

FALL SEMESTER, 2020  
PROFESSOR E. CHILDS

This exam consists of 3 essay questions. You will have 4 hours to complete your answers. Each question is of equal weight.

Your essay should demonstrate your ability to analyze the facts in the question, to tell the difference between material and immaterial facts, and to discern and understand the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationship to each other.

Your answer should demonstrate your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them. Consider the IRAC method of formulating your answer.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

QUESTION 1

Charles and Camilla were married on 1.1.2000. This was a second marriage for each. Both Charles and Camilla had two children from their previous marriages. During the marriage, Charles worked as a research attorney for the court and Camilla worked as a sales associate in an art gallery in Carmel-By-the-Sea. All of their children were grown, and the couple lived a comfortable life in Camilla's home in Carmel Valley. This home was paid in full as it was part of what she got out of her first marriage.

Both parties brought great wealth to the marriage as they each held valuable real estate, retirement, cash and luxury vehicles at the date of marriage. Charles owned a beautiful ocean-front home in Cambria that he had inherited from his grandfather. When the couple moved in together prior to marriage, he vacated the home and began to rent it out as an "Airbnb." Because of its great beach-front location and amenities, the home was almost always being rented out.

During marriage, Charles paid \$1,000 per month of child support and \$1,000 per month of spousal support to his ex-wife, Diana. His wages were being garnished by the Department of Child Support Services monthly as is customary. At the date of separation, Charles was current on his child and spousal support obligations.

In 2010, for their 10-year anniversary, Charles purchased an original Marc Chagall painting for Camilla. Camilla, an art enthusiast, loved Marc Chagall paintings. Charles was not, he found it boring and stuffy. He preferred horses and gardening. This Chagall painting was particularly moving to her as it was a painting of a bride and groom. It reminded her of their own wedding day. Charles purchased the painting for her for \$60,000.00 (an absolute steal but the seller was desperate) and gifted it to her. Camilla hung the painting in her personal study at home.

In 2010, after discovering Charles had been having an affair with Diana, his first wife, Camilla who was devastated, betrayed, angry and embarrassed threatened divorce. Charles was contrite and begged Camilla not to leave him. This was his second marriage and his family would disown him if he went through another divorce, tarnishing the good family name. He was worried he might be cut out of the family fortune by embarrassing his mother with another divorce. Camilla was no dummy. She told Charles to put her name on the Cambria home as a symbol of his love for and dedication to her. She reminded him that if he didn't, he would have a lot more to lose in the future. Conceding, Charles went to his local title company and put Camilla's name on the deed to the Cambria home. The couple patched things up until they separated for good on 1.1.2020.

How should the court rule? Answer according to California Law.

1. The Cambria house
2. The Chagall Painting
3. Payments made towards the child and spousal support

## QUESTION 2

Harry and Sally met at a law firm in 2007 where they both worked – Harry as a new associate attorney and Sally as a paralegal. Shortly after they couple met, Harry decided to go out on his own and open his own family law firm in downtown San Luis Obispo. In 2009, Sally, inspired by Harry's ambition, decided to quit work and enroll in the local law school to pursue her own dreams of becoming an attorney.

The couple married on 1.1.2010.

Over the next 12 years, Harry worked tirelessly to create a name for himself, learn the law, and turn himself into a well-reputed litigator. He often worked 60-70 hours per week doing attorney work, and performing managerial duties at the firm (billing, HR, marketing, bookkeeping, etc.).

Over the four years of law school, Sally took out a total of \$160,000 in student loans under her name alone. The funds were mostly used to make ends meet while she wasn't working. She used half of the money to pay for the couple's living expenses, and the other half went towards books, tuition, computers, and bar exam fees. In 2003, Sally finished law school and joined the district attorney's office as a new deputy DA.

The couple separated on 1.1.2020. At the time of separation, they had two children ages four and six.

The student loans had been paid off in full by the date of separation. The couple paid the student loans off over the course of the marriage using funds from Sally's pay as a DDA. Harry's little law firm that started on a coffee table in his apartment grew to a 10-attorney firm generating millions of dollars each year. He was known up and down the state of California as one of the best and hardest working family law specialists out there. Sadly, his dedication to his firm was the main cause of the breakdown of the marriage.

The couple decided to stay out of court to maintain their privacy and began negotiations which started off amicably but quickly deteriorated. Harry employed his bulldog tactics that worked so well for him as an attorney. Sally consulted with local family law attorneys for help, but no one wanted to go up against Harry so she continued on unrepresented. Sally finally conceded to Harry's demands after he threatened to never see the children again if she didn't agree to waive spousal support and receive less than guideline child support. Wanting it over and trying to protect her children, Sally signed the MSA and the paperwork was eventually signed by the court. Harry walked away with the law firm, and half of the community assets. Sally waived spousal support and is receiving \$400.00 per month of child support for both kids.

She is now in your office seeking legal advice. Answer pursuant to California Law regarding the following:

1. The law firm;
2. The student loans;
3. The MSA.

### QUESTION 3

Brad and Angelina are two very successful actors. This is the second marriage for each of them and they each bring to the marriage considerable wealth. Their magnetism was unavoidable and on 1.1.2000, they married. In 1998, Angelina bought a home in Menlo Park for \$100,000. She put down \$20,000, mortgaged \$80,000 and in two years, had paid the mortgage down by \$10,000. By the date of separation, the couple had paid the mortgage (which included principal, interest, taxes and insurance) down to \$0. During their trial, Angelina presented the following evidence from a licensed appraiser: At the date of marriage, the home was valued at \$200,000. At the date closest to trial, the home was valued at \$1,000,000. During the marriage, Brad had used about \$100,000 of his pre-marital savings to install solar panels and put in a pool in the backyard.

In 2010, Brad had a part in a blockbuster called "Thelma and Louise Come Back from the Dead" where he raked in millions. In celebration, Brad used some of that money to purchase a luxury ski chalet as a surprise to Angelina. He paid for it in full and put his name on title alone. Angelina was surprised and very happy. They used the chalet throughout the remainder of their marriage.

Unfortunately, the couple hit hard financial times. Brad had racked up \$100,000 in credit card bills of which \$50k was for haircuts and tanning sessions -- other \$50k was to fund his cocaine habit. The creditors came after them and placed a lien on their Aspen property. The property was foreclosed upon and creditors were made whole.

Sadly, the cocaine and money troubles led to the irremediable breakdown of the marriage. The couple separated on 1.1.2020.

What are each party's rights and responsibilities pursuant to California law for:

1. The Menlo Park home;
2. The Aspen ski chalet;
3. The credit card bills.

Q1 Matrix – General

**1. The Cambria House (50)**

A. GCPP's

B. Joint Form Title Presumption

C. Valid Transmutation?

i. Definition of valid transmutation

ii. facts

D. Undue Influence?

i. Adversely affected spouse must show: (4 elements)

ii. Facts applied

E. Rebuttal of presumption of undue influence. (5 elements)

i. facts applied

F. If valid transmutation, then was 2640 waived in writing?

G. Facts, conclusion

**2. Chagall Painting (30)**

A. 852(c) exception – definition

B. facts applied

C. Conclusion

**3. CS/SS payments (20)**

A. CP is liable

B. CS/SS - CP is liable for cs and ss of another relationship but there is a right to reimbursement

if cp funds use to pay cs or ss and sp funds were available

C. Facts, conclusion

Q2 Matrix

**1. The law firm (45)**

A. GCPP

B. Valuation?

i. Van Camp

ii. Definition

iii. Fact application

iv. Pereira

v. Definition

vi. Fact application

vii. Conclusion

**2. The student loans (30)**

A. The education does not have a value but community has equitable right of reimbursement absent a writing

B. 2641-equitable right to reimbursement to the community for actual costs of the education (not living expenses) with interest at legal rate (10%)

C. Must substantially enhance earning capacity of educated spouse

D. Reimbursement can be reduced or modified to the extent the community has substantially benefited from the education (equitable defense)

E. Rebuttable presumption that community has not benefited from community contributions made less than 10 years before commencement of proceeding

F. Fact application

G. Conclusion

### 3. The MSA. (25)

A. Definition

B. Once merged into judgment, what are remedies?

i. CCP 473 - Mistake, inadvertence, surprise, excusable neglect, -- 6 months

ii. CFC 2122

1. Fraud – 1 year after discovered or should have discovered

2. Duress – 2 years after date of entry of judgment

3. Mistake (as part of a stipulation) – 1 year after date of entry of judgment

C. Fact application

D. Conclusion

Q3 Matrix (100)

**1. The Menlo Park home (50)**

A. GCPP

B. Some property can have dual character property

i. Apportionment is an "ownership" interest, not just a reimbursement interest.

ii. The entities share a pro tanto interest in the property. (Moore/Marsden calculation)

iii. Only principal paydown. Not interest, taxes or insurance which are considered family expenses  
iv. Proportional interests even if community takes out new loan and pays down SP property (Branco)

C. Moore/Marsden/Aufmuth – Formula

D. Aufmuth pre dom principal pay down and increase in value.

E. Fact application

F. What about Brad's reimbursements of SP to Angelina's SP?

i. 2640 tracing definition

ii. fact application

iii. conclusion

D. Conclusion

**2. The Aspen ski chalet (20)**

A. Quasi-community property

i. definition

ii. fact application

iii. conclusion

**3. The credit card bills (30)**

i. Liability of community estate for community debts

ii. Necessaries of life/Common Necessaries of life

iii. Liability of QCP to creditors

iv. fact application

v. conclusion



1)

### **General Community Property Presumptions - GCPP**

#### Community Property - CP

California is a community property (CP) state. There is a rebuttable presumption that all property acquired during marriage (DM) is CP, while all property acquired before marriage (BM), after permanent separation, or by gift or inheritance is presumed to be separate property (SP). This presumption may be rebutted by a preponderance of the evidence and the burden is on the separator. The characterization of an asset as either CP or SP depends on 3 factors. (1) The source of the asset, (2) any actions by the parties that may have altered the character of the asset, and (3) any statutory presumptions that apply to the asset.

#### Separate Property - SP

SP is all property acquired BM, after entry of judgment, earnings after the date of separation, property acquired by gift, bequest, devise and dissent, as well as the rents, issues and profits of SP.

#### At Divorce

All CP is equally divided between the parties unless they have otherwise agreed in writing, orally stipulated to an open court, or an exception applies to the general rule of equal division of CP at divorce. A spouses SP remains their SP at divorce. With these general principles in mind, each property will be assessed individually.

### **The Cambria House**

See GCPP above

#### Transmutation

Starting 1/1/85 all transmutations must be in writing, contain an express declaration acknowledging the change in character of the asset, meaning a present intent to change the character of the asset, made, joined in, consented to, or accepted by the spouse whose interest in the property was adversely affected by the transmutation.

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Here Camilla will argue that a valid transmutation took place as Charles put her name on title to the Cambria house. She will argue that is sufficient writing evidence that Charles knew and consented to her gaining and ownership right in the house. However a series of inquires are required to analyze if a valid transmutation actually did take place.

Was there a valid transmutation as to form? The court are split on whether a deed is a valid transmutation but lets say that this court did in fact find a valid transmutation as to form when Charles put her name on title. The burden is on the adversely affected spouse if the transmutation is valid as to form, so here the burden would be on Charles. A series of questions will be asked. Can the AA spouse show the parties were in a confidential relationship at the time of the transfer (this will be presumed as the couple were married at the time)? And did Camilla rely on this confidential relationship? Did Camilla participate in the transaction? And did Camilla benefit from the transmutation? Here Charles will argue that Camilla did rely on their confidential relationship as she threatened to leave him if he did not put her name on title. This was something Charles could not risk so he gave in to her demands. Camilla will argue that she did not participate in the transaction as it states Charles went to the title company, it does not say Camilla accompanied him. However it is likely that adding her to title required her signature so it will likely be found that Camilla participated. Charles will also be able to show that Camilla benefited from this transaction because she gained an ownership interest in his beautiful Cambria home that Charles owns free and clear.

From here the burden will shift to Camilla to rebut Charles claims. Camilla will try and show that Charles entered into transfer freely and voluntarily, that he knew the facts needed including the legal implications and that it was fair and just. However Charles will rebut these claims and state that he was coerced into putting Camillas name on title. Charles could not stand the thought of another divorce and Camilla held that over his head when she found out Charles was having an affair. Camilla used that to her advantage in forcing Charles to put her name on title. Charles will likely be able to show that he did not make this transfer freely and voluntarily. Even if he did know the legal effects of the transmutation.

Conclusion: Due to the fact the Camilla used coercion and undue influence to get Charles to put her name on title it will be unlikely the court will find a valid transmutation

#### Valuation of the Cambria House

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In Camilla is in fact successful in her attempt to gain a community interest in the Cambria house the home will need to be apportioned for its CP and SP interests.

### Van Camp (VC) and Pereira (P)

When an asset is acquired as SP but appreciates in value DM the community may have earned an interest in the SP. In order to determine the extent of the community's interest, the court will apply either the VC or P method of valuation. When the managing spouse's labor, skill and effort are the main factors contributing to the increase in value the courts will apply P. When the nature of the asset contributes to the increase, then the court will apply VC. Generally the P favors the community, whereas VC favors the managing spouse. The court has discretion to apply either method that it believes will result in the most just result.

Here the Cambria house is in a great beach front location and has wonderful amenities. The home is almost always being rented out as the facts imply it sells itself. Due to the fact that the home is the contributing factor to its increase in value, not Charles' blood, sweat and tears the court will likely apply the VC method of evaluation. This **FORMULA** is:  $(FMV \text{ of the asset at dissolution} - (\text{CP labor} - \text{family expenses paid})) = \text{SP value}$ . Here we do not have any financial information on the home but the court would likely use that valuation method and formula.

Conclusion: it is unlikely that the Cambria house will be found as anything but Charles' SP, but on the off chance the court will need to apportion the SP and CP valuation of the residence they would likely apply the Van Camp method of evaluation.

### Revenue of the Cambria House

Charles inherited the Cambria house from his grandfather before marriage and so it will be found as separate property. The home is used as a rental property creating revenue for the couple during marriage. This revenue will also be considered SP because the rents, issues and profits of SP will also be SP.

Conclusion: the rents, issues and profits of the Cambria house will be Charles' SP

### **The Chagall Painting**

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See GCPP above

Transmutation - see supra

Camilla will argue that the Chagall painting was a gift from Charles and that it should be considered her separate property. However, due to the fact that the painting was purchased during marriage (for their 10th anniversary) and with presumptively community property funds, Charles can argue that the painting is CP so he too has a 50% interest in the painting. Charles will also point to the fact that no writing exists transmuting the painting to Camilla SP

Exception to a transmutation

There is a statutory exception to the writing requirement for transmutations under 852(c) for clothing, wearing apparel, jewelry or other tangible articles of a personal nature that is used entirely or principally by one spouse, to whom the gift is made and that is not of substantial value, taking into account the circumstances of the marriage.

Camilla will argue that Charles doesn't even like the Chagall painting, he thinks it's boring and stuffy. Camilla is an art enthusiast and finds the painting to be very sentimental as it depicts a bride and groom, reminding her of her wedding day to Charles. Camilla will argue that this painting is of a VERY personal nature and that she alone enjoys its presence in their home. Camilla will also show that despite the fact that Charles paid a substantial amount for the painting (\$60k), that is not unreasonable given their socioeconomic status. The couple is very wealthy and \$60k for a 10th anniversary gift is not unreasonable. Charles will argue that he has a CP right in the painting as even though it is not his preference he understands its value and appreciates it for its economic benefits. Charles will state that the painting should not be considered "of a personal nature that is used entirely by one spouse" because it sees it every day in his home and knows its great financial value.

Conclusion: Given the nature of the painting and the difficulty in trying to classify it as "of personal nature that is used entirely or principally by one spouse" it is likely that it will not fall under the 852(c) exception to the writing requirement. The court will likely find that Charles will retain a 50% CP interest in the painting.

**Payments Made to Child Support and Spousal Support**

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See GCPP above

Child Support and Spousal Support of a Previous Relationship

The general rule with debts is that the CP is liable for the debts of either party absent an express statutory exception. CP is liable for child support (CS) and spousal support (SS) of another relationship, but there is a right to reimbursement if CP funds were used to pay CS or SS and SP funds were available.

During marriage Charles was paying \$1,000 a month in CS and \$1,000 a month in SS (very little in comparison to his wealth). The facts state that his wages were being garnished to pay this support. As a research attorney, his wages during marriage would be CP. Camilla will argue that despite the fact the CP was liable for this support debt, Charles had SP income from renting out his Cambria home on Air B and B. Because Charles had SP available at the time the support payments were made, the community should be reimbursed for the payments made.

Conclusion: Charles has SP income and the support obligations should have been paid out of that first. The community has a right to reimbursement for the support payments made out of CP funds.

**END OF EXAM**

2)

California is a community property (CP) state. The basic tenant of the CP system is that earnings from the labor of each spouse during the marriage contribute equally to the accumulation of wealth and debt, Each spouse owns both the wealth and the debt equally and assets are vested upon acquisition. The CP system applies automatically to married couples domiciled in California. The California Family Code (CFC) governs the CP system. There are three key elements to the CA CP system: (1) Tracing, (2) Equality of Interest and (3) Right to modify. Each spouse has a mutual obligation of support during the marriage and owes a fiduciary duty (obligation of good faith and fair dealing) to their spouse. The CP system has three fundamental policy goals: (1) it furthers the State's compelling interest in marriage, (2) it provides married people with a default marital contract the becomes effective at the date of marriage, with terms governed by the CFC and (3) it gives third parties (lenders) confidence in their transactions with the CP estate.

The issue before the family court is three fold. First was does the community have an interest in the husbands law firm. Should the community be reimbursed for the student loans and was the MSA valid.

### **General Presumptions**

**GCPP:** California is a CP state. There is a rebuttable presumption that all property acquired during marriage is CP, while all property acquired before marriage (BM) or after the date of permanent separation (DOS), or by gift or inheritance is presumed to be SP. This presumption may be rebutted by a preponderance of evidence and the burden of proof is on the "seperatizer". The characterization of an asset as either CP or SP depends on three factors: (1) the source of the asset, (2) any actions by the parties that may have altered the character of the asset and (3) any statutory presumptions that apply to the asset.

**CP:** CP is defined as real or personal property wherever situated which was acquired by a married person during marriage (DM), while domiciled in the State of CA. This includes real or personal property, tangibles and intangibles, present, future, vested or contingent appreciation/depreciation of CP, rents, issues or profits.

**SP:** SP is defined as all property acquired BM, after the DOS (permanent), or after entry of judgement and property acquired by gift, bequest, devise, dissent as well as rents issues and profits derivative of SP. SP is protected by the CA Constitution under Article XI, Section 14.

**Debt Presumption:** The Community is liable for all debts acquired during marriage and before the DOS. For debts acquired BM, the CP and the debtors SP is liable during the marriage. The other spouse's SP is not liable so long as the non-debtors SP is held apart as SP.

**Divorce Presumption:** All CP is equally divided between the spouses unless they have otherwise agreed in writing, orally stipulated to an open court, or an exception applies to the general rule of equal division at dissolution. At divorce, all jointly held property is presumed CP. This includes property held as Joint Tenants and Tenants in Common This is a statutory rule, that is only applicable in CA Family Law proceedings. The divorce statutory presumption supersedes general presumptions and other special presumptions because at divorce, the most specific presumption controls. At divorce, a spouses SP remains his SP and there is a statutory presumption that an SP contribution is entitled to reimbursement without interest, so long as it can be properly traced an if there is not express writing stating otherwise.

**Validity of the Marriage:** See GCPP, cp, SP, Debt Presumption and Divorce Presumption above.

In CA, marriage is a personal relation arising out of a civil contract. It requires the consent of both parties, a license and a solemnization with at least one witness. The license must be recorded in the County Recorder's Office and at such time it becomes a marriage certificate. CFC 301 defines the age of consent as 18 years of age and both parties must be capable of consent, no incapacity, insanity or infancy. The marital economic community begins on the date of marriage and ends at the date of permanent separation, dissolution or death. The DOS is defined as the date that a complete and final break in the marital relationship has occurred, as evidenced by both of the following: (1) one spouse has expressed to the other spouse his/her intent to end the marriage and (2) the conduct of the declaring spouse is consistent with their intent to leave the marriage (in determining the DOS, the court will consider all relevant evidence both objective and subjective). Parties do not have to live separately from one another to have a permanent date of separation. A marriage may be void if it results from either incest or bigamy. A marriage may be voidable if it results from fraud, coercion or duress.

Here we are told that the couple married on 1/1/20, they were both intelligent and employed individuals and there is nothing in the fact pattern that would indicate that they lacked capacity . The marriage is valid

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**Asset Characterization: Law Firm**

See GCPP, CP, SP, Debt Presumption and Divorce Presumption above.

In order to determine the characterization of a property, as either SP or CP, the court must evaluate each asset separately and determine the source of the funds used to acquire the property (SP or CP), the timing of the acquisition (BM, DM or after DOS), any actions the parties have taken to changed the characterization and any relevant statutory presumptions. For property to be characterized as CP, it must have been acquired during marriage, by effort, while one or both of the spouses was domiciled in CA.

Business: See GCPP, cp, SP, Debt Presumption and Divorce Presumption above.

When one spouse brings a SP business into a marriage, the fruits of the labor from the community will gain an interest in the SP business. In order to apportion the equitable shares, the court must look at the nature of the business and how the community contributed. There are two approaches where cp funds or labor enhance the value of a sp business: Pereira and Van Camp. The court has discretion to apply either formula that it believes will result in the most equitable division.

Pereira: The Pereira approach favors the CP estate and is used when the spouse's management skills are the primary reason for the growth of the business. It will pay the original capital plus interest per year to the estate which provided the capital (SP) and five the remainder of the value of the business to the community for the labor contribution. The interest paid to the estate is simple interest at the going rate, which is currently 10% . The SP interest share = SP Contribution + reasonable rate of return. The CP interest= FMV of the business at disso - the SP interest from above,

Van Camp: This model favors the SP and is used when the nature of the asset is the contributing factor to the growth of the business. The managing spouse is paid a fair wage and the business retains the rest. Fair wage is determined by the going rate in the industry. The equation is : The cp interest = FMV - family expenses - salary taken. The SP interest = FMV of the business at disso - CP interest from above.

Here, we are told that the spouses live in SLO. The business was a revenue stream during the marriage but was acquired in 2007 and was the SP of H. The husband built the business and the wife went to law school and then later worked as a DDA. Because the business was started by H prior to marriage in 2010, that portion of the business from 2007 to 2010 was SP and that portion that was grown during the marriage is CP. The fact patten also states that for 12 years H worked



tirelessly to create a name for himself, learn the law and turn himself into a well reputed lawyer. H often worked 60-70 hours a week doing attorney work and all the managerial work as well. His extensive work is what led to the demise of the marriage. The law firm grew to a 10 attorney law firm generating millions of dollars a year.

W will want to utilize the Pereira model because the CP will gain the largest share while H will argue to use VC. There are a number of conflicting factors which could lead the court to decide either way. First the fruits of the effort were all the work of the husband which would support the P model. Now, however, the office is running with 10 attorneys and likely a large staff which would tend to support the VC model. The court will likely have to hire an actuary to determine the value of the business. They will take into the account the aforementioned.

The court will likely utilized the VC model because of the size of the business now. This will not favor the CP but the court can offset that with an award of SS. Sally walked away from her share of the business under duress, if she brings a cause of action to refute the MSA, she will likely get an equitable share of the law firm,

Student Loans: See GCPP, cp, SP, Debt Presumption and Divorce Presumption above.

CFC 2641 Education CP Reimbursement.

During marriage all debts DM and BM are the liability of the CP as above. There is an exception for Student loan debt. An education acquired DM is not a divisible asset for CP purposes. At divorce, the community may seek reimbursement, absent a writing for CP funds plus the legal interest rate. (10%), used for education expenses. This includes an education that occurred BM but student loans were paid DM. The education must substantially enhance the earning capacity of the educated spouse. Outstanding student loans will be assigned to the educated spouse at divorce . The reimbursement may be rebutted by the student if: (1) the education has substantially benefitted the community, (2) the education has reduced the need or eliminated the need for spousal support for the educated spouse, (3) the other spouse received a similar education DM.

Here W obtained her partially before marriage but passed the bar in 2013. So a portion of the debt was acquired BM and a portion DM. The fact pattern states that the W had \$160k in student loans. A half of the loan went to educational costs and the other half to living expenses. That portion for living expenses may not be reimbursed. All the loans were paid off DM. Here, H will demand a reimbursement to the CP for the cost of the repayment of the loans of which \$80k will be eligible. W

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will argue that both clause 1 and 2 of the exception above apply. They were married for 10 years and 7 of which she was working as a DDA. She will also argue that she will not require SS support as a result.

Here, it is likely the court will agree with the wife and not require a reimbursement of the student loans because she will not need SS and the community substantially benefitted for a period of 7 years. It was proper that Sally did not receive SS because of the offset of the cost of her education,

The MSA:

See GCPP, cp, SP, Debt Presumption and Divorce Presumption above.

At divorce the parties are able to negotiate a settlement agreement outside of the a court action. Each party has a duty to disclose all assets and debts as well as all income and expenses. The duty continues until final judgement is entered. Initial declarations and disclosures are required but the parties may stipulate and waive final disclosures and declarations. Parties are free to contract and stipulate a settlement outside of court, by themselves, with the assistance of counsel or through ADR. If a MSA is a stand alone, all remedies to the agreement are handled through contract remedies, but if the the MSA is fused with a final judgement from the family court, all FL remedies are available. FL remedies included contempt and sanctions, as well as other enforcement options. Modifications are permitted for Child Support/Custody/Visitation and Sp. Support.

Here, the couple decided to stay out of court to maintain their privacy rights . The began negotiations amicably but H began to bully W. Wife sought assistance of counsel but no one would take her case because they were afraid of H. She had to proceed Pro Per. She relented to the demands of H because he threatened to prevent her from seeing her children and if she refused to take less child support . Sally signed the MSA under coercion and duress and the MSA was eventually approved by the court. Harry walked away with the law firm and half the community assets. Sally waived spousal support and is receiving \$400/mo in Child support.

If Sally brings a cause of action to have the MSA set aside she may do so in family court because the MSA was incorporated into the final judgement and signed by the court. She will have to bring a cause of action under CFC 2122 and substantiate a claim of Duress. The statute of limitations is 2 years from the date the final judgement was signed. She may also attempt to bring a cause of action for mistake under CFC 2122 because the child support should have been determined on the basis of the income of the parties. It may have been appropriate to assign a lower child support because Sally makes good money as well, but \$400 seems low as compare to the large amount of

money the husband makes. Sally did get half the community assets and her student loans covered, she will have to weigh the cost of litigation against any money award that she thinks she may get for child support and the law firm.

Additionally, Sally can bring a cause of action at any time for modification of the child support order, which may be her best bet. If Sally was my client, I would advise her to apply to DCSS for collection and then request a modification of the child support order. This would avoid the cost of litigation and any public exposure, plus the money she may get for her portion of the CP reimbursement for the business may not outweigh the cost of a high conflict challenge, especially given the personality of her ex husband.

**END OF EXAM**

2)

### **General Community Property Presumptions**

**Community property (CP):** California is a community property state. There is a **rebuttable presumption** that all property acquired by a married person while domiciled in CA is community property. This presumption may be rebutted by a preponderance of the evidence with the **burden on the separatizer**. Interests of each spouse in community property during the marriage are present, existing, and equal. The characterization of an asset as either community property or separate property depends on three factors: 1) the **source** of the asset, 2) **any actions** by the parties that may have altered the character of the asset, and 3) any **statutory presumptions** that apply to the asset.

**Separate property (SP):** All property acquired prior to marriage, or during marriage by gift, bequest, devise, descent, as well as the rent, issues, and profits from those are presumed to be separate property.

**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 their SP at divorce. With these general principles in mind, each property will be assessed individually.

### **1. The Law Firm**

**See GCPPs above**

Per the GCPPs, the business is SP because it was started before marriage. However, there may be a CP interest.

### **CP Contributions to SP Business**

When a business or asset is acquired as SP, but appreciated in value during marriage, the community may have earned an interest in the business. In order to determine the extent of the community's interest, the court will apply either the **Pereira** or **Van Camp** method of valuation. When the managing spouse's labor, skill, and effort are the main factors contributing to the increase in value, courts apply the **Pereira** method, whereas **Van Camp** is used when the asset contributes to the increase. Generally, the Pereira method favors the community, while the Van Camp method

favors the managing spouse. The court has discretion to apply either method that it believes will result in the most just result and they may be used in combination.

Harry would argue that the Van Camp method should be used. He would point to the fact that he has 10 attorneys working under him and does not need to actively promote the business because he is known up and down the state as one of the best. However, Sally would likely have a stronger argument for Pereira valuation. Sally would argue that he worked tirelessly during their marriage (12 years since the opening which was a couple of years prior to their 10 year marriage). He worked 60-70 hours per week, started completely on his own doing both attorney work and managerial duties. It does not look like he has slowed down because he is known as one of the hardest working family law specialists and his dedication to the firm was the main cause of the breakdown of the marriage.

**The courts will likely use Pereira.**

### **Formulas**

**Pereira:** Everything other than excess profits is separate property.  $\text{Excess profits} = \text{fair market value (FMV) of the business at dissolution} - \text{SP contributions} + \text{simple interest on the business for the period using community labor.}$

**Van Camp:**  $\text{SP reimbursement is calculated by taking FMV of the business at dissolution} - \text{CP contributions} - \text{family expenses paid by the business.}$   $\text{CP reimbursement} = \text{CP contributions} - \text{family expenses paid by the business.}$

No information is given to fill in these formulas, but the court would look at his income/labor during marriage, FMV of the business, contributions, family expenses, etc.

The reverse formulas only apply to SP contributions after separation to a CP business and are not applicable here.

**Conclusion:** Validity of the MSA aside, the court would likely use Pereira as a valuation method of the CP interest in the law firm.

## **2. The Student Loans**

**See GCPPs above**

### **Education and Training**

Education and training acquired during marriage is **not treated as a CP asset**. Instead, at divorce, unless parties sign an agreement to the contrary, there is an equitable right of reimbursement with interest at the legal rate (currently 10%) to the community when CP funds are used to repay a loan incurred for education and training and the education and training **substantially enhances the earning capacity** of the spouse who the loans were for.

The MSA (validity aside) did not discuss reimbursement for Sally's legal education and related educational expenses. Prior to this, she was a paralegal and after she became a deputy DA. While a comparison of incomes is not given, it can be inferred that this was a substantial increase in her earning capacity, and even if it was not she could find a job as an attorney that would pay more than being a paralegal.

Reimbursement can be reduced or modified to the extent that the community has **substantially benefitted from the education**. There is a **rebuttable presumption** affecting the burden of proof that the community has not substantially benefited from community contributions to the education made less than 10 years before the commencement of the proceeding.

Sally finished law school in 2003, however I will assume that was a typo and it should be 2013. She started law school in 2009 and it takes 3-4 years depending on the program. Assuming 2013 and that they divorced in 2020, there has only been 7 years of benefit to the community so the presumption applies. Sally would need to prove that the community did substantially benefit from her work during those years in order to rebut the presumption.

Parties can contract for reimbursement. In absence of a contract for reimbursement, the community can **only** be reimbursed for contributions to education, **not living expenses**. Other equitable defenses would be if the community contributed to the education of both spouses or if the community's contribution reduces the student spouse's need for spousal support.

The couple used Sally's pay as a DDA to pay off the student loans. Earnings during marriage are CP, so the community did contribute towards the education by paying off the \$160,000 in loans. However, only \$80,000 (half) went towards books, tuition, computers, and bar exam fees, so the community could only seek reimbursement for that amount (if they did not already substantially benefit). Sally could also argue that her increased income decreased her need for spousal support (which she waived in the MSA).

When still outstanding, education loans are assigned to the educated spouse **without offset**. The loans had been paid off in full by the date of separation, so this is not an issue, but if there was remaining it would be given to Sally without offset.

**Conclusion:** The education is not a CP asset and the community may be reimbursed for up to \$80,000 depending on how the court decides on whether there was substantial benefit and if need for spousal support was decreased.

### 3. The MSA

See GCPPs above

**Marriage Settlement Agreements (MSAs)** are post separation agreements detailing division of property in lieu of litigation. MSAs do not require equal division as they are not litigated and remedies are based upon contract law. It was in writing, so the Statute of Frauds requirements was met. However, other defenses may apply such as **undue influence**. Sally needs to have freely and voluntarily entered into the agreement, have had full knowledge and full understanding of the legal effect.

Sally will argue that she was **not fully informed** of her rights when she entered into the agreement. Not only was not represented by an attorney, but Harry purposefully scared all of the local family law attorneys from representing her. Harry would argue that she is an attorney and that she could have gotten an out of town attorney, but the area of law she practices is criminal and she should not have to go out of town, pay more (for travel), and risk using counsel that is not used to the local court system because he intentionally used bulldog tactics to lessen her ability to receive counsel. In addition to being unrepresented, as a newly single parent she had less time to research herself into the issues.

Sally will also argue that she was **under duress** when she signed the agreement. Sally "finally conceded to Harry's demands after he threatened to never see the children again if she didn't agree to waive spousal support and receive less than guideline child support." She states that she wanted to protect her children so she signed. That is a huge weight on a parent to think that their decision could permanently impact their children's relationship with their other parent. He may argue that he wasn't serious, or that she just wanted it over, but in the end he threaten that and she reacted immediately afterwards, implying she was affected by it. His ultimatum likely amounted to **undue influence**.

The MSA was also likely **illegal** in that it contracted for child support at \$400, less than the guideline amount. Taking from the rules used for premarital agreements (PMAs), child support may not be contracted over. One of the reasonings is that it is not in the best interest of the child and they are not a party to the agreement. Also, for PMAs waivers of spousal support is only allowed if represented by independent counsel and it was not unconscionable. As discussed above, the agreement was likely unconscionable when entered into and she was not represented by counsel.

Lack of capacity would likely not apply because she is currently a DDA.

### **Fiduciary Duties**

Upon marriage, a fiduciary relationship is created between the spouses that imposes the duty of highest good faith and fair dealing in transactions between themselves and others, as well as a duty of disclosure. CFC 2102 applies the fiduciary duty from the date of separation through the distribution of the community estate. Violations may lead to setting aside the judgment and 50-100% monetary award of the property (100% if fraud, malice, or oppression). The statute of limitations for duress and mental incapacity is up to 2 years after the entry of judgment.

The court may find Harry violated his fiduciary duties to Sally by his actions (noted above).

**Conclusion:** The courts will likely find the MSA to be invalid.

### **If the MSA is deemed invalid:**

If the MSA is deemed invalid, the court will give an **equal division**. In litigated decisions, a court must divide CP assets and liabilities equally. Valuation of assets and liabilities must be determined as near as practicable to the time of trial unless one party shows good cause for another valuation date. Equal division does not require a straight division of assets.

Harry may still receive half of the CP assets, but Sally would have an interest in the law firm (see *supra*). The courts would decide spousal support and child support.

### **Tax Consequences**

A transfer of property between former spouses incident to divorce does not represent a taxable event, but must be transferred within one year of divorce or be related to the cessation of marriage. Spousal support is nontaxable to the recipient and non-tax-deductible to the payer, since 2019. Child support is not taxable or tax-deductible. The parties may want to keep this in mind in either situation, MSA or litigated judgement.



**END OF EXAM**