Recovered for Injuries to the Pedestrian?**

California is a Community Property State

California is a community property (CP) jurisdiction. Thus, any property acquired by either spouse during the course of the marriage by either spouse's labor is presumptively community property. Property acquired before or after the marriage by either spouse, or during the marriage by gift, inheritance, or devise, is presumptively separate property (SP). In determining the character of a particular asset, it is helpful to look at (1) the source of the asset or the source of the funds used to purchase the asset, (2) any actions by the spouses changing the character of the property, and (3) any relevant presumptions.

The House

Source

The facts tell us that Wendy (W) and Hal (H) purchased the family house during their marriage. However, we don't know what funds were used to purchase the house. If W's or H's earnings were used (or a combination thereof), and those earnings were earned during the course of the marriage, then the house would be CP because spousal earnings are CP to the extent they're earned during the marriage.

However, if one spouse partially used inheritance money or other SP acquired before the marriage, then that spouse would likely have a SP interest in the home to the extent SP was used to purchase it.

However, without more, the best assumption is that spousal earnings were used to purchase the house. The facts say H is currently unemployed, but he may have been employed in the past (and thus had earnings). Further, we can assume W earned money somehow, likely from a job.

Actions

There is no evidence that the house was put in only one spouse's name, suggesting that the house was the separate property of that spouse. Pre-1975, if the house was in W's name, the married woman's special presumption would operate to render the house (or the share of the house in W's name) W's SP.

Modernly, if title was taken in only one spouse's name, a court would not likely hold that to be conclusive evidence that the house was that spouse's SP absent some manifestation by the other spouse that the house was intended as a gift.

If H and W took title to the house as joint tenants with a right of survivorship, each would have a 1/2 SP undivided interest in the whole during life. On death, the form of title would control. On divorce, under CA's anti-Lucas statute, the house would be treated as CP, with a right to reimbursement for any SP used by either spouse to improve the home.

Finally, there's no evidence of a transmutation changing the character of the house, which, after 1985, would have to be in writing.

Thus, absent any of these actions, it appears the house is still CP.

Presumption

All property acquired during the course of marriage is presumptively CP. Here, nothing rebuts that presumption.

Community Responsibility for Debts of One Spouse

All debts incurred by either spouse prior to or during the course of marriage are community debts. Tort obligations are "incurred" when the tort occurs, not when judgment is handed down. Thus, any obligations arising out of H striking the pedestrian were "incurred" when he hit the pedestrian.

W will argue that the marital economic community was not in existence when H hit the pedestrian because she had kicked him out of the house. The marital economic

community begins at marriage and terminates upon permanent physical separation when at least one spouse has no intent of continuing the marriage.

Here, W kicked H out of the house. However, she told him that he could return when he completed an alcohol abuse program. Thus, the marital economic community had not yet ended when H got in the accident because W was still open to the possibility of him returning. W will argue that H manifested an intent to never continue the marriage because he refused to go to treatment. In other words, W will argue that by rejecting the pre-condition to the continuation of the marriage--i.e. getting treatment--H effectively terminated the marital economic community. Indeed, W can point to the fact that 11 months after she kicked H out, he hadn't obtained treatment. Given this length of time, W can argue, it's clear that the community had ended.

However, the stronger argument is that the marital economic community continued until W told H that she wanted a divorce. If W viewed the marital community as over prior to the accident, she would have likely filed for divorce then. Instead, it appears the accident was the "last straw." Thus, the request for a divorce was the clearest signal by either party that the physical separation was permanent and there was no intent to continue the marriage.

Thus, the marital economic community had not ended when H struck the pedestrian, any obligation incurred because of the accident is a community debt.

Order of Payment

When a tort is committed during an activity for the benefit of the community, the debt will be satisfied first by CP, then by the tortfeasor's SP. The non-tortfeasor spouse's SP is not subject to the debt.

When a tort is not committed during an activity for the benefit of the community, the debt will be satisfied first by the tortfeasor's SP, then by CP. Again, the other spouse's SP is safe.

Here, H committed the tort against the pedestrian while driving drunk. This was not an activity for the benefit of the community--to the contrary, H was supposed to be seeking alcohol abuse treatment while he was living away from the family home. Thus, recovery would be taken out of H's SP before the CP.

However, on the facts, it doesn't seem as though H has any SP to satisfy the debt. Thus, any recovery will likely be against the H and W's CP.

Reimbursement to the Community

To the extent any CP--i.e. the house--is used to pay any obligation arising out of H's accident with the pedestrian, the community may be entitled to reimbursement from H. Where CP is used to pay an obligation arising out of spouse's tort that was committed not during an activity for the benefit of the community, the community is entitled to reimbursement for that payment if the tortfeasor's SP was available to pay (or if the order of payment was not followed). However, as mentioned, it doesn't appear H has any SP available to pay the debt and, thus, reimbursement may be unlikely.

Distribution of Debts on Divorce

At divorce, community assets are generally divided under the "equal division rule"--i.e. each spouse gets 1/2 of each community asset in kind.

However, a judge has more discretion as to the allocation of debts at divorce. Typically, a judge will allocate a tort debt to the tortfeasor spouse if the tort was incurred not during an activity for the benefit of the community. However, a judge may take into account ability to pay to effect a more just allocation of debts.

Here, on divorce, the judge would likely allocate any judgment based on H striking the pedestrian to H. H will argue that he's unemployed and can't pay, but it's highly unlikely a judge would saddle W with an obligation to pay H's tort liability post-divorce.

Conclusion

Thus, during the marriage, H and W's CP will be liable for damages recovered for injuries to the pedestrian. Even though H and W have filed for divorce, until community assets and debts are distributed, the community estate continues and the pedestrian can recover against it. However, as mentioned, on divorce, the debt will be allocated to H. Further, W may be entitled to reimbursement for CP used to pay the debt.

*Note: If the court decided that the marital community was terminated when H struck the pedestrian, then CP--i.e. the house--would not be liable for the debt because the debt would be H's SP.

2. **Is Wendy's Interest in the Family Home Subject to Payment of H's Legal Fees**

Equal Management

Each spouse generally has equal rights to manage community property. This includes the right to sell and encumber community property. However, with respect to real property, one spouse may not encumber community owned real property without the other spouse's consent. If one spouse, without consent, sells or encumbers community real estate, the non-consenting spouse has the power to void that transaction within 1 year.

Lien on the House

Here, H has given Lawyer a lien on the family home without W's consent. Thus, W has the power within 1 year to void the encumbrance.

H will argue that because he gave the lien on the house after W told him she wanted a divorce, he was only granting a lien on his 1/2 SP interest in the family home. However, there's no evidence that W actually filed for divorce or that divorce proceedings were held during which a judge divided the community estate. While the marital economic community may no longer exist because there has been permanent physical separation, the community estate lives on until it has been distributed.

Thus, a court would likely allow W to void the encumbrance on the community real property due to her lack of consent in making the encumbrance.

Timing of the Attorney's Fees

Furthermore, H sought legal advice after W told him she wanted a divorce. Because W asking for divorce terminated the marital economic community, CP--i.e. the family home--is not liable for the debts incurred by H after such separation.

Thus, any obligation owed to Lawyer based on legal services rendered to H cannot be satisfied out of CP because such an obligation would not be a community debt.

He would argue that payment of attorney's fees is an obligation arising out of the accident of the pedestrian, when the marital economic community still existed. However, the attorney's fees represent an entirely different event. Furthermore, contractual obligations arise when the contract was made. Here, any contract and/or agreement with Lawyer was made after the economic community ended. Therefore, W's interest in the family home is not subject to payment for the additional reason that CP is not liable for H's separate post-marriage debts.

Necessaries

Post-separation, a spouse can still be liable for obligations relating to necessaries that the other spouse incurred during the marriage. Necessaries generally refer to food, shelter, and medical expenses. Here, H's legal fees don't likely constitute necessaries and, as such, this theory cannot be invoked to hold W's interest in the family home subject to payment.

3. **Lawyer's Ethical Violations**

Obtaining Pecuniary Interest in Outcome of Case

Under the ABA, a lawyer cannot obtain a pecuniary interest in the subject matter of a case other than in the case of a contingency fee arrangement or an attorney's lien. However, in CA, attorneys' liens are impermissible.

Here, Lawyer effectively acquired an attorney's lien on H's family home. Thus, Lawyer will argue that this was permissible because the only purpose here was to secure payment. In CA, this would constitute an ethical violation. Under the ABA, it's less clear.

While under the ABA, an attorney's lien is permissible, if Lawyer knew that H couldn't rightfully encumber the family home, then it's possible that Lawyer committed an ethical violation because accepting the attorney's lien would constitute a violation of a third party's (W's) rights in the course of representing H.

Entering into Business Transactions with Clients

An attorney can only enter a business transaction with a client if (1) the terms are fair and reasonable, (2) the terms are communicated to the client in an easily understandable manner, (3) the client is advised to get independent counsel to represent him in the transaction and is given a chance to do so, and (4) the client consents.

Here, by taking a lien on H's family home, Lawyer entered into a business transaction with H. However, it's not clear that Lawyer ever advised H to seek independent counsel or that he adequately informed him of the material terms of the lien. Although H immediately accepted, he did so without knowing what would trigger enforcement of the lien (1 missed payment? total failure to pay? late payment? H's insolvency?). Thus, by failing to adequately inform H and encouraging him to seek independent advice, Lawyer likely violated the ethics rules.

Fees

Under the ABA, a fee must be reasonable. In CA, fees can't be unconscionable. Further, in CA, a fee agreement must be in writing unless it's (1) less than $1k, (2) with a corporation, or (3) for a routine matter involving an existing client.

Here, the lien agreement was essentially a fee agreement. However, the terms were not adequately disclosed to H. Further, there was no written fee agreement. Because a writing was likely required--there's no evidence H was an existing client or that Lawyer's services were valued at under $1k--this is a violation of CA rules.

Further, the lien was likely unreasonable and unconscionable. Because H was unemployed, it was extremely unlikely that he was going to be able to pay Lawyer's fees. If Lawyer knew that H was unemployed--which he likely did, considering he conditioned representing H on having a lien on the house--then Lawyer must have known that H wouldn't be able to pay. Thus, the fee agreement was unconscionable because it was akin to a mortgagee lending to a mortgagor knowing that the mortgagor was going to default and the foreclosure was inevitable. Lawyer must have known (a) that H wasn't going to be able to pay and (b) that the value of the lien on the home was worth more than the value of the services to be provided.

Thus, the fee arrangement likely constituted an ethical violation.

Violating Rights of Third Parties

Lawyers cannot violate the rights of third parties in the course of representing a client. To the extent the lien violates W's rights and Lawyer knew of this, he likely acted unethically. Furthermore, if Lawyer knew that H could not rightfully encumber the family house, then Lawyer arguably breached his duty of competent and candid representation by not informing H that he couldn't offer a lien on his house without W's consent.

ANSWER B TO QUESTION 2

1. **Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian hit by Hal under California law?**

The parties were married and live in California. Thus, their property rights as a couple, specifically with regard to the property acquired during the marriage, are governed by California community property law. Whether the house was community or separate property can be determined by the source of the asset, whether any presumptions apply, and the actions of the parties during the marriage.

Community Presumption

There is a community presumption regarding property acquired during the marriage that it is community property. This would apply to the family home given, as the facts state, it was acquired during the marriage. The presumption can be rebutted by a showing that the house was not actually acquired during the marriage, it was acquired during the marriage but with separate property funds, the house was a gift/devise/inheritance, or the house was the rent/issue/profit derived from separate property.

Their house was purchased during the marriage so it was not a gift or devise. Although it is possible that the house was purchased with separate property funds, there are no facts to indicate this was the case. Because it was purchased during the marriage, and there are no facts to rebut the presumption, the house is considered community property.

Judgments Against Spouses

A tort judgment against a spouse will subject both the community property and the separate property of the tortfeasor to the judgment. But once the community property is divided, debt cannot be recovered from the spouse who received her half of the community property from what she received under the divorce decree unless she was the spouse that incurred the debt or the debt was assigned to her. Thus, for a judgment

against Hal for drinking and driving, the community will be liable for this debt, and it can be satisfied from the community property.

For the Benefit of the Community

Although the community property is liable for the judgment by the pedestrian, the judgment must be satisfied first from the separate property of the tortfeasor spouse if the tort was not committed by conduct that was being performed for the benefit of the community. For example, if Hal was on his way to drop the kids off at school or to pay the mortgage on the house, this would be for the benefit of the community. In that case, the judgment would be satisfied first from community property, and if there was any deficiency, then from the separate property of the tortfeasor.

Here, Hal had been kicked out [of] the house for his drinking problem at the time of the accident. Wendy had clearly communicated her disapproval for Hal's drinking. The drinking, including drinking and driving, would actually harm, not benefit, the community. Although we do not know where Hal was headed, he had already been kicked out of the house and was, generally, involved in a drinking binge at the time. Therefore, his actions were not to the benefit of the community and can be satisfied first from his separate property assets.

But the facts state that his only asset, at the present time, is his interest in the family home. Because it appears he has no separate property from which to satisfy the judgment, the judgment will be satisfied from the community property home.

End of the Economic Community

The accident in which the pedestrian was hit occurred after Hal had been kicked out of the house but before Wendy told Hal she wanted a divorce. As stated above, the source of property or debt, whether it was incurred before, during or after the marriage, can indicate whether it is community or separate debt. The pedestrian's claim is a form of debt because, once rendered, the plaintiff can reduce it to a judgment and attach liens to the tortfeasor's property. Thus, the question arises whether the economic

community ended when Wendy kicked Hal out of the house, because if so, the injury and judgment would have occurred after the economic community ended and would be the separate debt of Hal. In this case, the judgment could not be satisfied from community property, including the house.

In California, end of the economic community occurs when there is physical separation and an intent not to carry on the marital relationship anymore. If the parties maintain the facade or marriage, although physically separated, the economic community will not be considered to be at an end. The economic community will certainly result, if the above elements are not satisfied, when the divorce decree is entered.

Here, Wendy kicked Hal out of the house one year ago. She did not say anything about ending the marriage or never wanting to see him again. She did tell him he could not return until he completed alcohol treatment. Thus, Hal being kicked out was not indicative of an intent to permanently end the marriage relationship, it was indicative of a temporary physical separation by Wendy for the limited purpose of motivating Hal to get treatment and save the marriage. Thus the economic community would not have ended simply when he left the house.

But, after having moved out and hitting the pedestrian while drinking, Wendy learned of the accident and told Hal she wanted a divorce. At this point, both elements would be met. Hal and Wendy would have been physically separated, and one spouse has indicated an intention not to resume the marital relation by telling the other she wants a divorce.

Because the economic community did not end until that time, when Wendy told Hal she wanted a divorce, and the accident and/or the cause of action that is the basis for any judgment accrued before that time, the judgment resulting would be a community debt because it was essentially incurred before the end of the economic community.

Debt

Debt incurred before or during the marriage can be satisfied from the community or from the tortfeasor's separate property. Debt incurred by a spouse for necessaries, including medical care, can be satisfied from community property or the separate property of either spouse, although indemnity may be available. Here, the debt is for tort judgment and, as stated above, can be satisfied from either community property or separate property of Hal, first from his separate property and then from the community property.
In California, for the purpose of debt for necessaries or medical services, end of the economic community can only occur on divorce. Judgment may not be able to be satisfied from Wendy's earnings if she kept them in a separate (versus joint) account from which Hal had no right of withdrawal.

CONCLUSION--Because the debt was incurred before end of the economic community, it is a community debt. Therefore, it can be satisfied from community property or separate property of Hal. Because the tort that is the basis of the judgment was not conducted for the benefit of the community, the judgment must be satisfied first from Hal's separate property. But because Hal has no separate property, his only asset is the house, it will be reduced to judgment and recovery sought from the asset that is the community home, which as above is classified as community property. Wendy may be able to seek indemnity.

2. **Is Wendy's interest in the family home subject to payment of Hal's legal fees under California law?**

As stated above, the economic community ended when Wendy kicked Hal out of the house and told him she wanted a divorce. Hal appears from the facts to have consulted the lawyer after that time. Debt incurred after the end of the economic community will belong to the debtor spouse.

Attorney Fees for Divorce Lawyer

Generally, a spouse may not unilaterally encumber community real property without a joint action on behalf of both spouses. Additionally, the spouse may not separately

encumber her half interest in the property. The one exception to this rule is for the spouse to satisfy attorney fees in the divorce proceeding between the spouses.

Here, because the lawyer is not representing Hal as a family attorney in his anticipated divorce proceeding with Wendy, this rule would not apply. The lawyer fees incurred by Hal after the economic community ended for the purpose of defending against the tort suit could only be satisfied from Hal's separate property.

Division of Assets on Divorce

Generally, assets are divided pro rata at divorce, 50-50, no cashing out one spouse to give the other an entire asset. The only general exceptions to this rule are: for a closely held corporation whose shares are community assets where one spouse is the CEO and division would destroy the business; a pension plan from which one spouse can take a cashout instead of receiving payments from the pension so the spouse, who no longer wish to have any connection can go their separate ways; or, for the family home when selling it and dividing the proceeds will uproot the children and cause them harm.

While this is the family home, there appear to be no children and no reason not to apply the binding pro rata division, 50-50, by sale of the house and splitting the assets.

This means that on divorce, the assets of the house will be split evenly between the parties. Once the divorce decree is entered, the proceeds from the house that Hal receives are going to be his separate property. Upon divorce, the legal fees of Hal's lawyer can be paid by his share of the proceeds.

But the question asks whether the payment of Hal's legal fees will be satisfied from Wendy’s interest in the home. Wendy has no interest in Hal's proceeds after divorce from sale of the community property house, and thus the proceeds subject Hal's interest, not hers, to liability.

CONCLUSION--because the attorney fee debt will have been incurred after end of the economic community, it will be separate debt of Hal, and does not subject any of Wendy's interest in the family home to liability for those fees. The exception for divorce attorney fees does not apply.

3. **What ethical violations has the lawyer committed according to both the ABA and California law?**

A lawyer is a fiduciary of the client. She has a duty of confidentiality (not to communicate information relating to representation), a duty of loyalty not to act on behalf of her own, a client's, or a third party's best interests that are adverse to her client's, financial duties, and duties of competence which are all owed to the client.

Duty of Loyalty

Under the duty of loyalty, the lawyer must not develop an interest or maintain an interest that is adverse to the client, whether it is the interest of the lawyer herself, an interest of one of the lawyer's other clients, or an interest of a third party with whom the lawyer is closely related.

Loyalty--Financial Assistance to Clients

Under the ABA rules, a lawyer is not permitted to lend the client money for the representation, with the exception of forwarding costs of litigation to indigent clients and forwarding costs associated with a contingent fee arrangement. Under the California rules, the lawyer can lend the client any amount for any reason, as long as she does not promise to satisfy the existing debts of the client in order to buy the client's business.

Therefore, from this perspective, the loan would be considered acceptable under the California rules but unacceptable under the ABA rules. Under the ABA rules, once the client becomes indebted to the attorney, the attorney's personal interest against the client in collecting the money and receiving payment for the debt may conflict with his duty to act for the sole benefit of the client. Under the California rules, because this is not a promise to satisfy pre-existing debt for the prospective client, this is acceptable.

Loyalty--Transacting Business or Developing Adverse Interest to Client

Whenever the lawyer enters into business with the client, the terms must be fair, the lawyer must disclose the terms (effect of the transaction) to the client in writing, allow for an opportunity for the client to consult with independent counsel and probably should suggest she do so if the lawyer's interest will be adverse to the client's in the litigation, and obtain consent from the client in writing.

This loan would essentially be such a transaction. The facts do not indicate the above elements are met. Additionally, there is a question whether it would be fair to encumber a client's sole asset in order to receive payment. But the above rules that specifically address lending a client money are going to govern whether the transaction is permissible. Regardless, even though the loan is permissible under California law, the attorney should ethically consider whether the terms of the loan are fair and suggest receiving independent legal advice if the client wishes to fund the representation in this manner.

Financial Duties

The reason the nature of the fee arrangement is important is to judge whether it is permissible for the lawyer to charge the client in this way. Under the ABA, the fee must be reasonable considering the experience of the lawyer, novelty of the case, difficulty of legal issues, time and effort required, etc. In California, it simply must not be unconscionable. The question is whether the lawyer has complied with the requirements for charging a fee, and whether the amount is justified.

Contingent Fee

A lawyer can enter into either an hourly fee arrangement or a contingent fee arrangement with a client, or potentially a flat fee arrangement. Under the ABA rules, contingent fee arrangements (lawyer forwards fees and sometimes costs in order for a stake in the recovery, if there happens to be one) are not available in criminal or domestic cases. They must include the percentage of recovery taken, the costs deducted from recovery, and whether they are deducted before or after. In California,

the agreement must also indicate that it is subject to negotiation with the lawyer and what costs will not be covered by the contingent fee arrangement.

Under ABA rules, this may be a criminal case, but considering the question implies a money judgment that could subject the house to liability, brought by a private party pedestrian; using contingent fee arrangement in this case would be permissible. But here, if the mortgage is being used as payment, and thus this is more likely to be considered an hourly fee arrangement.

Hourly Fee

The agreement, under ABA rules, must disclose the rate at which the fee is charged, the services it covers, and the respective duties of lawyer and client. In California, it must also be in writing unless it is for less than $1,000, with a corporate client, routine matter for regular client, or emergency renders this impossible.

CONCLUSION--There is nothing in the facts to indicate the lawyer has complied with any of the above requirements regarding the fee arrangement. He made the offer to encumber the property without explaining the calculation of the rate, providing a writing, explaining what services it would cover, etc. Additionally, the case appears to be a simple one, involving culpability for drunk driving. Depending on how much the house was worth, a lien on the home could be unreasonable or unconscionable under either California or ABA approach.

Duty of Competence

A lawyer has a duty of competence, to represent the client with the skill, knowledge, thoroughness and preparation necessary to carry out the representation effectively.

As stated above, the home is community property. It cannot be encumbered unless both spouses jointly enter into the transaction. The non-consenting spouse can recover the house even from a BFP, and set aside the transaction, if she has not agreed to it.

There is a one year statute of limitations, but if the buyer knew the seller was married and failed to seek consent from the other spouse, there is no statute of limitations.

Here, an attempt to encumber the community property house to satisfy the separate debt of Hal would be a failure of competence on the part of the lawyer. A lawyer of reasonable skill, knowledge, thoroughness and preparation would be aware of this and would not attempt to encumber property to pay his debts knowing it was community property not subject to this type of transaction without consent of Wendy. This would ineffectively carry out the representation.

CONCLUSION--Under ABA rules only, the lawyer has breached his duty of loyalty to the client by lending him money in regard to the transaction. Although, he may argue he is permitted to do so because he is permitted to forward costs of litigation to indigent clients and Hal is indigent because he is unemployed and has no assets but the house. But because the house cannot be encumbered this way without the consent of Wendy, and a lawyer of reasonable skill and knowledge would know this, the attempt to encumber the house without Wendy's permission may also be a breach of duty of competence, subjecting the lawyer to discipline, sanctions, and malpractice liability. There is also a question of whether the amount of the fee is reasonable or unconscionable in light of the nature of the litigation and employment of the lawyer.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 3

In 2007, while married to Hank and residing in California, Wendy inherited $150,000. Wendy used the money to purchase $50,000 worth of Chex Oil stock and a restaurant that cost $100,000. Hank managed the restaurant and, solely through his own efforts, it prospered and is now worth $300,000.

In 2008, Hank inherited an unimproved lot in California worth $75,000. Hank and Wendy obtained a construction loan from a bank for the purpose of building a rental house on the lot. In making the loan, the bank relied upon the salaries earned by both Hank and Wendy and, in addition, required that Wendy pledge the Chex Oil stock. A rental house was constructed on the lot. The present market value of the property, as improved, is $500,000.

In 2011, Cathy, a customer at the restaurant, tripped and fell over a box carelessly placed in the entryway by Hank. She obtained a judgment against Hank for injuries suffered in the fall.

Hank and Wendy have now decided to dissolve their marriage.

1. What are Wendy's and Hank's respective rights in:

    a. The Chex Oil stock? Discuss.

    b. The restaurant? Discuss.

    c. The rental property? Discuss.

2. To satisfy her judgment, may Cathy reach the community property, Hank's separate property, and/or Wendy's separate property? Discuss.

Answer according to California law.

SELECTED ANSWER A

Community Property

California is a community property (CP) state. All property acquired during marriage is community property. Separate property (SP) includes property owned before marriage, property acquired by gift, will, or inheritance during marriage, rents, issues, and profits from SP, and earnings after separation.

Characterization of property as either CP or SP depends on: (1) the source of the property; (2) any legal presumption affecting the property; and (3) any actions of the parties that may have changed the character of the property.

With these principles in mind, each item of property will be analyzed.

The Chex Oil Stock

Source

In 2007, while married to Hank (H), Wendy (W) inherited $150,000. Wendy used the $150,000 inheritance to purchase $50,000 of Chex Oil stock and a $100,000 restaurant. Thus, the source of the Chex Oil stock was W's inheritance, which is W's SP.

Presumptions

All property acquired during marriage is presumed CP. This presumption can be rebutted by tracing to a SP source or by an agreement to the writing to the contrary. Here, W can trace the $50,000 used for acquisition of the Chex stock to her $150,000 inheritance. W's inheritance is her SP. Thus, the general CP presumption is rebutted by tracing the funds used to purchase the stock to a SP source, the inheritance.

Actions

The only action taken by the parties with respect to the Chex stock was to pledge it as collateral for the loan to build the rental property.

Parties may transmute property from SP to CP and vice versa, which is a change in character of the property. After 1/1/1985, any transmutation must be in writing, clearly state the change in character of the property, and be signed by the spouse whose interest is adversely affected.

Here, there was no agreement between H and W that the Chex stock be transmuted from W's SP to CP. The fact that the bank required H and W to pledge the Chex stock as collateral for the bank loan to build the rental property is not sufficient evidence of a transmutation because it does not state any intent that W is transmuting her SP to CP.

Thus, the pledging of the Chex stock as collateral does not change the character of the stock.

Disposition

Because the stock can be traced to a SP source, the general CP presumption is rebutted, and has had no change in character; the Chex stock is W's SP. Now that H and W are seeking dissolution of their marriage, the Chex stock will be awarded solely to W as her SP.

The Restaurant

Source

In 2007, while married to H, W inherited $150,000. Wendy used the $150,000 inheritance to purchase $50,000 of Chex Oil stock and a $100,000 restaurant. Thus, the source of the restaurant was W's inheritance, which is W's SP.

Presumptions

All property acquired during marriage is presumed CP. This presumption can be rebutted by tracing to a SP source or by an agreement in writing to the contrary.

Here, W can trace the $100,000 used for acquisition of the restaurant to her $150,000 inheritance. W's inheritance is her SP. Thus, the general CP presumption is rebutted by tracing the funds used to purchase the restaurant to a SP source, the inheritance.

Actions

Hank managed the restaurant during the marriage.

CP Contribution to SP Business

A spouse's effort, skill, and industry during marriage is a CP asset. Where a spouse contributed his or her effort, skill, and industry during marriage to his or the other spouse's SP asset, and the asset increases in value, the community receives an interest in the asset. There are two different accounting methods to determine the value of the respective SP and CP interests in the business at dissolution.

Here, H contributed his effort, skill, and industry, which is a CP asset, to the restaurant, which is W's SP asset, during marriage.

The court is not required to use either formula and may choose, or may use whichever formal the parties provide evidence in support of.

Pereira

The Pereira formula is used where the major factor contributing to the increase in value is the spouse's personal effort. Under Pereira, the value of the SP portion of the asset is equal to the value of the SP asset at the time of marriage or the time of acquisition during marriage, plus a reasonable rate of return, usually 10% per annum. The residual value belongs to the community.

Here, managing a restaurant takes personal effort and industry. The facts state that "solely through [H's] own efforts, it prospered." Thus, it appears that Pereira would be the more appropriate formula to use in this circumstance.

Here, the restaurant was purchased in 2007 for $100,000. Now, in 2013, H and W seek dissolution of marriage. Assuming that the purchase price was the fair market value of the restaurant at the time, the SP portion of the restaurant will be equal to $100,000 plus $10,000 per year for six years, or $160,000. The residual value, of $140,000 ($300,000 - $$160,000) is the community's interest in the restaurant.

Thus, under the Pereira formula, the restaurant will be $160,000 CP and $140,000 SP.

Van Camp

The Van Camp formula is typically used where the SP business is valuable and increases in value due to the existence of the business and market forces, and not the personal effort or industry of the spouse. Under Van Camp, the community receives a reasonable salary in return for the spouse's contribution of time and effort, reduced by the amount of community expenses paid by the returns from the business. The residual is the owning spouse's SP.

Here, as explained above, the restaurant in value because of H's contribution of effort and industry, not because of market forces. Thus, the Van Camp formula is probably not the more appropriate formula.

Under Van camp, the community would be credited with a reasonable salary for the 6 years that H spent managing the restaurant, less any community expenses paid by the returns from the restaurant. The balance will be W's SP.

Disposition

Since Pereira is probably the better formula, the restaurant will be $160,000 CP and $140,000 SP.

The Rental Property

Source

In 2008, H inherited an unimproved lot worth $75,000. Inheritance during marriage is the inheriting spouse's SP. Thus, the source of the lot is H's SP.

Regarding the construction loan, the personal credit of either spouse during marriage is a community asset. Here, a loan was obtained from the bank for the construction of the rental property. The loan was obtained in both spouses' names and the bank relied upon the salaries earned by both H and W. The bank also required W's Chex stock as collateral.

Since the bank relied on the personal credit of both spouses, the bank loan is CP.

Presumptions

All property acquired during marriage is presumed CP. The presumption can be rebutted by tracing to a SP source or a written agreement to the contrary. Here, the lot was acquired in 2008, during the marriage. However, the lot can be traced to H's inheritance, which is SP. The bank loan is presumed CP because it was acquired during marriage. There are no facts that can rebut this presumption. W may argue that her pledge of collateral of the Chex stock makes the bank loan her SP, but this argument will be rejected because the bank specifically relied on the salaries earned by both H and W.

Actions

Improvement of Separate Real Property with CP

Here, the bank loan (CP) was used to improve an SP asset (H's lot).

Where CP is used to improve a SP asset, the community is entitled to an interest. The formula used for calculating such an interest is from In re Marriage of Moore. The community is entitled to reimbursement for the value of the contributions for down payment, improvements, and payment of principal, plus a pro rata share of the appreciation.

Here, the community will receive reimbursement of the principal payments made on the bank loan, plus a pro rata share of the appreciation calculated by dividing the CP contribution by the total contribution of SP and CP. The facts do not give enough details to make such a calculation, but it will be some portion of the $500,000 present market value.

Disposition

The rental property is part CP and part SP as discussed above. The CP portion will be divided equally upon dissolution.

What Can Cathy Reach to Satisfy Her Judgment?

Liability of CP and SP for Tort Judgment

CP is liable for all debts incurred by either spouse before or during marriage. Where a judgment results from a tort committed by one spouse, the order of satisfaction of the judgment depends on whether the tortfeasor spouse was acting for the benefit of the community at the time the act giving rise to the judgment was committed. If the tortfeasor spouse was acting for the benefit of the community, the judgment may be satisfied first by CP and then by the tortfeasor spouse's SP. The non-tortfeasor spouse's SP is not liable. If the tortfeasor spouse was not acting for the benefit of the community, the judgment may be satisfied first from the tortfeasor spouse's SP and then from CP. The non-tortfeasor spouse's SP is not liable.

Here, H placed a box in the entryway of the restaurant, presumably while working at the restaurant. Cathy, the customer, obtained a judgment against Hank. If Hank was working at the restaurant and placed the box in the entryway negligently, in the course of his work, he was acting for the benefit of the community because the community had an interest in the restaurant and H's wages from the restaurant were CP. Alternatively, if H placed the box there and injured Cathy intentionally, or did not place the box there as part of his work at the restaurant, he was not acting for the community. Here, it is probably more likely he was acting for the benefit of the community.

As such, Cathy must first satisfy her judgment from CP, which includes a portion of the restaurant and a portion of the rental property. Once CP is exhausted, and if it is, Cathy must satisfy the balance of her judgment from H's SP, which includes a portion of the rental property. Cathy cannot reach the portion of the restaurant that is W's SP and cannot reach the Chex Oil stock, which is also W's SP.

SELECTED ANSWER B

California is a community property state. In California, there is a community presumption. Under the community presumption, property obtained during marriage by the spouses is presumed community property. There are also areas of separate property. Property obtained by either spouse before or after the marriage is typically separate property. Additionally, any property obtained by gift, will, or inheritance by either spouse is that spouse's separate property. Property that is obtained using separate property also remains separate property. With these considerations, Hank and Wendy's respective rights will now be considered.

1. Hank and Wendy's Rights in Property

Chex Oil Stock

While married to Hank and residing in CA, Wendy inherited $150,000. As described above, an inheritance by a spouse is separate property of that spouse despite the community presumption. Wendy used $50,000 of this money to buy the Chex Oil stock. The use of separate property to obtain other property results in that other property remaining separate property. Therefore, the Chex Oil stock was separate property when it was bought by Wendy.

Hank may argue that Wendy intended to make the stock a gift to the community when she used it as part of the collateral for the loan obtained by the couple in 2008. Since 1985, however, a transmutation of property from separate property to community property must be in writing and show the intent of the separate property holder to effectuate a gift to the community. Because Hank would not be able to produce such a writing, he will not be able to show that Wendy made a gift to the community.

The Chex Oil stock is Wendy's separate property.

Restaurant

While married to Hank and residing in CA, Wendy inherited $150,000. As described above, an inheritance by a spouse is separate property of that spouse despite the community presumption. Wendy used $100,000 of this money to buy the restaurant.

As described above, the use of separate property to purchase other property results in that property remaining separate property. Therefore, the restaurant was separate property when it was bought by Wendy.

The restaurant has increased in value because of Hank's efforts. Hank's labor is considered community property. The use of community property to enhance the value of a spouse's separate property is analyzed by the court in different ways.

When the separate property is the separate property of one spouse and then other spouse uses community property to enhance the value of the first spouse's separate property, courts in CA may sometimes consider this a gift by the second spouse to the first spouse. Here, hank used community property assets (his labor) to increase the value of the separate property owned by Wendy (her restaurant). Some courts may interpret this as a gift by Hank to Wendy.

The gift interpretation, however, is more likely to be used when a monetary or similar transfer of community property is made to enhance the separate property's value. Here, Hank worked for at least 4 years (depending on when they seek dissolution of the marriage – it could be 6 years) at the restaurant. It is unlikely he intended these years of work to be a gift to Wendy's separate property. Some courts will refute the presumption that the community property going to the other spouse's separate property was a gift and instead hold that the portion is community property.

In determining what portion is community property, courts will apply analysis either from the *Pereira* case or the *Van Camp* case.

The *Pereira* formula is often applied when the labor of the spouse has resulted in the increase in the value of the business. This is the case here, where the facts state that the restaurant has prospered "solely through his own efforts" as manager of the restaurant. The *Pereira* formula considers the value of the property at the time it was acquired (or time of the marriage if that comes after), and gives the spouse owning the separate property a fair return on the investment, which would be 10% per annum. Based on this analysis, and assuming 6 years have passed, Wendy would get 10% of the restaurant's initial value, or $10,000, each year. This would result in $60,000 of

increase. So $160,000 of the property remains Wendy's separate property and the other $140,000 is community property.

The fact that Hank was working instead of Wendy does not change this analysis. Typically the owning spouse may work on her own separate property. Regardless, community property (Hank's labor) was put towards the business to make it grow, and so the *Pereira* formula would view the fair investment return to be community property.

The *Van Camp* formula applies when the property increases in value because of its inherent worth. This does not apply here because the property increased due to Hank's efforts, not the restaurant existing itself. This formula would look at the reasonable rate of compensation for the spouse and deduct the expenses of the couple. The remaining value of the salary would be community property, and the remaining value of the business would be separate property of the spouse. As mentioned above, it does not apply here because the restaurant increased in value due to Hank's efforts and because it was Hank working on the property rather than Wendy.

Their respective rights in the property should be $160,000 separate property of Wendy and $140,000 community property, which the couple would split upon divorce.

Rental Property

While married to Wendy and residing in CA, Hank inherited an unimproved lot worth $75,000. As described above, an inheritance by a spouse is separate property of that spouse despite the community presumption. The unimproved lot, therefore, was separate property of Hank.

The community then obtained a loan to improve the property into a rental property. Whether a loan is considered community property or separate property depends on what the creditor looked at for satisfaction of the loan.

Here, the creditor looked at the salaries of each and the value of the Chex Oil stock. Because of the inclusion of the Chex Oil stock, Wendy may argue that the loan should be considered her separate property that then went into the rental property. The value of the stock, however, was only $50,000. In order to go from an unimproved lot to a rental property worth $500,000, the creditor likely made a substantial loan and relied

primarily on the salaries of each spouse. The salaries of each spouse at that time, and therefore their creditworthiness, is a community asset. The loan, therefore, should be considered a community asset.

As above, this involves the use of community property to enhance the value of separate property of a spouse. Hank may argue that Wendy intended her use of community property to enhance the value of his separate property to be a gift. Courts have analyzed this in different ways, as described above. Here, it is unlikely that a court would determine this to be a gift and instead hold that the community has some interest in the property.

Wendy may argue that Hank intended a gift to the community by using the community loan to build up his property. As explained above, however, a transmutation requires a clear writing by the party giving the gift. Here, there is no writing showing that Hank intended a gift. The court would determine that Hank did not gift the entire property to the community.

Instead, the court must then determine what percentage of the property is community property. The land went from unimproved and worth $75,000 to improved and worth $500,000.

Wendy may argue that the increase should all be considered community property, potentially subject to a reasonable increase in the original investment. This would essentially be like an argument that *Pereira* should apply because it is now a business and community assets went into it to increase its value. If this were used, the property would receive a fair 10% increase per annum and the community would receive the remaining value of the property.

Alternatively, the court looks at the amount of the loan that was received. The court could then compare this amount to the original value of the land to do a proration analysis. Under this theory, the court would look at the original $75,000 value of the land and compare it to the value of the loan (I'll assume $125,000 for basic calculation and demonstration purposes). If the loan were $125,000, then the total value going into the property would be $200,000 (75,000 + 125,000). The court would then prorate the proportion of separate property and community property to the value of the property

today, which is $500,000. The proportions of the separate property (3/8 in assumption) and the community property (5/8 in assumption) would be prorated to the $500,000 value to determine amounts of separate property and community property.

The court may also alternatively look at the amount of the loan and view this as the community property and merely require a reimbursement for the amount of money that went into the undeveloped land.

Because of the increase in the property value due to the improvements, some form of proration would likely be better for the court to apply to afford a more fair split of the property value.

2. Cathy's Judgment

Cathy, a patron at the restaurant, has received a judgment against Hank for his negligence. Based on the facts, it appears that the judgment is only against Hank individually and not against the restaurant itself. The analysis below will assume that Hank is individually liable and the restaurant is not vicariously liable for the judgment.

Because Hank is personally liable for the judgment, his separate property is subject to Cathy's judgment. Cathy may therefore go after Hank's portion of the rental property that is his separate property. She may also go after any other separate property owned by Hank.

The tort liability of one spouse can affect the community assets. Cathy would be allowed to go after the community assets to satisfy her judgment. The order in which she obtains her judgment, however, depends on whether the spouse was acting for the benefit of the community at that time or for his own separate benefit. Here, Hank was working at the restaurant for the benefit of the community when the tort liability was incurred. Because Hank was acting for the betterment of the community, Cathy may go after the community property before she is forced to go after Hank's separate property for the judgment. To the extent that Wendy's community property interest is infringed by Cathy's judgment, she may be able to seek reimbursement from Hank at the divorce because she is not personally liable for the tort.

Wendy's separate property is not subject to the tort liability of Hank. Wendy is not individually liable for the tort (again, assuming that the restaurant is not vicariously liable). Additionally, community property of Wendy, such as wages, kept in a separate account that the other spouse cannot access could not be reached by a creditor unless for the necessaries of the other spouse. Here, Hank is liable for a tort, not a contract for necessities, so the necessaries exception would not apply. Additionally, Cathy's Chex Oil stock that she keeps separate is separate property rather than community property that she keeps separate, so it could not be reached by Cathy.

Therefore, Cathy may go after Hank's separate property and the community property to satisfy her judgment. She may not go after Wendy's separate property.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

Question 2

Hank and Wendy are residents of California. Hank is a teacher and Wendy is an accountant.

In 2008, Hank and Wendy married. After their wedding, Wendy's mother deeded them a house as joint tenants. They moved into the house and used their earnings to furnish it in a lavish style, including an antique mirror in the entryway. One day, Hank gave the mirror to a friend who had admired it on a visit to the house.

In 2012, Wendy purchased a small office building where she established her own accounting practice. She paid for the building with funds saved from her earnings during her marriage and took title in her name alone.

In 2013, Hank and Wendy separated. Hank told Wendy that the house was henceforth her separate property and she said, "O.K."

After the separation, Wendy's income from the accounting practice tripled and she remodeled the office building with her increased earnings. Without Hank's knowledge, she then sold the building to Bob, who did not know that she was married.

In 2014, Wendy initiated dissolution proceedings.

1. What are Wendy's rights, if any, as to the antique mirror? Discuss.

2. What are Hank's and Wendy's rights, if any, as to the following:

    a) The house? Discuss.

    b) The accounting practice? Discuss.

    c) The office building? Discuss.

Answer according to California law.

QUESTION 2: SELECTED ANSWER A

Community Property Generally

Since Hank and Wendy are residents of California, the law of California will be applied in their divorce proceeding. California is a community property (CP) state. The general presumption is that all property acquired by either spouse during the marriage, real or personal, is CP. On the other hand, all property that is acquired by gift, bequest, devise or descent is considered separate property (SP) of the spouse who received it. In this case, the ownership of each of the assets will depend on whether the CP presumption controls, or the actions of the parties or some other presumptions have changed the character of the property. Each asset will be discussed separately below.

The Mirror

The first issue is whether Wendy has any rights in the antique mirror that Hank gave away to his friend. In this case the mirror was acquired during the marriage, and was purchased using the earnings of both parties; therefore the mirror is considered CP. There are no facts to indicate that the parties changed the character of the mirror and therefore the CP presumption is controlling.

Gift To the Friend

The issue here is whether Hank has fully disposed of the mirror by giving it away to his friend. After 1-1-1975, both spouses to the marriage acquired the rights to equal management and control of the marital assets. Under the rules regarding the rights of equal management and control, one spouse may not make a gift of CP without the consent of the other spouse.

Here, Hank gave the friend the mirror, and there is no indication that he asked for Wendy's permission before doing so. Hank may argue that although spouses may not

make gifts of CP without the other spouse's permission, the general rule is that the parties can dispose of personal property. On the other hand, the general rule is that spouses may not dispose of personal property without the consent of the other spouse, for less than fair market value. Here, the facts indicate that the parties decorated their house in a "lavish style" and that the mirror was an antique; therefore it is reasonable to assume that this antique mirror was fairly valuable. Since Hank merely gave the mirror to a friend, and received no consideration for the gift, he has breached his spousal fiduciary duty owed to Wendy. The gift to the friend was improper.

When one spouse makes an improper gift, the other spouse has a right to set aside the gift. In this case, if Wendy were trying to contest the gift during the marriage, she could set aside the entire gift. However, at divorce, a spouse only has a right to set aside one-half of the gift, because the parties each have a one-half interest in all CP. In this case, Wendy would be able to set aside one-half of the gift at divorce. Since the gift was of personal property and a mirror cannot be physically divided, the court will probably value the mirror and award Wendy one-half of its value through another source of money during the dissolution.

The House

Next, the court must determine how to characterize the house that was given to Wendy and Hank sometime after 2008. Since the parties were married in 2008 and the house was acquired afterwards, it is presumed to be CP. However, in this case, the house was received as a gift. The facts indicate that Wendy's mother deeded it to them as joint tenants. As discussed above, gifts during the marriage are considered to be SP of the spouse receiving the gift. In addition, when parties own property in Joint Tenancy, during the marriage it is classified as two SP halves. Therefore, during the marriage, this house would be considered two SP halves owned by each spouse.

Actions By the Parties

The issue here is whether the discussion between Hank and Wendy in 2013 changed the character of the house. Here, the facts indicate that Hank told Wendy that the house was "henceforth her SP" and that Wendy said "ok." This is an attempt at a transmutation. A transmutation is an action by the spouses to change the character of the property that the spouses already own.

Prior to 1985, transmutations could be of the most informal character, including orally. Here, there was an oral agreement to transfer the house to Wendy's SP at the couple's separation in 2013. If this was prior to 1985, this would be valid. However, modernly a transmutation is not valid unless it is in writing, indicates that there is a change in the character of the property, and is signed by the adversely affected party. In this case, Hank would be the adversely affected party because he would be abandoning his one-half interest in the property and giving it to Wendy. However, since there was no signed writing, this oral promise to change the character of the property to Wendy's SP is unenforceable.

Anti-Lucas Legislation

Since the transmutation was ineffective, the court must now determine how to divide the property at dissolution. Here, the property is held in joint tenancy, which is inconsistent with the basic CP presumption that all property acquired during the marriage is CP. However, under the Anti-Lucas Legislation, for purposes of dissolution only, all property held jointly is treated as CP. This presumption can only be overcome by a statement in the deed that the parties intend to hold title differently or a written companion agreement. In this case, the mother merely deeded the property to the spouses as a gift. It is unlikely that they literally intended for the property to be owned one-half by each of them as their SP. In addition, there is no written agreement indicating otherwise. Therefore, the house will be treated as CP. Since the house is treated as CP at dissolution, both Hank and Wendy have a one-half interest in the property.

The general rule is that at divorce, CP should be divided equally in kind. However, the court can fashion other relief if necessary. In this case, since Hank evidenced an intent to give the house to Wendy, the court may allow Wendy to keep the house, and just award Hank the value of one-half of the house.

The Accounting Practice

Next, the court will address the accounting practice of Wendy's. Although Wendy was an accountant prior to the marriage, the facts indicate that she established her own practice in 2012 during the marriage. Since the work of a spouse is considered CP labor, the earnings a spouse earns from work are CP funds.

Calculating the Value Of the Business

When there is a spouse that has a SP business, the court must determine how to allocate the business and the earnings from the business. The court does this by applying one of two formulas, each of which will be discussed below.

Pereira

Under the Pereira formula, the court takes the initial investment of the spouse, multiplies it by a simple and arbitrary interest rate (typically 10%) and then multiplies that by the number of years the spouse worked in the business during the marriage. That figure is considered to be a rate of return on the initial investment, and is awarded to the spouse who started the business with her SP, the remaining amount is considered CP.

Van Camp

Under the Van Camp formula, the court will calculate a reasonable rate of earnings for the working spouse, and multiply that by the number of years the spouse worked during the marriage. This figure would then be awarded to the community as CP. The

remaining funds would be considered SP of the spouse, and attributable to standard increases in value to the business due to the market.

In general, the court will use the Pereira formula when the increased value of the business was attributable to the work of the spouse in the business. In contrast, the courts will use Van Camp when the increase in value of the business is due to the overall market economy.

In this case, however, it does not appear that the court would use either approach. The facts indicate that the business was opened during the marriage, using money that Wendy had earned during the marriage. Because the money was earned during the marriage, the business itself is considered CP and not Wendy's SP. Therefore, the accounting business as of 2013 should be considered CP and should be divided equally between the parties at dissolution.

Post-Separation Earnings

In this case, the facts indicate that the earnings of the accounting practice tripled after the separation. The general rule is that marital community ends when there is physical separation of the parties with no intent to rekindle the relationship. Here, the facts indicate that the parties separated in 2013. It is unclear whether there was physical separation, but since Hank told Wendy that the house was her SP, it is likely that he moved out of the house at that time. If the court finds that 2013 was the date the marital community ended, then no CP could be established after that time, and all of the increased earnings in the accounting practice would be Wendy's SP. If the court finds that there was no true separation until 2014 when Wendy filed for divorce, then the accounting practice value as of 2014 would be divided equally between the parties as CP earned during the marriage. But, under these facts, it is most likely that the court will find that 2013 was the date that the marital community ended, and award the increased profits to Wendy as her SP.

The Office Building

Last, the court must determine the character of the office building in order to determine if Hank has any interest in it, notwithstanding the fact that Wendy sold it to Bob.

The property was acquired during the marriage using funds from Wendy's earnings; therefore the office building is initially characterized as CP.

Actions Of the Parties

The issue here is whether the general CP presumption can be rebutted since Wendy took title to the property in her name alone. Under California law, there is a form of the title presumption, which holds that the holder of record title to a property is presumed to be the true owner. In this case, Wendy will argue that the property is hers because she took title in her name alone, and therefore the form of the title prevails.

However, in order for the form of the title presumption to apply, the title must itself have evidentiary value. In this case, the title may not prevail, because there are no facts to indicate that Hank agreed to her taking title in her name alone. Wendy may argue that since the office was purchased with CP earnings, the community made a gift to her and she could take the property as her SP. However, there are no facts to support this. There is no evidence to show that Hank knew that she took title in her name alone, let alone that he agreed for her to do so. Therefore, the title will not be controlling. Since the property was acquired with CP funds, the property will be considered CP.

Post 2013 Actions

Although the property will be classified as CP, the court must determine how to handle the fact that Wendy remodeled the business with her increased earnings after the date of separation. As discussed above, all property that is acquired after the date of

separation is considered to be SP of the acquiring spouse. In this case, Wendy's earnings from her accounting practice post 2013 are characterized as her SP.

SP Improvements To CP

Since the money used in the remodel was Wendy's SP, the court will treat this as a SP improvement to a CP asset. Historically, if a spouse contributed SP to a CP asset, it was considered a gift. However, modernly the general rule is that if a spouse contributes SP to a CP asset, he can be reimbursed for SP down payments, loan reductions, and improvements. Here, Wendy remodeled the office building and therefore this will be characterized as an improvement. Wendy will then be entitled to reimbursement to her SP for either the cost of the improvement, or the increased value to the building because of the improvement.

The Sale to Bob

In this case, the classification of the office building is slightly complicated by the fact that Wendy sold the property to Bob. The general rule is that when disposing of CP real property, both spouses must participate in the sale and sign the appropriate documents. However, in this case, the facts indicate that Wendy sold the house without Hank's knowledge, which means he clearly did not participate in the sale. Here, it was easier for Wendy to do this, because the house was titled in her name alone and therefore Bob was unaware that she was married.

When a spouse disposes of real property without the consent of the other spouse, the injured spouse can set aside the sale if it is done within one-year of the sale. In this case, the facts are not clear when exactly the sale took place, but it was sometime between 2013 when they separated and 2014 when Wendy initiated divorce proceedings; therefore one year has not passed. Hank may be able to set aside the sale once the court makes the determination that the office building was in fact CP. On the other hand, since Bob did not know that Wendy was married and he bought the

building for consideration, he is considered a bona fide purchaser. The court may not want to injure Bob by voiding the sale, so the court may instead award Hank the value of one-half of the building.

Spouse's Obligations to Each Other

As discussed above, spouses have equal management and control of the CP assets. In addition, spouses are in a reciprocal fiduciary relationship with each other, and therefore owe each other a duty to act fairly and honestly with each other. If the court finds that Wendy acted fraudulently when she took title in her name alone and when she sold the property to Bob without Hank's knowledge, then the court could penalize her for this fraudulent behavior for breaching her fiduciary duty to Hank. Since the fiduciary duty continues until the assets have been fully divided in dissolution proceedings, Wendy still owed Hank this duty as of the date that she sold the property. However, absent a showing of fraud, the court will divide all of the assets as discussed in detail above.

QUESTION 2: SELECTED ANSWER B

California is a community property state and all property acquired during a marriage and before permanent separation is presumed to be community property ("CP"). Any property acquired by either spouse before marriage or after permanent separation is presumed to be separate property ("SP"), as is any property acquired by either spouse by gift, devise or bequest. At divorce, a court generally will award each spouse one-half of the CP in kind.

1. What are Wendy's rights, if any, as to the antique mirror?

The issue to be considered in determining Wendy's rights, if any, in the antique mirror, is whether the antique mirror is CP and whether Hank had a right to give the mirror to his friend.

The mirror is CP. Any property acquired during Hank and Wendy's marriage with CP is presumed CP. Earnings of either spouse are considered CP. Because the mirror was purchased with Hank and Wendy's earnings, it will be CP.

Under California law, both spouses have equal rights to manage and control CP. Thus, one spouse may not dispose of a piece of CP without the permission of the other spouse. Because Hank did not seek Wendy's permission in making a gift of the mirror, the gift is invalid and Wendy may try to rescind the gift and reclaim the mirror as CP. In the alternative, if the mirror is not recoverable, Hank may be required by the court to reimburse the community for the value of the mirror. Thus, in any event, unless Wendy consented to the gift, Wendy will retain her one-half interest in the antique mirror.

2. What are Hank's and Wendy's rights, if any, as to the following:

a) The house?

To determine Hank's and Wendy's rights, if any, in the house, we must determine whether the house is CP and whether any subsequent action altered that characterization.

The house was deeded to Hank and Wendy after their marriage as joint tenants. Under California law, any property held by husband and wife as joint tenants is presumed to be CP as holding in joint tenancy is antithetical to SP status; however, if the property is purchased or improved with SP, the SP is entitled to reimbursement from the community on divorce. (In contrast, on death, Lucas holds that any contribution by SP to property held in joint tenancy is a gift and there is no right to reimbursement.) The fact that Wendy's mother deeded the house to Hank and Wendy will not overcome the presumption that property held in joint tenancy will be considered to be CP. Although property given as a gift to one spouse (as one might have assumed Wendy's mother would have done) will be presumed to be SP, here Wendy's mother explicitly deeded them the house as joint tenants. Hence, it will be presumed to be CP as discussed above. Thus, prior to separation, each of Hank and Wendy had a one-half in kind interest in the house.

After the separation (which I presume for purposes of this question is a permanent separation as there are no facts to the contrary indicated in the question), Hank told Wendy that the house was henceforth her separate property and she said "O.K." In order to effectively transmute property that is CP to SP, and vice versa, under California law a valid transmutation agreement is required. Prior to 1985, an oral agreement could be effective to transmute property. However, after 1985, a transmutation must be in writing to be valid. As the purported agreement to cause the house to be SP occurred in 2013, it will be invalid. Thus, the house will remain CP and each of Hank and Wendy have a one-half in kind interest in it.

b) The accounting practice?

To determine Hank's and Wendy's rights, if any, in the accounting practice, we must determine whether the accounting practice is CP and whether any subsequent action altered that characterization.

Wendy established her accounting practice during the marriage with her labor. Any property acquired during Hank and Wendy's marriage with CP is presumed CP. Labor and earnings of either spouse are considered CP, and any goodwill created during the marriage and before permanent separation is CP. Although California allows the value of a business to be divided between SP and CP where the business was originally SP and appreciated during marriage, those rules (e.g., Pereira and Van Camp) will not apply here as the practice was established during the marriage. Thus, the value of the accounting practice that accrued until permanent separation is CP, and each of Hank and Wendy will be entitled to a one-half in kind interest therein.

However, here the facts state that Wendy's income from the accounting practice tripled after the separation. All property acquired after permanent separation is SP, including labor and wages of each spouse. Thus, Wendy's increased income post-separation and the post-separation increase in value to the accounting practice (because attributable to Wendy's labor) will be Wendy's SP and Hank will not have any interest therein.

c) The office building?

To determine Hank's and Wendy's rights, if any, in the office building, we must determine whether the office building is CP and whether any subsequent action altered that characterization.

The office building was purchased by Wendy in 2012 with funds from her earnings during marriage and she took title in her name. Under California law, all property acquired during marriage is presumed to be CP even if titled in one spouse's name. Here, we know that Wendy purchased the office building with her earnings during the

marriage. Under California law, such earnings are CP. Thus, because the office building was purchased with CP it will be CP notwithstanding that title is in Wendy's name alone, the presumption that the office building is CP will not be overcome, and as of separation each of Hank and Wendy have a one-half in kind interest in it.

After separation, there are two issues to consider to establish Hank and Wendy's respective rights with respect to the office building.

After permanent separation, Wendy's earnings become SP. The issue is whether Wendy's. Under California law, when CP is improved with SP, the property remains CP but the SP is entitled to a right of reimbursement from the community. Here, after separation when Wendy remodeled the office building with her increased earnings, she was entitled to reimbursement from the community for any increased value to the office building that resulted.

Wendy subsequently sold the office building to Bob, who did not know she was married. The issue is whether that sale is valid or whether it can be rescinded. Under California law, both spouses have equal rights to manage and control CP. Thus, one spouse may not dispose of a piece of CP without the permission of the other spouse. Where, as here, one spouse sells CP without the consent of the other, the sale may generally be rescinded within the first year, unless the sale is made to a bona fide purchaser. A bona fide purchaser ("BFP") is a purchaser for value who takes without notice of the claims of any other person. In the context of community property, to be a BFP a purchaser must not know that a seller is married. Here, we know that Bob did not know Wendy was married and the deed was in her name alone. Thus, he did not have notice of Hank's interest in the property and will be a BFP. Because Bob is a BFP, the sale cannot be rescinded. Even so, Wendy will be required to reimburse the community for the purchase price (although, as noted before, she will herself be reimbursed for the value of her SP improvements).

Thus, although neither Hank or Wendy will have an interest in the office building itself, Hank will have a one-half interest in the purchase price of the office building (less the value of the remodeling, if any) and Wendy will have a one-half interest in the purchase price of the office building and a right to be reimbursed for the costs of the remodeling.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

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Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 5

Henry and Wynn married in 2000. During the first ten years of their marriage, Henry and Wynn lived in a non-community property state. Henry worked on writing a novel. Wynn worked as a history professor. Wynn kept all her earnings in a separate account.

Eventually, Henry gave up on the novel, and he and Wynn moved to California. Wynn then set up an irrevocable trust with the $100,000 she had saved from her earnings during the marriage. She named Sis as trustee and Henry as co-trustee. She directed that one-half the trust income was to be paid to her for life, and that the other one-half was to be paid to Charity, to be spent only for disaster relief, and that, at her death, all remaining assets were to go to Charity.

Wynn invested all assets in XYZ stock, which paid substantial dividends, but decreased in value by 10%. Charity spent all the income it received from the trust for administrative expenses, not disaster relief.

Later, Sis sold all the XYZ stock and invested the proceeds in a new house, in which she lived rent-free. The house increased in value by 20%.

Henry has sued Sis for breach of trust, and has sued Charity for return of the income it spent on administrative costs.

1. What is the likely result of Henry's suit against Sis? Discuss.

2. What is the likely result of Henry's suit against Charity? Discuss.

3. What rights, if any, does Henry have in the trust assets? Discuss. Answer according to California law.

QUESTION 5: SELECTED ANSWER A

1. Henry v. Sis

As discussed in #3, Henry does not currently have a personal interest in the trust assets. However, he is the co-trustee of the trust, and this may be sufficient to give him standing as trustee to bring an action against Sis for breach of her fiduciary duty as trustee.

Trust creation

To be valid, an express private trust must have a settlor, an ascertainable beneficiary, res, a valid purpose, and a trustee. However, the court will appoint a trustee if one is not provided for, or the elected trustee declines to serve. Here, Wynn is the settlor, and she has designated herself and Charity as lifetime beneficiaries, and Charity as the remainder beneficiary. Any natural person, entity or government can be a beneficiary of an express private trust. Both are ascertainable beneficiaries because they are either persons or entities expressly named in the trust instrument. The res can be any property or present interest. Here it is the $100,000 from Wynn's separate account. The trust appears to have two purposes: to provide lifetime income to Wynn; and to contribute to disaster relief via Charity. To be valid, a trust purpose must be able to be determined from the trust document, and must not be illegal. Neither of the purposes are illegal and are clear from the trust document. Wynn has designated Sis as trustee and Henry as co-trustee, and from the facts it does not appear that either declined to serve. They must be competent but there is no indication of incompetency in the facts.

Charitable trusts differ in that they must have a charitable purpose: something that contributes to societal good, such as abating hunger, education generally, religion, or the like. The beneficiaries of the trust must be indefinite, not a specific person. Here, because Wynn is a specific person, this could not be a charitable trust.

A valid express private trust was created.

Trustee powers

A trustee has the powers expressly granted in the trust document itself, and those implied in order to effect the purpose of the trust. Here, the trust instrument directed Sis to pay one-half of the income to Wynn, and the other half to Charity. This expressly gave her the power to make these distributions.

Trustee duties

A trustee has the duty of loyalty, to act for the benefit of the beneficiaries solely, and not in her own self-interest or that of third parties. This duty requires the trustee to be impartial as to multiple beneficiaries. Here, Sis has a duty to treat Wynn and Charity impartially. If this were a revocable trust, she would have a primary duty during Wynn's lifetime to Wynn as the settlor, but the trust is irrevocable.

As part of the duty of loyalty, a trustee has a duty not to self deal. Sis is living in the house owned by the trust, rent-free. Thus she is reaping personal benefit from her position as trustee. She has violated her duty of loyalty.

The trustee has a duty of care as well, which requires her to act as a prudent person would in handling their own affairs. This includes the duty to account regularly to the beneficiaries, and not commingle trust assets with her own.

As part of the duty of care, a trustee has a duty to invest the trust res as a reasonably prudent investor would. Under the traditional view, this limited the holdings of the trust to things such as blue chip stock, 1st trust deeds on real estate, government bonds and other conservative and safe investments. Each separate investment was considered separately in determining this. Modernly, the investments are looked at as a whole, and factors such as the need for income, tax consequences, and particular trust purposes are considered. Thus, the court will need to look at how Sis invested the trust res in light of whether the trust was intended more for lifetime income sources, or as a gift to

Charity at Wynn's death, at how the income would affect taxes, at what was reasonable as an investment in light of what was available to invest, at what reasonable investors were doing at the time.

Wynn originally invested the trust assets in XYZ stock, which provided substantial dividend income but lost value overall. This would seem to indicate a preference for lifetime income over growth of the principal.

Henry will need to be able to show that a reasonably prudent investor would not have sold the XYZ stock and invested it in a house. The sale of the stock itself may have been prudent given the loss in value. However, a trustee also has a duty to diversify in order to reduce the risk of loss and enhance income/growth opportunity, as would a reasonable investor. While the duty to diversify may have called for Sis to sell some or all of the XYZ stock, that same duty would generally preclude sinking all of the proceeds into one property. The trust res is then subject to any decline in real estate in the market, and will not benefit from any gains in other potential investments. Sis has probably violated her duty of prudent investment, and has certainly violated her duty to diversify.

The duty to make the res productive requires that Sis put the assets to work for the benefit of the beneficiaries. When she lived in the house rent-free, she violated this duty. The rental income from the house is to be distributed to Wynn and Charity, not retained for her benefit.

Sis has a duty to effect the purpose of the trust, by ensuring that income is maximized, based on the express and apparent intent of the settlor. She has not done so by selling the income stock and buying a house that currently provides no income to the trust.

Because Henry is currently subject to these same duties as co-trustee, he is obligated to prevent the wrongdoing of the other trustee. Thus he has standing to bring an action against Sis for her violations of duty, as a trustee of the trust.

Remedies available

The remedies available against a trustee who has violated their duties includes removal, surcharge for lost income/profits, disgorgement of any benefit wrongfully taken by the trustee. This benefit does not run to Henry, who is acting solely for the trust beneficiaries' benefit.

Henry will seek an accounting for the rent that should have been paid by Sis while living in the house owned by the trust. These funds must be paid personally by Sis. Additionally, he will seek surcharge for the lost income from the XYZ stock or similar investment that would have maximized lifetime income. Sis will have to make up the shortfall in income from her own funds.

Finally, Henry will seek removal of Sis as trustee. The court may then allow Henry to act as sole trustee or may appoint someone else.

Given Sis's breach of duty, the apparent purpose of the trust, the court will allow all of these remedies.

2. Charitable trusts are enforced by the attorney general, rather than by private action. If Charity is a charitable trust, Henry will not have standing to bring an action.

Assuming Henry has standing as the co-trustee of Wynn's trust, he can seek a constructive trust by tracing the funds from the trust to Charity as used for admin purposes. This will mean that Charity's sole duty as trustee of the constructive trust is to use the funds as directed.

3. California is a community property (CP) state. All property acquired during marriage while domiciled in CA or another CP state is presumed to be CP. All property acquired prior to marriage, or after separation, is presumed to be separate property. Additionally, all property acquired at any time by gift, descent, devise or bequest is presumed to be CP.

All property acquired during marriage while domiciled in a non-CP state that would be CP if domiciled in CA, is presumed to be quasi-CP (QCP). At termination of the marriage, to determine the character of property, a court will look at the source of the funds used to acquire property, any applicable presumptions, and any actions by the spouses that may change the character of the assets. A mere change in form does not alter the character of the asset.

Source:
Here, the source of the funds for the house, which is the sole trust asset, can be traced back to the XYZ stock and further, back to Wynn's earnings as a history professor. Because all earnings by community labor are CP, these earnings would be CP if the spouses had been domiciled in CA at the time they were earned. Thus, by definition, they are QCP (defined supra). During marriage, QCP remains the SP of the owning spouse. At divorce or death of a spouse, the character as QCP affects the property determination.

Presumptions:
All assets acquired during marriage are presumed to be CP. However, as noted, the source of the house is earnings that are Wynn's SP until termination of the marriage. Spouses can also take title in ways that raise a presumption, such as a gift to the community, which arises on death of a spouse under Lucas. However, Wynn kept the funds in a separate account, and then created an irrevocable trust with the funds, so no alteration in the title is shown in the facts.

Actions of the spouses
Spouses can by transmutation or other actions alter the character of their own SP. Henry may argue that the change from Wynn's separate account to a trust is such a transmutation. However, a transmutation, to be valid, must be in writing, signed by the adversely affected spouse and clearly express the intent to transmute. This is not evident here, so no transmutation has taken place.

Distribution of assets

At divorce, QCP is treated as CP, and this would entitle Henry to half of the QCP. Death also impacts the character, depending on which spouse dies. If the SP owner (Wynn) predeceases the non-owning spouse, the non-owning spouse may choose their forced share (take against the will) in order to get to QCP assets. However if the non-owning spouse dies first, they have no right to devise the QCP that belongs to the other spouse.

As a result, Henry has no immediate right in the trust assets. In the event of divorce or death of Wynn, he would acquire such rights as are discussed above.

QUESTION 5: SELECTED ANSWER B

1. What is the likely result of Henry's suit against Sis

A trustee owes fiduciary duties of loyalty and care to the beneficiaries of a trust. A trustee may bring suit against a co-trustee for breaching the fiduciary duties, and move to have the violating trustee removed from their position.

A. Duty of Care

Generally, a trustee owes a duty of care to the beneficiaries to act as a reasonably prudent person under similar circumstances. This includes the duty to prudently invest trust property in a manner that will create the greatest return for the benefit of the trust.

i. Prudent investment

A trustee has a duty to prudently invest trust funds so as to increase the benefits from investments for the trust beneficiaries. Here, Sis sold all of the XYZ stock in the trust and used the proceeds to pay for a house. Sis will argue that this is a prudent investment because XYZ stock had decreased in value by 10%, whereas the value of the house has appreciated 20%. This increased the value of the trust property. However, Henry will likely argue that to tie up all of the trust assets in one piece of property which potentially can fluctuate wildly in the real estate market is not a prudent investment. Instead he will argue that Sis should have diversified to different stock from other companies other than XYZ in order to keep a more stable and broad base for the trust property.

Based on these arguments, it is likely that Henry will prevail against Sis in arguing that exchanging all of the stock into one parcel of real property is not a prudent investment.

ii. Duty to diversify

A trustee also has a duty to diversify the stock held by the trust. Here, as discussed above, the trust initially only held XYZ stock. Henry will argue that Sis had a duty to diversify the stock to include stocks from other corporations, and that consolidating the trust assets into one piece of property which is less liquid and potentially subject to market fluctuations in price and value violated the duty to diversify.

A. Duty of loyalty

A trustee is a fiduciary and owes a duty of loyalty to the beneficiaries and the trustor of the trust. Therefore, Sis has a fiduciary duty of loyalty to act solely in the best interest for the trust.

i. Duty to avoid self-dealing

A trustee has a duty to avoid self-dealing with respect to trust assets. The trustee must obtain court approval before the sale of any property which benefits the trustee personally. Here, Sis sold all of the trust assets and used the proceeds from the sale to purchase a house in which she lives in rent-free. She is therefore using trust assets for her own personal benefit, which is impermissible absent court authorization. She has a duty to pay fair market rent to the trust for use of the property in order to avoid a claim of self-dealing.

Therefore Sis has arguably violated her duty to avoid self-dealing

ii. Fairness to all beneficiaries

A trustee also has a duty to act impartially and fairly towards both the income and the principal beneficiaries. The trustee cannot favor one beneficiary over another in terms of their investments or distributions. Here, whereas Wynn and Charity are both

income beneficiaries of the trust currently, Charity is the only principal beneficiary after Wynn's death.

(a) "Income"

Income beneficiaries are entitled to cash dividends from stocks, and rents from property held by the trust. Initially XYZ stock issued substantial dividends which are considered income to the trust and distributed to the income beneficiaries. Therefore Wynn and Charity were sharing the substantial income beneficiary. However, as noted above, the stock declined in value and therefore was worth 10% less, therefore reducing the future value for the principal beneficiary.

However, upon changing the stocks for the house, the principal beneficiary would obtain a 20% increase in value of the property. However, Sis is not paying any rent for the property, and therefore Wynn is no longer getting an income from the trust as a result of this change. This change, coupled with the lack of rental payments by Sis, means that Henry will likely be successful in arguing that Sis has violated her duty to act fairly and impartially towards both income and principal beneficiaries.

D. Conclusion

Because of the aforementioned breaches in duty, it is likely that Henry will prevail against Sis in claiming a breach of trust. The trust would likely be entitled to a constructive trust for the unpaid rent that was due on the propety, and Henry may have Sis removed as trustee for breaching her duties of care and loyalty.

2. What is the likely result of Henry's suit against Charity for return of the income

A. Purpose of a charitable gift

A trust must have a valid purpose in order to be properly formed. Here, part of the trust's express purpose at the time of formation was for income from the trust to be delivered to Charity but only go towards disaster relief. Charitiable contributions and trusts are considered valid purposes and therefore the trust is permissible.

B. Violation of a condition by a beneficiary

However, a violation by a beneficiary of an express condition of the trust violates the trust purpose. The court will look at the totality of the circumstances to determine whether the language was intended to merely express a wish on the party of the trustor, or rather if it is an express condition for receipt and use of funds. Here, the trust had an express condition that the share of income given from the trust to Charity was only to be used for disaster relief. However, the beneficiary here instead used the funds for administrative expenses, not disaster relief. The Charity will likely argue that it was only a general wish because they would receive the full benefit of the property upon Wynn's death and therefore should be able to use and dispose of trust income in any manner that benefits the charity. However, Henry will likley argue that the express terms of the trust are explicit in requiring that the funds only be spent on disaster relief. Therefore the beneficiary has violated an express term of the trust.

C. Remedy for violation by a beneficiary

If a beneficiary violates an express term of a trust, the trustee can sue for return of the income used in violation of the trust terms. Therefore Henry would likely prevail in a suit against Charity for return of the income.

3. What rights does Henry have in the trust assets?

All property acquired during marriage in CA is presumed community property (CP). However, property acquired by (1) gift or inheritance; (2) expenditure of separate property funds, (3) the rents, profits, or income derived from separate property; or (4)

acquired before the marriage are presumed to be separate property (SP) of the acquiring spouse.

A. Quasi-Community Property

If a married couple acquires property in a non-community property state that would have been community property had the couple been residents of a community property state, such items are considered "quasi-community property" (QCP) and are potentially subject to community property laws if the couple later moves to a community property state. During the marriage, the QCP is treated as SP of the acquiring spouse. However, upon divorce or death of the acquiring spouse, the QCP will be treated as CP and divided equally between the spouses. Upon the death of the non-acquiring spouse, the property will remain the SP of the acquiring spouse.

B. Wages earned during marriage

Wages, earnings, and pensions earned during marriage are considered CP, absent an agreement between the spouses agreeing otherwise. Here, Wynn earned a salary working as a history professor while living out of CA. Regardless of whether she kept the earnings in a separate account, in CA the earnings would be considered CP. The facts do not show that Wynn and Henry had any agreements changing the character of the property. Therefore upon moving to CA, Wynn's earnings are presumed to be QCP. However, as noted above, they retain their SP characterization until death or divorce.

C. The trust assets

Wynn and Henry are still married at the time that Wynn sets up the trust fund with $100,000 of her earnings. Even though these funds are earmarked as potential QCP, during the marriage they are still considered the SP of the spouse who earned them. Therefore at this time, Henry does not have any interest in the trust assets because of

the ongoing marriage. Henry will not have any possible rights to the trust assets until death or divorce.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Criminal Law and Procedure
4.	Community Property
5.	Business Associations/ Professional Responsibility
6.	Constitutional Law/Real Property

QUESTION 4

In 2008, Henry and Wendy married in California. Neither had saved any money before marriage. At the time of the marriage, Henry had a monthly child support obligation of $1,000, which was deducted from his salary, for a child from a prior relationship.

In 2010, Wendy accepted a job at Company. At that time, she was told that if she performed well, she would receive stock options in the near future.

In 2011, Henry inherited $100,000. He used $25,000 to buy a necklace that he gave to Wendy as a holiday present. He used the remaining $75,000 to buy a municipal bond that paid him $300 per month.

In 2012, Wendy was granted stock options by Company, which would become exercisable in 2014, in part because she had been a very effective employee. Later in 2012, Wendy was injured in a car accident and made a claim against the person responsible.

In 2013, Henry and Wendy permanently separated and Henry moved away.

In 2014, Wendy settled her accident claim for $30,000. Later in 2014, Wendy exercised her stock options and earned a profit of $80,000.

In 2015, Wendy filed for dissolution.

1. What are Wendy's and Henry's respective rights regarding:

    a. The necklace? Discuss.

    b. The car accident settlement proceeds? Discuss.

    c. The stock option profits? Discuss.

2. Should Henry be required to reimburse the community for his child support payments and, if so, in what amount? Discuss.

Answer according to California law.

QUESTION 4: SELECTED ANSWER A

1. Wendy and Henry's Rights at Divorce

General Principles

Henry and Wendy were married in California. California is a community property state. Property acquired during marriage is presumed to community property (CP). Property acquired before marriage or after permanent physical separation is presumed to be separate property (SP). In addition, property acquired by gift, bequest, or devise, is that spouse's SP. The character of property is determined by tracing back to the source of funds used to acquire that property.

At divorce, each CP asset is divided 50/50 in kind, unless a special rule requires deviation from the equal division requirement or if the spouses agree in writing or by oral stipulation in court. Each spouse's SP remains that spouse's SP.

a. **The Necklace**

Characterization

Property acquired during marriage is presumed to be CP. A spouse can rebut this presumption by tracing back to the source of the property and showing that SP was used to purchase the property.

Here, the necklace was acquired in 2011, while Henry and Wendy were still married. Thus, the necklace is presumed to be CP. However, Henry will be able to rebut this presumption by tracing back to the source of the funds used to purchase the necklace. Henry used $25,000 of his $100,000 inheritance to purchase the necklace. Since an inheritance is SP regardless of when it was acquired, Henry will be able to

rebut the CP presumption by tracing his SP funds. The next issue is whether Henry and Wendy changed the character of the property when Henry gave the necklace to Wendy.

Transmutation

Spouses can change the character of any asset from CP to SP, SP to CP, or from one spouse's SP to another spouse's SP. This is called a transmutation. To be valid, there must be an express declaration in writing that is signed or assented to by the spouse whose property interest is adversely affected. The writing must expressly state that a change in the property ownership is being made.

Here, when Henry gave Wendy the necklace, no transmutation occurred because there was no express declaration in writing signed by Henry that stated that a change in the ownership interest in the necklace was being made. However, there is an exception to the transmutation rule for gifts of a personal nature.

Exception - Gift of Personal Nature

A transmutation is not necessary to change the character of an item when there is a gift from one spouse to another of an item of personal nature. For this exception to apply, the item must be of a personal nature, used primarily by the spouse who was gifted, and the item must not be substantial taking into account the circumstances of the marriage.

Here, the necklace is an item of a personal nature because it is jewelry that is worn by a person. Furthermore, Wendy, the spouse who was gifted with the necklace, is presumably the one who primarily uses the necklace. The issue here would be whether the necklace was substantial in value taking into account the circumstances of Henry and Wendy's marriage. The facts do not tell us about Henry's employment but we do know that he has a job. Furthermore, we know that Wendy has a corporate job. Nevertheless, the spouses came into the marriage with no savings and Henry had a

monthly child support payment. Considering that the necklace was $25,000, it was most likely substantial taking into account the circumstances of their marriage. Therefore, the necklace would most likely remain Henry's separate property and did not change into Wendy's separate property.

Distribution At Divorce

At divorce, a spouse's SP remains his or her SP.

If the necklace was substantial in value taking into account the circumstances of Henry and Wendy's marriage, then the necklace would remain Henry's SP. If it was not substantial taking into account the circumstances of marriage, then the necklace was changed into Wendy's SP.

b. **The Car Accident Settlement**

Personal Injury Award

The character of a personal injury award is determined when the cause of action arose, not when the spouse receives a settlement or judgment. If the cause of action arose during marriage, then the personal injury award is CP. If the cause of action arose before marriage or after permanent physical separation, then it is SP.

Here, the car accident settlement arose out of Wendy getting injured in a car accident in 2012. Thus, the cause of action arose in 2012. Although there may be an issue as to whether the economic community ended in 2013 or 2015 (discussed below), the community was certainly continuing in 2012, and thus the personal injury award would be CP.

Division At Divorce

The general rule is that each CP asset is divided 50/50 in kind at divorce. One special rule that requires deviation from the equal division requirement is for personal injury awards. At divorce, a personal injury award will be awarded entirely to the injured spouse unless the interests of justice require otherwise.

Here, the personal injury award will be awarded to Wendy at divorce since she was the injured spouse. We would need more facts to determine whether the interests of justice would require that the community receive part of the award, such as where part of the settlement was reimbursement for medical expenses that were paid from community funds. As it is, the personal injury award of $30,000 will be awarded entirely to Wendy at divorce.

c. **The Stock Option Profits**

The rents, issues and profits of community property are community property. Stock options get special treatment under the rules when the stock options are granted during the marriage but are not exercisable until after the marital community ends. It first must be determined when the marital community ended.

End of The Marital Community

The marital community ends when there is permanent physical separation and an intention not to resume the marriage. Intention not to resume the marriage by one spouse only is effective so long as it is communicated to the other spouse.

Here, Henry and Wendy permanently separated and Henry moved away in 2013. Thus, we have permanent physical separation. The issue is whether the spouses intended to resume the marriage. Henry moving away *permanently* is indication of an intention not to resume the marriage, but we would need more facts about intent to

make that determination. Wendy filing for dissolution in 2015 is certain evidence of an intention not to resume the marriage. Thus, it is certain that the economic community ended in 2015, but it most likely ended before that, in 2013 when Henry and Wendy permanently separated and Henry moved away.

Stock Options

The community interest in stock options depends on which formula is used. Which formula is used depends on what the intent of the employer was in granting the options. If the employer's intention was to reward the employee for past services, then the formula is: The numerator is the years that the employee was married until the economic community ended and the denominator is the years the employee was married until the options became exercisable. The community gets a larger percent under this formula because community labor is community property. If the employer's intention was to grant the options as an incentive to continue working for the company the formula is: The numerator is the date the option was granted until the economic community ends and the denominator is the date the option was granted until the date the options became exercisable. The fraction represents the community property interest.

Here, Henry would argue that the employer was granting the options as remuneration for past services because when Wendy was granted the options, it was in part because she has been a very effective employee. Wendy would argue that it was an incentive to keep working and doing a good job because she was told when she began working there that she would receive stock options in the near future if she performed well. Since it is a difficult determination on these facts, the stock options will be analyzed using both formulas.

Reward For Past Services

Here, when Wendy was hired in 2010, she was married to Henry. Henry and Wendy permanently separated in 2013, which is when the economic community ended. Thus the numerator is 3. The options became exercisable in 2014, so the denominator is 4 (2010-2014). Thus, the community interest in the stock option profits would be 3/4.

Incentive

Here, the options were granted in 2012 and the economic community ended in 2013. Thus, the numerator is 1. The options were granted in 2012 and became exercisable in 2014, making the denominator 2. Thus, the community interest in the stock option profits would be 1/2.

Division At Divorce

If the employer's primary intent in granting the options was to reward Wendy for past services, then the community interest in the $80,000 stock profits is 3/4, or $60,000. The $60,000 would be divided equally between Henry and Wendy; thus each would receive $30,000 of the profit. Wendy would end up with $50,000 ($30,000 (her half of the CP) and $20,000 (SP interest) and Henry would get $30,000.

If the employer's primary intent in granting the options was to incentivize Wendy to keep working, then the community interest in the $80,000 stock profits is 1/2, or $40,000. The $40,000 would be divided equally between Henry and Wendy; thus each would receive $20,000 of the profit. Wendy would end up with $60,000 ($20,000 (her half of the CP) plus $40,000 (SP interest)) and Henry would end up with $20,000.

2. **Should Henry be required to reimburse the community for child support payments and if so, what amount?**

Child Support Payments

Child support payments from a previous marriage are treated like a debt incurred before marriage. The CP is liable and the parent spouse's SP is liable. The other spouse's SP is not liable. The community is entitled to reimbursement for child support payments made with community funds to the extent that separate property was available and not used. A spouse's salary during marriage is community property.

Here, the child support payments were for Henry's child from a prior relationship so his SP is liable and the CP is liable. Henry paid $1000 a month for child support payments from his salary. Henry's salary is community property because it is from his labor during marriage. Since CP funds were used to pay the child support payments, the issue is whether there was Henry's separate property available that could have been used instead.

Reimbursement

Here, the spouses had no money saved coming into the marriage in 2008. Henry received an inheritance of $100,000 in 2011. Thus from 2008-2011, the community is not entitled to reimbursement because there was no separate property available. Henry tied up $75,000 of the $100,000 in a municipal bond and used the other $25,000 for Wendy's necklace. Since the bond had profits of $300 per month that went to Henry, that is SP that was available (as stated above, rents issues and profits of SP are SP, and this was SP because it was inherited). Thus, the community is entitled to reimbursement for at least $300 of the $1000 paid in child support until the economic community ended in 2013.

At Divorce

The community is entitled to $300 a month from 2011-2013 (when the economic community ended). So the calculation is 24 months multiplied by $300, which equals

$7200. At divorce, the $7,200 will be divided equally between Henry and Wendy. Wendy will get $3,600 and Henry will get $3,600.

QUESTION 4: SELECTED ANSWER B

1. Wendy and Henry's Respective Rights

California is a community property state. Property acquired during a valid marriage is presumptively community property ("CP"). Property acquired before marriage the spouse's separate property ("SP"). Further, property acquired during marriage by gift, devise, or bequest is SP, along with the rents, profits, and increases in value of the SP during marriage. At dissolution of the marriage, the court will divide CP assets equally in kind, absent an agreement to the contrary. At dissolution of the marriage, each spouse's SP will remain SP. The court will trace the asset back to its source to determine its ownership. California has also expanded its community property system to domestic partnerships between same sex couples and elderly couples who are receiving Social Security Benefits. Since Henry and Wendy married in California, community property rules govern.

End of the Economic Community

The community ends upon dissolution of the marriage or at permanent physical separation, with an intent not to resume the marital relation. The intent may be unilateral, provided it is communicated to the other spouse. Here, the facts state that Henry and Wendy permanently separated in 2013, and Henry moved away. While the facts do not state whether there was an express agreement not to resume the relation, Henry's moving away along with the fact that they permanently separated likely means that they intended not to resume the marital relation. Thus, the economic community ended in 2013, not at filing of dissolution in 2015.

1a. The Necklace

The issue is whether the community has an interest in the necklace Henry gave to Wendy. Since the necklace was acquired during the marriage, it is presumptively CP. However, Henry can trace the funds used to purchase the necklace to his inheritance of $100,000 in 2011. Since property acquired by inheritance is SP, the funds used to purchase the necklace are SP.

Spouses may agree to change the character of ownership during the marriage by transmutation. Prior to 1985, oral agreements were sufficient to transmute an asset from SP to CP, or from CP to SP. However, after 1985 the court requires an express agreement in writing, stating that the nature of ownership is changing, and signed by the adversely affected spouse. There is an exception, however, for gifts made to a spouse during marriage that are not substantial taking into account the economic circumstances of the marriage.

Here, Henry gifted Wendy a necklace purchased with $25,000 of his SP. There is no evidence of an express agreement, in writing, signed by Henry to change the ownership of the asset. Wendy may argue that since the necklace was a gift of SP, she owns the necklace as her SP. However, the facts state that neither Henry or Wendy had saved any money prior to marriage, and Wendy had accepted a new job the year before. Therefore, it is likely that $25,000 was substantial in value considering the circumstances of the marriage. Given that the necklace is worth $25,000, Henry and Wendy appear to be just starting out their careers, and there is no express transmutation agreement, the court will likely award the necklace to Henry as his SP, and Wendy does not have an interest in the necklace.

1b. The Car Accident Settlement Proceeds

A judgment obtained by a spouse for a cause of action arising during the marriage is presumptively CP. While Wendy settled the claim for $30,000 in 2014, after the end of the economic community, the accident occurred in 2012, prior to the permanent physical separation. Thus, the community would have an interest in the recovery during marriage.

However, the court will award the judgment to the injured spouse at dissolution of the marriage, absent circumstances which would be inequitable to the other spouse, such as if medical expenses were paid from the community or the noninjured spouse quit her job to care for the injured spouse. Here, however, there is no indication that it would be inequitable to award the settlement to Wendy, though the community may be entitled to reimbursement for any medical expenses. Therefore, the court will award the

settlement proceeds to Wendy at dissolution, and Henry has no interest in the proceeds.

1c. The Stock Option Profits

In determining whether stock options are CP or SP, the court will determine whether the options were granted as deferment of wages, or as a future incentive to continue working for the company. As a spouse's labor during marriage, in the form of wages, is CP, the community will have a greater interest in options that are granted as deferred wages. The court will conduct a proration to determine the CP interest in the stock options, dividing the years of employment during marriage over the years for the option to become exercisable. In this case, the court will take the years of employment during the marriage (2010-2013) divided by the years of employment until exercise (2010-2014). The community will have a 3/4 interest in the stock options under this approach, so Henry and Wendy would each have a 1/2 interest in $60,000 of the profits, and Wendy would own $20,000 as her SP. Thus, Henry would take $30,000 at dissolution, and Wendy would take $50,000.

Alternatively, if the options are granted as a future incentive, the court will divide the years of employment during the marriage after the option is granted by the years the option is granted to becoming exercisable. Thus, the court would divide the years of marriage from the grant of the option (2012-2013) divided by the option's grant to its being exercisable (2012-2014). In this case the community would have a 1/2 interest, so Henry and Wendy would each own 1/2 of $40,000, and Wendy would have $40,000 as her SP. Thus, Henry would take $20,000, and Wendy would take $60,000.

Since Wendy was told that "if she performed well" at Company, she would receive stock options in the near future, it appears that the options were granted as deferred wages, earned by Wendy's labor during the marriage. Further, at the time they were granted, Company stated they were because she "had been" an effective employee, pointing to her labor during the marriage as providing the basis for the options. Thus, the court will likely use the first approach, and Henry will take $30,000, and Wendy will take $50,000.

2. Reimbursement for Henry's Child Support Payments

Debt incurred prior to marriage is the spouse's SP, but CP may be used during marriage to fulfill the debt obligations. The nondebtor spouse may choose to keep her earnings in a separate checking account, to which the other spouse does not have access, to avoid her wages from being reached. At dissolution, the debt will be assigned entirely to the debtor spouse. Since Wendy did not appear to isolate her earnings in a separate checking account, the child support obligations could be paid by the CP.

However, the community may be reimbursed at dissolution if the support obligation was paid by the community when separate property was available. Since Henry paid the child support obligation of $1000 per month from his earnings, which are CP, during the marriage, the community paid for the obligation during marriage. As Henry and Wendy did not have SP coming into the marriage, Wendy will be unable to show that SP was available prior to 2011. However, in 2011, Henry inherited 100K, investing 75K to buy a municipal bond paying $300 per month. While the bond was acquired during marriage, and is thus presumptively CP, the court will trace the funds to the 75K inheritance, which was SP. As profits from SP during marriage are also SP, the $300 per month was Henry's SP. Since there was $300 per month of SP available from 2011 to 2013, and Henry paid the obligations from his earnings, or CP, the community is entitled to reimbursement of $300 per month during 2011 and 2012, since the parties separated in 2013. Thus, Henry is to reimburse the community $7,200 for the SP that was available.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Contracts
4.	Constitutional Law
5.	Community Property
6.	Professional Responsibility

QUESTION 5

In 2003, while planning their wedding, Harry and Wanda, a California couple, spent weeks discussing how they could each own and control their respective salaries. Sometime before their wedding, they prepared a document in which they stated, "After we marry, Wanda's salary is her property and Harry's salary is his property." At the same time, they prepared a separate document in which they stated, "We agree we do not need legal advice." They signed and dated each document. They subsequently married.

In 2004, Harry used his salary to buy a condominium and took title in his name alone. Harry and Wanda moved into the condominium.

In 2005, Harry and Wanda opened a joint savings account at their local bank. Each year thereafter, they each deposited $5,000 from their salaries into the account.

In 2015, Harry discovered that Wanda used money from their joint account to buy rental property and take title in her name alone.

In 2016, Harry and Wanda permanently separated and Wanda moved out of the condominium. Wanda thereafter required emergency surgery for a medical condition, resulting in a hospital bill of $50,000. Harry later filed a petition for dissolution of marriage.

What are Harry's and Wanda's rights and liabilities, if any, regarding:

1. The condominium? Discuss.

2. The joint savings account? Discuss.

3. The rental property? Discuss.

4. The hospital bill? Discuss.

Answer according to California law.

QUESTION 5: SELECTED ANSWER A

Community Property and Separate Property

California is a community property (CP) state. Property acquired during a valid marriage while domiciled in CA is presumed to be CP. Property acquired before marriage or after permanent separation is presumed to be separate property (SP). Property acquired during marriage through gift, bequest, devise or descent is also presumed to be SP. Under the source rule, tracing will be permitted to determine the source of the funds, and therefore the character of the asset as CP or SP. Upon divorce, CP will be divided equally in kind unless some special rule requires deviation from this equal division, or the spouses agree otherwise in writing or orally in open court.

Prenuptial Agreement

Spouses may deviate from the community property presumption by agreeing that their salaries, for instance, which normally would be a product of community labor during the marriage and thus CP, be SP. They may do so before the marriage through a written prenuptial agreement. Prenuptial agreements must be voluntary and not unconscionable. A court will find a prenup to be unconscionable if the terms are unfair, or if a spouse did not know the extent of the other spouse's property before signing the agreement. Additionally, prenuptial agreements must be in writing. A court will find that a prenup is not voluntarily executed if a spouse is not represented by counsel before signing the agreement. In order to rebut the presumption of involuntariness without counsel, the spouse not represented by counsel must be advised to seek the advice of counsel in writing, and must waive that right in writing, and if she does waive that right, she must be allowed 7 days between the presentation of a prenuptial agreement and the signing of it, and she must also write, in a separate writing, that she understands the rights she is giving up, and from whom she received the information regarding what the extent is of her spouse's property.

Here, while planning their wedding, Henry and Wanda, both California residents, spent

"weeks" discussing "how they could each own and control their respective salaries." Although it is not clear how long before the wedding this occurred, merely, "sometime before their wedding," they jointly "prepared a document in which they stated, 'After we marry, Wanda's salary is her property and Harry's salary is his property.'" They both signed and dated this document. Simultaneously, they "prepared a separate document in which they stated, 'We agree we do not need legal advice,'" which was also signed and dated by both of them. After doing so, they married.

Formalities of Prenuptial Agreement Not Followed: Voluntariness and Unconscionability

As discussed above, a prenuptial agreement must be in writing. It appears from the facts that Henry and Wanda were attempting to create a prenuptial agreement through the "document" that they prepared "sometime before their wedding" in which they agreed that Wanda's salary is her "[separate] property" and Harry's salary is his "[separate] property." Although couples may choose to contract around the general CP presumption through a prenuptial agreement, they must do so voluntarily and it must not be unconscionable. Because neither spouse was represented by counsel, the agreement is presumed to be involuntary. As stated above, this presumption can be rebutted if the spouses who are not represented by counsel are advised to seek counsel and explicitly waive that in writing. Here, it appears that the couple attempted to waive this right to counsel by stating, "We agree we do not need legal advice." This may be a sufficient writing in a court's opinion to waive the right to counsel. Nonetheless, there is still a problem with voluntariness, here. Even if this right is waived in a signed writing, the unrepresented couple must still be given 7 days with which to mull over the prenuptial agreement.

Either spouse (depending on the asset discussed below) may argue that because they spent "weeks discussing how they could each own and control their respective salaries," this was more than enough to satisfy the 7 day rule. However, because the agreement was signed simultaneously with their waiver of counsel, and there is nothing in the facts to demonstrate that there was a period of 7 days AFTER presentation of the document and signing, given that the facts only state "sometime before their wedding" they prepared a document. If this document was prepared and signed 2 hours before

the wedding, this would not be deemed voluntary, and may even be deemed unconscionable by a court given its unfairness.

Additionally, neither spouse executed an additional separate document stating that they understood the rights that they were giving up and that they stated the source where they got information about the other spouse's financial assets and liabilities. Therefore, this prenuptial agreement will not be deemed voluntary. However, it probably will not be deemed unconscionable because it does not appear that the terms were patently unfair, given that both spouses were attempting to transmute their salaries into SP, and it does not appear that either spouse was hiding substantial debts or liabilities or significant assets from the other spouse.

In sum, this prenuptial agreement is not likely effective. This will mean that the analysis below will reflect the fact that earnings during marriage will remain CP for purposes of the analysis. Nonetheless, I will still discuss the possibility that this agreement is valid within each spouse's argument, and how that may arguably alter the characterization of property, below.

What are Harry's and Wanda's rights and liabilities regarding:

1. The Condominium

Title Presumption

Property titled in one spouse's name alone is *not* presumably SP in CA.

Here, Henry will argue that he took title in the condominium alone, and therefore it is his separate property.

Wanda will argue that this is not conclusive in California, because ownership does not necessarily follow title. Wanda has the stronger argument here. She will argue that the court must trace, using the source rule to determine the character of the condo.

General CP Presumption

Assets acquired during marriage are presumably CP.

Wanda will argue that because the condo was purchased during the marriage, in 2004, it was presumably CP. She will argue that it is irrelevant that the condo was titled in Henry's name alone, because the court can trace.

Tracing: Source Rule

Under the source rule, a court will trace the assets used to purchase a particular property during marriage to determine its character.

Wanda will argue that by tracing, the court will determine that the condo was purchased with Harry's salary during marriage, and therefore it is CP.

Harry will argue that the prenup was valid, in which they agreed that his salary during marriage would be his separate property, and therefore by purchasing the condo with his salary, which is SP, and since SP breeds SP, the condo is also his SP.

Harry's argument will likely fail because, as discussed above, the prenup is likely invalid and therefore the salaries of both spouses earned during marriage will be community property, and therefore by purchasing the condo with CP funds, the condo itself is CP and it is immaterial that it is titled in Henry's name alone.

Transmutation

Spouses may alter the character of property from CP to SP, or from one spouse's SP to the other spouse's SP, or from SP to CP. After the "easy transmutation period" ended, courts now require transmutations to be in writing, and consented to or accepted by the spouse whose property is changing in nature, and the writing must explicitly state that a change in property is occurring.

Harry will argue that a transmutation of the CP condo occurred when he titled it in his sole name. He will argue that this was a gift from the community to his separate

property, and that titling it in his own name was sufficient for a transmutation.

Wanda will argue that this was not sufficient for a transmutation because she did not consent to the change of CP to SP and given that she is the adversely affected spouse, her consent or acceptance was required, and that there is also no writing in the title document stating that the property is changing in form from CP to SP. Wanda has the stronger argument here, and the title of the property will not be deemed a transmutation.

Gifts Between Spouses

As a last ditch effort, Harry will argue that the condo was a gift between spouses and therefore was a valid transmutation that did not need to be in writing. An exception to the writing requirement for valid transmutations is when a gift of a personal nature is given from one spouse to another, and that gift is used primarily by the recipient spouse and is not substantial in nature, taking into consideration the financial situation of the couple.

Wanda will argue that a condo is not tangible personal property, and a condo is also substantial in nature, financially, given that they did not come into the marriage with significant amounts of SP, and moreover, the condo was used by both of them because they both "moved into the condominium." Therefore, Harry's argument that the condo was a gift from CP to SP will fail.

Conclusion

The condo is CP because it was purchased with earnings during marriage and the prenup is likely invalid. Therefore, it will be subject to equal division in kind upon divorce and Harry and Wanda will each take 50% of the proceeds from the sale of the house, assuming it is sold.

2. The joint savings account

Jointly Titled Property CP Presumption

In CA, when title to property is taken in joint form, there is a presumption that the

character of the property is CP unless in the title document or elsewhere it is stated that a portion or all of the property is to be reserved as an SP ownership interest. In this case, under *Lucas*, a court will not allow tracing to determine the funds used to purchase a jointly titled home through the source rule and the property will be deemed CP. However, this joint presumption does not apply to bank accounts. With bank accounts, a court will allow jointly titled bank accounts to be traced to determine the source of funds and how it should be characterized.

Tracing

Because both spouses deposited $5,000 each from their salaries during the valid marriage in 2005 into the account, and these salaries were earned during marriage, property earned during marriage through community labor during the economic community is CP. In light of the fact that the prenuptial agreement is likely not valid, both spouse's salaries would be CP, and therefore the court would trace to the source of these funds and determine that the bank account is CP. If, for some reason, the court found that the prenup was valid, and therefore each spouse's salary was SP, then the account would be comprised of $5,000 worth of Wanda's SP and $5,000 worth of Harry's SP. However, this is unlikely.

Conclusion

Presuming that the prenup was invalid, the characterization of the joint savings account would be 100% CP, and therefore should be subject to the equal division in kind rule upon divorce, and whatever is left in the account will be divided equally between the spouses.

3. The rental property

Title Presumption

Property titled in one spouse's name alone is *not* presumably SP in CA.

Here, Wanda will argue that she took title in the rental property alone, and therefore it is

her separate property.

Harry will argue that this is not conclusive in California, because ownership does not necessarily follow title. Henry has the stronger argument here. He will argue that the court must trace, using the source rule to determine the character of the rental property.

General CP Presumption

Assets acquired during marriage are presumably CP.

Harry will argue that because the rental property was purchased during the marriage, in 2015, it was presumably CP. He will argue that it is irrelevant that the rental was titled in Wanda's name alone, because the court can trace.

Tracing: Source Rule

Under the source rule, a court will trace the assets used to purchase a particular property during marriage to determine its character.

Harry will argue that, by tracing, the court will determine that the rental was purchased with both spouses' salaries during marriage, and therefore it is CP. He will argue that because the funds were taken from the joint savings account, which is conclusively CP if the prenup was invalid, therefore Wanda used CP funds to purchase the rental, and therefore since CP breeds CP, the rental property is also CP.

Wanda will unconvincingly argue that the prenup was valid, in stark contrast to her earlier argument, stating that the couple agreed that her salary during marriage would be her separate property, and therefore by purchasing the rental with her salary, which is SP, and since SP breeds SP, the rental is also her SP.

Wanda's argument will likely fail because, as discussed above, the prenup is likely invalid and therefore the salaries of both spouses earned during marriage will be community property, and therefore by purchasing the rental with CP funds held in the bank account, the rental itself is CP and it is immaterial that it is titled in Wanda's name

alone.

Transmutation

Spouses may alter the character of property from CP to SP, or from one spouse's SP to the other spouse's SP, or from SP to CP. After the "easy transmutation period" ended, courts now require transmutations to be in writing, and consented to or accepted by the spouse whose property is changing in nature, and the writing must explicitly state that a change in property is occurring.

Wanda will argue that a transmutation of the CP rental occurred when she titled it in her sole name. She will argue that this was a gift from the community to her separate property, and that titling it in her own name was sufficient for a transmutation.

Harry will argue that this was not sufficient for a transmutation because he did not consent to the change of CP to SP and given that he is the adversely affected spouse, his consent or acceptance was required, and that there is also no writing in the title document stating that the property is changing in form from CP to SP. Harry has the stronger argument here, and the title of the property will not be deemed a transmutation.

Gifts Between Spouses

Finally, Wanda will argue that the rental was a gift between spouses and therefore was a valid transmutation that did not need to be in writing. An exception to the writing requirement for valid transmutations is when a gift of a personal nature is given from one spouse to another, and that gift is used primarily by the recipient spouse and is not substantial in nature, taking into consideration the financial situation of the couple.

Harry will argue that a rental property is not tangible personal property, and a rental property is also substantial in nature, financially, given that they did not come into the marriage with significant amounts of SP.

Wanda will counter that she, alone, was using the rental property, and therefore that property and any income, profits, or rents derived from it should be her SP because it

was used primarily by her. This argument will fail because it is not an item of tangible personal property and thus was not an exception to the transmutation in writing rule.

Wanda's argument that the rental was a gift from CP to SP will fail.

Rents, Issues and Profits

The rents, issues, and profits of CP will be CP, and the rents, issues, and profits of SP will be SP.

Because the rental property is CP, any rental income that Wanda derives by renting it out (the facts are silent about whether she has a tenant) will be CP, and therefore will be subject to the equal division in kind rule. Half of rents must be therefore shared with Harry.

Equal Management and Control

Each spouse has equal ability to manage and control CP. However, this is subject to certain limitations. For instance, a spouse may not sell or encumber personal property in the home or CP clothing belonging to either spouse or children without consent of the other spouse.

Gifts of CP

Moreover, spouses may not make gifts of CP without the written consent of the other spouse. A spouse may void the gift upon finding out about it.

Harry will argue that he did not consent to Wanda sneaking off and using money from their joint savings account to purchase the rental property and take title in her name alone. He will argue therefore that he should be allowed to void this transaction within one year of finding out about it. He will also argue that he can void this transaction because Wanda disposed of the CP without his written consent.

Wanda will argue that because she has equal management and control of the property, she does not need his consent to purchase a rental property with money from their joint

savings account because she has a community interest in both of their salaries, and therefore can do what she wants with the money given that she had equal withdrawal rights on the bank account. She will also argue that this was not a "gift" of CP because she got her substantial benefit of the bargain from it: namely, a rental in exchange for the funds.

Wanda, unfortunately, likely has the stronger argument here, and she did not need Harry's consent before purchasing the rental and he likely cannot void it and cause the seller to return any of the purchase price despite finding out about the sale/purchase within one year.

Breach of Fiduciary Duty

Spouses owe each other fiduciary duties similar to those of business partners. They owe each other the highest duty of good faith and to avoid self-dealing.

Harry will argue that Wanda breached her fiduciary duty to him as a spouse by going behind his back and taking their joint CP funds and buying a rental and titling it in her own name without his knowledge. He will argue that this breaches her duty of loyalty to him and that this act was not in good faith.

Harry likely has a strong argument here, and he may also argue that this lack of good faith should cause the court to deviate from the equal division in kind rule.

Conclusion

The rental is CP because it was purchased with earnings during marriage, which were held in the bank account which is CP, given that the prenup is likely invalid. Therefore, it will be subject to equal division in kind upon divorce and Harry and Wanda will each take 50% of the proceeds from the sale of the rental, assuming it is sold, and assuming the court does not find justification for deviating from this, in light of Wanda's lack of good faith and fair dealing when going behind Harry's back to purchase the rental.

4. The hospital bill

End of the Economic Community: Permanent Separation

The economic community begins during marriage, and ends upon permanent separation. Permanent separation is understood through physical separation plus an intent not to resume the marital relationship.

Separate Debts of Spouses

Debts acquired after permanent separation are SP and the debtor spouse will be liable to his creditors for such debt incurred.

Here, Harry will argue permanent separation occurred in 2016 per the facts when "Wanda moved out of the condo" demonstrating an intent to not resume the marital relationship, and therefore the hospital bill incurred is her SP and only she will be liable for it because the economic community had ended.

Wanda will argue that Harry had not yet evidenced an intent not to continue the marital relationship because he only filed for divorce after her surgery and therefore the economic community was still intact, and thus the debt is CP to be shared between both of them.

Harry has the stronger argument, because per the facts, Harry and Wanda had "permanently separated" prior to the surgery.

Necessaries of Life

Despite the general rule that debts incurred post-separation are the SP debt of the debtor spouse and that spouse only will be liable for that debt to creditors, there is an exception for the "necessaries of life" and debts incurred on their behalf post-separation but before divorce, because of the duty spouses owe to each other to take care of each other during marriage.

Wanda will argue that her surgery was an "emergency surgery for a medical condition,"

and therefore was a necessary of life similar to food and water. Harry will have a difficult time countering this, because a court is likely to hold that this is a necessary.

Therefore, despite Wanda being the debtor spouse, if she does not have sufficient SP to pay for the $50,000 hospital bill, the hospital can attach to the CP of either spouse, and Harry may also be required to pay for the debt using his SP, because of the duty owed to take care of one's spouse prior to divorce, even after separation for necessaries of life.

Conclusion

In sum, the condo is CP and subject to equal division, the bank account is CP and subject to equal division, the rental property is CP and subject to equal division unless the court finds that it should deviate from this rule because of Wanda's breach of her fiduciary duty, and the hospital bill, despite being Wanda's separate debt, is a necessary of life which Harry may be required to pay for with CP and/or his SP.

QUESTION 5: SELECTED ANSWER B

Harry and Wanda's Rights and Liabilities

California is a community property state. In a community property state, the marital economic community begins on the formation of a valid marriage, and ends with the death of a spouse, divorce, or permanent physical separation with intent of one spouse not to resume marital relations. Property, earnings, and debt acquired during the marriage is presumed to be community property. Property acquired by either spouse before the marriage, or at any time via gift, devise, or inheritance, is presumed to be separate property. Property acquired by the couple while living in a non-community property state, if it would be considered community property if acquired in California, is considered quasi-community property upon death of a spouse or divorce.

Valid Marriage

A valid marriage requires mutual consent, sufficient age (at least 18 years old) and legal capacity, and formalities, including a license and solemnization. Here, though the facts do not specify the details of Harry and Wanda's marriage, we can assume for the purposes of this question that they were validly married.

A valid marriage ends upon the death of a spouse, divorce, or physical separation of the spouses with intent of one spouse (or both) not to resume the marital relationship. Here, Harry and Wanda permanently separated and Wanda moved out of the condominium where they had been living together in 2016. Harry also filed a petition for dissolution of the marriage. These actions--the physical separation of the two and the petition for dissolution--indicate that the spouses intended to permanently separate and not resume the marital relationship in 2016.

Premarital Agreements

Before analyzing Harry and Wanda's rights and liabilities in specific pieces of property, we first must determine whether their premarital agreement is valid and effective. A premarital agreement may alter the couple's ownership status in property if it is valid. To be valid, a premarital agreement must be in writing and signed by both couples, though there does not need to be valid consideration exchanged. Additionally, the proponent of the premarital agreement (as of 2005) bears the burden of proving that the agreement was neither involuntary nor unconscionable at the time it was executed.

Voluntariness

To prove that the agreement was voluntary, the proponent of the premarital agreement must prove (1) that the other party was represented by independent counsel, or had knowingly waived in a separate, signed writing the rights to separate counsel after being fully informed of the advantages of such separate counsel, (2) that the other party, if not represented by independent counsel, was fully informed of the rights it was giving up, (3) that the agreement was not obtained by fraud, duress, or undue influence by one of the spouses, and (4) other factors that the court may think appropriate and just.

(1) Here, neither party was represented by independent counsel. Though the proponent of the premarital agreement may argue that the parties waived their right to independent counsel by saying, in a separate signed document, "We agree we do not need legal advice," it is not clear that this waiver was valid, because the parties likely were not fully informed of the advantages of obtaining legal counsel. It is possible that they could argue that they were both legally sophisticated--as evidenced by their knowledge that they needed a separate signed document to waive--but in the absence of additional evidence of this sophistication, a court would likely hesitate to enforce the agreement on this basis.

(2) Similarly, it is not clear from the writing signed by the parties--either the agreement

or the separate signed writing--that the parties were fully informed of the rights that they were giving up. Unless the proponent can produce evidence that the other party was fully informed, the court may decline to enforce the agreement.

(3) Here, the facts are unclear regarding whether there was fraud, undue influence, or duress. The party seeking to enforce the agreement would bear the burden of showing that these factors did not exist at the time the agreement was signed.

Unconscionability

To prove that the agreement was not unconscionable at the time it was executed, the proponent of the agreement would need to prove that the other party was fully informed of the assets and liabilities of the proponent party, or that the other party had waived such a right to full disclosure of the assets and liabilities of the proponent party, or that the other party actually knew or had reason to know of the assets and liabilities of the proponent party. In the absence of facts speaking to such disclosure, we assume that the agreement was not unconscionable for the purposes of this analysis.

Transmutation

Finally, in order to be a valid transmutation (agreement that changes the status of ownership of property), a premarital agreement or other agreement must expressly declare the intent of the parties--particularly the adversely affected spouse--to change the ownership status of property.

The spouse aiming to defeat the premarital agreement will argue that saying that "Wanda's[/Harry's] salary is her[/his] property" is insufficiently clear to demonstrate intent to make the property separate property because it does not use the word "separate." However, the other spouse will argue that the intent is clear. Since the earnings acquired during marriage would otherwise be community property, saying that it would be the earning spouse's property is sufficient to demonstrate the parties' intent

to make it separate property. The court would likely agree with the latter argument, since the intent to change the ownership status is clear.

Ultimately, however, since there was no independent legal counsel and the parties were likely not fully informed of the rights they were giving up, the party opposing the premarital arrangement will likely be able to prevent it from being enforced on the basis that it was not voluntarily signed.

The Condominium

Source of Funds and Time of Purchase

Property acquired during marriage from community property funds is presumed to be community property. This presumption holds true even if the spouse takes title in his or her name alone. The general community property presumption may be rebutted by a preponderance of the evidence.

Here, Harry used his salary to buy a condominium in 2004. The condominium was purchased after the marriage, using Harry's salary. Assuming that Wanda were able to defeat the premarital agreement and prevent it from being enforced, Harry's salary earned during the marriage would be community property. As a result, property purchased with this salary, as the condominium was, would be community property.

The Community Property Presumption

Harry will argue that the condominium should be his separate property. He may succeed in this argument if he can rebut the community property presumption by a preponderance of the evidence. Harry will argue that his title to the property in his name alone indicates his intent that the property should be his separate property. This alone, however, is not sufficient evidence to rebut the general community property presumption. Harry may also argue that he used separate property funds earned from

before the marriage to purchase the condominium in addition to some of his salary after the marriage. Harry may be able to prove that separate property funds were used to purchase the condominium by either directly tracing the funds used in the purchase to a separate property source (by showing that separate property funds were available and that he intended to use them in this purchase) or by indirectly tracing the funds via the exhaustion method (showing that community property funds commingled with separate property funds were exhausted by family expenses such that only separate property funds remained in the account that was used for the purchase). If Harry can succeed in this tracing, it will not change the status of the property, but Harry may be entitled to an equitable right of reimbursement for the separate property funds that he used in purchasing the property (without interest), and he may be entitled to a pro rata share of the property as separate property in proportion to the part of the purchase price paid with separate property funds.

However, in the absence of such evidence--and there is no such evidence suggested by the facts--we assume that Harry's salary referenced in the facts was earned between 2003 and 2004, and that it was thus community property.

The Special Presumptions

Harry may also argue that the Special Presumption of Title should be applied to the property. The Special Presumption of Title states that the property's title and the manner in which it is held is presumed to reflect the status of the property. But this presumption only applies at death, so it is inapplicable.

Instead, the Special Presumption that applies at divorce is the Special Community Property Presumption. This presumption states that any property jointly held by the spouses (as joint tenants or as tenants in common) is presumed to be community property at divorce. Wanda will likely argue that this presumption applies. Harry may attempt to defeat this presumption via clear and convincing evidence, which evidence (after 1984) must include an express statement in writing, demonstrating that the

property should be held as separate property. To defeat the presumption, Harry would need to produce in addition to this express statement--and there does not seem to be such a statement referring to the condominium--evidence of the sort discussed three paragraphs above. Again, in the absence of such evidence, Harry would not be able to rebut the community property presumption.

There are no transmutations suggested by the facts (again, assuming that the premarital agreement is unenforceable) that would change the ownership status of this property.

Dispositions

Thus, again assuming that the premarital agreement is unenforceable, the condominium is likely community property.

Upon divorce, the equal division rule applies, and community property is divided evenly between the spouses. Thus, Harry and Wanda are likely each entitled to 50% of the value of the condominium.

The Joint Savings Account

Source of Funds and Time of Purchase

The joint savings account was created in 2005. Both Harry and Wanda deposited $5,000 from their salaries into the account. These deposits of $10,000 a year over the course of 10 years would likely amount to $100,000, plus whatever interest the account has earned in that time. This $100,000 stemmed from Harry and Wanda's salaries. Again assuming that the salaries were community property, because they were earned during the marriage and the premarital arrangement is likely unenforceable, this bank account and the $100,000 it contains is community property.

At divorce, the special community property presumption applies (see rule above). Since the bank account is held in both of their names--it is a joint account--it is presumed to be community property, and the income earned on the account is also presumed to be community property.

There is no transmutation affecting this joint account.

At divorce, community property is divided equally between the spouses. Thus, not addressing for the moment the funds removed from the account to pay for the rental property, which will be addressed below, Harry and Wanda are each entitled to 50% of the account. This would be $50,000 (plus half of the interest) to Harry, and $50,000 (plus half of the interest) to Wanda.

The Rental Property

Source of Funds and Time of Purchase

The rental property was purchased by Wanda in 2015, during the marriage. Wanda used funds from the joint account to purchase the property. Assuming that the funds in the joint account were community property, this would make the rental property presumptively community property, as it was acquired during the marriage with community property funds.

Wanda will argue that the rental property was held in her name and that it should thus be separate property. However, this is not enough to rebut the community property presumption. Additionally, the special presumption of title does not apply at divorce, only at death. So, unless she were able to enforce the premarital agreement, which she will likely not be able to do, Wanda will not be able to argue that the rental property is her separate property.

Breach of Fiduciary Duty

Spouses owe each other fiduciary duties. These duties include the duty to inform the spouse of the status of community property and the duty to obtain consent for major decisions affecting the disposition of community property. If a spouse violates his or her fiduciary duty to the other spouse, as a remedy, the other spouse may have his or her name added to the title of the affected property, the spouse may be entitled to a larger share of the community property, or, if the property was fraudulently concealed, the innocent spouse may request that the court order the other spouse to forfeit the property entirely to the innocent spouse.

Here, assuming the joint account was community property funds, Wanda may have breached her duty to obtain consent for major decisions. She did not notify Harry about using money from their joint account to purchase the rental property, and she took title in her name alone. It is possible that she also intended to keep the proceeds from this rental property, which would be community property themselves, for herself, which would be a violation of the duty of loyalty and highest good faith owed to her spouse. Since there is insufficient evidence of fraudulent concealment of this property, the court is not likely to order that Wanda forfeit the property entirely, but the court may award Harry a larger share of the community property as a result of Wanda's breach.

The rental property is thus community property. At divorce, it will be divided evenly between the two spouses, with Harry receiving a larger share as the court deems just due to Wanda's breach of her fiduciary duties.

The Hospital Bill

Debts of spouses acquired after permanent physical separation are generally the liabilities of the debtor spouse, with that spouse being responsible for the debt payment after divorce. However, even after separation, both the debtor and the non-debtor spouse may be personally liable for payments for the necessities of life of either spouse.

The court may divide liability for such debts according to each spouse's ability to pay.

The hospital bill was for an emergency surgery. Such an emergency surgery is a necessity of life, and, as such, both Wanda and Harry will be personally liable. Harry may have an equitable right of reimbursement for any of his funds used in payment for the hospital bill, however, if he can show that Wanda had separate property funds available at the time the hospital bill was paid.

At divorce, either Harry or Wanda may be personally liable for the hospital bill. Assuming that Wanda's $50,000 share of the joint account is still intact, she may have had funds available for the payment herself. If this is true, Harry may be entitled to an equitable right of reimbursement for his own funds used to pay the hospital bill. Any funds that he used that made up for funds that Wanda did not have available will not be reimbursed to Harry.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Community Property
2.	Professional Responsibility / Evidence
3.	Remedies
4.	Civil Procedure
5.	Torts

QUESTION 1

Wanda, a successful accountant, and Hal, an art teacher, who are California residents, married in 2008. After their marriage, Wanda and Hal deposited their earnings into a joint bank account they opened at Main Street Bank from which Wanda managed the couple's finances. Each month, Wanda also deposited some of her earnings into an individual account she opened in her name at A1 Bank without telling Hal.

In 2010, Hal inherited $10,000 and a condo from an uncle. Hal used the $10,000 as a down payment on a $20,000 motorcycle, borrowing the $10,000 balance from Lender who relied on Hal's good credit. Hal took title to the motorcycle in his name alone. The loan was paid off from the joint bank account during the marriage.

At Wanda's insistence, Hal transferred title to the condo, worth $250,000, into joint tenancy with Wanda to avoid probate. The condo increased in value during the marriage.

On Hal's 40th birthday, Wanda took him to Dealer and bought him a used camper van for $20,000, paid out of their joint bank account, titled in Hal's name. Hal used the camper van for summer fishing trips with his friends.

In 2016, Wanda and Hal permanently separated, and Hal filed for dissolution. Just before the final hearing on the dissolution, Hal happened to discover Wanda's individual account, which contained $50,000.

What are Hal's and Wanda's rights and liabilities, if any, regarding:

1. The condo? Discuss.

2. The motorcycle? Discuss.

3. The camper van? Discuss.

4. The A1 Bank account? Discuss.

Answer according to California Law.

QUESTION 1: SELECTED ANSWER A

California is a community property state. Unless the parties have agreed otherwise in writing, all property acquired during the course of marriage is presumed to be community property (CP). Property acquired before marriage and after the marital economic community has ended is presumed to be separate property (SP). In addition, property acquired by gift, devise, or descent is presumed to be SP as well. To determine the characteristic of an asset, courts generally trace the property to the assets that were purchased.

At divorce, all CP is equally divided between the parties unless they have otherwise agreed in writing, orally stipulated to in open court, or an exception applies to the general rule of equal division of CP at divorce. A spouse's SP remains his or her SP at divorce. With these general principles in mind, each property will be assessed individually.

The Condo

At issue is whether the condo is completely part of Hal's (H) SP or whether the community estate has an interest in the condo. As stated above, property acquired by gift or devise, such as an inheritance, is presumed to be SP of the spouse receiving the gift/inheritance. Here, H's uncle left him the condo and Hal inherited it. Therefore, unless H and Wanda (W) expressly agreed in writing that it was to change from SP to CP, H owned it as SP alone. However, the facts indicate that H transferred the title to the condo to W into a joint tenancy with W to avoid probate. Therefore, at issue is whether this vested the community estate with an interest in the apartment.

In California, property that is held in joint form is presumed to be CP. Therefore, when H transferred his interest in the Condo to W as joint tenants, the law will presume

that he intended to gift the condo to the CP and for each to hold as joint tenants with right of survivorship. When property that is held in joint form is to be divided at divorce, two statutes apply. First, in order for the transferring spouse to have an interest of ownership it must establish that there was either a written agreement that he was to hold it as SP or that the deed itself contains language that the property is only to be SP. Here, no such written agreement exists. On the contrary, W and H agreed to transfer the condo to W and H as joint tenants. However, a spouse who "gifts" SP to CP is entitled to reimbursements for down payment, principal payments for the mortgage, and for improvements made to the property. Here, H essentially paid the price of the condo $250k when he transferred it from his SP to CP. Therefore, he will be entitled to receive a $250k return on the apartment's value if it is deemed to be CP. The remainder of the condo's apartment will be CP.

However, H can argue that the transaction should be set aside because it is presumptively obtained through undue influence and, therefore, void. In the course of dealing with one another, spouses owe the same duties as those who are in confidential relationships. This duty imposes upon them the highest duty of good faith and fair dealing when the spouses enter into transactions with each other during their marriage. If one spouse gained an unfair advantage over the other in a transaction, the court will presume that the transaction was obtained via undue influence and, thus, invalidate it. The spouse who obtained the advantage will have the burden to prove that the transaction was entered into by the other spouse freely and voluntarily with full knowledge of all the facts relevant to the transaction and the basic effect of the transaction.

Here, H will argue that W insisted that he transfer the property into both of their names as joint tenants to avoid probate. H will argue that because W was an accountant, he believed her word and relied on her professional experience to believe that the best move for the couple was indeed to hold it as joint tenants. Furthermore, he will argue that as an art teacher who knows nothing about estates and marital property, he relied on her word and did not know that holding as joint tenants will deprive him of

full interest in the condo if they were to divorce. W has the burden here. She will have to show that she explained everything to H and that she indeed told him of the basic effect of the transaction. However, this does not appear to be the case. It appears that all W did was insist that H transfer it to avoid probate, but did not inform him of any other consequences that such a transfer may have. Therefore, H has a good argument to void the transfer to W as joint tenants for the condo because W gained an unfair advantage over him.

If H is successful in arguing that the presumption that property held in joint form is CP, W may argue that the transfer constituted a valid transmutation. A transmutation is an agreement by the parties that changes the form of ownership from CP to SP, or SP to CP, or one's SP to the other's SP. However, to be valid, there must be a written agreement signed by the party whose interest is adversely affected and expressly state that a change of ownership is to occur. Here, this is not the case.

The Camper Van

At issue is whether the camper van is H's SP due to a gift from W or it remains as CP. During their marriage, the parties can enter into agreement to change the character of any particular property by transmutation. As stated above, transmutation is when the parties change CP to SP, or SP to CP, or one's SP to the other's SP. However, for a transmutation to be valid, it must be in writing, signed by the party whose interest is adversely affected and expressly states that a change in ownership is to take place. The general exceptions to writing requirements do not apply here. The only exception is when a spouse gives a gift of a tangible item of personal property to the other spouse. However, this personal gift exception only applies to gifts of low value and does not apply to those with substantial value.

Here, the wife purchased a camper van for $20,000 on H's 40th birthday using money paid from their joint bank account, titled in H's name. Title alone does not establish the characteristic of property for community law purposes. Rather what is

more important is the funds that were used to acquire the property. Here, the funds were used from a joint bank account. The joint bank account is indeed community property because both of them were depositing money into it from the income they earned from their respective jobs. Therefore, the camper van purchased with CP is presumed to be CP unless there was a valid transmutation or other exception. Here, there was no valid transmutation. When W gifted the camper van to H, it was not accompanied by any written agreement, signed by W, that stated that H was to own the property as his SP and that W was gifting it to him outright. The issue then is whether the personal gift exception applies here. It does not. Generally, the personal gift exception applies to gifts of personal property with low value (such as a piece of jewelry that was inherited by a spouse). A $20,000 camper purchased with CP will not be presumed to be a personal gift from one spouse to the other for community property law purposes. The subjective intent of the spouses does not matter.

In conclusion, the camper van is CP subject to be divided 50/50 between H and W because it was acquired with CP property and no exception applies to change its characterization.

The Motorcycle

To determine whether property is CP or SP, the courts will trace the funds used to acquire to purchase the property. Here, H used an initial down payment of $10,000 to purchase the motorcycle. This $10,000 was his SP because he had inherited it from his uncle and, as stated above, gifts acquired via inheritance are presumed to be SP. However, H then paid off the remainder of the 10k from a loan borrowed from a lender. Thus, the issue is whether then $10,000 credit to purchase the motorcycle was CP or SP. Each spouse has an equal right of management over CP and, therefore, has the right to individually enter into agreements to purchase property on credit without the approval of the other. Determining whether a property purchased with a credit from a lender hinges on the primary intent of the lender and where he was looking for assurances before giving out the credit. For example, if the purchasing spouse used his

own SP for collateral for the credit purchase, then it would be presumed to be SP because the lender's primary purpose for giving the loan was due to the collateral. However, where the lender relies on the purchasing spouse's good credit, the property purchased with that credit is presumed to be SP. This is because one's good credit or reputation as having good credit is community property.

Therefore, because the lender relied on H's good credit in giving out the $10,000 loan for the purchase of the motorcycle, the $10,000 is presumed to be CP. As a result, H owns a 50% SP interest in the motorcycle because he used $10k to purchase the property (50% of the purchase price) and shares the other half of the value of the motorcycle as CP with W. To conclude, H owns 50% of the motorcycle as SP and both H and W own the other half of the motorcycle as CP.

Additionally, even if the court determines that the lender's primary intent was based on H's SP and, therefore, the motorcycle was not presumed to be SP, the community estate will still have a 50% interest due to the principal debt reduction method. Where a spouse has acquired property before the marriage or acquired property through inheritance and then CP funds are used to pay for the principal of the property, the community estate obtains a pro rata interest in the property based off of the principal debt reduction due to funds paid from the CP. Here, the remaining $10k of the motorcycle's balance was paid off with the joint bank account during the marriage, which is indeed CP. Therefore, the community estate would be entitled to a principal debt reduction of 50%, meaning it would have an interest of 50% of the total value of the motorcycle.

The A1 Bank Account

As stated above, all property acquired during the course of marriage is presumed to be CP, regardless of who holds title to the property. Here, W owned an individual bank account at A1 Bank without telling Hank and deposited some of her earnings into it. Earnings by each spouse are deemed to be community property when earned during

the course of the marriage. It does not matter where the spouse transfers the earnings or what type of account she transfers it into. The fact remains that the funds that she deposited in the A1 Bank were CP and she was not entitled from hiding CP or depriving H of his rights to the CP. The fact that she held the bank account solely in her name is not determinative here. Where the A1 Bank account would matter is if third party creditors of H's debts were seeking payment from him, they would not be able to attack this bank account because W expressly held the Bank account in her name, H did not have any rights of withdrawal and there was no commingling. However, at divorce, the bank account is subject to equal division as it was funded by W's earnings. Thus, H and W own 50% interest each in the bank account.

At issue is whether H may argue for an exception to the equal division of assets to apply here because W misappropriated CP. Although the general rule is that CP is to be divided 50-50 on divorce, a spouse who misappropriated community funds may not be entitled to receive an equal share due to her wrongful acts. H will argue that W misappropriated community funds here because she secretly opened up a bank account without informing H and deposited only her earnings in there. H will argue that because each spouse's earnings are CP he was entitled to those funds during the course of their marriage as it was supposed to be part of the community estate rather than W's private funds. Due to this misappropriation, H will argue that W should be forced to forfeit her interest in the A1 Bank and that he be entitled to take the 50k in full. Ultimately, this is a decision for the judge to make when he is ordering the divorce decree.

Additionally, H may argue that W again breached her duty of good faith and fair dealing by hiding the funds from him. He will argue that W had assumed control over the couple's finances and used that power to obtain an unfair advantage over H by hiding funds from him. He will argue that the agreement to allow her to control the couple's finances imposed a duty on W to use the duty of the highest good faith and fair dealing when she managed the finances and that she breached it by failing to disclose all the funds to H. W will have to overcome the presumption of undue influence by

showing that H knew of all the facts constituting the transaction. However, because H did not have any idea about the secret bank account it will be impossible for W to overcome this burden.

Therefore, H has a strong argument for having the court strip W's interest in the A1 Bank account funds and reward the full 50k to H for breaching her fiduciary duties as a spouse and for misappropriation of community funds. However, it is important to note that H's and W's marital economic community ended in 2016. The marital economic community ends when there is a permanent separation by the parties and an intent by one of the spouses to not resolve the marriage. The filing for a marriage dissolution is determinative evidence of such intent. Therefore, the marital economic community ended in 2016. From that time, any money that W deposited into the A1 Bank Account will be presumed to be her SP since the marital economic community has ended.

QUESTION 1: SELECTED ANSWER B

General Presumptions

California is a community property state (CP) all property acquired from the date of the marriage until separation is presumed to be CP - owned by the spouses equally 50/50. All wages earned from the time or labor of a spouse during marriage are CP. Property acquired before marriage or after separation is presumed to be Separate Property (SP) of the acquiring spouse. Property received by gift, bequest, or devise is also the separate property of the receiving spouse, as are the rents, issues and profits produced by SP. The character of the property may not be changed simply by changing the manner in which the property is held, the property will be traced to its source and characterized according to the source used to acquire the property. Upon divorce, spouses are entitled to in kind 50/50 distribution of all property.

Transmutation

One spouse may not gift themselves community property. In order to change the character of property from CP to SP or SP to CP, there must be an agreement in writing signed by the spouse whose interest is adversely affected explicitly stating that the spouse intends and understands that she is altering the character of the property. Oral agreements will not be a valid transmutation.

1. **THE CONDO**

The general presumption is that property acquired during the marriage is CP. Hal acquired the condo in 2010 which was during his marriage to Wanda. However, by law, property acquired through inheritance is the separate property of the inheriting spouse. Since Hal acquired this property from his uncle through inheritance, the condo was Hal's SP. The issue is that Hal, at Wanda's insistence, titled the property in Joint tenancy with Wanda.

Title in Joint Form

A married couple who takes title in joint form when it is inconsistent with the nature of the funds used to acquire the property will be presumed to have intended the property as CP. Taking title in joint form with no indication that a spouse wanted to reserve a separate property interest creates the presumption of CP. Here, Hal and Wanda took title in joint form and Hal did not reserve any separate property interest, there also is no other writing that evidences an agreement between Hal and Wanda for Hal to keep a separate interest so the court will presume that because they took title in a joint form that they intended the property to be CP.

Transmutation by Deed

In order for spouses to change the character of property from SP to CP as in the case with the condo being Hal's SP and then later conveying to CP, there must be a valid transmutation. The issue is whether the deed from Hal to Hal and Wanda will be a valid transmutation of his interest. Typically, a deed satisfies the writing requirement for the transmutation if signed by the party adversely affected, in this case Hal. However, Hal may not have intended for interest in the property to be adversely affected. The facts indicate that he only agreed to put the condo in joint tenancy after Wanda's insistence that he do so in order to avoid probate. It is likely that Hal being an artist relied on Wanda's assertion because Wanda was a successful accountant who would have known the consequences of such decisions as titling property in a particular manner. The courts have been unclear in whether or not they consider a deed by one spouse to other spouses to be a valid transmutation. Assuming that that the deed from Hal to Wanda is a valid transmutation, then at most Hal would be allowed reimbursement for his SP that was used to acquire the condo by the community. The reimbursement will be allowed without interest or apportionment of increase in value to the items. A court would likely use the value of the property at the time it became CP which for the condo was $250,0000, Hal would be reimbursed for the $250k at divorce and the remaining value of the condo would be divided in kind 50/50 between Hal and Wanda.

Fiduciary Duties of Spouses

Spouses owe one another the highest duty of care and are fiduciaries to one another. If one spouse breaches her fiduciary duty to the other and takes advantage of that spouse by gaining an interest financially or in an asset, then the non-breaching spouse may be able to set aside the conveyance on those grounds. Here, Wanda was a successful accountant and Hal was an art teacher, there is a strong possibility that but for Wanda's insistence that Hal put the condo in joint form that he would not have done so. By insisting that the condo be in joint title, Wanda gained a financial interest in property that she would have otherwise had no rights to because it was received by Hal through inheritance. If Hal can show that Wanda breached her duty to him in convincing him to put the condo in joint form only to benefit herself, Hal may be able to have the conveyance set aside.

Equal Rt of Mgmt

Each spouse has an equal right to manage the assets of the community and keep the other spouse reasonably informed as to the financial situation. Here the facts indicate that Wanda managed the couple's finances and that she also kept a secret bank account without Hal's knowledge. By doing this she breached the duty to share management with Hal and used it to her advantage to try to hide $50k - Hal will also be able to use this to bolster his case that Wanda breached her fiduciary duty to him and should not be allowed to take an interest in the condo.

Conclusion as to the Condo: Hal will likely be entitled to reimbursement for his contribution of SP to CP - in this case the condo was valued at $250k at the time he conveyed to Joint Tenancy so he will have a right to reimbursement of the $250k and the remaining value will be CP. However if the court finds that the deed was not a valid transmutation from Hal's SP to CP then the condo would remain Hal's SP.

2. THE MOTORCYCLE

One spouse may not appropriate CP to themselves by simply taking title to the property in their name alone. When both SP and CP are used for the purchase of an asset the

funds used to acquire the property will be traced to their source and the property will be characterized in accordance with funds used for acquisition.

Down Payment

Property that was initially SP will continue to be SP even if the SP is exchanged or sold and the form changes. Hal inherited $10k from his Uncle - inheritance is an area of SP. Hal then took his $10k of SP and used it for a down payment on a motorcycle that he took title to in his name alone. Had the motorcycle cost only $10k, there would be no issue here because the $10k used to purchase the motorcycle could be traced directly to the inheritance which was Hal's SP making the motorcycle then SP as well. The motorcycle cost $20k, though, so it must be determined where the other $10k came from and whether the additional $10k can be traced to other SP or to CP.

Credit - Intent of the Lender

The credit, good will and reputation of a spouse belong to the Community during the marriage, this also includes credit scores. A loan taken out during the marriage is a community debt unless it can be shown that the lender in determining whether to loan one spouse the money relied solely on the borrowing spouse's separate property for repayment. The fact that a lender "relied" on one spouse's good credit is not the determining factor because good credit of one spouse belongs to both spouses as community property. When Hal borrowed the additional $10k from the lender, the lender ,relied on Hals good credit - Hal's good credit belongs to the community and so therefore, the loan for the motorcycle was a community debt. If there were other facts that indicated that the lender relied on Hal's separate property interest - such as the condo - for repayment then the debt could belong to Hal alone, but based on the facts present that the lender relied on credit of Hal the debt was community debt.

Repayment of Loan w Joint Acct $

Wages and earning of a spouse are community property if earned during the marriage. Here Wanda and Hal were putting their earnings into a joint checking acct which was used to pay off the motorcycle loan. Because CP was used to pay off half of the

motorcycle loan, the community owns a 1/2 interest in the motorcycle.

Conclusion as to the motorcycle: Hal owns the motorcycle as 50% SP because half of the purchase price can be traced to his SP inheritance, the community owns the other 50% interest because community property was used to obtain the loan and pay off the loan.

3. CAMPER VAN

When one spouse uses CP to buy a gift for the other spouse and puts title into that spouse's name alone, it is presumed to be a gift. While one spouse may not appropriate CP, one spouse may make a gift of interest in CP to the other spouse as SP. In this case, Hal will argue that Wanda taking him out for his 40th birthday and buying the camper van was her gifting her interest in the CP to Hal as his SP. On the other side, Wanda will argue that she did not intend to make a gift to Hal as SP, but instead intended to retain a CP interest in the van and that there was no valid transmutation from CP to Hal SP.

<u>Gift Exception to Transmutation</u>

There is an exception to the requirement that all transmutation be in writing. The exception is for gifts given to one spouse that are for that spouse's personal use and that are not substantial in value. Here Hal may argue that the van would also fall into the gift exception even if there was no writing that evidenced Wanda's intent to may a gift. Hal did use the camper van for fishing and summer trips with his friends. There is no mention of Wanda participating in these trips which would indicate that the van was for her personal use. However the gift must also not be substantial in nature and the van cost $20k; whether or not this is of substantial value would be considered in light of Hal and Wanda's station in life - their assets etc. While this may be an arguable issue, courts have typically found that cars are not items that are personal enough in nature to fall within the exception.

Conclusion as to the Van: If a court finds that by purchasing the van and titling it in

Hal's name alone that Wanda intended a gift of her CP to Hal SP, then the van will be considered Hal's SP at divorce. Otherwise by tracing the funds to the CP checking account the van will be deemed cp.

4. A1 BANK

Wages earned by either spouse's time, labor, or skill during the marriage belong to the community. Here Wanda took her earnings during the marriage which are CP and deposited them into a secret acct w/o Hal's knowledge or name. Regardless of the fact that Hal's name is not on the account, Wanda's wages still belong to the community and, therefore all of the money in the account ($50k) is CP. A court may continue to have jurisdiction over the proceedings and assets until they are all disbursed. Just because in this case Hal did not discover the $50k until right before the final hearing will not affect his rights - and if Wanda purposely hid the money or failed to inform the court of its existence then she may be denied interest in the money to the extent that justice and fairness require.

Conclusion : The $50k in the A1 acct is CP subject to in kind division upon divorce.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

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Question Number	Subject
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

QUESTION 5

In 2001, Ted, who was married to Wendy, signed a valid will bequeathing all of his property as follows: "$10,000 of my separate property to my daughter Ann; then $2,000 of my separate property to each person who is an employee of my company, START, at the time of my death; and all the rest of my separate property, plus all of my share of our community property to my beloved wife of 20 years, if she survives me." No other gifts were specified in the will.

In 2003, Wendy died.

In 2005, Ted adopted a child, Bob.

In 2006, Ted signed a valid codicil to his 2001 will stating that, "I hereby bequeath $10,000 of my separate property to my beloved son, Bob. All the rest of my 2001 will remains the same."

In 2011, Ted married Nell.

In 2012, Ted and Nell had a child, Carol.

In 2016, Ted died, leaving his 2001 will and his 2006 codicil as his only testamentary instruments. After all debts, taxes, and expenses had been paid, Ted's separate property was worth $90,000, and his share of the community property was worth $100,000. At death, Ted still owned START, which by then had ten employees, none of whom had been an employee of START in 2001.

What rights, if any, do Nell, Ann, Bob, Carol and the START employees have in Ted's estate? Discuss. Answer according to California law.

QUESTION 5: SELECTED ANSWER A

The facts tell us that the 2001 will and the 2006 codicil were both valid so we do not examine their validity.

Nell

Ted's 2001 will provided for his "beloved wife of 20 years" to receive all his share of community property (CP) and the remainder of his separate property (SP). Under this calculation, the wife would receive $50k in SP and Ted's (T's) interest in the CP. Nell (N) will argue that the will specifically provided for this estate to go to his wife, Wendy (W), who he had been married to for 20 years. This gift failed because it was specifically conditioned on W surviving T. This provision would not be covered by the Anti-Lapse statute because the gift was specifically conditioned on the wife's survival. Had it been silent on this point, we would assess rules of lapse and anti-lapse. Anti-lapse would not apply because that saves gifts to kindred of the testator (not the testator's spouse) who die leaving surviving issue. Here, the gift was to a spouse, not kindred, so even absent the specific condition, the gift would not have been saved by the anti-lapse rules.

Instead, N will argue that she is an omitted spouse, so she is entitled to an intestate share of the estate. If T married N and never updated his will after their marriage, and his will does not provide a gift for his wife, or evidence a specific intent not to provide for his wife, and the wife does not get a gift outside the will (such as an annuity), the wife is considered an omitted spouse and she takes a share of the estate equal to what she would get if her spouse died intestate.

Here, T made his original will in 2001. He republished his will by codicil in 2006. He did not marry N till 2011. He did not update his will to provide for N after he married her. There is nothing to suggest that he intentionally wanted to exclude N from his will, and there is nothing to suggest he provided for her outside his will. Therefore, the only

question is whether he intended for N to receive W's share under the will, or whether she should be treated as an omitted spouse.

While a court would permit the introduction of parol evidence to aid in resolving the ambiguity, there are no facts to suggest any evidence that would be helpful. Therefore, the court will likely take the will at face value and find that the gift was meant for W (as she was T's wife of 20 years and N was only T's wife of five years), who died, so the gift failed according to its own condition, and N would take an intestate share. The intestate rules provide that a spouse receives all of her husband's estate if he died without issue or parents. If he died with one child/issue or parents, the spouse would take half his SP and all of the CP. If he died with two or more children/issue or parents, the spouse would get 1/3 of his SP and all of his CP. T died with three living children, so his omitted spouse gets 1/3 of his SP and all of his interest in the CP.

Under these calculations, N would get $30k (which is 1/3 of T's SP) plus all of the CP.

Ann

A was given $10k of T's separate property in the 2001 will. In 2006, T executed a codicil that said he was leaving $10k of his separate property to his beloved son, Bob and leaving the rest of his will unchanged. The court will have to determine whether the codicil was meant to take anything out of the 2001 will, or whether it was meant to simply add another gift to the 2001 will.

A will may be revoked explicitly by a later instrument, or by obliteration (lining out words) or by physical act such as tearing or burning. Here, there are no facts to suggest that A did any of these things. Therefore, the court will find that the 2001 will was not revoked at all, and the 2006 codicil simply added another gift to the 2001 will.

A will get $10k of T's SP.

Bob

B might have been treated as an omitted child (similar to the omitted spouse, as discussed above) except that after he was adopted, T republished his will by codicil and

provided specifically for B to take a gift of $10k of T's SP. (Adopted children are treated the same way biological children are treated.)

B will get $10k of T's SP.

Carol

C will be treated as an omitted child. She was born after T last updated his will. T did not evidence any intent to exclude her from his will. He did not provide a specific gift to her mother to care for her - her mother was omitted from the will, too. C was not given a gift outside the will. It appears T updated his will, had a child, and forgot to update his will again to include her. C will take her intestate share under the will.

As discussed above, since T died with more than 1 child (issue), and a spouse, the spouse gets 1/3 of T's SP and the children get 2/3 of the SP. The 2/3 is divided equally, per capita to the children, or per capita with representation if any of the children predeceased their father and left issue.

Here, T's estate consists of $90k in SP. Two thirds of $90k is $60k. C would be entitled to 1/3 (because she is one of three children) of $60k, which is $20k.

The other two children were provided for in the will, so they do not take their intestate share. They only get the gifts they were provided in the will.

START Employees

The court will determine whether the employees are sufficiently identified in the will. The will refers to "each person who is an employee of my company, START, at the time of my death." The court will find that these are facts of independent legal significance. T would have employed these people regardless of whether he wanted them to take under his will. He would employ them because they would make his business succeed. He acted to employ them for reasons other than making his will valid. Therefore, the court will allow the will to refer to these facts of independent legal significance and allow the gift to stand.

Each employee will get $2k. There are 10 employees. The START employees would get a total of $20k, which exhausts T's SP.

QUESTION 5: SELECTED ANSWER B

1. CALIFORNIA IS A COMMUNITY PROPERTY STATE

California is a community property ("CP") state. Therefore, there is a presumption that property acquired during the marriage is community property. Separate property consists of property acquired before or after a marriage, property acquired during the marriage with separate property ("SP") funds, property acquired during the marriage by bequest, devise, or gift, and the rents, issues, and profits from the SP. Courts will trace the assets to determine the source of funds used to acquire the asset, to determine whether the asset is SP or CP. Courts will also look to see if any valid agreements or the spouses' conduct changes the character of assets. Via a valid will, each spouse may devise all of his SP and his half of the CP to any beneficiaries that he wishes.

NOTE: Wendy's Share

In the original will, Ted's gift to Wendy consisted of all of his share of the CP and any SP not devised by will (also known as the "residuary estate"). Ted included a survivorship requirement for Wendy's gift; Wendy did not survive Ted, so these gifts would not be valid. Furthermore, this gift would have failed anyway without this clause. Under California law, a beneficiary of a testamentary gift must survive the testator, or else the gift "lapses" (meaning it fails). If the gift lapses, the gift goes to the testator's residuary devisees, if any, and if not, it is distributed by intestate distribution. A testator's "residuary" estate is a gift of whatever is not specifically devised in his will to certain beneficiaries. California does have an anti-lapse statute. However, it only applies if the devisee is the kindred (blood relative) of the testator and the kindred leaves issue. Wendy was Ted's spouse, not his kindred. Therefore the anti-lapse statute does not save her gift under Ted's 2001 will, and the separate property and community property devised to Wendy by Ted's will therefore lapses and will be distributed via intestate succession (because Wendy was the residuary beneficiary - he devised whatever remained of his SP to Wendy, so it must instead be distributed

intestate). Therefore, Wendy's gifts under the will do not preclude others from inheriting Ted's SP.

2. NELL - The Pretermitted Spouse

California has a statute protecting spouses from being accidentally omitted from testamentary dispositions. If, after execution of all testamentary instruments (including wills and codicils, and any intervivos trusts), the testator gets married, the spouse is considered a "pretermitted spouse" and will be entitled to take her intestate share of the estate. Exceptions to this are if the will states on its face that it was not his intention to give this gift to a pretermitted spouse, the pretermitted spouse is otherwise provided for by nontestamentary transactions (for example, if the testator takes out an annuity for the spouse), or if the spouse waives her rights to make claims as a pretermitted spouse.

Here, the last testamentary instrument executed by Ted was in 2006 (his codicil). Ted married Nell in 2011, and no subsequent testamentary instruments were executed. There is no evidence that any of these exceptions to Nell's ability to claim as a pretermitted spouse exist. Therefore, Nell would be entitled to her intestate share of the Testator's estate; under California intestacy distribution laws, when as here, there is one surviving spouse and more than one surviving issue (here, Ted has three surviving children), the surviving spouse is entitled to the testator's one-half of the community property (so she ends up with 100% of the community property) and one third of the testator's SP. Therefore, Nell would be entitled to all of the CP ($100,000) and one-third of the SP ($30,000).

It is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Nell would also be entitled to her intestate share of the SP and CP value of Ted's ownership of the business.

3. CAROL - The Pretermitted Child

Just like the pretermitted spouse, California protects children who have been unintentionally omitted from a testator's testamentary distributions when the child is born

or adopted after the execution of all testamentary instruments. Pretermitted children are entitled to their intestate share of the testator's estate, unless the face of the will indicates an intent not to do so, the child is provided for by a non-testamentary transfer, or all of the testator's assets are given to the mother of the pretermitted child when the testator has other children, with the indication that the mom take care of all the kids. Here, Carol was born in 2012, well after Ted executed his last testamentary instrument (the codicil in 2006), so she is a pretermitted child.

Here, there is no evidence that facts exist that would prevent Carol from making a claim as a pretermitted child. There are no apparent non-testamentary transfers to Carol to be taken instead of a testamentary gift, and in the original will, although Ted left a substantial portion of his estate to his then wife Wendy, he also left gifts to his other children - Ann and Bob. Therefore, Carol is entitled to her intestate share of Ted's estate, which under California's intestate distribution laws described above, would mean that Carol is entitled to her share of 2/3 of Ted's estate (Nell gets 1/3, and all the children would share the other 2/3 of the SP). Therefore Carol would get $20,000 of Ted's SP.

Again, it is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Carol would also be entitled to her intestate share of the SP value of Ted's ownership of the business.

4. ANN and BOB

Neither Ann nor Bob is a pretermitted child. Ann was born prior to the execution of the 2001 will, and Bob was adopted prior to the 2006 codicil. Note that adopted children are treated the same as natural children for the purposes of distribution in California.

Ann and Bob both receive valid gifts from the will. Ann is devised $10,000 of Ted's SP, and Bob is devised $10,000 of Ted's SP. Unless their gifts have to be abated to accommodate the share of the estate given to Nell and Carol (which, it does not appear that this is the case), they would be entitled to this money.

5. START EMPLOYEES - ACTS OR FACTS OF INDEPENDENT SIGNIFICANCE

To take under a will, the beneficiary must be ascertainable. Usually all of the material terms of the will must be within the will itself, and extrinsic evidence is not allowed to supplement the will provisions. A potential problem with Ted's will is that he wants to give $2,000 to each employee who works at his company at the time of his death. These employees are not individually known at the time of the will, and their names are not included in the will. Generally, the court will not admit extrinsic evidence to probate a will due to fear of fraud. However, a gift to a group of individuals to be determined upon the death of the testator can be a valid gift. Under the theory of **acts or facts of independent significance,** the court may use external facts to fill in the gaps of a will if the external facts would be in existence regardless of the will. In other words, the existence of the extrinsic evidence is not testamentary in nature and therefore does not have the same concern of fraud. Here, who Ted's company employs exists separate and apart from the will. Therefore, the court will admit extrinsic evidence to determine who the employees were at the time of Ted's death in order to give effect to his testamentary dispositions. At the time of his death, START had ten employees. It does not matter that none of them were employed when the will was created in 2001, or re-published by codicil in 2006, because the will provision applies to the employees of START at the time of Ted's death. Therefore, each of the employees is entitled to $2,000.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Evidence
3.	Professional Responsibility
4.	Community Property
5.	Constitutional Law

QUESTION 4

Wilma, a California resident, was employed as an accountant for many years. She retired in 2010 and received a pension. Wilma received part of the pension as a lump sum and the rest in monthly installments deposited into an account in her name at Main Street Bank. She used the lump sum as a down payment on a townhouse. The title to the townhouse and the mortgage are in Wilma's name.

In 2011, Wilma met Harry, also a California resident, who worked in a local store. Wilma and Harry married in 2012. Harry opened an account at Valley Bank in his name and deposited his salary from the store into the account. Wilma did freelance accounting work and deposited the pay from that work into her Main Street Bank account.

During their marriage, Wilma and Harry used funds from Harry's account to pay the mortgage on the townhouse in which they both lived. They paid all their household expenses from Wilma's account. Wilma's pay from her accounting work did not cover all their expenses and her monthly pension installments paid the rest of their expenses.

In 2013, Wilma and Harry bought a motorboat using funds from Wilma's account. Although they would both use the boat, title was taken in Wilma's name.

In 2014, Harry was injured when a driver, Dana, negligently struck him with her car.

In 2016, Wilma and Harry permanently separated, and Harry moved out of the townhouse and stopped making mortgage payments.

In 2017, Harry settled his claim against Dana for $30,000.

In 2018, Harry instituted dissolution proceedings.

What are Wilma's and Harry's rights and liabilities, if any, with regard to:

1. The townhouse? Discuss.

2. The motorboat? Discuss.

3. The personal injury settlement funds? Discuss.

Answer according to California law.

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QUESTION 4: SELECTED ANSWER A

California (CA) is a community property (CP) state. There is a community presumption, meaning that all property acquired during marriage is CP. This includes wages of either spouse and labor of either spouse during marriage. There are areas of separate property (SP): (1) property acquired before or after marriage, (2) property acquired during marriage by either spouse through gift, will, or inheritance, (3) Property acquired from SP funds, and (4) profits, rents, and issue of SP. The burden is on the spouse opposing SP to defeat the CP presumption. Courts use the source rule to determine the character of property by tracing the source of funds used to acquire the property.

The marital economic community (MEC) begins at marriage and ends at death of either spouse, divorce, or with the intent of either spouse to not resume the marital relationship coupled with conduct indicating that intent. If spouses maintain the facade of marriage the MEC has not ended.

Here, Wilma (W) and Harry (H) married in 2012. This is when the MEC began. The MEC likely ended in 2016 when W and H permanently separated. Although separation in and of itself is not sufficient to end MEC, it shows the intent of both spouses not to resume the MEC. The fact that Henry moved out is conduct that supports that intent. However, if Henry moved out for the intention of improving and coming back together, the MEC would officially end when H instituted divorce proceedings in 2018.

Generally, on divorce, CP is divided equally in kind, meaning on a per-item basis (not in the aggregate), unless a special rule requires deviation from the equal distribution requirement. Earning power is not generally not considered, other than considering spousal support or debt. Upon divorce, each spouse is entitled to their own SP. Upon death, one spouse's CP inures to the other spouse, such that the surviving spouse ends up with 100% of CP. The

surviving spouse is entitled to at least 1/3 of decedent- spouse's SP, depending on how many, if any, heirs or issue the decedent left behind.

Note, that all CP is divided equally between the spouses. Thus, even if property below is awarded CP, it is still split between the two spouses upon marriage, with the exception of personal injury funds.

TOWNHOUSE

The issue is whether the townhouse is CP or SP. As stated above, property acquired before marriage is presumptively SP. Here, the townhouse was purchased by W prior to 2012 when H and W married. Additionally, wages of either spouse earned prior to marriage is SP. The court will trace the source of the funds used to acquire the townhouse to determine its character. Here, the source of funds is W's pension before she was married. To determine the character of pension, courts use the time rule. Courts consider the amount of time the spouse worked during marriage to get the pension divided by the amount of time total the spouse worked to get the pension. The rationale for the formula is that spouse's labor during marriage is CP and any funding earned from spouse's labor is CP. However, W received the pension before she met or married H. As such, the entire pension is her SP. As such, the townhouse was initially SP.

Spouses may alter the character of assets during marriage with an agreement known as a transmutation agreement. A transmutation agreement may alter the character of CP to SP, SP to CP, or one spouse's SP to another spouse's SP. A valid transmutation agreement must be in writing, accepted by the adversely accepted party (signed), and expressly state that ownership of the property is being transferred. One exception to the writing requirement is gifts of personal property given by one souse to another spouse that are not substantial in value and used in the home. Here, there were no transmutation agreements because there was no writing. Rather, after the MEC, the spouses began paying off the mortgage on the townhouse with funds from Harry's account, which is CP (as discussed below). Harry might argue that the fact that both spouses lived in the townhouse changed

the character of the townhouse. However, that is insufficient. There was not a valid transmutation agreement. As such, using CP to pay the mortgage on SP did not alter the character of the townhouse from SP to CP.

When property is acquired in joint and equal form, there is a presumption that the property is CP and if any SP was used to purchase the property is subject to the Lucas and anti-Lucas statute. Here, the townhouse was solely in W's name alone. Therefore, the presumption that arises from joint and equal form and the anti-Lucas (which applies on divorce) and the Lucas (which applies on death) need not be considered.

Harry may argue that the fact that CP funds are used during marriage to pay off the mortgage on the townhouse makes the property CP. The funds used to pay down the debt constituted deposits of H's salary at the Main Street Bank. As stated above, wages earned during marriage by either spouse are CP. The fact that such wages are deposited into an account in the sole name of just one spouse does not alter the character of the funds. Therefore, the funds in Harry's account deposited after 2012 are CP. The funds beforehand are SP.

Here, the Court will trace back the funding used for the house. As stated above, the downpayment was W's SP, but for the reasons stated in the previous paragraph, the mortgage was paid with CP.

When CP funds are used towards SP property, the character of the property does not change. Rather, the community gets a pro rata ownership share in the property. Courts use the principal debt reduction method to discern the community's ownership share in the property. The community is entitled to the amount it expended to "feather the nest" of CP. Additionally, the community is entitled to the pro-rata increase in value of the property as to its pro-rata ownership share. As such, the townhouse is SP, and under the principal debt reduction method, the CP will receive a pro rata share as follows: amount of CP funds expended on paying down the debt divided by the total amount of SP and CP money used to

pay off the debt X the increase in value. Furthermore, the CP is entitled to the funds expended on paying down the debt from H's account.

If the court finds that the property was somehow held in joint and equal form, upon divorce, under the anti-Lucas statute, the SP spouse is entitled to a refund for downpayment, and any improvements and principal payments. Under this unlikely theory, W will receive a refund for the downpayment.

With regards to the mortgage, the lender's primary intent when giving the loan determines the character of the loan. If the lender looks to SP as security, the mortgage is likely SP. However, if the lender looks to the spouse's standing in the community or CP property as security, the loan is likely CP. Here, the loan was given before marriage. Therefore, the mortgage is entirely SP. Upon divorce, W will be responsible for the mortgage unless justice requires otherwise.

MOTORBOAT

The issue is whether the motorboat is SP or CP considering that it was purchased during the marriage, but from funding from Wilma's account. As stated above, property purchased during marriage is presumptively CP. Here, the motorboat was purchased during the marriage and therefore is presumptively CP. W will urge the court to use the source rule to trace back the funds used to purchase the motorboat. Here, the funds used to purchase the motorboat were funds from Wilma's bank account. Funds from Wilma's bank account include the pension plan monthly installments as well as her pay from freelance accounting.

W may argue that the motorboat is SP because it was purchased in her name alone and with funds from a bank account held in her name alone. W will not prevail on this argument because depositing wages earned during MEC into an account held in the name of only one spouse does not alter the character of the asset. Additionally, holding property in the name of one spouse does not defeat the community presumption that arises when property is

acquired during marriage. As such, W will not prevail on these arguments. For the reasons stated above, neither action is a valid transmutation agreement (no writing).

As stated above, the pension plan monthly installments are W's SP because she worked as an accountant for many years prior to the marriage and thus, under the time rule, none of her labor during the marriage (CP labor) was used to earn the pension. However, W also deposited her pay from the freelance accounting jobs into her Main Street account as well. After MEC, W did freelance accounting. Since these wages were earned during the marriage, W's bank account in Main Street is commingled with both CP and SP.

COMMINGLED FUNDS

H might argue that W's pension plan benefits are CP because they were commingled with CP. However, commingling SP and CP funds does not alter the character of either spouse. When CP and SP funds are commingled, the burden is on the spouse claiming that property acquired with funds from that account is SP to show that SP funds were used to acquire the property. Here, W may claim that her pension benefit funds only were used to purchase the motorboat and thus, under the source rule, the motorboat is SP.

W can satisfy the burden using two methods of accounting: (1) direct in-direct-out method and (2) the exhaustion rule. Under the direct-in-direct-out rule the spouse claiming SP must show that there were sufficient SP funds in the account and that the spouse had the intent to purchase the asset with SP funds. Alternatively, under the exhaustion rule, the spouse claiming SP must show that all the CP funds were used in the account and all that was left in the account was SP. Under the family expense presumption, expenditures for community items, such as living, rent, food, etc. are presumptively made from CP. However, inevitably due to commingling and inadequate records, SP funds may be used for family expenses. If there are not adequate records and commingling occurs, it is presumed the SP funds used for family expenses are a gift to the community.

Here, H and W paid all of their household expenses from Wilma's account - the account that has both SP and CP. Wilma's pay from her accounting work, which is CP, was not enough to cover all of their expenses and the monthly pension installments (SP) were used to pay the rest of the expenses. Under the exhaustion rule, W has a strong argument that only SP funds were used to purchase the motorboat because the CP funds were "exhausted," shown by the fact that Wilma's accounting work was not enough to pay for their expenses. This means that inevitably Wilma's separate property was used to pay for the living expenses. Under the family expense presumption, it is presumed that CP was used first to pay for the family expenses and that all the funds left to purchase the boat were Wilma's SP. H can argue some of W's SP was used for the family expenses and some of Wilma's accounting work (CP) was used for the motorboat. However, due to the family expense presumption, H is unlikely to prevail in this argument given the exhaustion method.

Under the direct-in-direct-out method, Wilma must argue that not only were SP funds available but also it was her intent that the motorboat remain SP. It is unclear from the facts when the motorboat was purchased - whether it was at a time when the Wilma's wages from accounting were exhausted and thus only SP funds were available for the rest of the expenses, or was it during the beginning of the month when both SP and CP funds were available. H may argue that Wilma's pension funds used for expenses is presumably CP because the funds were commingled. A court may have to seek more documents to see the status of the funds during the time the motorboat was purchased. However, it is likely that SP pension funds were available when the boat was purchased because SP funds were used by the "finish out the month" after the CP funds were exhausted. This means that generally SP funds were always available.

If court finds that SP funds were available, then with regards to the intent, W will argue that the spouses intended the motorboat to be SP because it was held in her name alone. H will argue that the intent was for the property to be shared because they both used the motorboat.

H may also argue that W violated her fiduciary duty to him as a spouse. Due to the close and honest relationship between spouses, courts find a fiduciary duty relationship. Where one spouse gains a better position in a transaction as compared to the other spouse, there is a presumption that the spouse in the better position breached that duty. Here, H may argue that W breached her duty using SP funds to purchase the motorboat and thus, the community does not have a stake in the property. H can argue that W was more sophisticated financially then H because she was employed as an accountant for many years and was working as a freelance accountant during the marriage. H can point out that he merely worked at a local store and did not have the financial knowledge held by W. H can argue that CP funds were available from his work at the store, as well. This is a strong argument for H and a court will strongly consider this fact when deciding whether W satisfied her burden from the commingled funds.

Accordingly, unlike PI and townhouse, it is unclear who has rights to the motorboat.

PERSONAL INJURY SETTLEMENT FUNDS

The issue is whether the personal injury (PI) funds are CP and SP considering the cause of action arose during the MEC, but the case settled after the MEC. Generally, all funds acquired during marriage are presumptively CP. With regards to PI settlement awards, if the cause of action arose during the MEC, the settlement award is CP, UNLESS the settlement award is from the other spouse when the other spouse is the tortfeasor. The rationale behind this is if the funds were CP, the tortfeasor spouse would be able to benefit from his own wrongdoing. Although PI funds awarded from a cause of action that arose during marriage are CP, upon the divorce the court usually awards the funds exclusively to the injured spouse as SP. However, this exception is limited and applies only if those funds are not spent. The court will attempt to trace back the funds to determine that.

Here, H was injured by driver (D) when she negligently struck him in 2014. H and W permanently separated in 2016 and divorced in 2018. As such, even if the MEC did not end

at separation (as discussed above), the cause of action still arose during MEC. Although the funds were paid out afterwards, the funds were initially CP.

H will ask the court to provide the award solely to him because he was the victim of the accident. Here, the funds were paid out after the MEC and there is no evidence that supports an assertion that it would be difficult to trace the funds, given that they were awarded after MEC has ended. As such, H is likely to receive rights to the entire award at divorce because he was the victim and tracing is not an issue. While courts may split PI awards evenly if justice so requires, there are no facts here that suggest it is equitable to split the PI funds. Accordingly, H will receive the PI settlement award.

QUESTION 4: SELECTED ANSWER B

California is a community property state. There is a presumption that all assets acquired during marriage are community property. California also recognizes the following forms of separate property: (1) property acquired before marriage, (2) property acquired through gift or inheritance, (3) expenditure of separate property, and (4) rents and profits of separate property.

Upon divorce, all community property assets are separated equally in kind, unless otherwise provided by a special rule of community property. Separate property remains separate property upon divorce.

THE TOWNHOUSE

There is an issue as to how the townhouse should be distributed upon divorce. Here, Wilma purchased the townhouse in 2010, prior to Wilma and Harry's marriage in 2012. Both title to the townhouse and the mortgage are in Wilma's name. The townhouse is presumptively Wilma's separate property since it was acquired before marriage.

Characterization of Funds From Harry's Account

There is an issue as to whether the funds used to make the payments on the townhouse mortgage were separate property or community property. Generally, all assets acquired during marriage, including any income earned, is presumptively community property. The fact that the funds are placed in a separate account, not a joint account, does not change the characterization of the property.

Here, the funds to pay the mortgage on the townhouse came from Harry's account. Harry opened the account only in his name and deposited his salary from his job into the

account. The fact that the funds were put into an account in Harry's name does not change the fact that the funds were community property. Since the funds were acquired from a job during marriage, they were community property. The community therefore was responsible for paying down the mortgage on the townhome.

Proration Rule

Under the proration rule, when community property is used to pay an installment payment on separate property, the community gains an interest in the property. The community has a prorated interest in the property, calculated by the expenditure of community property towards the installment payment over the total purchase price.

Here, Wilma and Harry used funds from Harry's account to pay the mortgage on the townhouse. As discussed above, the funds from Harry's job are community property. Since community property was used to pay down the balance of the mortgage, the community has a pro rata interest in the townhouse. The community's interest in the townhouse is the ratio between the amount of community funds used to pay the mortgage, over the total purchase price.

Conclusion

The community has an interest in the townhouse, calculated by the ratio between the amount of community funds used to pay the mortgage over the total purchase price. Wilma and Harry will split the proceeds from the community's interest in the townhouse.

THE MOTORBOAT

There is an issue as to Wilma's and Harry's rights and liabilities in the motorboat. Since the motorboat was acquired during marriage, there is a presumption that the boat is community property, despite the fact that title was taken only in Wilma's name.

Characterization of Wilma's Pension

There is an issue as to whether the monthly payments from Wilma's pension are community property or are separate property. Generally, property acquired before marriage is separate property. However, property acquired during marriage, such as income, is considered community property.

Here, Wilma retired in 2010 and received a pension. Wilma received part of the pension as a lump sum and received the rest in monthly installments. She then deposited these funds into an account in her name at the Main Street Bank. Harry may try to argue that these funds are community property since Wilma gets funds each month, characterizing them as income. Wilma, however, will argue that the pension funds were earned and acquired before marriage. Wilma worked as an accountant for many years. Wilma had to work for many years prior to 2010 before receiving a pension. The work was already done, and Wilma earned her pension when she retired in 2010, despite the fact that it was paid over many months. Wilma will argue that unlike income, she did not perform any work during marriage to receive the funds. Wilma had a property interest in the pension prior to her marriage with Harry.

Wilma's pension will likely be considered her separate property, since it was earned prior to marriage. Wilma's pension was a result of her work as an accountant, from which she retired prior to the marriage.

Characterization of Wilma's Salary

Generally, all assets acquired during marriage--including income--are community property. Here, Wilma took a salary from freelance accounting work which she deposited into her Main Street Bank account. Wilma's salary was earned during marriage and is therefore community property.

Commingling of Funds

There is an issue as to whether Wilma's separate property or community property was used to purchase the boat. The commingling of separate property and community property does not transform the nature of the property. Wilma has deposited both her pension--separate property, and her salary--community property, into her account. The assets have been commingled and it must be determined whether separate property or community property was used to purchase the boat.

Family Expenses Presumption

There is a presumption that all family expenses are paid with community property. Any funds spent on household expenses exceeding the amount of community property is deemed to be a gift to the community.

Here, Wilma and Harry paid all household expenses from Wilma's account. Wilma's pay from the accounting work was not enough to cover their expenses, and her monthly pension paid the remaining expenses. There is a presumption that all these household expenses were paid using the community property assets.

Exhaustion

A spouse can show that a purchase was made with separate property from a commingled account if they show that the community funds were exhausted, and the only remaining funds were separate property.

Here, Wilma paid all household expenses with the commingled funds from Wilma's account. Based on the family expenses presumption, discussed above, the payment of these expenses is presumed to be from community property. Wilma can show that the

community property funds in the account were exhausted, since Wilma's pay from her accounting work did not cover all their expenses. Wilma was required to use her monthly pension installments to pay the remaining expenses. Since the community property funds were depleted each month to pay for the household expenses, the only funds remaining in her account were her separate property funds from her pension. Wilma can therefore show that the separate property funds were used to purchase the motorboat. Since the motorboat was purchased with Wilma's separate property, the motorboat is Wilma's property, not subject to equal division upon divorce.

Tracing

Tracing is available when you can directly trace a deposit of separate property into a commingled account to a subsequent purchase. For example, if Wilma deposited $12,000 into her account, and then purchased the boat for $12,000, the court can trace the purchase to the deposit of separate property. Here, however, Wilma only deposited her salary and monthly pension installments into the account, and tracing is not available.

Joint Use/Transmutation

Harry may try to argue that the boat is community property since they agreed that they would both use the boat. Joint use does not change the character of the property. Here, the property was acquired through the expenditure of Wilma's separate property, making the boat her separate property.

A valid transmutation requires a writing signed by the spouse whose interest is affected, and must explicitly state that a transmutation in the form of property is being made. Here, there is no writing signed by Wilma. The fact that both parties agreed to use the boat does not transform the separate property into community property.

Conclusion

There is a presumption that the boat is community property since it was acquired during marriage. Wilma, however, can show that the motorboat was purchased with her separate property. Wilma purchased the boat from a commingled account containing community and separate property. The community property was exhausted each month to pay the family expenses, and the only remaining money was Wilma's separate property. This separate property was used to purchase the boat, making it an expenditure of separate property. The boat is separate property and not subject to equal division upon divorce--Wilma has a 100% interest.

PERSONAL INJURY SETTLEMENT FUNDS

There is an issue as to how Harry's settlement for his personal injury claim should be distributed upon divorce. Funds received from a personal injury settlement are community property if the cause of action arose during the economic community.

End of Economic Community

The economic community ends when the parties intend not to continue marital relations, and take action consistent with that intent.

Here, Wilma and Harry permanently separated in 2016, but did not file for dissolution proceedings in 2018. It is unclear whether the parties intended to divorce when they separated in 2016. If the parties intended to end marital relations in 2016, it does not matter that dissolution was not filed until 2018. The fact that Wilma and Harry permanently separated is sufficient conduct for the economic community to have ended in 2016 if they intended to permanently end marital relations at the time of separation.

Harry was injured in 2014, while the parties were still married. Harry, however, did not settle his claim against Dana until 2017--arguably after the end of the economic community. Harry may try to argue that the personal injury award should be his separate property since it was obtained after the economic community. His argument will fail, however, because his cause of action arose in 2014 when the parties were still married. The parties were married at the time the cause of action arose, and Harry's settlement funds are therefore community property.

Personal Injury Funds Upon Divorce

Generally, personal injury settlement funds are community property. The court will, however, award the entire recovery to the injured spouse upon divorce, unless the money has been spent or the interests of justice require otherwise. Here, although the funds are community property, the money does not appear to be spent, and it does not seem unfair to award Harry the entire settlement. Harry should therefore be awarded the entire $30,000 settlement upon divorce.

Conclusion

Although Harry settled the claim after the end of the economic community, the cause of action arose while the parties were married making the settlement community property. The court should, however, award the entire $30,000 settlement to Harry, the injured spouse.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

QUESTION 1

In 2006, while Hank and Wendy were married and living in State X, a non-community property state, they purchased a house in State X and a condominium in California with money from Hank's salary. Hank took title to both the house and the condominium in his name alone.

In 2008, Hank executed a will leaving whatever he might own at death to Wendy. As allowed by State X law, only one witness signed the will.

In 2016, Hank and Wendy retired and moved to California. Hank conveyed the condominium to himself and to Sid, his son from a prior marriage, as joint tenants with right of survivorship, doing so as a gift to Sid. Hank then put $100,000 he obtained from an inheritance into a valid revocable trust, the income to be paid to him for life, then to Wendy for life, remainder to Sid.

In 2017, as a result of a skiing injury, Hank lost all mental capacity and was on the verge of death. In accordance with Hank's prior wishes, Sid was appointed as Hank's conservator. Sid prepared a codicil to Hank's will, giving a one-half interest in the State X house to Hank's best friend, Bill. Sid signed the codicil as conservator, and had it properly witnessed.

In 2018, Hank died. Sid found that Hank owed various creditors more than the value of the State X house and California condominium combined.

1. What rights, if any, do Wendy and Sid have in the California condominium? Discuss. Answer according to California law.

2. What rights, if any, do Wendy and Bill have in the State X house? Discuss. Answer according to California law.

3. Will Hank's creditors be able to reach the assets in the trust? Discuss.

QUESTION 1: SELECTED ANSWER A

Community Property Basics / Overview

General Community Property Rules; Quasi-Community Property Concept

California is a community property state - a married couple is seen as forming a marital economic community (MEC) and property acquired by the couple or either spouse during the MEC (which exists from time of valid marriage until the earlier of permanent separation (which may be affected unilaterally by a spouse by the communication of the intent to permanently separate together with conduct in conformity with such intent) or death) while domiciled in CA is presumptively community property, unless it fits into specific categories of so-called "separate property". Separate property includes property acquired by either spouse prior to (or for that matter after) the MEC, or during the MEC if: (1) by gift, inheritance, or bequest; (2) as income, issue, or rents on SP; or (3) by the expenditure of SP funds (i.e., property traceable to SP).

California's system also captures so called "quasi-community property" - property that would have been CP if the couple had been domiciled in CA at the time of acquisition. QCP is treated like SP until the death (or dissolution) of the MEC, when it is subject to treatment like CP.

Default Division upon Death of Spouse; Right of Decedent Spouse to Make Will; Surviving Spouse Rights to Take Against Will

At death, in the absence of a valid will (i.e., decedent spouse dies intestate), CP and QCP owned by the decedent spouse will generally all be inherited by the surviving spouse (anywhere from 1/3 to all of decedent spouse's SP will also be inherited by surviving spouse - it would be 100% if decedent spouse left no issue or surviving parents or issue of parents; but if as here decedent spouse was survived by 1 child, then surviving spouse would take 1/2 SP)

However, a spouse may make a valid will - and CA will probate a will that was validly made pursuant to the laws of another jurisdiction where decedent spouse testator was domiciled at the time (even if the will would not be valid under CA law). However, if the will attempts to gift

away CP / QCP owned by the surviving spouse, the surviving spouse can (at the cost of rejecting all gifts under the will), "take against the will" and claim all such CP / QCP (i.e., decedent testator spouse can only will away all of his SP and his 1/2 of CP / QCP without surviving spouse consent / acquiescence)

Application to Hank and Wendy

Here, Hank and Wendy were validly married in 2006 and living in State-X (a non-community property state) until 2016, when they moved to CA - Hank then died while the couple was domiciled in CA. So, all property acquired by the couple from 2006 to 2016 is generally QCP (unless it qualifies as SP - burden of proving SP would be on the SP proponent)).

Furthermore, Hank's 2008 will (which was validly made under State X law) can be probated under CA law (effect of 2017 codicil to be discussed below)

With these basics in mind, we now turn to each question

1. California Condo

Original Characterization of Condo

When a couple ultimately is domiciled in CA at the time of death of one spouse or dissolution of the MEC, property acquired while domiciled outside of CA is QCP if it would have been CP if the couple had been domiciled in CA at the time the property was acquired. This is true even if the purported QCP is real property located in CA. Wages / salary of each spouse during the MEC are CP - and property acquired using such CP funds is also CP, regardless of whether title to the asset is taken in the name of one spouse.

Here, even though Hank took title to the condo in his own name, he used CP funds (his salary during the marriage) to purchase, so the condo would have been CP -- since the couple was domiciled in State X at the time, and Hank is dead now, it is treated as QCP.

Effect of Inter Vivos Conveyance

QCP is generally treated as the acquiring spouse's SP until the time of the acquiring spouse's death (or, irrelevant here, the dissolution of the marriage). However, that does not mean that

the acquiring spouse is completely free to make inter vivos transfers of the QCP -- if the acquiring spouse transfers QCP during his life for less than fair value while retaining an income right, a right to revoke the transfer, or a right of survivorship, the other spouse has a right to clawback 1/2 of the value of the transferred QCP from the transferee.

Here, Hank transferred the QCP condo while retaining a right of survivorship - so Wendy has a right to 1/2 of the condo under this clawback rule. Sid does not have the right to own the entire condo (even that would otherwise be the result, due to the right of survivorship - if not for the QCP system, Hank's death would have extinguished his ownership rights in the condo, leaving nothing to pass by his will to Wendy, and giving Sid 100% ownership of the condo). Note that this is not "taking against the will", since this was a separate inter vivos transfer of QCP - so Wendy doesn't need to repudiate any rights under the will to assert this right to the CA condo.

2. State X House

Original Characterization of State X House

See above for rules.

Here, Hank also purchased the State X house using CP funds (his salary), so the State X house is also QCP.

Validity and Effect of 2017 Codicil

Under California law, a will can be amended, revoked or otherwise modified in whole or part by a subsequent codicil, provided it is validly executed. A validly appointed conservator can make a will or codicil for a now-disabled / incompetent person.

Here, Sid was properly appointed as conservator (when Hank become incapacitated from the skiing accident), signed the codicil, and had it properly witnessed (i.e., 2 witnesses who witness the will signing simultaneously and then sign the will) - so this a proper testamentary instrument that modifies Hank's 2008 will, even though Hank was not mentally competent. Furthermore, there are no facts that would allow Wendy to argue that Sid abused his power as conservator to improperly benefit himself. Instead he gave a gift to a close friend of Hank's,

and Hank expressly designated Sid to be his conservator, so there are no "bad facts" for Wendy to attack.

Wendy's Rights

See rules above

Because the will and codicil together only dispose of 1/2 of the State X house, and provide that Wendy receives the other 1/2, Wendy has no grounds (or reason) to "take against" the will here.

3. Creditor Rights with respect to Trust Assets

Trust Basics; Characterization of Trust Res

A Trust is fiduciary relationship in respect of property, where one party - the Trustee - is given legal title to certain property by another - the Settlor / Trustor; the Trustee holds the property subject to fiduciary duties, for the benefits of certain beneficiaries, who have equitable rights in the property.

A trust requires trust property and ascertainable beneficiaries, an act of creation (including an inter vivos transfer to a Trustee) by the Settlor with the intent to create a Trust, and a Trustee with duties (who can be selected by agreement between Settlor and Trustee, or Trustee can be designated by court if Settlor does not name or intended person declines to serve as trustee). Trust must also have a valid purpose

Settlor can name self as beneficiary and can reserve right to revoke trust. Providing income to a person (including Settlor) during lifetime is a valid trust purpose.

Here, Hank created a valid trust, with himself and Wendy as successive lifetime income beneficiaries, and Sid as the remainderman beneficiary. Since he funded the Trust with inheritance, this was SP, and there is no CP issue with Hank putting the money into trust (or designating Sid as remainderman) without Wendy's consent.

Rights of Creditors to Reach Assets In Revocable Trust; Rights of Creditors to Reach Assets in Trust After it Becomes Irrevocable

When Settlor puts money or other assets into trust and reserves the rights to revoke, creditors of the Settlor can generally reach these assets. However, a trust that that is revocable inter vivos becomes irrevocable upon death.

Here, Hank's creditors could have reached the trust assets during his life - if they obtained a judgment against him, they could have moved against his various assets (including his interests in the State X House and CA Condo, for that matter). But here the creditors have not acted promptly - Hank's estate does not have an interest in the trust; Wendy has an income interest for life, and then Sid has the remainder. Accordingly, Hank's creditors cannot reach the trust res.

As discussed above, however, the State X house is owned by Hank's estate, and due to go 1/2 to Wendy and 1/2 to Bill. Creditors could presumably move against that asset.

QUESTION 1: SELECTED ANSWER B

1. California condominium - Wendy & Sid's rights

Valid Will

A will is considered valid in California if it complies with the law of either: (i) California, (ii) the state where the will was executed, or (iii) the state of the decedent's domicile at death. H's will was executed in State X. Under the law of State X, which allowed only one witness to sign the will, the will was valid. Therefore, Hank (H)'s 2008 will is valid in California because it complied with the law of the state where it was executed (State X), even if it would not be valid under CA law, which requires two witnesses.

Community Property Law

California is a community property state. Under community property law, the marital economic community (MEC) begins with a valid marriage and ends with the death of a spouse, divorce, or permanent separation. Any property obtained during the marriage, as well as any labor and wages of the spouses during the marriage, is community property (CP). Property obtained prior to marriage, or after permanent separation, is considered separate property (SP). Property obtain by gift, inheritance or devise before or during the marriage is also considered SP. Property that is obtained with SP only will also be considered SP, because a change in form will not result in a change in characterization. Quasi-community property (QCP) is any property obtained by the spouses during marriage while living in a non-CP state, that would have been considered CP had the spouses been living in California. QCP will receive that classification on the death of the titled spouse or on divorce, prior to which the property will be governed by the law of the non-CP state. QCP will be divided on divorce just as CP is.

Hank (H) and Wendy (W) married in 2006 in State X, a non-CP state. Thus, the MEC was formed by at least 2006, when H and W were living together in State X. The California condo was bought after H and W married, thus during the marriage. Although

H and W were living in a non-CP state when they bought the California condo, the property would have been considered CP had the spouses been living in California because it was obtained during the marriage. Therefore, on H's death in 2018, the condo became QCP. However, prior to H's death, H and W's rights to the condo remained governed by State X law.

H took title to both the house and the condo in his name alone. Assuming this was valid in State X, H could then transfer his interest in the property to himself and Sid during life because the property was not yet classified as QCP. However, once H died, the property became classified as QCP, and will be treated as community property for the purpose of W's rights if she elects to take her CP law share instead of taking under the terms of the will.

a) SID

Joint Tenancy

A joint tenancy is characterized as having four unities: unity of possession, unity of transfer, unity of interest, and unity of time. This means that for a valid joint tenancy to be present, the tenants must have the right to possess all of the property together, they must receive those interests in the same instrument of transfer, and in equal shares, at the same time. A right of survivorship can only be created by express language in the deed. Consideration is not necessary to transfer an interest in real property. A right of survivorship vests the entire interest in the property to the surviving tenant after the other has deceased.

H transferred the condo to himself and Sid (S) as joint tenants with right of survivorship. H created these interests at the same time in the same transfer. Therefore, assuming also H granted Sid half, and himself the other half interest in the property, H and S had a valid joint tenancy with right of survivorship, as long as H also included express language that this was to be a joint tenancy with right of survivorship.

If W decides to take under the terms of the will, instead of her intestate share, S would receive the entire interest in the property because an interest in a right of survivorship

cannot be devised by will. S would own the condo in fee simple absolute as the surviving joint tenant because H's interest would vest in S upon H's death. The creditors will not be able to take the property in this case because S is not part of the MEC and not otherwise liable for H's debts.

However, if W decides to take her forced intestate share under CP law, she will be able to take the condo, but it will likely be subject to the claims of H's creditors as discussed below, because the CP is liable and the condo would be QCP, effectively treated as CP for the purposes of distribution and satisfaction of creditors.

b) WENDY

Spouse's Share

On the death of a spouse, a spouse can elect to either take under the terms of the deceased spouse's will, or take an intestate share. There is no elective share of the will in California. Rather, community property law provides for the distribution.

Electing under Community Property Law

Under California intestacy law, the spouse takes an intestate share that includes: the deceased spouse's 1/2 interest in the community property, in addition to the surviving spouse's own 1/2 interest in the CP, totaling to all of the CP. In addition, if the deceased spouse is surviving by one issue, parent, or issue of parent, the surviving spouse takes half of the deceased spouse's separate property.

H was survived by only one issue, his son, S. Therefore, if W chooses this option, W is entitled to all of the CP and half of H's SP. As discussed above and below, both the condo and the State X house will be considered QCP on H's death. Therefore, W can decide to take all of the CP, including both the State X house and the condo, as well as 1/2 of the interest in the trust as H's SP ($50,000 worth).

Under the Will

If W decides to take under the terms of the will, she will not receive any interest in the condo because it would vest entirely in S due to the right of survivorship.

Spouse's Homestead Rights

In probating a will, a spouse can petition the court to allow for a homestead for the surviving spouse, essentially allowing the spouse to continue living in the family home.

If the California condo was H and W's family home, W could petition the court to allow it as her homestead. However, if W does not take her CP share, S will have a valid interest and claim to the condo and the court would not grant the petition.

2. State X house - Wendy & Bill's rights

a) Classification as Separate Property

(i) Community Property Presumption

See rule above.

H and W bought the house during their marriage while living in a non-CP state. Therefore, the State X house will be presumed QCP on H's death, because H, the titled spouse, has died. Unless H's estate is able to rebut this presumption by a preponderance of the evidence by tracing the funds used to purchase the house to H's earnings before marriage, the State X house will be properly presumed QCP because a spouse's earnings *during* marriage are CP. Any property obtained with CP funds will also be considered CP.

However, a general presumption, such as the general community property presumption, can be overridden by application of a special presumption, such as those listed below. H's estate, or Bill, or both, will likely argue that the special title presumption should apply such that the court should presume the property is H's SP.

(ii) Special Community Property Presumption

W might argue, fruitlessly, that under the special community property presumption, property that is held jointly at divorce or the death of a spouse is presumed to be CP. This presumption can be rebutted by clear and convincing evidence. However,

because H and W did not own either the State X house or the California condo jointly at H's death, this presumption will not apply.

(iii) Special Title Presumption

On divorce or death of a spouse, property will be presumed to be held as stated in the title. This presumption can only be rebutted by clear and convincing evidence. In California, it must be rebutted by clear language in a deed or other document that indicates the spouse's intent to hold the property as not stated in the title, such as CP.

Because the property was held only in H's name, a court will presume that this is how the spouses intended to hold the property absent clear language otherwise. Because there is no clear language in the deed or other document indicated H and W's intent to hold the property in both of their names, or as CP, W will not be able to rebut this presumption, and the property will be considered H's SP.

Thus, the court should presume that the State X house was H's SP, and therefore could be properly devised by will without W's consent or knowledge. However, if W elects to take her forced share under CA community property law, she is still entitled to 1/2 of H's SP.

b) Devised by Will as Separate Property

2017 Codicil

A prior will can be revoked in whole or in part by subsequent instrument, such as a codicil.

By a Conservator

If the testator does not have capacity to make a will, a conservator can make a will if ordered to do so by a court. A conservator has fiduciary duties towards the incapacitated person. An incapacitated person can nominate someone to serve as their conservator prior to becoming incapacitated.

H nominated S, as part of his prior wishes. Thus, the appointment of S was valid. As conservator, S was required to act in H's best interests as to the disposition and care of H's property. In accordance with this role, S executed a codicil to H's prior will. H's 2017 codicil to his 2008 will transferred a 1/2 interest in the State X house to Bill. However, S was not ordered by a court to do so. There are no facts to suggest that S's action in changing H's prior will are supported by H's likely intent, as Bill was also likely H's best friend before he became incapacitated. This codicil impliedly revoked H's prior will in part by inconsistency because the prior will left all of H's property to W, and now Bill is being given a 1/2 interest in the State X house.

If W decides to take her intestate share under CP law instead of under the will, Bill will not be granted his 1/2 interest because the State X house will be considered QCP, as discussed above.

However, if W decides to take under the terms of the will, B will receive the 1/2 interest in the State X house.

Undue Influence - Confidential Relationship

A presumption of undue influence arises when a person in a confidential relationship with the testator participates in making a will, and an unnatural devise results. W could argue that S was in a confidential relationship with H when he became incapacitated, as S owed H fiduciary duties. S participated in making the codicil because he "prepared" and signed it as conservator for H. However, S will correctly counter-argue that no unnatural devise resulted because the devise of 1/2 of the interest in the State X house to Bill was natural, since Bill was H's best friend.

Therefore, W is unlikely to succeed in convincing the court to reject the codicil on this basis.

Conclusion - W's Rights Under the Will

A remainder beneficiary takes whatever is left in the testator's estate once all other devises have been satisfied.

If W does not choose to force her share under community property law, she will not own the California condo, but she could receive the other 1/2 interest in the State X house that was not transferred to Bill. If the court finds that the codicil is unenforceable, W will receive the State X house in fee simple absolute because she is the remainder beneficiary under the will. However, it is more likely that the condo and house will be taken by H's creditors in order to satisfy H's debts. Therefore, unless some portion of the trust remains after the debts have been satisfied, H is actually likely to get nothing.

3. Hank's creditors - Ability to reach the assets in the trust

Source of the Trust: Separate property

See rule above. Because H obtained the $100,000 from an inheritance, even though he obtained it during the marriage, the $100,000 will be considered H's SP. Therefore, interests to be given in the trust were subject to H's discretion because although spouses owe each other the highest duty of good faith and fair dealing in managing and controlling community property, the same is not true of a spouse's separate property.

Liability for Debts

The MEC is liable for debts of the spouses incurred both before and during the marriage. However, the SP of a spouse will not be liable for debts incurred by the other spouse prior to the marriage.

The facts state that H owed various creditors more than the value of the State X house and California condo combined. The MEC, and hence all of the community property, will be liable to pay these debts. Furthermore, in settling an estate, creditors are paid first, and any devises will abate proportionally to satisfy the testator's debts accordingly. Therefore, the creditors will be able to obtain both the State X and the California Condo. If this is the case, the devise to Bill will not occur because it will either abate or be eliminated due to the debt.

S's interest would not be reachable, and thus the California condo would not be reachable by the creditors, because H's 1/2 interest vested automatically in S on his

death. If any debt related to the condo itself, such as a mortgage, S would take on that debt.

Ability to Reach Trust

A creditor can reach the interest of a person in a trust if it is freely alienable, if the settlor retained a right to revoke the trust, or if the assets of a trust are subject to the demand of a current beneficiary.

Because H retained a right to revoke the trust, H had an interest in the trust that his creditors could reach upon his death. However, as discussed above, the MEC is also liable for the debts incurred by Hank and thus the creditors can reach the CP. If W elects to take her intestate share under CP law instead of under the terms of the will, she will be entitled to $50,000 of the $100,000 in the trust as 1/2 of H's SP. If her SP is also liable for the debts, such as if some of the debts were incurred for necessaries of life or for the benefit of the community, the creditors could reach her interest because as a life tenant, she would be entitled to payment from the trust.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

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Question Number	Subject
1.	Evidence
2.	Contracts/Remedies
3.	Community Property
4.	Professional Responsibility

QUESTION 3

Prior to her 1990 marriage to Hal in California, Wendy helped operate an antiques and rare book business owned by her father.

During the marriage, Wendy continued to work with her father in operating the business. Over the years, Wendy and her father jointly operated the business and in 1995, they signed an agreement whereby Wendy became the owner of a ½ interest in the business. Wendy had developed an exceptional talent for buying antiques and took over that part of the business in 1995. The business doubled in value from 1995 to 2000. In late 1999, Wendy's father died and by his will left his interest in the business to Wendy, including all of the business's real property and inventory.

Wendy and Hal separated early in 2014. They have lived separate and apart since then and are now involved in divorce proceedings.

How should the court allocate the value of the business between Hal and Wendy? Discuss.

Answer according to California law.

QUESTION 3: SELECTED ANSWER A

California is a community property state (CP). In a CP state, the marital economic community begins at the time of marriage and ends with (a) separation, (b) divorce or (c) the death of a spouse. Income, property and debts acquired during the marriage are presumed to be CP. Income, property and debts acquired (a) prior to marriage, (b) during marriage but pursuant to a gift or inheritance and (c) after separation or divorce are presumed to be separate property (SP). Property acquired while the couple are living in another state that would be CP if the couple had been living in a CP state is called quasi-CP and is distributed according to CP principles upon divorce or the death of a spouse.

Marriage: In California, marriage requires the consent of two individuals with the capacity to enter into the contract of marriage, along with adherence to certain formalities. Here, the facts indicate that that H and W married in California in 1990. We presume that they met all of the above requirements. As the marriage took place in California and it appears that H and W still live in California, the entirety of their marital economic community is subject to CP principles.

Separation: In California, separation requires (1) an expression of intent by one or both spouses to end the marital relationship and (2) action in conformity with that intent. Prior to 2017, a valid separation ending the marital community also required that the spouses live separate and apart. That requirement no longer holds, and this applies retroactively. Here, the facts indicate that W and H separated early in 2014 and that they have been living separate and apart since. Though the separate and apart element

is no longer necessary, it certainly evinces an intent to end the marital relationship. There has therefore been a valid separation since 2014 and that is when their marital economic community ended.

1990-1995: Prior to marriage W helped operate an antiques and rare book business owned by her father. During the marriage, W continued to work with her father in operating the business.

Presumptions: As noted above, income acquired during marriage is presumed to be CP. During this period, though the business was owned by W's family, W did not own it. Therefore, it was not W's SP business. Rather, she worked for her father and probably derived an income from her work. W's income during this period would be CP but would not be incorporated into the calculations further discussed below.

Distribution: As with any other income accrued during the marriage, W's income from this period would be CP and, as such, would be split 50/50 with H upon divorce.

1995-1999: In 1995, W and her father signed an agreement whereby W became the owner of a 1/2 interest in the business.

Presumption: Property acquired during marriage is presumed to be CP. As the 1/2 interest in the business was acquired during marriage, it is presumed to be CP. However, it is not clear that W paid any consideration for her 1/2 interest. If she did not, then the 1/2 interest would be considered a gift and therefore W's SP. Though the business was SP, W's efforts invested in the business would be considered CP and therefore the community would have an interest in the business and be allotted a portion at divorce using either the Pereira or Van Camp formula. The following

discussion assumes that the business was SP.

Pereira Formula: The Pereira formula applies to the allotment to CP when the increase in the value of the SP business comes from the efforts of the spouse. Here, the Pereira formula fits because the facts indicate that W had developed an exceptional talent for buying antiques and took over that part of the business in 1995, so her efforts probably contributed to the subsequent increase in the value of the business.

Under the Pereira formula, the SP is calculated as (fair market value (FMV) of the business at marriage) + [(FMV of business at marriage) * (fair rate of return) * (years of marriage)]. Here, we do not have the numbers to do the calculation. While we know that the value of the business doubled from 1995 to 2000, that is not necessarily reflective of the actual fair rate of return. Note also that the years of marriage would be 1990 to 2014, at time of separation, rather than 1990 to now.

The CP is then calculated by subtracting the SP calculated above from the FMV at time of separation.

Van Camp: The Van Camp formula applies to the allotment of CP when the increase in the value of the business is due to reasons other than the spouse's efforts, such as market forces or characteristics inherent in the business, rather than the efforts of the spouse. Here, the Van Camp formula may fit because (1) the facts indicate that the entire value of the business doubled, but we know W was only involved in 1/2, so her father's efforts probably also contributed and (2) antiques and rare books naturally go up in value over time.

Under the Van Camp formula, the CP is first calculated as [(FMV of spouse's efforts in

business) minus (family expenses paid from business)] multiplied by years of marriage. Again, we do not have the numbers to do the calculation but note that the years of marriage are 1990 to 2014.

SP is then calculated as the FMV of the business at separation minus the CP calculated above.

If the spouse was under-compensated - that is, the salary she drew was lower than the actual value of her work - then the court may choose to calculate CP by removing family expenses from actual salary paid on the theory that the community has already been compensated for the spouse's efforts.

Disposition: Assuming the 1/2 interest in the business was a gift, then the formulas above would apply. If W paid consideration for her 1/2 interest, however, then she would have likely used CP and therefore the 1/2 interest would be CP. This is because the concept of tracing dictates that property takes on the character of the property used to acquire it.

1999-2014: In late 1999, W's father died and by his will left his interest in the business to W. Presumably this would be the book end of the business.

Presumptions: Property acquired during marriage is generally considered CP. However, property acquired during marriage by gift or inheritance is presumed to be SP. Here, H and W had not separated at the time W's father died. However, as W's father left W his 1/2 interest in the business by will, the interest would be S's SP.

Disposition: As this 1/2 interest in the business was definitely SP, the formulas outlined above would apply again to the CP allotment.

2014-2021: During this period H and W were separate, which ended the marital economic community.

Presumptions: Property acquired after separation is presumed to be SP. Any earnings W had from the book side of the business would then be entirely SP. If the antiques side of the business is SP, then any earnings from that side of the business would also be SP. If, however, W paid for that interest and used CP, then that interest would be CP. This is because the property acquires the character of the property used to buy it; so property acquired using CP would continue to be CP. If the antique side of the business is CP, then the community would be entitled to allotment even after separation. The following calculations presume that the antiques side of the business was CP.

Reverse Pereira: As with the regular Pereira formula, the reverse Pereira formula applies to the allotment of CP when the increase in the value of the business comes from the efforts of the spouse. Again, the reverse Pereira formula would apply because the facts indicate that W's knack for the antiques business contributed to the business's earlier success.

Under the reverse Pereira formula, the CP is calculated as (FMV of the business at separation) + [(FMV of business at separation) * (fair rate of return) * years of separation)]. Here, we do not have the numbers to do the calculation. Note also that the years of separation would be 2014 to 2021, or 2020 since it is so early in 2021.

The SP is then calculated by subtracting the CP calculated above from the FMV at time of divorce.

Reverse Van Camp: As with the regular Van Camp formula, the reverse Van Camp formula applies to the allotment of CP when the increase in the value of the business is due to reasons other than the spouse's efforts, such as market forces or characteristics inherent in the business, rather than the efforts of one spouse. Here, this may fit because antiques and rare books naturally go up in value over time.

Under the Van Camp formula, the SP is first calculated as [(FMV from spouse's efforts from business) minus (family expenses paid from business)] multiplied by years of separation. Again, we do not have the numbers to do the calculation but note that the years of separation are 2014 to 2021, or 2020 since it is so early in 2021.

CP is then calculated as the FMV of the business at divorce minus the SP calculated above.

Disposition: The book side of the business, which W inherited from her father at death is definitely SP and W will be able to keep it. It is not clear whether the antique side is SP or CP, and the court will allocate the value of the business as discussed above. If it is CP, there may be a question as to whether H will be able to maintain a 1/2 interest in it (i.e., a 1/4 interest in the whole business). It is possible that he will and that W will have to buy him out. She will be able to keep the business for herself, however, despite the usual rule of equitable division at divorce. The court will consider that the business is identified more with her than with H and that her means of income would be severely affected if she lost it.

QUESTION 3: SELECTED ANSWER B

General Community Property Principles

California is a community property (CP) state. All property and earnings that are acquired during marriage that do not come from inheritance, gift, or devise, is considered CP. Property that a spouse acquires before marriage, after divorce or permanent separation, or during marriage via gift, inheritance, or devise is considered separate property (SP). Property acquired in a non-CP state that would be CP if the spouses were living in California is considered quasi-community property (QCP) and treated like CP upon divorce or death.

Here, Hal (H) and Wendy (W) were residents of California and married in California, so the general CP principles of California would apply to this case.

Marital Economic Community

The marital economic community is defined as the time between the formation of a valid marriage and ending with death, divorce or permanent separation. Property acquired during the marital economic community is CP, as discussed above.

Here, H and W were married in 1990 and separated in early 2014. They have lived separate in the interim and now have initiated divorce proceedings. The community begins in 1990 when the marriage was entered into, and potentially ended in 2014 if there is the requisite intent attached to their separation to not re-instate the marital economic community. Seemingly their separation in 2014 was permanent because the facts mention they lived separate and have been apart since, which has led to their

divorce proceedings. There's no other mention of them rekindling any romance in between or making any other remedial measures to re-instate the marital economic community, so likely the community ended in 2014 upon their permanent separation.

Thus, the community lasted between 1990 when they got married and 2014 when they permanently separated.

VALUE OF THE BUSINESS

Character / Source of the Business

As discussed above, property acquired before marriage or during marriage through a gift, inheritance or bequest is considered SP. Property acquired during marriage or acquired from CP assets, is considered CP.

Here, W helped operate the antique business owned by her father before she and H got married. However, she did not acquire the property until after they got married and she took jointly with the operations in 1995. W would argue that the business is her SP because the business was owned by her father and her father granted her 1/2 of the business in 1995. There's no mention of her father granting H any stake in the business and no mention of H even working there. Further, W would argue that the business is hers because in 1999 when her father died, she inherited the entire business through his will. So while she and H were married in 1999 at the time she inherited the business, because the business was hers through inheritance and not through purchase or any other acquisition, means that would result in it being CP, that the business is her SP and her SP alone.

H would likely counter this and say that even though W acquired her father's interest in

the business through his will in 1999, that her becoming owner of 1/2 of the business in 1995 means that the business is a CP asset. The 1/2 interest was not a result of any inheritance or gift, and seemingly the inheritance in the will only was to give her the other half she didn't own already. While the 1/2 she inherited in 1999 would be her SP because it came from an inheritance, the fact that he obtained a 1/2 ownership to the business during marriage would result in 1/2 of the business being a CP asset. However, the court would have to determine the exact circumstances surrounding the 1995 acquisition and whether it was a purchase with CP funds, SP funds or a gift.

There's no mention of whether W paid for this 1/2 interest or whether the business was a gift from her father, but all the facts mention is that they "signed an agreement" where W became 1/2 owner of the business and took a 1/2 stake. Depending on whether W paid for this 1/2 stake and where the money came, potentially this could result in 1/2 of the business being a CP asset. If she paid for the 1/2 interest with her earnings during marriage, then that 1/2 stake would be a CP asset because funds earned during marriage are a CP asset and anything bought with them would also be considered a CP asset. If the court finds that this was a gift from her father to W, then potentially this is an SP asset because it could be a gift in lieu of money or some other repayment that was specifically directed at W and not at H and gifts acquired during marriage are the SP of that spouse. While the facts are ambiguous as to what the 1/2 ownership stake came from, W clearly owns 1/2 of the business as her own SP from the inheritance from her father because inheritance during marriage is an SP asset.

Thus, depending on whether the court finds the 1/2 ownership interest W took in 1995 via the agreement with her father was purchased or a gift, potentially that 1/2 interest

could be a CP asset, or an SP asset. The other 1/2 interest W took in 1999 under her father's will would be considered an SP asset because property acquired via inheritance during marriage is an SP asset.

CP Contributions to SP Business

When one spouse owns an SP business and there are CP contributions to the business, the CP acquires an interest in the SP business. The court has discretion to apply one of two formulas when determining how to apportion the CP share of the business: the Pereira formula, and the Van Camp formula.

Here, W would likely argue that the court should apply the Van Camp formula to apportion the CP share because the increase in the business was not due to her own work, but rather the work of her father and the inherent value of the business itself. The business was an antique shop that also sold old rare books. Her father owned the business and started it and even though she continued to work there, her father was really what got the business off the ground. There's no mention of how long W's father owned it, but potentially he was a mainstay in the community and someone that was very valued in the community. He could have had the business for a very long time before W began helping him out in 1990 and potentially the business was already on an upwards trajectory before she joined the team and started helping him out. Further, depending on where they live in California, W could also argue that the business was successful because of the local area. Potentially people in that area were attracted to the store because of its items and because the local population valued such a store in their community and not because of W's own contributions to the store. Even though W

worked there, she would argue that the value of the business and the increase was due to her father and the business that he created and not any of her own doing.

H would certainly counter this and say that the increase in the business between 1995 and 2000 was due to W's contributions. She developed "an exceptional talent for buying antiques" and took over that part of the business in 1995. Even if the local community valued the store, it was because of W's own contributions. She had worked at the store for over 5 years and had been helping her father out with running the business. He would argue that potentially she did not have this skill before they were married because she hadn't been working there for that long, but rather developed the skill after they were married through her continued work, and the fact that she developed it after they got married would result in it being a CP asset. She did not come into the marriage with this, but because of her constant work and time spent with her father she learned these skills and trained her eye for antiquing which increased the value of the business based on her work alone and her own time spent developing her craft. That much experience and that much exposure contributed to her having an eye for antiquing and for collecting valuable items and it was this eye and expertise that increased the value of the business. Even if the 1/2 stake W acquired in 1995 was a SP interest, her own contributions through her labor and time and expertise increased the business, so much so that she solely took over the antiquing part of the business from her father because she was so good in that area and had such a skill set that H would argue she developed during the marriage meaning it is a CP asset. She was married during that time so her labor would be a CP asset and the exceptional and business savvy labor was the reason that the business doubled in value from 1995 to 2000 and no market

forces could have pushed that drastic increase in value.

Likely the court would apply the Pereira formula to determine the CP share of the increase in value. While there's no mention of any outside market or economic factors that drove the increase in the business from 1995 to 2000, seemingly W's own acquired skill and expertise in this area had a huge impact on the business. While it is in the court's discretion to apply either formula, likely they would apply the Pereira formula to determine the CP share of the business.

Pereira Formula

The Pereira formula attributes the increase in value of the SP business to the labor, skill, and work of the spouse, which is considered a CP asset. The Pereira formula is more favorable to the CP because it views the labor and skill and work of the spouse as the factor behind the increase and the reason the business is doing so well.

Here, as discussed above, if the court applies the Pereira formula to determine the CP share in the SP business, it would determine that the increase in the value of the business was due to W's own experience, skill, and mastery in the area of antiquing. The SP would still have its ownership interest, but the CP share would likely be greater because the Pereira formula is more favorable to the CP interests. Thus, the court would determine the CP and SP share of the business as shown by the formula below.

Formula

Under the Pereira formula, the court determines the two shares as follows: SP = value of business at marriage + (value of business at marriage X fair rate of return [10% in California] X years of marriage). CP = fair market value of the business at divorce - the

SP share.

Here, there are no specific numbers to determine the value of the business when W started working there or acquired her interest. The two were married for 24 years so that would be applied at the end of the formula, and presumably the fair market value at marriage versus at divorce would be different because of the increase in the business during marriage, but without the specific monetary figures it is all speculative. Dependent on the discussion above and whether the interest she acquired in 1995 was an SP or a CP interest, potentially the value at marriage would be different because those were four years apart. Without the numbers and actual concrete monetary figures of the increase it is impossible to know the actual numerical figures associated with the business value, but likely the CP would have a sizable stake based off of W's contributions because her contributions seem to have drastically increased the value of the business.

Thus, if the court applies the Pereira formula, likely the CP interest would be greater because of Pereira's favoring of the CP interest.

Van Camp Formula

The Van Camp formula attributes the increase in the value of the business to market forces, the economy, the inherent business value, and all other factors not related to the hard work of the spouse. Because this formula does not consider the work of the spouse to be the reason for the increase, this formula and approach tends to favor the SP of the business owner spouse.

Here, if the court determines the Van Camp formula applies, it will be because the

increase in the value of the business was due to the market forces and inherent business qualities of the business and not of W's hard work or expertise. Thus, the court would determine the CP and SP share based on the formula as described below.

Formula

Under the Van Camp formula, the court determines the shares as follows: CP = (reasonable rate of services - annual family expenses) X years of marriage. SP = fair market value of the business at divorce - CP share.

Here, as discussed above, there are no corresponding monetary values to show the actual expenditures. Likely W's reasonable rate of services was substantial because she seemingly was the sole operator of the business outside of her father and was the only person running it as there is no mention of any other employees or any other helpers, especially after her father died. There's also no mention of the family expenses or no other mention of them having any children, but depending on how much they spent annually on the family expenses, this would be factored in. Further, they were together for 24 years, so the interest would be determined by multiplying that figure at the end. Presumably the fair market value at divorce would be substantial because the business doubled in value from 1995 and 2000 and there's no mention of any other decrease in value. Without any other facts to support the numbers it is pure speculation, but likely the SP would have a more favorable interest here because the Van Camp formula more heavily favors the SP interest.

Conclusion

Likely the court would find the Pereira formula to be more appropriate for determining

the SP and CP interest of the business, but without any concrete monetary values it is impossible to determine the actual percentage of both interests.

Goodwill of CP Business

Goodwill of a CP business refers to its community reputation and future business prospects and earning potential. If the goodwill of the business is earned during marriage, then it will be a CP asset.

Here, potentially the goodwill of the business could be a CP asset. If the court finds that W's acquisition of the business in 1995 was a CP acquisition and that 1/2 was a CP asset, then any other increase in goodwill from the business from there on out could be a CP asset as well. The business seemed to be doing well, saying it increased in value substantially from 1995 to 2000 and W had seemed to develop quite a specialty in that area. W's own expertise and the business's success would likely result in high projected future earnings and a good reputation throughout the community. If this comes from W's own hard work and labor, which is a CP asset, then the resulting growth of the goodwill of the business would also be a CP asset. There's no mention of any future contracts or earnings or deals that the business has lined up, but if the business is successful in the community which it seemingly is, then the goodwill and local good reputation of the business would be a CP asset and the court would have to attribute a value to this in order to distribute it evenly at divorce.

Thus, the goodwill of the business could also be factored into its value and be distributed at divorce between H and W if the court finds that the goodwill comes from CP contributions.

Distribution

W owns at least 1/2 of the business as her own SP from when her father devised it to her in his will. An increase in the business and its value would at least be half of her own SP as attributed to that 1/2 of the business. Depending on whether the court determines the 1995 acquisition of the other 1/2 was a purchase with CP funds or an SP acquisition through a gift or other SP funds purchased, then potentially 1/2 of the business is CP or SP. Further, the CP will have an interest in the SP business and its increase because of W's work there while they were married. The court will likely apply the Pereira formula to determine this interest because of the mention of W's expertise and growing skill in antiquing. However, the court has the discretion to apply either the Van Camp or Pereira formulas and the resulting CP or SP share will be different depending on which formula is applied. Further any earnings W had from her time at the business while married would be CP assets.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

QUESTION 2

Harry had premarital savings of $10,000 in a bank account when he married Winona in California in 2015. After the wedding, Harry started working at a new job and deposited his $3,000 salary check into the account. Shortly afterward, he paid $2,000 for rent and $2,000 for living expenses with checks drawn on the account. He then bought $1,000 in Acme stock in his own name with another check drawn on the account. The Acme stock increased in value over time.

During the marriage, Winona purchased disability insurance out of her salary. She later became disabled and could no longer work. As a result, she became entitled to monthly disability insurance payments, which will continue until she reaches the age of 65.

Thereafter, Harry and Winona decided to live separately, but to go to counseling with the hope of reconciling. After Harry moved out of the family home, he used his earnings to gamble at a local casino, winning a large amount of money with which he opened an investment account in his own name. Harry did not tell Winona about his winnings or investment account because she did not approve of gambling.

Subsequently, after a period of counseling, Harry and Winona concluded that they would not reconcile and Harry filed for dissolution. A few days later, Harry took out a loan to pay for a sailboat, hoping that sailing would relieve the stress of the divorce.

What are Harry's and Winona's rights and liabilities regarding:

1. The Acme stock? Discuss.

2. Winona's post-separation disability insurance payments? Discuss.

3. The investment account? Discuss.

4. The loan for the sailboat? Discuss.

Answer according to California law.

QUESTION 2: SELECTED ANSWER A

INTRODUCTION

California is a community property state. The marital community begins upon the formation of a valid marriage and terminates upon permanent separation, divorce, or death of a spouse. During marriage, all earnings and income of both spouses, and all property acquired by either spouse during the marriage with community funds, are part of the marital community and are considered to be community property ("CP"). All income and property owned by either spouse from before marriage, as well as earnings through inheritance, gift, or bequest during marriage, are separate property ("SP") of the recipient spouse. All debts and liabilities of both spouses from before and during the marriage are generally presumed to be CP. All debts and liabilities of each spouse after permanent separation or dissolution are generally SP.

1. ACME STOCK

Presumption--CP

All property acquired by either spouse during the existence of a valid marriage is generally presumed to be CP. In this case, Harry acquired the Acme stock after the formation of the marital community. Thus, the stock will generally be presumed to be CP, although Harry will try to rebut this presumption.

Action: Titling Stock in Harry's Name Alone/Transmutation

If property is acquired as community property, the action of titling the property in one spouse's name alone will not suffice to change the nature of the property. Since 1984, in order to change the nature of acquired property from community property to separate property, there must be an express writing by the adversely affected spouse assenting

to the change in nature of the property.

In this case, Harry may attempt to argue that the Acme stock is his separate property because it is titled in his name alone. However, that alone is not sufficient to change the nature of the property. Moreover, the facts do not indicate that there is any writing by Winona acknowledging the nature of the change in status of the stock, or that she even knew about the existence of the stock. As such, Harry's titling the property in his name will not suffice to rebut the presumption of it being community property, without more.

Source: Harry's Bank Account

Harry will argue that the stock is his separate property because the purchase was conducted via a bank account that contains his premarital savings of $10,000. Savings from before marriage are Harry's SP. However, the facts also indicate that following the marriage, Harry deposited $3,000 of his salary into the account. All wages and salaries earned by both spouses during the marriage are for the benefit of the community and are community property. Thus, because Harry commingled community property and separate property in his bank account, he may attempt to rebut the presumption of community property through tracing.

Tracing

When separate property and community property are commingled, a spouse may establish that the source of funds was separate property through tracing.

Direct Tracing

A spouse may trace the source of funds to separate property by directly linking a deposit of separate property to a purchase, so long as the spouse had intent to purchase the property as separate property.

In this case, Harry had deposited $3,000 of CP into the account before making the $1,000 purchase of stock. All of the other deposits seem to have been made prior to the marriage. Thus, Harry will be unable to directly trace the source of the funds to SP. Moreover, the facts are unclear as to whether Harry intended the stock to be SP when he purchased it. He placed the stock in his own name, but without more, he probably cannot establish intent to keep the stock as SP.

Exhaustion

Alternatively, a spouse may establish that any CP funds in a commingled account were exhausted prior to the purchase of purported SP.

In this case, Harry deposited $3,000 of CP into the bank account. He then paid $2,000 for rent and $2,000 for living expenses. Rent and living expenses of spouses during the marriage are CP. When a commingled account is used to pay for CP liabilities, it is presumed that CP funds are withdrawn first, followed by the spouse's SP. Because the total of CP costs withdrawn from the account are $4,000, which exceeds the CP deposit of $3,000, Harry will be able to establish that the CP funds in his bank account were exhausted prior to the purchase of the stock, and that the source of the funds can be adequately traced to Harry's pre-marriage SP savings.

Distribution

The Acme stock is Harry's SP, because the CP funds in the account were exhausted before he purchased the stock, and he will be able to establish the source of the funds for the stock as his SP savings. As such, the stock, along with the increase in value that occurred during the existence of the marriage, will be assigned to Harry upon divorce.

2. WINONA'S POST-SEPARATION DISABILITY PAYMENTS

Disability Insurance--Presumed CP

The disability insurance was purchased by W during the existence of the marriage. Moreover, the source of the payment of the insurance policy was W's salary, which is CP. Thus, the insurance policy qualifies as CP.

Disability Payments

When a spouse receives disability or other payments, the court will first look to whether the payments are intended to compensate for past work or to replace future earnings. In this case, W purchased the insurance policy during the marriage with CP, as discussed above. The facts indicate that the disability payments will continue until W is 65 years old. Thus, it appears that the disability payments are meant to replace future earnings, rather than compensate for past earnings. As such, all payments received by W prior to permanent separation are CP, as they acted as a replacement for W's earnings during the existence of the marriage.

When did separation occur?

Since 2017, permanent separation occurs in California when one spouse indicates intent to permanently end the marriage, and that spouse's behavior is consistent with that intent. Living separately is not required but will be considered when examining the intent and behavior of the spouses.

In this case, the facts indicate that H and W decided to live separately but continued to go to counseling in the hopes of reconciling. After a period of counseling, H filed for dissolution after deciding that they could not reconcile. Even though the spouses were living separately, they were attempting to reconcile. As such, it cannot be said that

either spouse had intent to permanently end the marriage at that point. However, at a later point, W and H decided that they could not reconcile, and H then filed for dissolution. Because H's filing for dissolution is consistent with his intent to permanently end the marriage, the court will determine that permanent separation occurred at that point. Prior to H filing for dissolution, permanent separation had not occurred, even though the spouses were living separately.

Disability Payments Post-Separation

When disability payments that replace future earnings are received by a spouse after permanent separation, those payments are that spouse's SP. In this case, W will continue receiving disability payments until she is 65. The payments she receives after dissolution will replace earnings that she would have acquired through labor. All payments received after H filed for dissolution will be considered to be W's SP.

Distribution

All of W's disability payments prior to H filing for dissolution are CP and will be assigned to the marital estate. All payments received after H filed for dissolution are W's SP and will be assigned to her.

3. INVESTMENT ACCOUNT

Presumption=CP

As discussed above, the marital community did not end, and permanent separation did not occur, until H filed for dissolution. H may argue that the parties were separated and that the account is his SP. However, the purchase of the investment account occurred during the existence of the marriage because the spouses were attempting to reconcile at that point. As such, it is presumed to be CP.

Action: Titling Account in Own Name/Transmutation

See rule above. The fact that H titled the investment account in his name alone is not by itself sufficient to change the nature of the account. Moreover, the facts do not indicate that there is any writing by W acknowledging the change in character of the property, or that she knew about the account at all. Rather, the facts indicate that H did not tell W about the account because she did not approve of gambling. Thus, H will need to provide more facts in order to establish a change in the nature of the account.

Breach of Fiduciary Duty

Spouses are considered to be fiduciaries of each other and owe each other the highest duties of good faith and loyalty. When a spouse breaches his fiduciary duty, a court may take that into account when distributing community property and may assign the non-breaching spouse a higher share of the CP or take other action consistent with remedying the breach.

In this case, the facts indicate that H won a large amount of money gambling at a casino. Because W does not approve of gambling, H declined to tell her about the winnings and instead opened an investment account in his own name. The court will likely find that this action constituted a breach of H's fiduciary duty to W. H had a duty to keep W apprised of his financial status, and not to take actions in order to disadvantage W. When H opened the account without telling W, he was presumably attempting to hide earnings from W in order to benefit himself in a possible future divorce. This is a clear breach of fiduciary duty.

Distribution

Because the investment account was purchased during the existence of the marriage

and there are no facts indicating that a valid transmutation occurred, the account is CP and will be divided equally between the spouses upon divorce. However, because H breached his fiduciary duty to W by refusing to tell her about the account and attempting to hide its existence from her, the court may determine that W is entitled to a larger share of CP.

4. LOAN FOR THE SAILBOAT

Debts

All debts and liabilities of both spouses before and during the existence of the marriage are CP. All debts and liabilities by spouses after divorce or permanent separation are that spouse's SP. An exception exists if the debt or liability is for necessaries of life, such as food or medical expenses.

End of Marital Community

See discussion above. Although H and W started living separately prior to H filing for dissolution, the court will determine that the marital community did not end until H filed for dissolution, because prior to that point the spouses were attempting to reconcile.

Action: Acquiring the Loan After Filing for Dissolution

Debts acquired by both spouses after permanent separation or dissolution are SP of the debtor spouse. In this case, the facts indicate that H took out the sailboat loan a few days after filing for divorce. Even though the marriage had not been formally dissolved at that point, the fact that H and W had decided that they could not reconcile, and that H had filed for dissolution indicates that permanent separation had occurred. Thus, the loan will be assigned to Harry as his SP.

Liability of H's SP for Loan

Because the loan is H's SP, his SP will be liable for payment of the loan.

Liability of CP for Loan

If a loan is acquired by a spouse following permanent separation, the loan will be the debtor spouse's SP, and the CP will not be liable for the debt. An exception exists for necessaries of life, for which CP may be liable even following permanent separation. H may attempt to argue that the sailboat loan qualifies as a necessary, because it helped him to cope with the stress of the divorce. However, the court will not accept that argument, as the loan was not necessary to sustain H's health or life.

Liability of W's SP for Loan

If a debt acquired after separation may be satisfied from CP, the non-debtor spouse's SP may also be reached if all other funds are exhausted. The non-debtor spouse may protect their SP from liability by keeping their money in a bank account titled in their name alone and to which the debtor spouse does not have access.

In this case, as discussed above, the CP is not liable for H's sailboat loan, because it was acquired after separation and is not a necessary of life. As such, W's SP will also be protected from liability for the loan.

Distribution

The loan is H's SP and will be satisfied from his SP funds.

QUESTION 2: SELECTED ANSWER B

Community Property Essay

California is a community property state. This means that the marital economic community begins at marriage and ends at divorce, or permanent separation, or the death of a spouse. All earnings made during a valid marriage are considered community property (CP), and all things purchased with those earnings are also considered CP. Property acquired before marriage or after divorce or permanent separation is presumed separate property (SP). Additionally, all property acquired during marriage by either gift or inheritance are considered SP.

Valid Marriage

In California, a valid marriage requires (1) consent, (2) capacity, and (3) legal formalities. Here, the facts simply state that Harry (H) and Winona (W) were married in California in 2015. Therefore, it is presumed they had a valid marriage that began in 2015.

Permanent Separation

Permanent separation ends the marital community. This occurs when one spouse (1) communicates to the other spouse a desire to end the marital community, and (2) conduct in conformity with that desire. Permanent physical separation is no longer required. Here, at some point, H and W decided to separate but continued to go to marital counseling before there was a final dissolution of the marriage. Although there was a physical separation between H and W when H moved out of the family home, the fact that both sought marriage counseling indicates that they wanted to work things out and there was no set intent on ending the marital community with conduct in conformity

with that intent. Therefore, although H and W physically separated, it is unlikely that the marital community ended until there was a final dissolution.

1. Acme Stock

CP Presumption

The general presumption is that all property acquired during a valid marriage is CP. This presumption can be rebutted by a preponderance of the evidence that the property acquired was traced from a separate property source or an agreement between the spouses to keep certain property separate.

Here, the Acme stock was purchased after H and W were married. Therefore, the general presumption is that it is CP.

Earnings

A spouse's labor, skill, and effort are considered community assets and therefore, the earnings of a spouse during a valid marriage are CP, absent agreement between spouses to contrary. Here, Acme stock was purchased from funds in bank account that had H's earnings deposited into it, and those earnings were acquired during marriage. Therefore, account that purchased Acme stock had CP earnings in it. But H's account also had premarital savings of $10,000 which are H's SP. H will likely want to claim Acme stock as his own SP and must therefore rebut CP presumption by tracing the purchase of stocks to his SP.

Tracing to SP

CP presumption can be rebutted if spouse demonstrates that funds used to make purchase came from SP source. If this evidence is proffered, then spouse is entitled to refund of SP contribution but not any increase in the value of the property acquired with

SP funds.

Here, H will want to argue that Acme stock is his SP. Since it was acquired during marriage, H must overcome CP presumption. Since H purchased stock from commingled account that had both CP and SP in it, H can only establish Acme stock as his SP if he can show direct tracing or exhaustion method.

Direct Tracing

Direct tracing requires that the spouse show that the funds used from commingled account to purchase property came from a SP deposit, and CP funds were not used. It is not enough for the spouse to show that the account had more SP funds than CP funds at time of purchase. Generally, a spouse can prove direct tracing by keeping conspicuous records of the deposits and credits of the account and their characterizations (CP or SP). With this information, the spouse must then show that he had the intent to make purchase with SP funds and the proof of the SP deposits and credits that demonstrate such SP funds were in fact used to make the purchase.

Here, H had $10,000 SP funds in account and H also deposited CP earnings into same account. Facts are unclear as to whether H intended purchase of Acme stock to come from SP funds in account, and the facts are also silent as to H's accounting practices that would help corroborate that needed intent. For these reasons, it is unlikely that H can demonstrate direct tracing.

Exhaustion Method

The exhaustion method of tracing requires that the proponent spouse show that the commingled account was depleted of all CP funds at the time of the purchase, and the only remaining funds in the account to make the purchase were SP funds. It is

presumed that family expenses are paid with CP funds first, and then SP funds. Here, account had $10,000 SP, then H deposited $3,000 salary check (CP), and thereafter withdrew $2000 for rent and $2,000 for living expenses. Since H and W lived in the family home prior to separation, the rent payment and living expenses payments are considered family expenses to be paid from CP funds first. Since CP funds in account only totaled $3,000 and the family expenses totaled $4,000, there was not enough CP in account to pay off those family expenses. Therefore, $1,000 of H's SP funds were used to pay the rest. After this payment, the account only had $9,000 left, which is considered H's SP. Thereafter, H made purchase of Acme stock. Since CP funds depleted from account at time of purchase, exhaustion method can be properly used here to help H prove that Acme stock was purchased with SP funds and therefore H is entitled to reimbursement for his SP contribution to the Acme purchase.

Title

A spouse placing title to property in his or her name alone does not change the character of the property without more, such as a valid transmutation. Therefore, the fact that H bought stock in his name alone is not determinative on this issue.

Conclusion

H can trace Acme purchase to SP funds using exhaustion method. Therefore, H is entitled to his $1,000 SP contribution for the purchase of that property but not any increase in value of the stock beyond that amount. The appreciation is considered CP.

2. Post-Separation Disability Insurance Payment

CP Presumption

See above rule. Here, W purchased disability insurance during marriage. Therefore, it is

presumed CP.

Earnings

See above rule. Here, the insurance was bought with W's earnings made during marriage, which makes the earnings CP, as well as the property purchased with those earnings (i.e., the insurance policy).

Disability Insurance Payment

Disability payments will generally be considered the disabled spouse's SP upon dissolution, but if the disability payments were, in part, given as a form of prior compensation, then the community is entitled to its proportionate share of the disability payments that reflects the compensation earned during marriage.

Here, W purchased the disability insurance during marriage with CP earnings. Therefore, the community is entitled to an interest in the policy and the policy is generally considered CP until divorce. W became disabled while still married to H and began receiving disability payments. These payments made while H and W were still married will be considered CP. But after H and W dissolved their marriage, the court will likely find that it would be equitable for W to be entitled to most of the proceeds for the disability payments because she resultingly became disabled and likely needs the policy payments to replace her lost earnings. But the community will likely be entitled to any CP contributions made to acquire the policy (i.e., the premiums paid out of W's earnings).

3. Investment Account

CP Presumption

See above rule. As noted above, although H and W physically separated in prior to their

dissolution, since they both sought marriage counseling, it is likely that they would not be deemed to have permanently separated until the dissolution. Here, H acquired the gambling winnings used to fund the investment account after using his earnings made after separation. This would usually result in the investment account and the gambling winnings being considered SP because earnings after separation are SP as well as things purchased with SP earnings. But since there was no permanent separation at the point in time when H made those earnings (see above analysis) used to gain gambling winnings, the earnings were still CP and thus, the gambling winnings acquired from those earnings and the investment account funded with those winnings are also presumptively CP.

Breach of Fiduciary Duties

Spouses owe fiduciary duties to each other to act in the highest of good faith and fair dealings. Spouses must be loyal to each other, and each is entitled to a full account and disclosure of the community estate and in some instances, the other spouse's SP interests. It is a breach of a spouse's fiduciary duties to actively conceal property from the other in order to derive a secret profit from the property. This is a breach of the duty of loyalty.

Here, H likely breached his fiduciary duty of loyalty to W when H did not disclose the fact that he used CP earnings to gamble and take a substantial amount of gambling winnings to open up an investment account in his name alone. As noted above, the investment account is presumptively CP, and therefore, W has an interest in the winnings and investment account. The fact that H did not disclose any of this to W may be found to be active concealment which could lead the court to punish H for such

breach by depriving him of any interest in the investment account.

Title

See above rule. Here, although H titled the investment account in his name alone, this does not change the character of the account to SP.

4. Loan for Sailboat

Debts and Creditor Rights

Generally, debts acquired before or during marriage, by either spouse are considered community debts. These community debts are first paid with CP and then the SP of the spouses. After permanent separation, debts acquired by either spouse are usually considered the separate debt of the debtor-spouse. While permanently separated but before divorce, the debts acquired by one spouse for necessities can result in the non-debtor spouse's SP being reached to satisfy those debts for necessities during separation.

SP Presumption

See above rules. Here, H acquired a loan for a sailboat. This loan was acquired after H and W concluded counseling would not help their marriage and H filed for dissolution. Since this debt was acquired either after permanent separation or divorce, the loan is the SP debt of H, rather than it being a community debt. Therefore, the loan on the sailboat will be H's separate debt.

Division of Community Estate

At the end of the martial economic community, the community property is usually divided equally among the spouses. Each spouse is entitled to a 1/2 portion of the net community estate.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Constitutional Law
3.	Professional Responsibility
4.	Business Associations
5.	Wills / Community Property

QUESTION 5

Hari and Wanda were married to each other for 20 years, being domiciled in State X (a non-community property state) for the first 15 years, and thereafter, until Hari's death, being domiciled in California for 5 years.

At Hari's death in 2020, two documents were submitted for probate:

1. A formal will signed by Hari and Witness One on June 1, 2018 and signed by Witness Two on June 3, 2018. Both witnesses were disinterested. This document left all of Hari's community property to Wanda, but did not mention any separate or quasi-community property.

2. An undated pre-printed will form that had printing at the top, declaring that it was intended to be a will. On the form Hari had written, in his own handwriting, "All of my separate property and 25% of my community property goes to my son, Samir." Hari signed the will form, but no witnesses signed it, and there was no date on the form.

Hari had full mental capacity throughout his life.

At his death, Hari's property consisted of:

A. Separate property worth $100,000;

B. Community property – Hari's half being worth $50,000;

C. California land worth $100,000, which Hari had bought with his earnings while he and Wanda were still living in State X. In 2017, without Wanda's written consent, Hari gave this land to himself and his daughter, Deepa, as joint tenants on her birthday.

What rights, if any, do Wanda, Samir and Deepa have in Hari's estate? Discuss.

Answer according to California law.

QUESTION 5: SELECTED ANSWER A

What rights, if any, do Wanda, Samir, and Deepa have in Hari's Estate?

Wanda will have a right to all of Hari's community property, as well as a one-half interest in the California land. Samir will have a right to all of the separate property, worth $100,000. And lastly, Deepa will have a one-half interest in the California land.

Hari's Death in 2020

At his death, Hari left behind a formal will and a holographic will. The validity of each will be discussed in turn.

Will Witnessing Requirements

To be a valid will in California, certain formal witnessing requirements must be met. There must be: (1) a signature by the testator or someone else at the testator's direction; (2) in front of, or previously signed and then acknowledged in front of; (3) two disinterested witnesses; (4) who sign in the testator's lifetime; and (5) who understand that the document that they are signing is a will.

Here, Hari's will seems to comply with nearly all the formal statutory requirements, but there may be some doubt as to the complete adherence to formality because of the witnesses' signatures. It appears that one witness signed on June 1, 2018, and the other on June 3, 2018. These signatures are within Hari's lifetime because he died in 2020. However, there is no requirement that the witnesses sign at the same time, and no facts indicate the witnesses did not witness actual signing or acknowledgement at the same time. If the reason for these two dates is that Hari did not either sign his will in front of them at the same time or acknowledge the signature in front of them at the

same time, then the will may fail the formal witnessing requirements.

Substantial Compliance Doctrine

In an event where the formalities of witnessing requirements are not perfectly met, the proponent of the will may still be able to have the will properly probated if they are able to show substantial compliance with the witnessing requirements and that the testator intended the document to be their will.

Here, if there is some doubt raised as to the witnesses' signatures, the proponent of the will should be able to show intent by Hari that this document be his will, in part because of how closely he followed the strict requirements.

Thus, this will is valid despite any perceived inadequacies in the witnessing requirements; it is valid and Wanda has interest in the will.

Holographic Wills

A holographic will is a handwritten will and it does not necessarily need to follow the same formal requirements as a typed will. A holographic will is valid if it contains: (1) a signature by the testator (in whatever marks the testator intended to be a signature); (2) in the testator's own handwriting; (3) and the will contains the material provisions. Material provisions are the beneficiaries and the gifts to be distributed. A date on a holographic will is very helpful to understanding the disposition of property but is by no means necessary to finding a valid will.

Here, the undated pre-printed will form is signed by Hari and written in his own handwriting, which satisfies the first few requirements. Additionally, the will names the beneficiaries "my son, Samir" and the gifts to be bequeathed, "All of my separate

property and 25% of my community property," which successfully handles the material provisions requirement. Samir will likely be the proponent of this will, as he would want to obtain the property, and he will have a successful claim to the estate.

However, Samir will run into problems with the gift of community property because it is inconsistent with the other will from 2018. Unless he can prove that the holographic will came after the formal will and revoked the community property clause, he will be unable to assert rights to that part of the estate.

Revocation

A will or its clauses may be revoked physically, expressly, or impliedly. Physical revocation may be some physical act, such as tearing, crossing out, obliteration, destruction, or burning. Express revocation occurs where a subsequent will specifically disavows a previous will. Implied revocation occurs where a subsequent will contains clauses or gifts which are inconsistent with the previous will, such that they cannot both exist at the same time. In these cases, the latter will controls.

Here, the formal will leaves all community property to Wanda, but the holographic will leaves 25% of the community property to Samir. Because the holographic will has no date, the courts will probably not consider it to be the "second will," and will probably consider the dated will's disposition of the conflicted property as being superior. As such, the terms of the formal will were probably not "revoked".

Thus, the courts will likely distribute the community property solely to Wanda.

Conclusion as to Samir

In conclusion, Samir will have a right to all of Hari's separate property at the time of his death, in the amount of $100,000.

Capacity

A testator must have proper mental capacity when making their will. This means they must: (1) be over 18; (2) be of sound mind; (3) understand the nature of their assets and the extent of their bounty (those who could possibly receive under the will); and (4) understand that they are creating a will.

Here, the facts state that Hari had full mental capacity throughout his life, so his disposition of property would be tough to challenge. The fact that he left inconsistent terms in his wills does not sufficiently demonstrate a failure to understand the nature and extent of his assets, and so a challenge to capacity.

Thus, capacity is likely a non-issue.

California Community Property

California is a community property state. This means that all property obtained during the marriage is presumptively community property. All property obtained before and after the marriage is separate property. Community property includes wages of a spouse, in addition to the fruits of a spouse's efforts and labor. Furthermore, title alone nor change in nature of the property will not determine the characteristic of the asset. Where the asset is unclear, courts will "trace" the funds used to purchase a property to determine whether it is community property or not. Quasi-community property is any property obtained in a non-community property state, which would be community property had it been obtained in California.

California community property laws take effect at either death or divorce.

Here, Hari and Wanda lived in State X, a non-community property state, for 15 years,

and then eventually in California for 5 years whereupon Hari died. Because Hari died in California, certain property will be administered under California community property laws. Hari purchased California land worth $100,000 with the earnings he made in State X. It appears that Hari had purchased this land and put title in his name alone, using funds that he earned solely on his own, which is a valid disposition of separate property in State X. However, because he retained his interest until death and he died in California, the land will become quasi-community property.

Thus, the land is quasi-community property at Hari's death.

Gifts During the Marriage

Where one spouse wishes to gift community property to someone outside the marriage, the spouse must obtain the written consent of the other spouse to make such a gift. Failure to obtain consent gives rise to the non-gifting spouse to demand reimbursement to the community, or to refuse the gift altogether.

Here, Hari gifted a one-half interest in California land to his daughter, which was quasi-community property at his death, but at the time of the gift it was separate property. Because the funds can be traced back to his separate property earnings in State X, and he had neither died nor divorced in 2017, the property was still separate property.

Thus, Hari did not need Wanda's consent to make the gift to Deepa.

Joint Tenancy with Right of Survivorship

A joint tenancy with right of survivorship occurs where two or more tenants have simultaneous interest in: (1) time; (2) title; (3) interest; and (4) possession. When one joint tenant dies, the other receives the ownership interest that the other one had. This

interest cannot be disposed of by will. There are four ways to sever a joint tenancy: inter vivos conveyance, contract, mortgage in a title theory jurisdiction, and agreement. Under the *Strawman* rule, a self-conveyance does not break joint tenancy, even though it is an inter vivos conveyance because it prevents the needless complication of someone transferring land to a third person and simply transferring it back to oneself.

Here, in 2017 Hari created a valid joint tenancy with right of survivorship with his daughter, which was within the time of the marital community (2000 to 2020). Although an inter vivos conveyance may sever a joint tenancy, it is doubtful that the self-conveyance would qualify as a severance due to the *Strawman* rule.

Under normal circumstances, at Hari's death the property interest would fully vest in Deepa as his survivor. However, because of the *Clawback* rule, this situation must be examined more closely.

Clawback Rule

Where quasi-community property owned by a deceased spouse and given away without paid-for consideration, but while retaining some ability to exercise ownership or control over the property (such as a trust or joint tenancy property ownership), the surviving spouse may "claw back" the property to their own possession as community property at the death of the spouse.

Here, Hari gave the half-ownership in the California land to Deepa as a gift for her birthday. Because he gave it to her as a gift, there was no paid-for consideration. Further, because he maintained a one-half ownership in the property, he maintained ownership and possession of the property until his eventual death in California. Once he dies, California community property rules apply, and Wanda will be able to reclaim his

quasi-community property ownership in the property as her own because no consideration was paid in the conveyance.

Thus, Wanda owns a one-half interest in the California land as tenants in common with Deepa.

Conclusion as to Wanda

Thus, Wanda has an interest in all of Hari's half of the community property and a one-half interest in the California land worth $100,000 (her share $50,000).

Conclusion as to Deepa

Pretermitted Children

A child who is unintentionally left out of a will is nevertheless able to have rights in the will and inherit some of their parent's property. However, a pretermitted child will not be able to recover when: (1) the testator intentionally left the child out of the will; (2) the testator left a sizable estate to the child's parent; or (3) the child is provided for outside the will, such as with a trust.

Here, Deepa was not left anything under either will, and all of Hari's property has been disposed of, so she may challenge the will claiming she is pretermitted. This argument would likely fail as she was provided for outside the will in $50,000 worth of land, and her mother has received a sizable estate from Hari which could be used to provide for her. Also, as mentioned above, Hari had full mental capacity so he probably did not leave her off the will unintentionally.

Thus, Deepa is likely not a pretermitted child and has no interest in the estate.

QUESTION 5: SELECTED ANSWER B

How is community property treated in California?

California is a community property state in which there is a presumption that all of the property that is acquired during the marriage will be considered to be community property. Upon death, each spouse may only freely transfer or will away one-half of the community property. Separate property is all the property that was acquired either before marriage, after marriage, or as a result of earnings of separate property. A spouse has full disposition of this property upon his death.

Here, Hari has $50,000 worth of community property and the distribution is discussed below. Hari also has $100,000 of separate property, which is discussed in its disposition below.

Was there a valid will in 2018?

A valid will has the following requirements: (1) there must be a writing concerning the disposition of property upon death; (2) the writing must be signed by either the testator or by someone in the testator's presence and at their direction; (3) there must be at least two disinterested witnesses who were both present contemporaneously at the time that the testator signed the will, and they must then (4) both sign the will at some point during the testator's lifetime; and (5) they must understand when they are signing the will that the document that they are signing is the testator's will. A valid will does not have to dispose of all of a decedent's property, as any remaining parts of the property will go through intestacy. Additionally, even if there was not a valid witness requirement that was met, after 2009, as long as the proponent of the will can show by clear and

convincing evidence that the testator intended the document to be his will at the time that he signed it, then the will is still able to be probated.

Here, there was likely a valid will from Hari that he made on June 1, 2018 because there was a writing concerning the disposition of his property that he signed on June 1, 2018, and the facts state that the witnesses both signed the will before Hari's death in 2020, and because the last signature was on June 3, 2018. Additionally, the facts state that Hari was competent at all times when he disposed of his property. Even though Samir might argue that there was nothing in the facts to indicate that both of the disinterested witnesses were contemporaneously present at the time that the will was actually signed by Hari, even if they were not both present, given that Hari was of full mental capacity through his life, the proponent (Hari's wife) would likely be able to show that Hari intended the document to be his will at the time that he signed it.

Thus, here, Hari had a valid will in 2018.

Was there a valid Holographic will?

California allows testators to use holographic wills as wills and as codicils; all that they require is that the material terms of the will must be in the testator's handwriting and that the will be signed by the testator in his own writing. The material terms are usually considered to be who is getting the property and what amount of the property they are getting. Holographic wills do not have to dispose of all of the decedent's property in that instrument and they do not have to be dated. However, if the holographic will is not dated and there is another will that conflicts with the undated holographic will, then the dated will is likely to prevail unless there can be clear and convincing evidence that the other will was made after.

Here, it is likely that Hari's undated will on the pre-printed will form would have been a valid will because Hari wrote the material terms of the will in his own handwriting, stating that all of his separate property was going to his son and that 25% of his community property would be going to his son as well. The holographic will was signed by Hari in his own writing. However, because the holographic will is undated there will be a problem with the conflicting terms in the holographic will and the 2018 will regarding who gets the community property because the 2018 will that is dated states that Wanda gets all of the community property.

Therefore, unless Samir can rebut the presumption and show clear and convincing evidence that the undated holographic will was created after the 2018 will, Samir will only take the separate property gift under the valid holographic will.

<u>If the holographic will was shown by clear and convincing evidence to be made after the 2018 will then who would take the 25% of the community property?</u>

A party may revoke their will by a subsequent will, codicil, or valid holographic will as long as they can show that they had an intent to revoke, and as long as they followed the proper will requirements. Then any subsequent will, codicil, or holographic will that is made that directly conflicts with a prior will takes effect over the prior inconsistent provision.

Here, in the (unlikely) event that Samir could prove by clear and convincing evidence that Hari made the holographic will after the 2018 will, then the subsequent holographic will would revoke the 25% gift of community property to the mother.

<u>Who would get the Quasi-Community Property Real Property Upon Hari's Death?</u>

What is Quasi-Community Property?

Quasi-community property is all property that was acquired while living in another state that would have been considered to be community property had the spouses been domiciled in the state of California at the time of the acquisition of the property. If a spouse has quasi-community property and then dies while domiciled in California, during the spouse's lifetime, the quasi-community property will be treated as separate property. However, upon dissolution it will be treated as community property and, upon death, all personal property will be treated as community property. All real property will be governed by the state in which the property resides.

Here, the house would have been treated as quasi-community property because the house was purchased by Hari with his earnings, which would be presumed to be community property as stated above. Not only did Hari purchase the property with his marital earnings, but he also purchased the property while married and living in State X. Because he purchased the property while married and living in another state, it would have been considered to be community property had they been living in California at the time of purchase, and thus the property would be considered to be quasi-community property at death, but separate property during his lifetime.

Was there an illusory transfer of the quasi-community property house during Hari's lifetime?

Generally, QCP is treated as separate property during a marriage, which means that the owning spouse is free to sell or manage the property how they would like. However, there is an exception if there is an illusory transfer. There will be an illusory transfer of quasi-community property if: (1) the decedent dies while domiciled in the state of

California; (2) the spouse sold the property for less than its fair or reasonable value or gave it away; (3) did so without the other spouse's consent; and (4) the decedent spouse retained some control over the quasi-community property by “keeping their hooks in the property,” either by retaining some sort of right of reentry in the property, joint title in the property, or retaining some other usage. If there is an illusory transfer of quasi-community property, then the non-transferring spouse can demand back up to one-half of the QCP after the death of the decedent spouse. If there is a right of survivorship that is granted to another party, which gives joint title to both holders and then avoids probate altogether, courts usually consider this to be a means to retaining control over the property.

Here, Deepa is likely going to try and argue that she has a right to the real property in California because Hari granted himself and Deepa a right of survivorship on her birthday. Thus, Deepa would claim that the real property will pass over probate and go straight to her upon Hari's death. However, Wanda is likely to argue that Hari's transfer of the real property was an illusory transfer because: first, Hari died while domiciled in California; second, Hari gave the property away to Deepa as a gift and thus it was given away for less than substantial value; third, Wanda did not provide her consent or agreement to the transfer of the real property. Thus, Wanda would claim that, under the illusory transfer rules, she is entitled to one-half of the real property located in CA and thus should get $50,000 worth of the land. Given that the property was given away for free and without Wanda's consent, the court is likely to agree with Wanda that this was an illusory transfer.

Thus, there would be an illusory transfer and Wanda and Deepa would each get one-

half of the cabin, both getting $50,000 and they will each own the property as tenants in common.

Who gets what share of the property?

In light of rules stated above, the following is the likely disposition of the property: (A) First, regarding the $100,000 of separate property, this will all go to Samir through the holographic will; (B) Second, regarding Hari's $50,000 of community property, this will all go to Wanda, unless it can be shown by clear and convincing evidence that the holographic will was made after the 2018 will; and (C) third, regarding the California property, one-half (or $50,000) worth will go to Wanda and one-half (or $50,000) worth will go to Deepa.