

Kern County College of Law

COMMUNITY PROPERTY

Fall 2024

Prof. E. Estrada

#### INSTRUCTIONS

This is a 3-hour exam.

There are 3 essays.

Each is worth 1/3 of your final grade.

**ESSAY 1**

On April 1, 2020, Hal told Wendy he wanted a divorce. Wendy was taken aback and did not want a divorce, but understood it was what Hal wanted. Financially, neither could afford to live without the other's income and medical benefits, so they discussed it and decided that they must continue living in the same house until financial circumstances changed. Hal moved into a separate bedroom in the house and all sexual relations between Hal and Wendy stopped. They opened separate bank accounts for their earnings and each contributed half of the monthly living expenses into the joint account they opened when they married. Hal and Wendy ate dinner together every night at home and she did his laundry every weekend. They bought each other birthday and Christmas gifts. And when Hal's mom died, Wendy accompanied him to the funeral out of state where they stayed in a hotel room together.

In May 2021, Hal went to a work event and drank too much. On his way home, Hal caused a car accident. He was severely injured and spent 2 weeks in the hospital. The other driver was also injured.

On July 1, 2021, Wendy won the lottery for \$500,000. She excitedly told Hal that they could finally afford to part ways. Hal told Wendy that his hospital stay had made him reevaluate and he no longer wanted a divorce. Wendy said that she had come to terms months ago with Hal's decision to divorce and she thought it was for the best that they did.

Hal incurred \$400,000 in hospital bills for his stay, and the other driver incurred \$150,000 in hospital bills.

Wendy filed her dissolution petition on July 3, 2021. Hal did not respond and on January 3, 2022, the court issued an order dissolving the marriage and assigning both the hospital debt and tort liability to Hal.

Discuss the following under California law:

1. Are the lottery proceeds community property, or Wendy's separate property?
2. Which estates (community property, Wendy's separate property, or Hal's separate property) may the hospital look to for payment of H's medical bills:
  - a. If the lawsuit for collection is filed December 31, 2021?
  - b. If the lawsuit for collection is filed February 1, 2022?
3. To whom should the court assign the tort liability for the injuries sustained by the victim of Hal's drunk driving?

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## ESSAY 2

Henry and Hayden met in law school and planned to get married 1 month after graduation, before the bar examination. When Henry graduated from law school, his father, who was also a lawyer, gave him a \$2 million graduation gift.

Hayden was not from a wealthy family. Before Henry and Hayden married, Henry's father encouraged them to sign a prenuptial agreement, which Henry's father drafted. The prenuptial agreement stated that all property acquired in the first five years of marriage would be Henry's separate property and that Hayden would waive spousal support. Henry's father presented the prenuptial agreement to Hayden to sign 5 days before the wedding and said, "you may not have passed the bar yet, but you're a lawyer. You don't need anyone else to review this for you. Plus, you are family to me, and I have your best interests at heart too." Hayden reviewed it and didn't agree with the terms, but he believed that his marriage to Henry would last forever, and the prenuptial agreement would not matter.

After Henry and Hayden married and passed the bar, Henry went to work with his father and Hayden went to work as a public defender. Henry used \$200,000 from his father's gift as a down payment on a \$750,000 house. Henry put the title in his name alone. He obtained a mortgage in his name alone. Hayden did not sign any document other than the prenuptial agreement agreeing that the home was Henry's separate property. Hayden and Henry lived together in the home.

Henry asked Hayden to pay all mortgage payments from Hayden's earnings, as Henry wanted to put all his earnings into investments. Hayden trusted Henry to make good investments. Hayden paid all mortgage payments while Henry invested all of Henry's earnings in a new company called "DNA and Disease" that purported to have cutting edge technology that could predict future disease based upon blood DNA tests. Henry also invested the remainder of his gift from his father into a more diversified portfolio.

1 year after investing in DNA and Disease, Henry learned that it was a scam and that the CEO of the company was a con artist. Henry's investments from his father's gift, however, yielded a 9% return on investment.

4 years and 2 months into the marriage, Henry filed for dissolution.

Discuss under California law:

1. Whether the prenuptial agreement is enforceable.
2. The respective rights of the parties as to interests in the house.
3. Whether Hayden has any recourse against Henry for his investment in DNA and Disease, and if so, what are Hayden's remedies?

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**Essay 3**

Harold and Whitney married in 1984. At the time of the marriage, Whitney had been a dentist for 2 years and owned her own dental practice. Whitney paid herself a salary of \$125,000. Harold and Whitney purchased a home in 1984 and took title to it as joint tenants. Harold and Whitney had children, at which point Harold became a stay-at-home dad.

In 1990, Whitney had become so busy due to her small, gentle hands and her soothing demeanor, that she entered into a partnership with another dentist, Dennis. The partnership agreement gave each partner the right to buy out the other partner for \$250,000 and included a non-compete agreement precluding the departing partner from practicing dentistry within 100 miles. The partnership agreement further provided that no spouse of a partner had any interest in the partnership other than an economic one.

The partnership decided to purchase an office building. The building was \$800,000. Each partner made a \$100,000 deposit toward the purchase price. Title to the building and the mortgage were taken in the partnership's name. The mortgage was secured by a deed of trust against the property. Harold signed a quitclaim deed to the partnership, disclaiming any community property interest in the building.

In 2005, after 21 years of marriage, Whitney told Harold she wanted a divorce. At the time, Whitney was earning \$800,000 per year. Other dentists in the area earned, on average, \$500,000 per year. Harold, however, was having a difficult time finding a job due to his long stint as a stay-at-home father.

1. What interest, if any, does the community have in Whitney's dental partnership and if there is an interest:
  - a. How should it be valued
  - b. As of what date should it be valued?
2. What interest, if any, does the community have in the home and how should it be distributed upon dissolution?
3. Should Harold have a right to increased alimony?

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## **ANSWER OUTLINE**

### **COMMUNITY PROPERTY - KCCL**

**FALL 2024-**

**Prof. E. ESTRADA**

## **EXAM GRADING OUTLINES**

### **ESSAY 1**

1. Are the lottery proceeds community property or Wendy's separate property?
  - a. Rules:
    - i. All property acquired during the marriage is presumed to be community property. Property acquired after separation is presumed separate.
    - ii. Separation occurs when there has been a complete and final break in the marital relationship, as evidenced by one party expressing the intent to separate and conduct consistent with the expressed intent to separate.
  - b. Analysis: Hal expressed his intent to separate and moved into a separate room in the house on April 1, 2020. Hal did not move out due to financial constraints. They opened separate accounts for their earnings. But, the parties continued to eat together, she did his laundry, they went to his mom's funeral and stayed together in a hotel out of town. They also maintained their joint account in which they each contributed half the living expenses. It appears that Hal was reconsidering his wish to divorce after his injuries and before July 2021, when Wendy first expressed her desire to divorce. Wendy only expressed to Hal her desire to separate after she won the lottery.
  - c. Conclusion
2. Which estates (Wendy's separate property, community property, or Hal's separate property) may the hospital look to for payment of H's medical bills?
  - a. Rules:
    - i. Generally, for debts incurred before or during the marriage, a third-party creditor may look to both the debtor's separate property and community property to satisfy the debt. Where the debt is for a necessary of life, in addition to the debtor's separate property and community property, the creditor may also seek to satisfy the debt from the non-debtor spouse's separate property.
    - ii. "During marriage" does not include the time that the spouses are living separate and apart.
    - iii. After the court assigns a debt to a spouse, the creditor may not seek to recover the debt from the non-debtor spouse.
  - b. Analysis

- i. Lawsuit filed December 2021:
      - 1. Was the debt for a necessary of life? Medical bills would fall within that exception.
      - 2. Did the debt occur during marriage? Maybe, depending on the outcome of the separation analysis.
    - ii. Lawsuit filed in January 2022: Liability has now been assigned to Hal by court order
  - c. Conclusion
- 3. To whom should the court assign the tort liability for the injuries sustained by the victim of Hal's drunk driving?
  - a. Rules:
    - i. A married person is not liable for any injury or damage caused by the spouse unless the married person would be liable even if the marriage did not exist. Judgments shall be satisfied first from the community estate if the act giving rise to the liability was for the benefit of the community, then from the person's separate estate. If the act giving rise to the liability was not for the benefit of the community, then judgment shall be satisfied from the debtor's separate property first, and then from the community.
    - ii. A debt is incurred at the time of the tort
    - iii. During marriage means the parties are not living separate and apart.
    - iv. After the court assigns a debt to a spouse, the creditor may not seek to recover the debt from the non-debtor spouse.
    - v. A court may only assign assets and liabilities on a default judgment where the petition for dissolution requests it.
  - b. Analysis:
    - i. Wendy does not appear to have been present at the time and there is nothing to indicate that she was negligent.
    - ii. Hal was returning from a work event. His presence there could arguably have been for the benefit of the community if they are not deemed separated as of the time of the accident. But driving drunk is not a benefit to the community.
    - iii. There is nothing in the facts stating that the petition for dissolution requested assignment of the liability for drunk driving to Hal.
  - c. Conclusion

## ESSAY 2

### 1. Is the prenuptial agreement enforceable?

#### a. Rules:

- i. A prenuptial agreement that violates public policy is unenforceable. A prenuptial agreement violates public policy if it encourages divorce.
- ii. Waivers of spousal support are reviewed for conscionability both at the time the prenuptial agreement is executed and at time of dissolution.
- iii. A prenuptial agreement is unenforceable if one party did not voluntarily sign it. To be considered voluntary, the party against whom enforcement is sought must:
  1. have been represented by independent legal counsel at the time of signing the agreement, or expressly waived that right in a separate writing after being advised to seek independent legal counsel.
  2. have had at least 7 days between being presented with the agreement and execution.
  3. If unrepresented, have been fully informed of the terms and basic effect of the agreement in a separate writing delivered prior to execution and sign a declaration stating they received it.
  4. The agreement and declaration were not executed under duress, fraud, or undue influence, and the parties did not lack capacity.
  5. Anything else the court deems relevant.

#### b. Analysis:

- i. The agreement states that all property will be separate until 5 years of marriage. Hayden was not advised to seek representation and did not waive it in writing. No separate document was presented to Hayden explaining what the terms and effects of the prenuptial agreement were. Hayden did not sign a declaration stating who presented the separate document to him and that he received it. Henry's father also told Hayden he had Hayden's best interests at heart. On the other hand, Hayden had graduated from law school, although he was not a licensed attorney.
- ii. If the prenup were valid, the court would look at the spousal support waiver to determine if it is unconscionable at that time. At the time of dissolution, Henry has depleted CP through risky investments and had much greater earning potential than Hayden who works for the government. But Hayden also has the education necessary to seek a job with more compensation.

#### c. Conclusion

### 2. Is the house community property or separate property and what are the rights of the parties with respect to the house?

#### a. Rules:

- i. Property acquired during marriage is presumed to be community property. This presumption is rebuttable and the burden is on the party claiming the property is separate.
    - ii. Gifts are the separate property of the spouse who received the gifts.
    - iii. Characterization of a property remains the same unless transmuted by written agreement of the parties that expressly states the intent to transmute.
    - iv. Where community funds are used toward the purchase of separate property, the community is entitled to a pro rata share of the equity of the property.
    - v. Where separate funds are used toward the purchase of community property, the separate estate is entitled to reimbursement without interest.
  - b. Analysis: The down payment came from funds gifted to Henry from his father and therefore was separate property. The remaining purchase price was financed by a loan in Henry's name alone and title was taken in Henry's name. On the other hand, the property was acquired during the marriage and Henry asked Hayden to make the payments from Hayden's earnings alone. There is no quitclaim waiving Hayden's community interest in the property and no other document agreeing to characterization as separate property other than the prenuptial agreement. Therefore, Henry may not meet his burden of proving the property is separate.
  - c. Conclusion – If the property is community, Henry is entitled to reimbursement for his down payment. If it is separate, the community is entitled to a pro rata share of the equity for roughly 4 years of payments.
3. Does Hayden have any recourse against Henry for his investment in DNA and Disease, and if so, what are Hayden's remedies?
- a. Rules:
    - i. Spouses owe a fiduciary duty to one another from the date of marriage until the date of distribution of property. The duty is akin to that of a business partner.
    - ii. Both spouses have full and equal authority to manage community assets.
    - iii. Where one spouse breaches the fiduciary duty, that spouse may be charged with the loss.
  - b. Analysis: Henry made a risky, undiversified investment with community funds in a new and unproven company. Meanwhile, Henry invested his own separate funds in a diversified, less risky portfolio. Henry was more careful with his separate funds than with the community funds.
  - c. Conclusion

### ESSAY 3

1. What interest, if any, does the community have in Whitney's dental partnership:

Rule: Separate property retains its separate nature after marriage. But income earned by Whitney after marriage is community property and increase in the valuation of her business due to her community efforts are also community property.

Analysis: The business was Whitney's before marriage. After marriage, she transferred her business into a partnership. She continues to earn compensation, whether through a salary, a draw, or otherwise. That is community property, as well as the increase in value of the partnership due to Whitney's efforts and goodwill.

#### Conclusion

#### **a. How should it be valued**

Rule: Where a business's success is based largely upon the spouse's labor, the Pereira accounting is used. Under Pereira, a fair return on a separate property investment is allocated and then any excess is allocated to the community. Where a business is capital heavy, the Van Camp accounting may be more appropriate. Under Van Camp, the community is allocated the value of the spouse's usual salary and all other amounts remain separate.

Analysis: Whitney is a dentist. Her business is largely based upon her personal services, not upon capital. Therefore, a Pereira accounting should be used and a fair return on her separate property should be allocated to her, and all excess should be allocated to the community.

#### Conclusion

#### **b. As of what date should it be valued?**

Rule: Generally, assets are valued at or as close to the time of trial as possible, but for separate businesses and goodwill, we value at date of separation.

Analysis: This is a separate business that includes goodwill.

#### Conclusion

2. What interest, if any, does the community have in the home and how should it be distributed upon dissolution?

- a. Rules:
    - i. Property acquired during marriage is presumed community. Prior to 1975, property acquired during marriage in joint tenancy was presumed to be separate property of the spouses. Now the presumption is that property acquired in joint tenancy is community property.
    - ii. Since 1984, any transmutation of the character of the property must be in a written instrument with a clear expression of intent signed by the spouse against whom enforcement is sought.
  - b. Analysis: The property was acquired in 1984. There is no signed writing changing the character of the property.
  - c. Conclusion
3. Should Harold have a right to increased alimony?
- a. Rule: The court can consider the effect of the education/training in determining the appropriate spousal support award. There is a rebuttable presumption that the community has **not** substantially benefitted from the education if the marriage ended less than 10 years after conferment of the degree/certificate and has if the marriage ended more than 10 years after the degree/certificate was earned. Alimony is also appropriate where one spouse has a lesser earning potential.
  - b. Analysis: The rules pertaining to education typically apply where the educated spouse was obtaining the education during marriage. Here, Whitney and Harold did not marry until after she obtained her education. In any event, they were married over 20 years and a court could presume that Harold obtained the benefits of Whitney's education. Harold, however, was a stay-at-home father who supported Whitney through household management and child-rearing. Harold is now having difficulty finding a job due to his long-term absence from the workforce.
  - c. Conclusion



1)

California is a community property state. All property, real or personal, acquired after the date of a marriage until the date of separation is presumed to be community property unless the property was acquired by gift, bequest, or inheritance. The profits and issues of separate property are also classified as separate property. Debts and other liabilities are property and the same presumption applies: debt and liabilities accrued after the date of a marriage are presumed to be community property. *Strong Start!*

**Hal and Wendy separated on April 1, 2020.**

The date of separation is a legally significant date as it concerns community property. The date of separation is the date on which the community property presumption no longer applies. To determine the date of separation, courts look to the facts of each case. Separation is deemed to have occurred when one of the spouses: (1) intends to end the marriage AND (2) takes physical actions consistent with the intent to be permanently separated from their spouse. *Precise rule statement*

**Hal intended to permanently end the marriage when he told Wendy he wanted a divorce.**

Here, Hal unequivocally told Wendy that he wanted a divorce on April 1, 2020. The first element of separation was satisfied on that date. Hal did not say he "wanted to take a break" or "just needed some space"—he used the actual word 'divorce' which unequivocally shows that he intended to end his marriage to Wendy. Although Wendy did not want a divorce on that date, separation does not require the consent of both spouses. The intent of one of the spouses to end the marriage is sufficient. *Fantastic analysis and use of the facts here.*

**Although Hal and Wendy did not live apart, their physical separation inside the home and the separation of their finances is probably sufficient to meet the requirement for legal separation.**

The facts do not state that Hal moved into a separate bedroom on a date later than April 1, 2020, so it will be assumed that all of the acts constituting this separation occurred on that date. Wendy will argue that Hal moved into a separate bedroom, and all sexual relations between himself and Wendy ceased on that date. Although legal separation requires physical acts consistent with the intent to permanently end the marriage, it is not strictly necessary that one of the spouses actually move out of the family home. Hal and Wendy chose to continue living together due to financial considerations. Hal and Wendy were no longer sleeping together, and opened separate bank accounts where they



each deposited their own earnings. This should be sufficient conduct to demonstrate to the Court that Hal had no intention of reconciling with Wendy and the separation was complete as of April 1, 2020.

Hal, on the other hand, will argue that the physical separation in the home was not sufficient. Hal will point to the fact that they continued to dine together and that Wendy continued to do his laundry. Gifts were exchanged, and Wendy accompanied him on a trip for his mother's funeral. Hal can argue that these acts sufficiently diminish their physical separation, and that they were not really separated until the petition for dissolution was filed on July 3, 2021.

Ultimately, Wendy has the better argument. Although the dinners together and gift exchanges tend to show they had not irrevocably separated, the physical separation of bedrooms and finances is a very compelling argument to show they had permanently separated when Hal demanded the divorce on April 1, 2020. Therefore, the Court will find that the parties legally separated on April 1, 2020.

**1. The lottery proceeds are separate property if Wendy purchased the winning ticket out of her own funds.**

As stated above, in California property (real or personal) is presumed to be community property if it was acquired during a marriage. All other property is separate property. The date of marriage of Hal and Wendy was not provided, but it is not important for this analysis. Wendy did not purchase the winning lottery ticket until 2021--after the separation date of April 1, 2020. The lottery ticket was, therefore, separate property and the profits Wendy realized from it are also her separate property.

Hal will argue that the lottery ticket and the winnings are community property for two reasons. Hal will first argue that the lottery winnings are community because the lottery ticket was purchased during the marriage. Wendy did not file her petition for dissolution until July 3, 2021 (two days after she won the prize.) But for the reasons discussed above, the trial court will find that the date of separation was April 1, 2020 and Hal will not prevail on this argument. Hal will also argue that the lottery ticket is community property because it may have been purchased with community funds.

Hal and Wendy commingled their earnings into a joint account which they opened when they were married. The commingling of funds does not necessarily destroy the separate property characterization of the funds in the account, so long as the funds can be traced to separate sources. Wendy may have purchased the ticket with funds taken from the joint account shared between Hal and Wendy. The funds in the joint account were ordinarily used to pay the living expenses of the

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community prior to separation, and continued to pay the living expenses of Hal and Wendy after they separated.

Because the ticket was not purchased until after the date of legal separation (April 1, 2020), the presumption that the ticket was community property does not apply. If Hal can trace the funds in the account and prove that Wendy's separate funds in that account were depleted when the ticket was purchased, Hal could have a valid claim to the lottery proceeds. On the other hand, Wendy can trace the funds in the account and prove that they were her own separate funds that purchased the ticket. Hal would then have no claim. Of course, if Wendy purchased the lottery ticket out of her own separate bank account, then she will have purchased separate property with separate funds after the date of legal separation--making all the lottery proceeds her separate property alone.

**2a. If the lawsuit is filed prior to the Court's judgment, the hospital may look to all three estates for payment of Hal's medical bills.**

Ordinarily, the community is not responsible for debts incurred after the date of separation. Those debts would be borne by the spouse who accrued them. For example, if one spouse purchased a new car after the date of separation and defaulted on the payments, the finance company would not be able to look to the community for repayment of that debt (unless the finance company was unaware of the separation, and wrote the loan based on the community finances.) But there are exceptions to this rule.

Although Hal was injured after the date of separation, Hal and Wendy were still married and the community is responsible for liabilities which arise out of the necessities of life before the judgment of dissolution. Here, Wendy and Hal separated on April 1, 2020. A little over a year later, Hal was severely injured and accrued very large hospital bills. Hospital bills that were incurred for treatment of injuries are definitely necessities of life, and the community is responsible for the payment of those bills.

In this scenario, the payment of Hal's bills would first be satisfied out of Hal's separate property. If Hal's separate property was not sufficient to cover the entire \$400,000, the community would be liable for the balance. After community funds were exhausted, the hospital could reach Wendy's separate property to cover the balance. Because Wendy just won \$500,000 in the lottery, she would have sufficient separate funds to cover Hal's hospital bill.

**2b. If the lawsuit is filed after the Court's judgment, the hospital may only look to Hal's separate property.**

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After the date of dissolution and the judgment assigning liability for the hospital debt to Hal, Wendy would be shielded from the collection efforts of the hospital. The divorce decree from the court and the judgment assigning the hospital debt to Hal would be an absolute defense to any action against Wendy for Hal's debts. The hospital could not reach any of Wendy's separate property to pay the bills after the final judgment of dissolution and the division of property.

**3. Married persons are not jointly and severally liable for the torts committed by their spouses unless they would otherwise be liable if they were not married.**

Marriage does not create any sort of presumption of joint tort liability. Tort liability is assigned to married persons exactly the same way as it is assigned to anyone else. For Wendy to be liable for Hal's tort (presumably, Hal's negligence), there would need to be some other relationship between them that created the liability. If Hal was Wendy's employee (as well as her husband) then perhaps Wendy could be liable under a theory of respondeat superior. But no such relationship is stated in the facts, and none will be assumed here. For Wendy and Hal to share liability as joint tortfeasors, the tort would have had to have been committed to benefit the community.

There is no reasonable argument that can be made by the victim of Hal's drunk driving that would make Wendy liable as a joint tortfeasor. Hal was certainly not negligent for the benefit of the community. The court would, therefore, assign Hal's tort liability to Hal and order it paid out of Hal's separate property. The plaintiff would not be able to reach Wendy's separate property to pay the judgment.

You hit both issues I was looking for: (1) W's own negligence; and (2) benefit to the community.

This essay is model caliber. You demonstrate clear command of the material and you went above and beyond in your analysis.

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2)

In California, real and personal property acquired after marriage and before separation is presumed to be community property. This presumption does not apply to property which was acquired by gift, bequest, or inheritance and does not apply to the profits, rents, and issues from separate property so acquired.

**1. The prenuptial agreement between Henry and Hayden is not enforceable because the 7-day waiting period was not satisfied, and the agreement is unconscionable.**

A valid prenuptial agreement can cover any topic, unless the agreement promotes divorce or otherwise violates public policy. To be valid, the agreement must be in writing. Further, the party against whom the prenuptial agreement is sought to be enforced must have been given at least 7 days between presentation of the final agreement and the date it is signed, and must be advised that they should seek independent legal counsel prior to signing it. If the party against whom the agreement is to be enforced did not have legal counsel, a separate writing waiving legal counsel is required. Finally, an unrepresented party must have a separate writing presented to them, in a language they understand, explaining the full consequences of the agreement. Unlike other contracts, consideration is not required for a prenuptial agreement.

Here, the only terms of the prenuptial agreement are that all property acquired within the first five years would be Henry's separate property and that Hayden would waive spousal support. The first term is not particularly controversial. It is not unusual for couples to enter prenuptial agreements where they give up all or a part of their community property rights. This part of the agreement does not violate public policy.

The second term, that Hayden would waive spousal support, is a bit more problematic, but is also not against public policy. When a prenuptial agreement is litigated in a dissolution action, the Court evaluates this particular provision at two points in time: whether it was unconscionable when it was signed, and whether it is now unconscionable when a party is seeking enforcement. To be enforceable, the provision waiving spousal support must not be unconscionable at either point in time. On its face, then, the prenuptial agreement does not violate public policy and this term is met. But the agreement is only enforceable if all the other terms comply with the law.

**The 7-day rule is absolute, and any violation of the 7-day rule makes a prenuptial agreement invalid.**

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As stated above, there is a mandatory 7-day waiting period between the time the parties are presented with the final agreement and the date they must sign the agreement. Here, only 5 days elapsed between the date Hayden was presented with the agreement and the day he signed it. There was no way Hayden could have waited the mandatory seven days, because the agreement was presented to him only 5 days before the wedding. The 7-day rule was meant to prevent the outcome in *Bonds v. Bonds* where Barry Bonds's ex-spouse was presented with a lengthy prenuptial agreement to sign at the 11th hour before their wedding. The 7-day rule is meant to give the parties to the agreement ample time to look it over, understand it, and seek legal counsel. Because the agreement was presented in violation of the 7-day rule, the agreement is void and unenforceable.

**Even if the agreement was not unenforceable due to a violation of the 7-day rule, Hayden was not properly advised to seek counsel, and did not properly waive counsel.**

The second part of the 7-day rule is to ensure that the party against whom enforcement is sought has ample time to speak with their own, independent attorney prior to entering the agreement. Hayden should have been advised, either by Henry or Henry's father, to seek independent legal counsel prior to signing any documents. If Hayden did not wish to do that, he was required to confirm his waiver of counsel in a separate writing. Neither happened here. Henry's father was coercive when he told Hayden "you don't need anyone else to review this for you." Henry's father was a lawyer, and this could have easily been perceived by Hayden to be official legal advice given to him by a lawyer—setting aside the fact that what Henry's father did was completely unethical. Hayden should have been told to consult independent counsel, and if he chose voluntarily to forego speaking with his own independent lawyer, he was required to confirm that waiver in a separate writing. Hayden did not do so, and therefore the prenuptial agreement is void on that ground as well.

**2. Henry and Hayden have equal rights to the house, as 100% of the house is community property, but Henry will receive a \$200,000 reimbursement from the community for the down payment because he paid it with separate funds.**

As stated above, real and personal property acquired in California after the date of marriage but before separation is presumed to be community property. This presumption can be rebutted. Henry will make several arguments attempting to rebut this presumption, but all of these arguments will fail.

**Henry will argue that the prenuptial agreement makes 100% of the house his separate property.**

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First, Henry will rely on the prenuptial agreement to rebut the community presumption. If the prenuptial agreement was valid, then Henry can successfully rebut the community presumption. Their marriage did not last more than 5 years, so according to the prenuptial agreement, all the property acquired during the marriage would have been Henry's separate property. But, of course, the prenuptial agreement was *not* valid as was explained above. Henry will not prevail on this argument.

**Henry will next argue that his \$200,000 contribution gives him a larger share of the house.**

Next, Henry will argue that because he contributed \$200,000 of his separate property to the purchase price of the house, he owns a larger share of the house than Hayden. This argument will also fail. It is true that Henry had a large amount of separate property that he brought to the marriage (a \$2,000,000 gift from his father.) As stated above, gifts received during marriage are not community property. The \$2,000,000 was therefore Henry's alone. But that money does not necessarily *stay* separate property. If that money is used to purchase property for the community, the community property presumption applies.

To overcome that presumption, it must be clear from the transaction that the parties intended for the property to be separate property and not community. Absent a prenuptial agreement, this would require some signed writing from Henry and Hayden confirming that the house was to be Henry's separate property. No such writing exists--the facts state Hayden did not sign anything other than the (void) prenuptial agreement stating that the home was Henry's separate property. The fact that Henry took title to the house in his name alone is not dispositive, and is not a sufficient writing to transmute the property from community to separate property.

The only thing Henry may claim is reimbursement from the community for the \$200,000 he put down on the house. This reimbursement would be paid dollar-for-dollar, and Henry would not be entitled to interest or appreciation on the home upon sale.

**Hayden will argue that the house is community property, because he made the mortgage payments.**

Wages from employment are presumed to be community property. The same rule applies to wages as any other community property--to be transmuted from community to separate property, there must be a writing confirming that wages earned are to be separate property. No such writing exists here. Hayden was therefore making the mortgage payments with community property. Even though the mortgage was in Henry's name, if the community makes payments toward the property which

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reduces the principal balance, the community is given pro rata ownership to the extent the community pays down the balance. Of course, for the reasons explained above, the house is 100% community property anyway, so this does not ultimately matter when the division of property occurs.

**Hayden will argue that Henry is not entitled to any reimbursement because the \$200,000 Henry paid was a gift to the community.**

Hayden will also argue that there is no reimbursement due to Henry because the \$200,000 from Henry toward the purchase price was a gift to the community. There is ample evidence, though, that Henry did not intend to give the community a gift of any funds whatsoever. Henry (and his father) took great pains to ensure that all the property acquired during marriage was separate property. The existence of the (void) prenuptial agreement, and the fact that the house and mortgage were both taken in Henry's name alone indicate that there was no intent for Henry to give a gift to the community. In Henry's mind, there was no community at all, and one cannot gift something to an entity which does not exist. Hayden's argument that Henry gave a \$200,000 gift to the community is not persuasive.

The house is, therefore, 100% community property, subject to a \$200,000 reimbursement to Henry when the house is sold when the community property is divided.

**3. Hayden has no recourse against Henry for his investment in DNA and Disease. Boo!**

Spouses have a fiduciary duty to one another from the inception of the community (the date of marriage) until the date the community is dissolved by the court. These duties include a duty of care, the duty of good faith and fair dealing, and the duty of disclosure. The fiduciary duties of spouses is more like the duty of business partners--not duties of trustee and beneficiary. The duty of care requires that each spouse make their best judgments about how to preserve the community's assets, but the duty does not impose on them the duty to be *correct*.

Here, Henry invested his income (earned as wages for working for his father) in DNA and Disease. As stated above, wages are presumed to be community property. The prenuptial agreement was presumably intended to apply to Henry's wages as well, but because the agreement was void and there was no written agreement otherwise, Henry's wages are community property. Henry therefore owed a fiduciary duty to Hayden to exercise care in how he spent the community funds.

**Hayden had control over Henry's income, even though he did not exercise it.**

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Hayden will argue in court that Henry breached his fiduciary duty by investing community property in risky investments like DNA and Disease. However, the law gives both spouses control over community property. Upon learning of Henry's investment plan, Hayden could have objected and prevented Henry from investing the community property in a risky investment. Hayden, however, acquiesced to Henry's desires and paid the mortgage with his earnings, allowing Henry to invest in DNA and Disease. The community shares in both risks and rewards of investing.

Hayden cannot now, with the benefit of hindsight, argue that Henry breached his fiduciary duty. Hayden knew all along what Henry was investing in. Hayden could have taken steps to prevent the investments, or encourage Henry to diversify the investments he was making, or done his own research into DNA and Disease and discover on his own that it was a scam. Hayden did none of these things and was content to allow Henry to manage the investments without his input. Hayden cannot, therefore, sue Henry for reimbursement to the community for any money he lost on DNA and Disease.

If Henry did not tell Hayden about the losses, or that DNA and Disease turned out to be a scam, then Henry has breached his fiduciary duty of disclosure and Hayden can petition the court for an accounting of all the money that was invested and the disposition of the same.

**if Henry continued to invest in DNA and Disease after he learned it was a scam, then Hayden may seek reimbursement from Henry.**

If, after learning DNA and Disease was a scam, Henry continued to sink money into it, then Henry *has* breached his fiduciary duty of care. Henry and Hayden were married for 4 years and 2 months. The scam was discovered only a year into the investment. If Henry continued to invest after he knew the company was a scam, then Hayden has several options. At the time of divorce and division of the assets, Hayden can ask the court to reimburse the community out of Henry's separate property. If it is unclear when the investments were stopped, Hayden can also petition the court for an accounting to determine exactly when and how the money was lost. Based on the results of the accounting, Hayden can then ask for reimbursement.

An absolute pleasure to read.

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3)

In California, real and personal property acquired after marriage and before separation is presumed to be community property. Property acquired by one spouse as a result of gift, bequest, or inheritance is separate property, as are the profits, issues, and rents from property so acquired. Property owned by one spouse before marriage is separate property.

**1. Whitney and Howard were married six years before Whitney acquired the dental partnership, therefore the dental partnership is community property.**

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Whitney owned a dental practice two years before Whitney and Howard were married. The dental practice she owned was her separate property. But in 1990, Whitney and Dennis formed a professional partnership. The interest Whitney acquired in the partnership was acquired six years after Whitney and Howard were married, and there was no agreement between Whitney and Howard (in writing, oral, or otherwise) that the professional partnership would be separate property. Therefore, the community property presumption applies and the community has an interest in the dental partnership between Whitney and Dennis.

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Ordinarily, spouses have equal management and control over community property. However, this right of management and control does not apply to professional partnerships like the one at issue in this case. Whitney, as a partner, has exclusive management and control over the business (which she shares with Dennis, who has the same right to management and control as a partner, in accordance with the partnership agreement between them.) Whitney may not, however, dispose of the community's interest in the partnership without the consent of Howard. The facts do not say that she has ever attempted to do so.

The partnership agreement stated that no spouse of a partner had any interest in the partnership other than economic. This is consistent with the law as it applies to the management and control of a professional business that is managed by one of the spouses. The community's interest in the partnership is strictly economic. Howard cannot manage the business, even though he has a community interest in the partnership.

A major part of the partnership's assets is the office building, purchased for \$800,000. The fact pattern states that each partner made a \$100,000 deposit toward the purchase price. The facts do not state the source of the \$100,000. There are several possibilities.

**If Whitney paid the \$100,000 deposit out of money she received from selling her previous practice, then the community had no interest in the building.**



When separate property is sold, the money received for the purchase is also separate property. The facts do not state what Whitney did with her previous dental practice when she formed a partnership with Dennis. If she sold her practice to someone else, then the money she gained from that sale would have been her separate property. If Whitney then took \$100,000 of that money to place a deposit on the building, then the community would have no interest in the building because it was purchased with traceable separate funds.

**If Whitney paid the \$100,000 deposit out of money she received as a salary, then the community has an interest in the building.**

Money received as wages during a marriage are presumed to be community property unless there is a written agreement between the spouses to make that money separate property. No such agreement appears here. If Whitney paid the \$100,000 out of her salary she was receiving as a dentist (either from her own practice after Whitney and Howard were married, or from her salary from the partnership formed in 1990), then those funds were community funds and the community has an interest in the building. If the building were purchased with community funds, then the community owns a pro rata share of the building, notwithstanding the fact that title was taken in the name of the partnership.

**Howard signed a quitclaim deed to the partnership, but Whitney did not--so if the building was ever community property, it's still community property.**

Community property belongs to the community. Disposing of a piece of real property (via sale, encumbrance, gift, or transfer) requires the consent of both spouses. Because there was no consideration paid from the partnership to Howard for the community's interest, the transfer would be an inter vivos gift from Howard to the partnership. For the quitclaim deed to be an effective gift and transfer the community's interest to the partnership, Howard and Whitney must both sign the quitclaim deed to the partnership to fully divest the community of its interest in the property. Because Howard was the only one who signed the quitclaim deed, Whitney can void the gift and reclaim whatever portion of the building is owned by the community.

**Because the facts do not give sufficient information to conclude that Whitney paid her share of the deposit with separate funds, it will be assumed that the \$100,000 she paid toward the deposit on the building were community funds.**

Because the partnership was formed after the date of marriage, and the purchase of the building was partly financed using community funds, the community's interest in the partnership is Whitney's

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entire interest in the partnership (including goodwill) plus a pro rata share of ownership of the building, including appreciation.

**1a. The partnership should be valued at fair market value and include Whitney's goodwill.**

The partnership agreement provides that one partner may buy out the other's interest for \$250,000. This would imply that the value of the partnership is \$500,000—but this is only true as to the value of the partnership between partners. Partners often set a fixed price in partnership agreements for a buy-out of other partners to avoid winding up the entire (likely profitable) partnership, selling all of its assets, and dividing the cash per each partner's interest. These fixed buy-out amounts tend to exclude goodwill and are a matter of convenience for the partners. But the value of \$500,000 was set by the partners in 1990 when the partnership agreements were signed. The actual value of the partnership is likely much more than that. The building itself is worth \$800,000, and Whitney's yearly salary was \$800,000. The Court would need to rely on expert testimony and comparable sales to determine the actual, fair market value of the partnership. To declare the partnership worth \$500,000 would be consistent with the partnership agreement, but would deprive the community of a substantial amount of value.

Additionally, the Court should add the value of the partnership's goodwill to the value of the partnership. Goodwill is established when a business is out-earning comparable businesses in the area. To establish the amount of goodwill due, the court will determine what the fair market value of other dental practices in the area is, subtract that from the value of the partnership, and assign the rest as goodwill. The community is entitled to this amount, as well.

**1b. When community property is divided, the value of community assets should be valued as close as possible to the time of trial.**

As previously stated, the original valuation of the partnership was \$500,000 in 1990. This is far removed from the date of trial and has little to no relation to the actual value of the partnership today. The court will need to consider the value of other dental practices near the time of trial to fix an accurate value of the partnership.

**2. The home is not community property because Harold and Whitney took title as joint tenants in 1984.**

California law has undergone substantial changes as it relates to community property. Prior to 1975, California law provided a "married woman's presumption." That is, when title was taken by a married woman in her own name, the law presumed that property to be the married woman's separate

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property, even if it was acquired during marriage and even if it was acquired using community funds. Had Harold and Whitney taken title to the home as joint tenants prior to 1975, Whitney's share of the home would have been 50% as her separate property, and Harold and the community would each have 25% shares of the property.

Since the property was acquired in 1984, the married woman's presumption does not apply. Even though Whitney and Howard took title as joint tenants, the presumption that the house is community property applies. This presumption was easier to overcome in 1984 than it is now. Prior to 1985, the form of title was sufficient to rebut the community presumption. Whitney and Howard took title of the house as joint tenants. A joint tenancy is similar to tenancy-in-common, but joint tenants enjoy the right of survivorship. Because Whitney and Howard took title as joint tenants, each of them has an undivided one-half interest in the house. The community does not have an interest in the home.

Under these facts, this is a distinction without a difference. If the house were community property, Whitney and Howard would each be entitled to 50% of the value of the home at the time of trial. As joint tenants, even though the home is not community property, the interest in the house will still be divided 50/50 between Whitney and Howard. The only situation in which the distinction would matter is if one of the spouses died. Under a joint tenancy, the other spouse would always take a 100% interest in the home because of their right of survivorship. If, on the other hand, the home were community property and one of the spouses died, the surviving spouse may or may not take a 100% interest in the home. The deceased spouse could leave their half of the community property (the house) to their children and the surviving spouse would hold title as tenants in common with the surviving children.

Under these facts, though, the house is not community property and the court will either give the entire house to one of the spouses with an equalizing payment from the other (in this scenario, Whitney would be best positioned to make an equalizing payment, so Howard would receive the cash and Whitney would receive the house) or order a partition by sale and divide the proceeds between Whitney and Howard.

**3. Howard will not receive increased alimony because he has already received the benefits of Whitney's education and work.**

Alimony, also known as spousal support, can be awarded in a divorce action based on the equities involved. California has a strong interest in preventing its citizens from becoming public charges and going on state benefits. If one spouse has a far greater earning capacity than the other, then the

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Court is likely to award spousal support for a period of time to allow the spouse with the lower earning capacity to re-enter the workforce and become self-sufficient.

This effect is especially pronounced when one of the spouses puts the other through college. If Howard and Whitney were still very young and Howard had worked full time to put Whitney through dental school, Howard would be compensated for his efforts with an increased alimony award. This is to prevent an injustice where one spouse gets all the benefit from the education and earning ability, while the other spouse is left with nothing. Here, Whitney earns \$800,000 per year and Howard earns nothing. This is after a 31 year marriage, though. Howard reaped substantial benefits of Whitney's education and work as a dentist for three decades. He was able to stay at home and care for the children, and presumably lived a comfortable lifestyle. To prevent Howard from receiving state benefits, Whitney will likely be ordered to pay some spousal support to Howard while he re-enters the workforce, but he will not receive a substantial increase like he would had they divorced early in the marriage.

**END OF EXAM**

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