**Community Property Outline**

1. **Basic Default Principles & Presumptions**
   1. **Definitions**
      1. **Separate Property**: property (1) owned by either spouse before marriage, (2) acquired by gift, will, or inheritance, or (3) acquired during the marriage with separate funds, (4) rents, issue and property derived from separate property, even if acquired during marriage.
      2. **Community Property**: property, other than separate property, acquired by either spouse during marriage. E.g., salary, income from community assets.
      3. **Community Presumption**: all assets acquired during marriage are presumptively community property. Burden on party asserting it is SP.
   2. **Extension of CP System**: applies to registered domestic partners (RDPs). Available to (1) same-sex couples, and (2) elderly opposite-sex couples receiving social security. Same-sex couples lawfully married after *In re Marriage Cases* (2008) but before Prop. 8 (Nov. 5, 2008) may claim community property rights as spouses, not as domestic partners.
   3. **When Does Economic Community End?** Permanent physical separation and intent (by one party) not to resume the marital relation. Note: if both maintain the façade of marriage, community has not ended, even if cheating and not living together.
      1. For CP not divided on divorce, court retains continuing jurisdiction to award, and on motion will divide 50/50 unless interests of justice require otherwise.
   4. **How is CP Handled on Divorce?**
      1. **Equal Division Required**: absent agreement, all CP *must* be divided equally, on an *individual asset basis*. That is, each community asset and liability must be divided 50/50.
         1. **Economic Circumstance Exception**: permits entire asset to one spouse and cash to other: residence, closely-held corporation, pension.
         2. **Statutory Exceptions**: misappropriation of CP by a spouse; educational debt; spouse’s tort Liability not based on activity for benefit of community; personal injury is CP but on divorce is awarded to injured spouse unless interests of justice require otherwise; negative Community: where community liabilities exceed assets, ability of each spouse to pay is considered, and may not be 50/50 division (concern to protect creditors).
      2. **Disparity in Earning Power**: may be considered only as to spousal support or child support.
   5. **Rules Governing Gifts of CP**
      1. **No Unilateral Lifetime Gift**: neither spouse can make *gift* of CP without other spouse’s written consent. If gifting spouse is alive, non-gifting spouse can set aside gift *in entirety* or, on divorce, take equal offsetting CPto recover her half. If gifting spouse dead, non-gifting spouse can set aside gift as to *her half*, and recovery will be either from donee or spouse’s estate. Same result if third-party is named on spouse’s CP life insurance. However, if gift was U.S. Bonds, federal law preempts and provides that cannot be recovered from third party.
      2. **Yes Unilateral Testamentary Power over ½ CP**. Each spouse has testamentary power over ½ CP and all SP.
         1. Widow’s Election Will: if will purports to dispose of more than ½ CP, surviving spouse cannot read will selectively, and must elect either to take (1) under the will as written or (2) against the will by claiming ½ interest, but must then relinquish all testamentary gifts in her favor.
   6. **Acquisition on Credit During Marriage**: under the Community Credit presumption, funds borrowed during marriage and goods purchased on credit during marriage are presumptively CP. However, ultimately classified according to *primary intent* of the lender. Single spouse’s personal credit score or reputation in community is *not* sufficient primary intent, as both are CP. However, where funds secured by mortgage on single spouse’s SP, sufficient primary intent to defeat presumption of CP. Note, and items obtained with funds from note, would be SP.
   7. **Confidential Relationship, Fiduciary Duty, Undue Influence**: spouses are fiduciaries and owe duty of highest good faith and dealing with each other. If one spouse gains advantage from transaction, presumption of undue influence arises. Spouse has burden of proof to show no breach. Under 2002 statute, grossly negligent and reckless investment of community funds is breach of fiduciary duty.
2. **Effect on Characterization of How Title is Taken**
   1. **Property Acquired Pre 1975-Married Woman’s Special Presumption**: where CP was used to take written title in a married woman’s name and the title did not indicate CP or joint tenancy was intended, presumptively wife’s SP. This is exception to general rule that assets in one spouse’s name does not overcome community presumption.
      1. Rebuttability: not rebuttable as against BFP who takes in reliance that it is wife’s SP, but as between wife and husband, husband can rebut by showing he did not intent to make a gift to wife.
      2. Weird Examples: title taken in name of “Hobie Gates & Winkie Gates” (with no reference to marital status), or “Winkie Gates, a married woman,” presumption applies.
   2. **Presumption From Taking Title in Joint Form Where SP Used for CP** (i.e., only where title lists *both* spouses’ names) on ownership and reimbursement where SP is used to purchase or improve the property. These rules only apply if a title or deed document exists. A receipt is not enough.
      1. **SP in Death:** *Marriage of Lucas*: presumptively CP, and any SP is presumptively a gift to community. No SP ownership interest or claim for reimbursement unless written agreement to that effect.
      2. **SP in Divorce**: Anti-*Lucas* Statutes
         1. Ownership: presumptively CP, rebutted by express statement in deed or other instrument of title, or written agreement.
         2. Right to Reimbursement: spouse contributing SP entitled to reimbursement without interest for DIP: contribution to Down payment, Improvements, and Principal payments on mortgage (as well as principal even if no mortgage).
      3. During Marriage: could be joint tenancy, in which each has a SP interest. Must check instrument. Not necessarily CP.
3. **Altering Character of Assets by Agreement**: parties can, by agreement, opt out of CP and SP default characterizations as to particular assets or all acquisitions. No consideration required.
   1. **Premarital Agreements**
      1. **Rule**: must be in writing signed by both parties, unless (1) oral agreement is fully performed, but marriage alone is not sufficient performance, or (2) estoppel based on detrimental reliance.
      2. **Scope**: parties can agree to anything except to limit child support contributions.
      3. **Defenses to Enforcement**
         1. **Not Signed Voluntarily**: a premarital agreement is deemed involuntary unless challenging party was given at least 7 days to sign and was either represented by independent legal counsel or was fully informed in writing of terms and basic effect, and executed acknowledgement.
         2. **Unconscionable**: a question of law for judge
            1. **Spousal Support Provision**: unenforceable if either (1) party not represented by independent counsel at time signed, or (2) provision is unconscionable *at time of enforcement*, even if represented.
            2. **Anything Else**: unenforceable if both unconscionable when made *and* (1) no full and fair disclosure of other party’s property or financial obligations; (2) right to disclosure not waived in writing, and (3) party challenging had no adequate knowledge of other party’s property or financial circumstances.
   2. **Intra-Marital Agreements (Transmutations)**: prior to 1985, oral transmutations permitted, but after 1985 all transmutations must be in writing, signed by spouse adversely affected, and explicitly state that a change of ownership is being made. *No usual exceptions to writing requirement for SOF, estoppel, part performance.* However, no writing required for gift of tangible property of personal nature (e.g., inherited jewelry) which is not substantial in value under circumstances.
      1. Will/Revocable Trust as Evidence: in any proceeding commenced before death, statements contained therein relating to character of property is not admissible evidence of a transmutation.
4. **Effect of Parties’ Actions on Characterization of Assets**
   1. **Installment Purchase Pre-Marriage, Debt Paid With CP During Marriage**:Pro-Ration Rule: community estate takes pro-rata portion of the property measured by the percentage of *principal debt reduction* attributable to the CP. To get percentage, you do not look at contributions to interest, taxes, etc.
      1. Insurance: pro-ration rule applies to whole life insurance. But for term insurance, pro-ration inapplicable, and the *last premium* determines the character, as each payment governs each respective portion of the term.
   2. **CP Used to Improve SP**
      1. Spouse Expends CP to Improve Own SP: where CP used to improve SP by way of fixture, community has no *ownership* interest in the SP. However, community has right to reimbursement of the greater of the CP or the SP’s increase in value.
      2. Spouse Expends CP to Improve Other Spouse’s SP: courts are split: some require reimbursement, others do not and presume a gift to other spouse’s SP rebuttable only by evidence of agreement to reimburse community.
   3. **Tracing Property Purchased From Commingled Funds**
      1. **Rule**: to establish that property purchased from commingled funds is SP, spouse must use one of the following tracing methods on an *asset-by-asset basis*:
         1. **Exhaustion**: at time asset purchased, community funds had already been exhausted.
         2. **Direct Tracing**: at time asset purchased, there were separate funds available, and proponent intended to use them to purchase SP.
      2. **Family Expense Presumption**: expenditures for family expenses are presumed to be made by community funds even if SP available. If SP is explicitly used, however, presumption of gift to community, unless agreement otherwise.
      3. No Recapitulative Accounting: SP proponent cannot simply show that total community expenses exceeded total community income and conclude all remaining funds and assets purchased from commingled account are SP. Burden is to show that *each asset* was purchased with SP funds.
      4. Mere fact of commingling of SP and CP does not effect a recharacterization.
5. **Common Characterization Problems**
   1. **SP Business Increases in Value During Marriage**: two tests for determining how much increase is CP vs. SP, and both should be discussed.
      1. ***Pereira*** **Accounting** (Personal skills and effort of spouse—Pay interest): SP is businessperson’s separate capital + a fair rate of return. Remaining value is CP. [The idea is that since the increase came as a result of spouse’s hard work, and hard work is community asset during marriage, community should get a lot.]
      2. **Van Camp** (Valuable Company or asset—Value Community labor): CP is value of spouse’s services less family expenses paid from business earning. SP is everything else. [The idea is that since spouse’s work, which is community asset, didn’t do so much, community should get little.]
      3. Court is not bound to adopt either, and can select whichever achieves substantial justice between the parties.
   2. **Pension**
      1. Rule: if accumulated during marriage, whether or not vested at time of divorce, it is CP, subject to pro-ration rule: percentage of years service while married out of total years employed to retirement.
      2. Awarding Before Vesting: if at divorce pension has not vested, spouse can be awarded either (a) “if and when received decree” in which when pension is received, spouse gets share, or (b) cash-out by awarding other assets of equal value. If vesting has occurred, spouse has present right to her share of the pension, even if other spouse does not opt to retire.
      3. Federal Law: if a non-participant spouse (NPS) in a qualified pension plan divorces a participant spouse, her CP interest is recognized, and under federal law, she can get a Qualified Domestic Relations Order and receive payments from the plan. If the NPS predeceases the participating spouse, NPS cannot devise her CP interest in the plan, because federal law preempts and prevents her from doing so.
   3. **Disability & Workers’ Compensation**: treated as wage replacement. Thus, classified according to when *received*, *not according to when earned*. However, where an election is possible, a spouse cannot defeat community interest by way of electing the kind of benefit.
   4. **Severance Pay After Marriage Ends**: no clear rule. Some court say SP because it replaces lost earnings, others say CP because it was earned during marriage.
   5. **Stock Options Awarded During Marriage But Vesting After Marriage**: pro-ration formula depends on the employer’s *primary intent*:
      1. **To Compensate for Past Performance**: *Marriage of Hug* Formula: CP = number of shares multiplied by fraction of years of employment to date community ended over employment to date option vests.
      2. **To Encourage Remaining**: *Marriage of Nelson* Formula: CP = number of shares multiplied by fraction of years from date option is granted to date economic community ends over years from date option granted to date option becomes exercisable.
   6. **Goodwill of Professional Practice**: is CP to the extent acquired during marriage. Any agreement among the business partners as to value of goodwill to each partner is a factor that may be considered, but not conclusive as to CP value. Valuation methods: (1) current-sale value, or (2) future income from accrued goodwill.
   7. **Education & Expenses** 
      1. **Education Not Property, But Right of Reimbursement**: *not* property subject to division on divorce, even if other spouse funds education. However, funding spouse entitled to reimbursement *if* *education enhanced earning capacity*.
      2. **Equitable Defenses to Duty to Reimburse**: (1) if community has already benefitted from education, which is presumed if more than ten years have passed since education, or (2) other spouse also received CP-funded education, then no right to reimbursement.
      3. **Student Loans**: on divorce, assigned solely to the party that incurred the debt.
6. **Tort Liability to Spouse or Creditors**
   1. Spouse Injures Other Spouse: any recovery is SP of injured spouse.
   2. Spouse Injured by 3rd Party: any recovery is CP, but in a property division on *divorce*, entire award goes to injured spouse so long as can be traced and was not already spent, unless interests of justice requires. However, on *death* rather than divorce, treated as CP.
   3. Tort Creditors of One Spouse: CP is subject to tort liability of either spouse. If spouse committed tort to benefit community (e.g., drive child to school), liability is satisfied first from CP and then from spouse’s SP. If spouse not performing act for benefit of community, liability first satisfied from spouse’s SP, and then from CP. Can never reach non-negligent spouse’s SP.
7. **Contractual Liability to Creditors**
   1. **Generally**: contractual creditors of *one* spouse
      1. Intra-Marital Debts: can reach CP in satisfaction of a spouse’s business debts.
      2. Pre-Marital Debts: can reach CP, except cannot reach *earnings* of nondebtor spouse held in separate account in which debtor spouse has no right of withdrawal and not commingled with CP.
   2. **Medical Expenses**: can reach CP *and even non-debtor’s SP* because each spouse had duty to support other spouse and children, and is thus personally liable for their necessities. However, if CP was available, non-debtor spouse may be reimbursed. Note: spouse still liable even if, when debt incurred, spouses had separated and marital community ended, because, for this purpose only, still husband and wife until divorce.
   3. **Prior Child/Spouse Support Obligations**: if arose before marriage, even if ordered during, is considered pre-marital debt. If after, intra-marital debt. Treated like any other debt. However, if CP is used for pre-marital, right to reimbursement if spouse had SP available to satisfy the obligations. If not, no reimbursement.
   4. Vice Debts: debts for gambling, prostitutes, even if legal, do not benefit community and, though creditors can reach CP, other spouse has right to offset in divorce.
   5. **Post-Divorce**: after divorce, a creditor cannot reach the CP awarded to a non-debtor spouse unless that spouse was assigned the debt by the court.
8. **Management of CP**:each spouse has *equal management and control* over all CP, and *has* full power to buy or sell CP and incur debts to community *without other spouse’s consent*. Exceptions:
   1. **Personal Family Belongings Exception**: one spouse cannot encumber personal property used in family dwelling without written consent of other spouse, and harmed spouse can void the transfer.
   2. **Business Exception**: spouse operating business that is all or substantially all CP has *primary* management and control, and may act alone, except must give prior written notice of any sale, lease, or exchange of all or substantially all of personal family property used in the business. If notice not given, spouse has remedy only if breach *substantially impaired* her interest, but cannot void the transfer.
   3. **Real Property**: for transfer of interest in real CP, both spouses *must* join in executing instrument of conveyance. Neither spouse can convey their ½ interest in CP, unless to pay for family attorney in divorce action (Family Attorney’s Real Property Lien).
      1. When CP title in one spouse’s name and he sells to a third party by misrepresenting his marital status, nonconsenting spouse has 1 year to bring action to void transfer, unless transferee not good-faith, in which case no SOL. Transfer to good-faith purchaser is presumed valid, but may be rebutted, in which case transfer voided and purchase price must be returned to good-faith purchaser.
9. **Foreign Property**: where spouses move to CA from a non-CP jurisdiction, property acquired in other state during marriage which would be CP if acquired in CA is deemed “quasi-CP”, and treated like CP. Same for SP.
   1. **Foreign Real Property**: for purposes of division on *divorce*, quasi-CP foreign real property is treated as CP (and though no jurisdiction over property, jurisdiction over acquiring spouse); for purposes of division on *death*, though, foreign jurisdiction’s law controls (no jurisdiction over dead spouse, and thus no jurisdiction over property).
   2. **Death of Non-Acquiring Spouse**: Where non-acquiring spouse dies first, she has no power of disposition over quasi-CP. Thus, she cannot devise quasi-CP. However, where spouses move from a CP state, CA will treat not as quasi-CP, but as true CP.
10. **Property Acquired Outside Marital Relation**
    1. **Common Law Marriage**: where people live together and hold themselves out as married: not recognized in CA, and thus property acquired is not CP, unless validly contracted in a recognizing state.
    2. **Putative Spouse**: if party has objectively reasonable and good-faith belief of marriage, assets are “quasi marital property” and split 50/50. Be sure to make argument that while unclear, possible lying spouse may be entitled to less.
    3. **Unmarried Cohabitants**: governed by contract law.
11. **Miscellaneous**
    1. U.S. Savings Bond is, under federal preemption, SP of named party.

Essay Tips

1. First Paragraph of Any CP Essay Answer: California is a community property state. In California, there is a community presumption, whereby all assets acquired during the marriage are presumptively community property. There are, however, areas of so-called separate property: property (1) owned by either spouse before marriage, (2) acquired by gift, will, or inheritance, or (3) acquired during the marriage with separate funds, and (4) rents, issue and property derived from separate property.

2. Look to certain key, threshold issues. Divorce or death? Out-of-State property?

3. Organize analysis under headings for each item of property.

4. For each item of property, address (1) the source of property, (2) basic presumption for that source; (3) *any* actions that would change that presumption (every sole bank account is a transmutation/gift issue), (4) any special rules that change presumption, and (5) distribution of property.