

# Monterey College of Law

FINAL EXAMINATION  
COMMUNITY PROPERTY  
PROFESSOR S. CAVASSA  
FALL SEMESTER, 2019

This exam consists of 3 essay questions. You will have 3 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.

Exam Question 1

On January 1, 2010, Tina and John use an online form completion website to create a premarital agreement. The terms of the premarital agreement are:

- Tina's premarital home, Blackacre, purchased for \$400,000 and at time of the agreement worth \$500,000 and having no mortgage, shall remain her separate property;
- Each party's earnings during marriage shall be their separate property;
- If the parties have children and later divorce they will share custody of their children 50/50;
- If the parties later divorce neither shall pay the other any spousal support; and
- Each party shall pay their own attorney's fees in a later divorce, unless the divorce is caused by infidelity in which case the unfaithful spouse shall pay all of the attorney's fees for both parties.

Tina and John are both completely in agreement with the above terms, and sign their premarital agreement on January 5, 2010. The premarital agreement contains a provision that both parties recognize they have the right to retain independent counsel and have had an opportunity to do so, but they both waive that right. It also has a severability clause, stating that if any provision of their premarital agreement is found to be unenforceable, the remainder of the agreement is still in full force and effect.

On February 14, 2010, Tina and John marry.

During 2014, Tina receives a bonus from work of \$200,000. Tina and John use this \$200,000, and \$50,000 that John inherited in 2012, to remodel the kitchen and bathrooms at Blackacre.

On March 1, 2018, John discovers that Tina has been having an affair with Chris, who John believed was Tina's ex-husband. When John confronts Tina, Tina tells John that she actually never finalized her divorce from Chris, so in fact she has done nothing wrong in reuniting with Chris. She alleges John should be ashamed for having an affair with Tina for all of these years.

John immediately moves out of Blackacre and seeks legal advice. At the time of John and Tina's separation, Blackacre has a value of \$1,000,000.

Assume the parties are domiciled in California at all times and analyze under California law.

1. Analyze John and Tina's premarital agreement. Is the agreement, and each of its terms, valid or invalid, and why?
2. Is John and Tina's marriage valid or invalid, and why? If it is invalid, what rights does John have?
3. Analyze the ownership interests and reimbursement rights, if any, in Blackacre.

Exam Question 2

In 1996, Will starts a software company "Will's Software". He works hard at his business, often 50-60 hours a week. The software teaches how to do-it-yourself for home improvement tasks, such as building a deck, or repairing a refrigerator. Will is the only employee of Will's Software from 1996 until 2003 – he does all of the product creation, marketing, sales, and financial management. In 2003, the software is discovered by a major real estate company, who decides that providing this software to new homebuyers as a gift would be good marketing. Will meets with the real estate company executives, and cultivates a strong relationship with them. He convinces them to buy an unlimited number of Will's Software subscriptions for a five year period. At the conclusion of the contract with the real estate company, Will's Software is valued at \$350,000. Between 2003 and 2008, Will's involvement in the company decreases. He hires a professional business manager and other employees, and reduces his own work hours to 15-20 per week. Over the years, the real estate company becomes increasingly pleased with the results of utilizing Will's Software products as a gift for it's new homebuyers, and in 2008 buys the company Will's Software for \$1,000,000.

In 2001, Will met Cathy and the two married that same year. Cathy was a retail manager and earned \$50,000 per year. Will's Software was valued at \$200,000 when the parties married. Will drew a salary of \$100,000 from Will's Software in 2001, 2002 and 2003. In 2004, he drew a salary of only \$25,000 as company profits were spent on company expansion. In 2005, 2006, and 2007, Will drew a salary of \$150,000.

In 2009, from the sale proceeds of Will's Software, Will and Cathy buy a house at 123 Main Street for \$800,000 cash. They take title as "Will and Cathy, Husband and Wife." The parties use the remaining \$200,000 in proceeds from Will's Software to take a \$25,000 vacation, and to invest \$175,000 in Apple stock. Will takes a job at another software company, as an employee, earning \$125,000 per year.

In 2015, Will and Cathy separate. They own 123 Main Street, valued at \$1,300,000. The Apple stock is worth \$975,000. They have \$150,000 in a savings account held in Cathy's name, accumulated from their earnings during marriage.

Assume the parties are domiciled in California at all times and analyze under California law.

Analyze the ownership interests in 123 Main Street, the Apple stock, and the savings account.

**Monterey College of Law**  
**Community Property**  
**Fall 2019**  
**Prof. S. Cavassa**

Exam Question 3

On November 15, 2016, Jim and Brad marry. Jim is a law student and works part-time as a law clerk, and Brad works as an accountant. Prior to their marriage, and continuing after, Brad provides for most of their regular living expenses, as Brad's income exceeds Jim's income.

Between January 2017 and August 2019, Brad and Jim pay \$30,000 toward Jim's tuition and registration from their joint earnings, and Jim takes out a student loan for \$60,000 for the remainder of Jim's tuition and registration.

On October 1, 2019, the parties have a huge fight while Jim is studying for the bar exam. Jim yells that he wants a divorce, and storms out of the parties' apartment. The next day, Jim goes to the bank, takes half of the balance out of Jim and Brad's joint checking account, and opens a checking account in Jim's sole name. Brad, distraught, immediately takes a three month leave of absence from work and stops receiving any employment income. Three days later Jim feels badly, and returns home. Jim apologizes to Brad, and Brad says he forgives him. However, for the next two months Jim and Brad do not socialize together and barely speak to one another, as Jim continues to study for the bar exam. Jim does not return the money he took to the joint checking account. Brad does not return to work.

On November 30, 2019, Brad uses one dollar from the parties' joint checking account to buy a lottery ticket and wins One Million Dollars. On December 1, 2019, Brad files a petition for dissolution of marriage, alleging a date of separation of October 1, 2019. On December 5, 2019, Jim files a response to the petition for dissolution of marriage, alleging a date of separation of December 1, 2019.

The parties' major assets and debts to be resolved in the dissolution are: the contents of the parties' joint checking account, the contents of the checking account in Jim's name, the winning lottery ticket, and \$60,000 in student loans.

Assume the parties are domiciled in California at all times and analyze under California law.

1. Analyze all pertinent property division and reimbursement issues.
2. Analyze the potential results if Brad conceals the existence of the lottery ticket, and does not disclose it in his declaration of disclosure in the divorce.

## MCL-Community Property -Answer Overview-Fall 2019-SCavassa

### Question 1

#### Premarital agreement

1. Must be in writing, signed by both parties, prior to marriage, and cannot promote disso.
2. 7 day rule – party must be given the agreement and advised to seek independent counsel at least 7 days prior to signing. Timing of wedding not relevant to 7 day rule.
3. Waiver of independent counsel must be in a separate writing.
4. Cannot contract regarding child custody.
5. Cannot install fault divorce (atty fees provision).
6. Spousal support provisions require independent counsel or are unenforceable.

#### Putative spouse status

1. John had a reasonable good faith belief in the validity of his marriage to Tina. He can elect putative spouse status. Tina cannot elect putative spouse status.

#### Blackacre

1. Tina's separate property despite invalidity of premarital agreement.
2. Tina's \$200k bonus was community property – FC 760.
3. John's \$50k inheritance was John's separate property – FC 770.
4. John is entitled to a \$50k reimbursement for his SP contribution to BA – FC 2640.
5. The community is entitled to a Moore Marsden interest in BA. Interest will be dollar for dollar \$200k contribution, plus a percentage of appreciation. Formula =  $(200k/\text{purchase price} + 200k)$  multiplied by appreciation.

### Q2

#### 123 Main Street

1. Characterization of purchase price of Main Street dependent on Pereira/Van Camp analysis of business.
  - a. If Van Camp, was salary fair market each year – from 2001 to 2003, Will drew 100k, but in 2004 only \$25k, in 2005 to 2007, \$150k. Will's post-sale job pays \$125k.
  - b. If Pereira, discuss date of marriage value and reasonable rate of return.
  - c. Can be both Pereira/Van Camp during different periods.
    - a. Through 2003 Will is the only employee, appears to be labor driven and likely Pereira.
    - b. Between 2003 and 2008, Will's involvement decreases. He hires professional business manager and reduces work hours. At the same time, market forces are increasing value. Could 2003 to 2008, or some portion thereof, be Van Camp?
2. Growth in Main Street will be community property – FC 2581.
3. Will may be entitled to a reimbursement for SP contribution to Main Street to the extent he had a SP interest in sale proceeds of Will's Software.

#### Stock

1. Characterization of purchase price dependent on Pereira/Van Camp.
2. If stock was SP, then growth on stock is SP – FC 770.

#### Savings Account

1. Earnings during marriage are CP – FC 760.
2. The account being held in Cathy's name is irrelevant unless there is a transmutation under FC 852.

Q3

Date of Separation - FC 70 – when was statement and conduct consistent with termination of marriage?

Checking Accounts and Lottery ticket – all CP as acquired during marriage or with CP.

Law School Expenses and Student Loans - 2641

1. Expenditures - \$30k reimbursable, living expenses not reimbursable.

2. Student loans – Assigned to Jim without offset

Concealment – Discuss fiduciary duties. If Brad conceals ticket and ticket is CP, if fraud oppression or malice, Jim could receive 100% of proceeds. If Brad conceals and not F/O/M, discovery sanction.



1)

Question 1:

1. Is the premarital agreement between John and Tina valid?

Premarital Agreement (UPPA - 1986)

A premarital agreement is valid if it is signed by both parties. The agreement cannot contain any child custody or support provisions. However, the parties can always use a premarital agreement to divide both their community property and separate property. Under Family Code 1612 if the premarital agreement contains a provision that waives or limits spousal support then the following requirements must be met: (1) the party against whom enforcement is sought must be represented by counsel (this cannot be waived); and (2) the spousal support provision will be unconscionable at the time of performance. *Substantive question or not*

Further, Family Code 1615 states that a premarital contract will be not be considered voluntary unless the party is represented by counsel or the party waives counsel in a separate writing. Additionally, a premarital cannot contain provisions that are contrary to the public or revive fault. More importantly, the parties should have 7 days from the time they are presented with the premarital agreement to the time they sign unless they are represented by counsel. Moreover, the agreement cannot promote divorce.

Here, the facts state that on January 1, 2010, Tina and John used an online form completion website to create a premarital agreement. The parties agreed that Tina's premarital home, Blackacre, purchased for \$400K and at the time of the agreement worth \$500K and having no mortgage shall remain her separate property (SP). This specific term would be perfectly valid under a premarital agreement because parties can make terms that divide their property. The second term states that each party's *separate property* shall remain their SP. Similar to the first term, the provision would be valid because the

parties are separating their funds which is perfectly acceptable. The third provision states that if the parties have children and later divorce they will share custody of the children 50/50. Unfortunately, this provision is not valid because a premarital agreement cannot contain child custody provisions, the court maintains jurisdiction of child custody. Term four states that if the parties later divorce neither shall pay the other any spousal support, given that this provision contains a spousal support provision the provision would be invalid unless the parties retained independent counsel. As for the last term, that states that each party shall pay their own attorney's fees in a later divorce, that specific part would likely be found to be unenforceable because the court can always order the higher earning spouse to pay the attorney fees. The last term also states that the parties shall pay their own attorney's fees in a later divorce, unless the divorce is caused by infidelity in which case the unfaithful spouse shall pay all of the attorney's fees for both parties. This provision is not enforceable because the "infidelity" portion revives fault which is not allowed.

In summary, terms 3 and 5 would not be valid. As for term 4, it would be valid if the parties had an attorney. The rest of the terms would not be valid because the facts state that the premarital agreement contains a provision that both parties recognize they have the right to retain independent counsel and have had an opportunity to do so, but they both waive that right. This is not okay, because the waiver must be in a separate writing.

*Entire prenup invalid b/c No 7 days between presentation + signing, as well.*

## Putative Spouse & QMP

A putative spouse is a spouse that has a good faith belief that he/she was married. Yet, the marriage was invalid. The court uses a subjective test to determine the reasonableness of the belief. The subjective test is supported by objective facts. A person that claims a



putative spouse status and is actually granted such status has quasi-marital property rights (QMP). In California QMP is treated exactly the same way as community property (CP).

Here, the facts state that on February 14, 2010, Tina and John married. On March 1, 2018, John discovered that Tina had been having an affair with Chris, who John believed was Tina's ex-husband. When John confronted Tina, Tina told John that she actually never finalized her divorce from Chris, so in fact she has done nothing wrong in reuniting with Chris. Given the facts, John would be the only one that can claim a putative spouse status because Tina knew that her divorce was not finalized. John will likely argue that he never doubted Tina and believed that Chris was in deed her ex-husband. Tina on the other hand will claim that John's claim is ridiculous as he never asked to see the Judgment and the Entry of Order which would have finalized her divorce. Further, Tina will claims that John is just acting dumb that he should be ashamed for having an affair with her while she was still married to Chris. The court is likely to find in favor of John and find that he is a putative spouse. Yet, in order of this to happen John needs to claim his putative spouse status so that he can have QMP rights. ✓

3. What are John and Tina's ownership interests and reimbursement rights, if any in Blackacre?

### Family Code 770 - Separate Property

Under Family Code 770, the following is considered separate property (SP): all property owned prior to marriage; all property acquired during marriage as a gift, bequest, devise or descent; and all the issues, profits, and rents of the property described in this section.

Here, the facts indicate that Tina purchased Blackacre for \$400K and that it was her premarital home. Given that the property was owned prior to the marriage between Tina and John in February Blackacre would be presumed to be Tina's SP. ✓

### Family Code 760 - General presumption

Under FC 760 all property acquired during marriage while domiciled in California is community property unless otherwise provided by statute. ✓

Here, the facts state that during 2014 when the parties were married, Tina received a bonus from work of \$200K. The 200K were used to remodel the kitchen and bathrooms in Blackacre. Tina will claim that the 200K are her SP for all her hard work. On the other hand, John will allege that the 200K are CP (QMP) because they were acquired during marriage while the parties were domiciled in CA. The court is likely to find in favor of John and find that the 200K are CP (QMP). ✓

### Family Code 770 - Separate Property (analyzing the 50K)

Under Family Code 770, the following is considered separate property (SP): all property owned prior to marriage; all property acquired during marriage as a gift, bequest, devise or descent; and all the issues, profits, and rents of the property described in this section.

Here, the facts state that 50K were inherited by John in 2012. John will claim that the 50K are his SP because they were acquired during marriage as an inheritance. The court will find that John is correct and so the 50K are his SP. ✓

### Apportionment - Moore/Marsden

If the community contributes to the acquisition of SP then the community not only gets reimbursed but also gains an ownership interest unlike a 2640 reimbursement. The Moore/Marsden is a three step formula. First the community is reimbursed dollar for dollar. Second the community contribution is divided by the purchase price and everything is multiplied by an equity value, at the end we are left with a community percentage of appreciation. Third, we add the community percentage of appreciation to ✓



the dollar for dollar reimbursement and we are left with the total community reimbursement. ✓

Here, the facts indicate that the 200K which will likely be found to be CP (QMP) were used to remodel the kitchen and bathrooms at Blackacre. Tina will point out that that the community should not be reimbursed because the reimbursement is limited to down payments, reduction of mortgage principle, and capital improvements. However, John will argue that all the remodeling is a capital improvement as it substantially increased the value of the property from 400K to 1 million. If the court finds in favor of John the court would have to do the following calculation: the dollar for dollar reimbursement would be 200K. Second, the 200K (community contribution) would be divided by 400K (the purchase price) and multiplied by (1,000,000-500,000). This would give a total of 250K. The 250K would be added to the 200K so the grand total would be 450K, the community would be reimbursed for 450K so John would receive 250K and Tina would receive 250K. ✓

### Family Code 2640 - Reimbursements

Under FC 2640(c) (1/1/05), if a spouse uses SP for the acquisition of SP then the spouse is reimbursed dollar for dollar unless there is a waiver or a transmutation. ✓

Here, the facts indicate that the 50K which will likely be found to be John's SP were used to remodel Blackacre. Once again, it is likely that John will claim that the remodeling was capital improvement and that he should be reimbursed. Tina will argue that the remodeling did not increase the value of the property rather it was market forces. If Tina succeeds then the court will likely find that the SP contribution was a non-reimbursable gift to the community. However, it is unlikely that the court will favor Tina. It seems that John has a better argument because the facts do indeed demonstrate an increase in the value of the property. Thus, John would get a 50K reimbursement especially since as

mentioned earlier, the premarital was not valid because the parties did not waive the attorney in a separate writing.

In summary, John would receive 300K in reimbursements, while Tina would get 250K.

**END OF EXAM**



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Question 2

What are the community and separate property interests in 123 Main Street

California is a community property state. Under Family Code 760 (FC 760), all property acquired, including wages, compensation, bonuses, dividends, etc. while married and domiciled in California (CA) is considered community property (CP). This is rebuttable by tracing (either direct or through family expense tracing) to separate property. When FC 760 is applied, all property is then equally divided between the parties on a per item basis not in aggregate form unless a special rule or public policy causes the court to deviate from this presumption.

✓ Family Code 2581 states that property taken jointly while married is considered community property and is not rebuttable by tracing. However it is reimbursable under Family Code 2640. Under Family 2640 (2640) the separate property owner is entitled to a dollar for dollar reimbursement, but is not entitled to interest, appreciation, reimbursement for taxes, cosmetic improvement, etc., they are only entitled to separate property acquisition funds, mortgage reduction payments, and capital improvements. Under Family Code 852, which became effective after 1/1/85, if a property's character is going to be changed, it must be in writing, expressly state the nature of change (from CP to SP or SP to CP or SP to the other spouse's SP) and it must be signed by the party against whom enforcement is sought.

Here, Will and Cathy buy a house, 123 Main Street (house) while married and domiciled in CA. The general presumption under FC 760 (see supra) is that the house is community

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property and is not rebuttable through tracing, unless the deed expressly states that the property is intended not to be community property (CP) or there is a separate writing that states the property has been transmuted per FC 852 (see supra). The property title states "Will and Cathy, Husband and Wife." Therefore according to 760 and 2581, the house is community property.

However, Will (W) is entitled to a reimbursement in accordance with 2640 (see supra) for separate property. Separate Property Family Code 770 (FC 770). Under FC 770, separate property is property that was acquired prior to marriage, during marriage from SP funds, gifts, devise, bequests, inheritance, and profits, issues, and rents from separate property and property acquired after the date of separate. The house is currently worth \$1,300,000.

*Good acquisition*  
In order to determine how much separate property W contributed to the CP house, it is necessary to trace the funds back to W's separate property. There are two methods of tracing: 1) direct tracing which would be from a SP directly to an account and then traced to the property acquisition and 2) family expense tracing, which follows the presumption that living expenses are funded with community property first and only if there is separate property available could an acquisition of SP have been made.

Here, W had a separate property business prior to the marriage that he operated on his own from 1996 - until the date of marriage in 2001. At the time of the marriage it was valued at \$200,000 dollars. At the time of the sale of the company it was valued at \$1,000,000 in 2008, seven years after getting married to Cathy (C). It would be presumed that the \$800,00 would be community property as the growth of the company occurred during the marriage, however, the court will use several different formulas to determine how to apportion CP and SP from an SP business that was brought into the marriage. The formulas are not exclusive and can be used in combination. They are Pereira and Van Camp.



Pereira is a formula that is used when the effort, time, skill, and good reputation is the primary reason there is company growth. Here, W worked hard at his business often 50-60 hours per week, he is the only employee and he did the product creation marketing, sales, and financial management, he meets company executives and cultivates good relationships with them. Based on this, his business' growth would be attributed to his efforts and follow the Pereira formula for from 2001 until 2003. The value of the company is \$200,000 at the time of marriage and it is valued at \$350K at the time that he is solely responsible for its growth, based on this W can expect the court to take a comparable salary for this type of position, add a reasonable rate of return and that would be considered his separate property and the remainder would be CP. Here, that would probably amount to a small amount being attributed to CP such as \$25-50K. Between 2003 and 2008, W pulled back from the business as he sold subscriptions, hired a business manager. The growth of the company is due to market forces and the success of the product. Based on these facts, the court would use the Van Camp method and take a comparable salary and if W was under paid, the community would get the benefit of the difference from company and if he was underpaid or under-compensated or the standard of living dropped significantly then the community would get the benefit of the difference between what he should have been paid and was paid. Here, Will was paid 100,000 for each year in 2001-2003 and then in 2004, he was underpaid significantly and then in 2005-2007 he is paid \$150,000. The court would take the highest salary of \$150,000 and assume that is what he should have been paid if it is comparable to positions similar to his. Therefore the community was underpaid in 2004 and the difference is owed to the community -- this amounts to about 125,000 for that year. The total for the marital community is now approximately \$150-200K. The sale of the company was valued at \$1,000,000. Will will argue that he is entitled to the \$25,000 dollars to be reimbursed for the vacation, but it is considered a gift to the community and not reimbursable. Therefore W's separate property from the sale of the company is approximately \$800,000. He will get \$900,000 as he gets 1/2 of the CP of \$200K and his wife will get the other half.



The purchase of the house was \$800,000 dollars and it is now valued at \$1,300,000. \$800,000 is directly attributable to W's SP. Therefore under 2640, will is entitled to a dollar for dollar reimbursement of \$800,000 and the remainder of the appreciation of the house is CP. Therefore, each party will get \$250,000 in CP from the house.

*How is the Apple Stock apportioned based on CP and SP?*

As \$200,000 dollars is CP from the sale of the company, the purchase of the stock for \$175,000 was purchased with CP. ~~To evaluate stock it is important to evaluate if stock has been given in lieu of compensation and if it is vested and then a time rule is applied to apportion the stock.~~ Here, W will argue that the stock was purchased with his separate property and therefore the stock and it's growth is his sole separate property. C will argue that they took the stock jointly and it was directly traceable to the community property asset that she is entitled to under the Pereira and Van Camp formulas above. As W has sold the company, he is no longer collecting salary from company and it is not in lieu of compensation or vested. It is also possible that the as W took another position and is earning \$125,000 per year and C is earning \$50,000 per year that the both the funds from the company sale, and their joint compensation has become co-mingled and that the purchased is difficult to discern if it came from SP or CP funds. The fact pattern states it came from the company proceeds, so it appears to be directly traceable and under Family Code 721 each spouse can manage the marital economic community and acquire property without gaining approval from the other spouse prior to making the decision or acquisition. However, under 721, spouses must engage in good faith and fair dealing on behalf of the community and to prevent the community from reaping the benefits of an investment opportunity would be violative of a subsection of 721, the Community Opportunity Doctrine, that states if a beneficial investment opportunity presents itself, the spouse with the opportunity should consult the other spouse and provide the community with the opportunity to take advantage of an investment that benefits them.



Here the Apple Stock was purchased together, it was purchased for \$175,000 and increased in value \$800,000 dollars. Even if the dollars could not be directly traced SP it would be violation of 721 and of 760 -- that property acquired during marriage is community property and the court will determined that the stock is equally divided between the parties and each party will receive half of \$975,000 dollars.

*CP presumed unless, but to rebut will be trace to 1/2 CP/SP*  
*How is the savings account divided? 2/3 to W in amount of SP*

Under FC 760 (See supra), all compensation and wages are deemed CP. C was employed during the marriage as a retail manager and earned \$50,000/year. It appears she placed a substantial amount of money in savings from her compensation, while W supported the economic community with his compensation. The court will look at the source, which is C's compensation. C will argue that placing the funds in her own name makes it her money. The court will look at C's conduct to determine if she changed the nature of the asset under FC 852 -- she did not expressly write, sign and agree that the savings account would be her separate property, placing the bank account in her name alone does not make it her separate property and there are no presumptions to rebut the general presumption that this is community property from her compensation. The savings account will be divided equally between the parties. ✓

END OF EXAM

3)

### Question 3

What are the parties rights in terms of the parties joint checking account?

#### Family Code 760 - General presumption

Under FC 760 all property acquired during marriage while domiciled in California is community property unless otherwise provided by statute.

Here, the facts indicate that on November 15, 2016 Jim and Brad married. The facts also indicate that the parties have a joint checking account. Unfortunately, the facts do not indicate whether the joint checking account was opened before or during marriage.

Assuming that the joint checking account was opened during marriage, the account would be presumed to be community property (CP). The presumption could always be rebutted through direct tracing or exhaustion tracing. In this case, it is likely that Jim would claim that some of the funds in the joint checking account were his SP. However, the facts do not favor this argument because it is clearly stated that prior to their marriage, and continuing after, Brad provided for most of their regular living expenses, as Brad's income exceeds that of Jim. Thus the court would find that it is more likely that the majority of the funds in the joint account are Brad's and not Jim's.

#### Family Code 70 - Date of separation

Family Code 70 is a two prong test that helps the court determine the date of separation (DOS). The requirements are the following: (1) expression of an intent to end the marriage; (2) conduct consistent with the intent to end the marriage.



In order to fully analyze the situation we must determine the DOS. Brad claims that the DOS was October 1, 2019. It is likely that Brad will state that the expression of the intent to end the marriage took place when the parties had the huge fight as Jim was studying for his bar exam and Jim yelled that he wanted a divorce. As for the conduct consistent with the intent, Brad will point out that following the argument, Jim stormed out of the parties apartment. Further, the following day, Jim went to the bank and took half of the balance out of the joint checking account and opened an account in his sole name. According to Brad, the Jim's expression and conduct to end the marriage lead to Brad being distraught and taking a 3 month leave of absence from his work which in turn lead to no employment income. Jim will argue that the DOS was not in October 1, 2019 because even though he made an expression of his intent to end the marriage he returned to the house three days later. Thus, according to Jim, his conduct was not consistent with his intent to end the marriage. Brad will point out the fact that even though he forgave Jim, for the next two months Jim did not socialize with him and the two barely spoke to one another. Further, Brad will mention that Jim never returned the money that he took out of the joint checking account. Lastly, Brad will emphasize that this all caused him so much pain to see his marriage end, that he did not return to work.

Based on the facts, it is likely that the court will determine that the DOS was October 1, 2019. *good analysis*

### Family Code 721 - Fiduciary Duties

Under FC 721 spouses are in a confidential relationship and must look after the best interest of one another. A spouse owes the other spouse the highest duty of fair dealing and good faith.

Here, the facts indicate that Jim took money from the parties joint account and used it to open a checking account in his sole name. Here, the court would find that even though

the date of separation was October 1, 2019, the parties will still be married when Jim took out the money thus FC 721 should apply. In other words there is a possibility that the court would find that Jim breached his fiduciary duty because he took money out of the account without Brad's knowledge.

### Family Code 1101(g) & FC 1101(h)

Under FC 1101(g) if a spouse fails to disclose an asset to the other spouse then he is entitled to a 50% reimbursement of the undisclosed asset under FC 1101(g). However, if a spouse maliciously or fraudulently fails to disclose then the other spouse might be entitled to 100% of the undisclosed asset.

Here, Brad could make the argument that he should be reimbursed because Jim took out the money without his knowledge. However, the court will just order Jim to return the money he took.

What are the parties' rights in terms of the winning lottery ticket?

### FC 70 - Date of separation

(see rule statement above)

Here, if the court determines that the date of separation was October 1, 2019 then the court would find that FC 771 applies.

### Family Code 771

Under family code 771, all earnings and accumulations after the DOS are SP.

Here, the facts mention that on November 30, 2019 Brad used one dollar from the parties' joint checking account to buy a lottery ticket and he won 1 million dollars. Brad will claim



that because the money was taken after the DOS, then the money was his SP and thus the lottery award is his SP. Further, Brad will claim that he did nothing wrong, that Jim did the same thing and even worse because he took a greater amount of money and never returned it. Unfortunately for Brad, this claim will likely not prevail because it is likely that Brad too breached his fiduciary duties when he used CP funds without Jim's consent.

### FC 721

(see rules statement above)

In order for the lottery ticket award to be his SP, Brad needed to use his separate funds. Here, he used money from a joint account that is presumed to be CP. When parties marry they have joint management and control of all the community property. Brad, never informed Jim whom he continued to be married but separated of the fact he was taking a dollar from the account.

### FC 1101(g)

(see rule statement above)

Brad could always claim that he forgot to inform Jim that he was taking the money and that at most Jim should be entitled to 500k.

### FC 1101(h)

(see rule statement above)

Jim will claim that Brad acted with malice, that he wanted to keep everything to himself and thus he should be entitled to 1 million. The court is most likely not going to favor Jim's 1101(h) argument because the facts don't indicate the Brad expressly acted with malice.

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What are the parties rights in terms of the 60K student loans?

### Student Loans ✓

A student loan acquired during marriage is community property debt. Here, the facts indicate that in January 2017, Jim took out a student loan for \$60K for the remained of his tuition and registration. Thus, the 60K would be community debt. After the date of separation the remaining amount owed on the loan would be separate property. In other words, during marriage the loan is CP but after marriage the loan becomes SP (student takes his loan). Here, the 60K loan was likely acquired after October 1, 2019 (DOS) so it would be Jim's separate debt and not the community.

### Family Code 2641

Under FC 264, the community (not the single spouse) is entitled to reimbursement if the community contributed to the education of the spouse and did not benefit from it. Please note that daily community expenses are not reimbursed under a 2641.

Here, the facts state that after marriage, specifically between January 2017 and August 2019, Brad and Jim (the community) paid \$30K towards Jim tuition and registration from their joint earnings. The facts also state that prior to their marriage, and continuing after, Brad provided for most of their regular living expenses as Brad's income exceeded Jim's income. Thus, assuming that the community did not benefit from Jim's education since he never earned a good income, the community would be reimbursed for the 30K. Thus, upon divorce, Brad would be able to obtain 15K.

**END OF EXAM**

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