

COMMUNITY PROPERTY

ALWAYS START YOUR ESSAY WITH:

“California is a community property state. All property acquired during the course of a marriage is presumed to be community property. All property acquired before marriage or after permanent separation is presumed to be separate property. In addition, any property acquired by gift, devise or bequest is presumed to be separate property.

In order to determine the character of any asset, courts will trace back to the source of funds used to acquire the asset. A mere change in the form of an asset does not change its characterization. With these basic principles in mind, we can now turn to the specific items of property involved in this instance.”

GENERAL RULES

1. REBUTTABLE PRESUMPTIONS

- a. Property shown to be owned during M is presumed to be acquired during M.
 - i. Exception: Spouse dies after divorce more than 4 years earlier
- b. All property acquired during M is presumed CP
- c. All property acquired before or after M is presumed SP
- d. All property acquired by gift or inheritance is presumed SP
- e. Income, interest, rents from SP is presumed SP
- f. Out of state property in non-CP states, acquired during marriage in CA, is presumed CP
- g. Out of state property in non-CP states, acquired while outside CA, is presumed QCP

2. WAYS TO REBUT PRESUMPTION OF CP

- a. Show property was by gift, bequest or was income from SP
- b. Parties took written title to the asset in a manner showing they didn't want it to be CP
- c. Parties agreed property would not be CP
- d. One spouse took title in a way evidencing a gift to the other
- e. Purchase funds are traced to an SP source

3. CHARACTERIZATIONS

- a. Property is characterized according to when it was earned/acquired – not necessarily when received.

4. WHEN ECONOMIC COMMUNITY ENDS

- a. Ends at death OR when:
 - i. H and W are physically separated AND
 - ii. Have an intent not to resume the marital rel'ship

SPECIFIC ASSETS – SP OR CP?

1. PERSONAL INJURY AWARDS

- a. If accident happens during marriage, CP, but at divorce will be awarded entirely to injured spouse.
- b. If injury caused by one spouse against the other, SP

2. RETIREMENT BENEFITS/PENSIONS

- a. Apply the time rule
 - i. Years earned toward benefit during the M
 - ii. Divided by total years earned toward the benefit
 - iii. Equals portion that is CP. Rest is SP.
- b. If spouse elects not to retire when he is eligible, court can order him to begin payouts to ex-spouse anyway!
- c. Spouse in this situation may not elect a disability retirement instead of a regular pension, if he has this option, just to screw ex-spouse.

3. DISABILITY PAY AND WORKER'S COMP

- a. Viewed as wage replacement so treated exactly the same as current wages earned.
- b. So received after M → SP

4. SEVERANCE PAY

- a. When it resembles a retirement pension → CP
- b. When it intended to just replace wages for a short time → Treated same as regular wages paid out (SP after M, CP during M)

5. STOCK OPTIONS

- a. Apply the time rule:
 - i. Years accruing stock options during M
 - ii. Divided by total years accruing stock options
 - iii. Equals portion that is CP. Rest is SP.

6. BUSINESS AND PROFESSIONAL GOODWILL
 - a. This is CP.
 - b. How to determine what portion of the business is goodwill:
 - i. Market sales valuation OR
 - ii. Capitalization of excess earnings
7. EDUCATION AND TRAINING
 - a. SP, but at divorce, the community can be reimbursed for educational expenses IF the education enhanced the spouse's earnings capacity.
 - i. Defenses to reimbursement:
 1. More than 10 years have passed → CP presumed already reimbursed
 2. Other spouse got education paid for with CP too
 - b. Also educational debt will be assigned solely to the educated spouse – EVEN IF part of loan used for living expenses.
8. LIFE INSURANCE
 - a. Whole life policies (cash value) → apply time rule to when premiums were paid
 - b. Term insurance (no cash value) → Character of last payment controls
 - i. Term insurance is considered to have no cash value at divorce
 - c. For CP policies naming other than surviving spouse as beneficiary → beneficiary receives that spouse's ½ share ONLY.
9. PROPERTY INSURANCE PROCEEDS
 - a. Character of underlying property controls, although if premiums were paid from CP, there's a right of reimbursement.
10. MONEY OR PROPERTY FROM A LOAN MADE DURING M
 - a. Character of the property is determined by the INTENT of the lender, but is presumptively CP.
 - b. To show it's SP, spouse must show lender relied primarily on the spouse's SP in making the loan (for example, if an SP asset was used as security).
 - c. "Personal credit" of either spouse based on EARNING CAPACITY is CP!!

CP AND SP FUNDS SPENT ON ASSETS OF A DIFFERENT CHARACTER

1. PROPERTY ACQUIRED WITH BOTH CP AND SP FUNDS
 - a. Most common situation: House bought before marriage with SP funds, then CP funds pay off mortgage.
 - b. CP and SP both have a proportional interest to the extent of amounts paid for:
 - i. Down payments
 - ii. Improvements
 - iii. Principal debt reduction
 - iv. BUT NOT interest, taxes
2. CP USED TO PAY SP SUPPORT OBLIGATIONS FROM PRIOR REL'SHIP
 - a. CP has a right to reimbursement to the extent that SP was available to pay the support instead.
3. CP USED BY H TO IMPROVE H'S SP
 - a. CP is entitled to the greater of:
 - i. Reimbursement of amount spent OR
 - ii. Value of the improvements to increased FMV of property
4. CP USED BY W TO IMPROVE H'S SP
 - a. Absent an agreement to reimburse, presumed to be a gift to CP.
5. SP USED TO IMPROVE CP
 - a. Same as for when property is acquired with both SP and CP funds (pro rata buy-in)
6. SP PROPERTY BOUGHT FROM COMMINGLED ACCOUNT
 - a. 2 permissible tracing methods:
 - i. Exhaustion → When particular asset was purchased, CP funds in the account had already been exhausted, so the purchase must have been with SP
 - ii. Direct tracing → At the time the asset was purchased, there were SP funds available that spouse claims he used to buy the SP
 - b. Recapitulative accounting is NOT allowed
 - i. This is when SP proponent totals up ALL the family expenses and ALL the community income and shows that the former exceeds the latter overall.

ACTIONS BY SPOUSES ALTERING THE CHARACTER OF THE PROPERTY

1. PRENUPS

- a. Must be in writing (SOF) UNLESS:
 - i. Agreement fully executed on both sides
 - ii. The promisor is estopped to deny the agreement
 - b. May not waive or limit child support.
 - c. Premarital agreements are unenforceable IF:
 - i. They promote divorce (but it takes a lot)
 - ii. Burdened party did not have adequate disclosure of other party's wealth
 - iii. It is not voluntary -- presumed involuntary if:
 - 1. Didn't get at least 7 days to think about it
 - 2. Party neither had independent counsel NOR was fully informed in a plain-english writing what rights and obligations were being given up.
 - iv. It was unconscionable when made (does NOT apply to spousal support waivers) AND:
 - 1. There was no fair, reasonable, full disclosure of other party's \$\$\$ AND
 - 2. The right to disclosure was not waived in writing AND
 - 3. The party seeking to avoid enforcement had no adequate knowledge of the other party's \$\$\$.
 - v. It was unconscionable when made (spousal support waivers only) AND party did not have independent counsel.
 - vi. (Spousal support waivers only) It is unconscionable at the time of enforcement.
 - d. CANNOT waive a spouse's legal duty to care for the other one.
2. TRANSMUTATIONS
- a. Oral OK before 1985 → after must be in writing SIGNED by the party against whom enforcement is sought
 - b. No writing needed for gifts that are:
 - i. Personal in nature AND
 - ii. Insubstantial in value given the couple's \$\$\$ circumstances.
 - c. NOTE confidential nature of M imposes a duty of good faith and fair dealing on the spouses.
3. MARRIED WOMAN'S SPECIAL PRESUMPTION
- a. When a piece of property...
 - i. Was bought with a WRITTEN TITLE
 - ii. Before 1975
 - iii. In a married woman's name ONLY
 - iv. It is presumptively her SP.
 - b. This INCLUDES when title is taken with husband and wife's name but there is no reference to joint tenancy or their being husband and wife.
 - i. So title to "Bob Jones and Carol Jones" would give Carol ½ as her SP and the other ½ CP – so Bob would really only get ¼!
 - c. Property acquired after 1975:
 - i. No presumption, but it's still a reasonable inference that property bought by one spouse and titled in the other's name is a gift, absent evidence to the contrary.
4. TAKING ASSETS IN JOINT TITLE
- a. When H and W buy an asset in joint, written, title, even if SP is used for part of the price, it becomes CP b/c a gift to the community is presumed (Lucas).
 - i. AND if there is a later divorce, this presumption of CP can be rebutted ONLY by a written statement by the parties or in the deed.
 - ii. AND the spouse who contributed SP has a right of interest-free payback (original amount only) for SP that went to:
 - 1. Down payment OR
 - 2. Improvements OR
 - 3. Principal payments on loan (NOT interest payments)
 - iii. This is ONLY if there is a later divorce – NOT if M ends b/c someone dies. Then Lucas still applies (gift presumption).
 - b. REMEMBER that if there is no written title for the asset, we don't care about any of these rules.
5. COMMUNITY LABOR ENHANCING VALUE OF SP
- a. WHEN SP BUSINESS GROWS IN VALUE
 - i. Van Camp test
 - 1. For when the nature of the business is the main part of the business' growth

2. Value spouse's services at going market salary. Subtract family expenses paid from business earnings. The remainder is CP. Rest is SP.
- ii. Pereira test
 1. For when spouse's skills/efforts during M are the main part of the business' growth.
 2. Take the original value of the business, add what have been a reasonable investment return on the business assets (10%/yr), and that's SP. The rest is CP.

PROPERTY IS CHARACTERIZED. NOW WHAT?

1. DISTRIBUTION AT DIVORCE

- a. Presumption that **each asset** is divided... not just total them all up and divide.
 - i. Deviation from the "in-kind" rule is allowed "when economic circumstances warrant," such as:
 1. Awarding family home to custodial parent
 2. Awarding all shares of stock of a closely-held corp to spouse who is the CEO.
 - ii. When deviation from in-kind division is appropriate, other spouse gets extra stuff so it's still all 50-50.
- b. Everything is divided 50-50, unless:
 - i. One spouse has deliberately misappropriated CP
 - ii. Where liabilities exceed assets, and one party is more able to pay the debt
 - iii. When one spouse has incurred educational debt
 - iv. When one spouse has incurred a tort liability during an activity NOT for the benefit of the community
 - v. When one spouse has received a CP personal injury award
- c. When will a property distribution order be set aside?
 - i. Extrinsic mistake
 - ii. Extrinsic fraud
 - iii. Breach of fiduciary duty by one spouse

2. DISTRIBUTION AT DEATH

- a. If an unauthorized gift of CP to a third party has not been voided by the other spouse before the gifting spouse dies, it's treated as a valid testamentary transfer of the gifting spouse's half of CP.
- b. If there is a CP life insurance policy and the dead spouse has named a 3d party as beneficiary, it is presumed to be a gift of the dead spouse's 1/2 interest in the policy.
- c. The surviving spouse is entitled to 1/2 of each item of CP, not 1/2 of the total.
- d. A will provision that says the surviving spouse must chose EITHER her 1/2 share OR her gift under the will will be upheld.

3. QUASI-COMMUNITY PROPERTY

- a. Property that would have been CP if it had been acquired here, but the couple was living in a non-CP state at the time.
- b. It REMAINS SP while parties are in California, but only becomes QCP at divorce or death.
 - i. Divorce
 1. Treated same as CP
 2. Out of state reality usually awarded to SP owner with other property given to other spouse to compensate
 - ii. Death
 1. Survivor has a 1/2 interest in D's QCP, but the decedent's estate has NO RIGHTS in the survivor's QCP.
 2. Out of state reality usually probated in state where it is
- c. Special rule for hinky transfers of QCP right before decedent died IF
 - i. D died domiciled in CA
 - ii. Transferred his QCP for less than substantial consideration
 - iii. W/o spouse's consent,
 - iv. Surviving spouse may force the person to return her 1/2 share IF:
 1. D reserved any of the following rights in the property:
 - a. Right to income
 - b. Power to revoke, consume, invade, or dispose of principal for D's own benefit
 - c. Right of survivorship
- d. Property acquired in another CP state is treated as regular CP.

4. MANAGEMENT AND CONTROL DURING MARRIAGE

- a. Generally, each spouse has an equal right to sell, encumber, spend, etc. ALL of the CP during their lifetimes. BUT...
- b. Fiduciary duty exception
 - i. In managing the CP, each spouse owes the other the highest duty of good faith and fair dealing.
 - 1. Duty is breached by gross negligence of recklessness (not mere negligence).
 - ii. Managing spouse must give non-manager a full accounting when requested.
- c. Real property exception
 - i. Both spouses must join in selling or leasing (for more than 1 year) real property.
 - 1. If H acts on his own, W can void the transfer EVEN to a BFP w/in one year IF:
 - a. H lied to BFP about his single status
 - b. Property was titled in H's name only, so BFP was not on notice.
 - c. If BFP was NOT in good faith, no 1-year limit!
 - 2. A nonconsenting spouse may also void ANY security interest in CP granted to a creditor by the other spouse UNLESS it's a family attorney's lien.
 - a. BUT unsecured debt still remains.
- d. Household furnishings exception
 - i. The CP household furnishings or clothing may NOT be transferred w/o the written consent of the other spouse.
 - ii. If no consent, spouse can VOID the entire transfer FOREVER into the future and need not refund B's \$\$\$!
- e. Business exception
 - i. Spouse who is operating a business even if it's CP has **primary** (but not sole) management and control.
 - ii. Can act alone on most things but must notify other spouse in writing of:
 - a. sale of business
 - b. lease of business
 - c. exchange of all, or substantially all, of the personal property used in the business
 - 2. If no writing, spouse can't void the transfer, but has a remedy if the action "substantially impaired" her 1/2 interest.
- f. Unauthorized gifts exception
 - i. A spouse may not make a gift of CP without the written consent of the other spouse.
 - 1. BUT if the non-consenting spouse doesn't revoke the gift before the donor dies, she's limited to recovering her 1/2 interest against either the donee or D's estate.
- g. Rights of creditors
 - i. Can reach CP but not **other** spouse's SP.
 - 1. BUT other spouse's SP can be reached in a debt for "necessaries" accrued during M.
 - ii. CP can be reached even for SP debts.
 - iii. BUT CP earnings of the other spouse canNOT be reached for SP debts acquired before M, IF the earnings are held in a separate account where the debtor spouse has no right of withdrawl.
 - iv. Tort liabilities:
 - 1. If tort committed during an activity for the benefit of the community, first CP, then SP. If not, reverse it.

DEALING WITH UN-MARRIED COUPLES

1. PUTATIVE SPOUSE DOCTRINE
 - a. Treated as a regular spouse – can get rights to CP at “divorce”/death
 - i. Unresolved question: If H was at fault in making W think was married, does H have rights to W's “CP”?
 - b. Requirements:
 - i. Good faith belief
 - ii. Based on objectively reasonable grounds
 - iii. Who believes she is lawfully married.
 - c. Once she realizes she is not married, putative spouse property rights no longer accrue
2. UNMARRIED COUPLES LIVING TOGETHER
 - a. Courts may apply quantum meruit/equitable trust doctrines to compensate housewife, for example
 - b. May also apply joint venture principles
3. UNMARRIED COUPLES WHO AGREE TO HOLD THEIR PROPERTY AS IF THEY WERE MARRIED

- a. This is a valid, express contract between them which will be enforced by applying CP rules.
- b. BUT contracts based explicitly on consideration for sex won't be enforced.

FEDERAL PRE-EMPTION ISSUES

1. Armed Forces life insurance proceeds → SP
2. Civil service pensions → time rule apportionment to CP/SP
3. Federal Disability benefits → SP
4. Foreign services pension → time rule CP
5. Military retirement benefits → time rule CP
6. Railroad retirement benefits → Social security-type are SP, supplemental are apportioned time rule CP
7. Social Security benefits → SP
8. U.S. Savings bonds → SP (unless fraud involved)