

TEXAS COMMUNITY PROPERTY

I. BASIC PRINCIPLES

A. SEPARATE PROPERTY ["SP"]

1. Property owned by either spouse before marriage.
2. Property acquired during marriage by gift, will or inheritance.
3. Separate property produced by a written partition or exchange of community property.
4. Tracing ("mutation") principle: [Feb & July 1997] Ppty purchased with separate funds.
5. Tort recovery for personal injury (disfigurement, pain & suffering);

[July 1999] But not tort recovery for _____ **A: PI**

or _____ **A: Pain & suffering**

[Feb 1994: But loss of *future earnings after the parties divorce* will be that spouse's SP]

A: Not med expenses or loss of earning capacity, these are C.P.

1. [July 1986] H was injured in accident. Classify: W's recovery of \$10,000 for loss of consortium [benefit of comfort, companionship and sexual relations].

A: W injured susp not CP

- #### B. COMMUNITY PROPERTY ["CP"]:
- Property, other than separate property, acquired by either spouse during marriage. Examples: (1) Salary and wages of either spouse, (2) the income from community assets.

In Texas, *the income from separate property is community property** unless:

- (1) The spouses agree *in writing* that such income shall be that spouse's separate property;
- (2) [July 1989] Gift from one spouse to other spouse: income from the donated property is *presumptively* the donee spouse's separate property.

*The income is, however, that spouse's **sole management community property**.

From sep prop

C. THE COMMUNITY PRESUMPTION

1. All assets acquired during marriage presumptively belong to the community.
2. All assets acquired on credit during the marriage are presumptively acquired on community credit.

3. All assets on hand *whenever the issue is raised* (divorce, creditor's claim, death of spouse) are presumptively community property.

[July 1994] The burden of proving that an asset is separate property is on the party so contending, who must overcome the community presumption by:

2. [July 1986] Question involved five assets, including \$20,000 of municipal bonds, to be classified as SP or CP. While detailed facts were given as to the source of the other four assets, the question gave no facts as to the municipal bonds.

_____ Municipal bonds. **A: CP**

Presumptively CP, and there are no facts to overcome the presumption

3. Shortly before her divorce, W recovered a \$100,000 damage award in a personal injury suit. The award did not break down what portion of the recovery was for injury, pain and suffering, and how much was for medical expenses and loss of earning capacity. At the divorce trial, W testified that while some of the recovery was for loss of earning capacity and medical expenses, most of the recovery was for disfigurement, pain and suffering.

_____ How should the \$100,000 personal injury award be classified? **A: CP**

II. CHARACTERIZATION ISSUES

- A. INCEPTION OF TITLE RULE** is the fundamental rule governing characterization of assets. The character of an asset, as SP or CP, is determined ***at the time the asset is acquired.***

Subsequent events or expenditures (*e.g.*, payment of remaining purchase price with community funds, using community funds to make improvements) ***never*** affect the asset's characterization, but go only to a ***claim for economic contribution.***

Inception of title rule is applied in ALL cases.....except ***employee retirement benefits.***

4. [Tested frequently] Hobie Gates enters into an installment contract for the purchase of Blackacre. He pays \$10,000 down, and signs a 10-year note secured by a vendor's lien for the \$40,000 balance. Six months later, Hobie marries Winkie. All remaining contract payments plus accrued interest, and all taxes on the property, are paid out of community funds after the marriage. Hobie dies leaving a will that devises "all my property" to Sam, his son by a former marriage. Blackacre is worth \$100,000 at Hobie's death. What are Winkie's rights?

Installment purchase begun before marriage, completed during marriage:

A: SP Title ... back to K, before marriage. His sep property

“What are Winkie’s rights? [1] *Homestead** [2] _____ A: Claim for co contribution!

*See Estate Administration outline.

B. COMMUNITY FUNDS EXPENDED ON ONE SPOUSE’S SEPARATE PROPERTY

2001 statute: Where community funds are expended to *reduce secured debt* or make *capital improvements* on one spouse’s separate property, the community has a *claim for economic contribution* that matures on termination of the marriage. [A claim for economic contribution also arises if one spouse’s *separate funds* are used to pay down secured debt on or improve (I) community property or (ii) the other spouse’s separate property.]

In cases involving *reduction of secured debt*, the amount of the claim is computed by multiplying the *equity* in the property on the date of divorce or a spouse’s death by a fraction.

Equity: Current value of property *minus* amount of secured debt.

Numerator: Amount of principal debt reduction attributable to community funds.

Denominator: (I) Debt reduction attributable to community funds *plus* (ii) equity in the property on date of first contribution of community funds *plus* (iii) debt reduction attributable to owner spouse’s separate funds during the marriage.

Reduction of principal debt attributable to economic contribution of CP debt reduction attributable to CP + equity on date of 1st contribution + debt reduction attributable to SP

5. [July 1999, Feb 2000] While single, W buys a house for \$100,000, making a down payment of \$20,000 and signing a note secured by a mortgage for the \$80,000 balance. Before her marriage to H, W makes mortgage payments that reduce the principal balance on the note by \$10,000. At the time of the marriage, the house is valued at \$140,000, and the balance on the mortgage note is \$70,000. Beginning immediately after the marriage, community funds are used to make the mortgage payments. When the parties divorce some years later, the house is valued to make the mortgage payments. When the parties divorce some years later, the house is valued at \$200,000, and the balance on the mortgage note has been reduced during the marriage by an additional \$30,000. How is the community’s claim for economic contribution computed?

Equity in the property at time of divorce: \$160,000 [\$200,000 value at time of divorce minus \$40,000 mortgage debt]

Numerator of fraction: \$30,000 [amount principal balance on note was reduced by the expenditure of community funds] It's the amount of principal debt reduction, **not** the dollars expended, that controls.

Denominator of fraction: \$100,000 [\$30,000 mortgage reduction with community funds during marriage + \$70,000 equity on date of first contribution of community funds]

$$\frac{\$30,000}{\$100,000} \times \$160,000 = \$48,000$$

5a. What if, in a "discharging a separate debt" case, community funds were expended to make improvements on the property? Suppose, in #5, \$40,000 in community funds was expended to remodel the kitchen and put swimming pool in the back yard; at the time of the divorce, W's house is worth \$300,000.

The COST of the improvements is added in as an economic contribution of community property.

Equity in the property at time of divorce: \$260,000 [\$300,000 value at time of divorce minus \$40,000 community funds expended for capital improvements]

Numerator of fraction: \$70,000 [\$30,000 principal debt reduction attributed to community funds plus \$40,000 community funds expended for capital improvements]

Denominator of fraction: \$140,000 [\$70,000 mortgage reduction and cost of improvements with community funds during marriage + \$70,000 equity on date of first contribution of community funds]

$$\frac{\$70,000}{\$140,000} \times \$260,000 = \$130,000$$

5b. In #4, what is the amount of the equitable interest where, shortly before marriage, Hobie Gages entered into a vendor's lien installment contract to buy Blackacre for \$50,000, paying \$10,000 down, the \$40,000 balance was paid off with community funds, and Blackacre was worth \$100,000 at Hobie's death?

Equity in the property at time of divorce: _____ **A: \$100,000**

Numerator of fraction: _____ **A: 40,000 = 4/5** [principal debt reduction with

Denominator: _____ **A: 40,000 + 10,000** community funds]
[principal debt reduction with
community funds plus equity on date
of first contribution]

Community claim for economic contribution: _____

A: 80,000 (4/5 x 100K = 80K)

5c. In #5, is a claim for economic contribution recognized for the amount of mortgage *interest*, insurance premiums, or property taxes paid on separate property with community property?

A: No. Only cap improvement & reduction of secured debts.

5d. In #5, is any offset made against the equitable interest to reflect the fact that the community benefitted by living in W's house rent-free for the 15 years of the parties' marriage? **No**

_____ In computing the equitable interest, any offsetting community benefits are
A: No, disregarded

6. [Tested frequently] W owned a vacant lot valued at \$20,000 (no mortgage lien) when he married H. H and W spent \$80,000 in community funds to build a house on the lot. When H died some years later, the value of the property was \$200,000 H died intestate survived by W and his son Sam by his first marriage, who inherited H's one-half CP. Under the 2001 statute, where community funds are used to make *capital improvements* on one spouse's separate property and *the case does not involve paying secured debt*, numerator of the fraction is: **COST OF THE IMPROVEMENTS**, i.e., *dollars expended*.

Equity in the property on date of H's death: **A: \$200,000**

Numerator of fraction: _____ **A: 80,000 8/10** [capital improvements made with CP
Denominator: **A: 80K + 20,000 = funds**]
[capital plus equity on date of 1st contribution]

Community claim for economic contribution: _____ **A: 160,000**
8/10 x 200K = Still her separate property though

The claim for economic contribution is a *community asset*. If the claim matures by reason of the parties' divorce, it is *subject to "just and right" division* along with all other community property. If the interest matures on the death of a spouse, the surviving spouse (or deceased spouse's successor) takes one-half of the equitable interest. Thus in #6, Sam takes _____.

A: \$80,000

If the marriage ends on divorce, the court "shall" secure a claim for economic contribution by imposing and *equitable lien* on property of the benefitted estate. If the marriage ends on death of a spouse, an equitable lien is imposed *only* if application is made by the surviving spouse, the personal representative of the deceased spouse, or any other interested person,. Subject to homestead restrictions, *the equitable lien* may be imposed on any property of

the benefitted marital estate, and *is not limited to the benefitted property itself*.

7. [July 1991] H inherits land worth \$100,000; W inherits \$100,000 cash. They use W's cash to build a house on the land. Who owns the land and house?

#1: The land was: _____
A: H's SP (inherited)

#2. When a house was built on the land, the _____ doctrine of real property law applies. A: **Fixtures**

Therefore, the land (*including the house*) is: _____
A: **H's separate property**

W gets what? (1) Homestead rights (if it qualified); (2) _____
A: **claim for economic contribution**

The claim for economic contribution is calculated under the same formulae, the only difference being that *the entire claim will be W's separate property*.

In cases involving expenditure of CP on one spouse's SP (and vice versa) but *not* involving reduction of secured debt or capital improvements, an *equitable claim for reimbursement*, based on case-developed principles, can be recognized. (See *infra*.)

_____ Can a reimbursement claim be recognized for (i) payment of child support, alimony, or spousal maintenance, (ii) living expenses of a spouse or child, (iii) contributions of nominal value, (iv) payment of a liability of a nominal amount, or (v) payment of a student loan owed by a spouse? A: **No**

C. PROPERTY BROUGHT TO TEXAS FROM ANOTHER STATE

8. [July 1996] H and W were domiciled in New Jersey, a common law state. When they moved to Texas, H and W sold their New Jersey home, title to which was in H's name. The home was purchased from H's salary in New Jersey. The \$40,000 sale proceeds were brought to Texas and invested in a \$100,000 home, title to which was taken in H's name. The remaining \$60,000 was evidenced by a promissory note signed by H. At this point in time, how is the Texas home owned as between H and W?

Starting point: *Apply the inception of title rule.*

A: **-40k down part**

\$40,000 down payment: Property acquired while a couple is domiciled in a common law

(non-community property) state is that spouse's property in that state; and when the couple thereafter moves to Texas, is the acquiring spouse's: SP

#1: In a common law state, a husband's salary is his property; and a wife's salary is her property.

#2: In a common law state, how title is held determines ownership. Since the New Jersey houses was titled in H's name, it was his property.

#3: Conflict of laws separate property: If it was H's property in New Jersey, it is H's separate property in Texas. (You don't lose property rights by moving to a new state).

(But if issue arose in a divorce action, the \$40,000 from New Jersey would be characterized as:)

A: Quasi community property

[July 1986] The \$60,000 note: _____. Under "community credit" presumption, goods purchased on credit during marriage, and funds borrowed during marriage, are presumptively on community credit. Thus the purchased goods or borrowed funds are presumptively CP. **A: community obligation**

A: And these facts do not overcome the presumption of C credit

Consequence: The state of the title to the "new Texas home" is: _____
A: 4/10 SP 6/10 CP

Same "mixed" ownership results if [July 1999; three times since 1996] during the marriage H makes \$25,000 down payment with separate funds and signs a note for the \$75,000 balance of the purchase price.

A: 1/4 SP & 3/4 CP in a divorce proceeding

[July 1996] In a divorce action the New Jersey component would be **QUASI-COMMUNITY PROPERTY**.

For purposes of marital property division upon **divorce**, property acquired in another state, which would have been community property if acquired while domiciled in Texas, is treated the same as community property, and is subject to “just and right” equitable division.

** **BUT** (*Hanau v. Hanau*, Tex. 1987) for purposes of distribution on **death**, New Jersey component would be:

A: H’s separate property

Suppose that H died leaving a will that devises “all my property” to his son Sam. How much of the title to the Texas home will pass under H’s will?

A: $4/10$ SP + $1/2$ of CP ($6/10$) = $4/10 + 3/10 = 7/10$ for Sam

[The nine community property states:]

Washington

Idaho

Wisconsin

[since 1986]

Not Oregon

Nevada

California

Arizona

New Mexico

Texas

Louisiana

Because of the community property system, Texas (I) does not have an elective share statute (found in most common law jurisdictions, and (ii) does not recognize the tenancy by the entirety estate.

9. [July 1999] H uses community funds to buy land in Arkansas, taking title in his name.

_____ Is the land in Arkansas community property? **A: No**

Under the _____, ownership and transfer (including intestate succession) of land located in a state is governed by the laws of that state, and Arkansas does not recognize community property. However, the Arkansas courts will recognize W’s one-half ownership interest (her $1/2$ CP used to acquire the land under the equitable doctrine of **resulting trust** or **constructive trust**. **A: Situs Rule**

D. COMMUNITY CREDIT PRESUMPTION: What must be shown to overcome the presumption of community credit? There are two tests:

*****Gleich v. Bongio*** (Tex 1937): creditor agreed to look solely to the separate credit of the borrowing spouse. This would be the result if (*e.g.*,) H had signed the note “H, **for his separate estate.**”

Or [July 1982] ***McClintic v. Midland Grocery*** (Tex 1913): The *spouses agreed* that it was to be on separate credit of borrowing spouse.

10. [July 1983] Classify: House and lot purchased during marriage with proceeds of a loan secured by mortgage on other separate property owned by H; H alone signed the note, and deed names H as grantee.

A: CP Acquired on credit during marriage. None of these facts overcomes presumption of CC.

What of the fact that the deed names H (and H alone) as grantee? [July 1997]

A: How title held does not effect classification.

What of the fact that H alone signed note? [Feb. 1996]

A: He presumptively signed on behalf of community estate.

[July 1995] What of the fact that the note was secured by a mortgage on H's separate property?

A: Does not overcome presumption of comm credit

Reason:

A: Lender is not limited to S/I. Could s... note deficiency

[Feb. 1989] Only case where separately-owned collateral used to secure the note would make it a separate obligation: **non-recourse note** on which borrowing spouse is not personally liable.

E. EFFECT OF HOW TITLE IS TAKEN, WHEN DOES TITLE AFFECT CLASSIFICATION?

General rule: How title is held does not determine characterization. Rather, under the inception of title rule it's the time and circumstances of the acquisition. Exceptions to the general rule:

11. [Feb. 1996] Hank purchases Greenacre with proceeds of a gift from his uncle and places title in his wife's name without any recitals; the deed names "Mary Jones" as grantee. Greenacre is:

Where one spouse uses separate funds, takes title in other spouse's name

A: : Presumption of gift to spouse (see Trust LAN discussion of "Purchase money resulting trust)

- 11a. Same facts, except that the funds used for the purchase of Greenacre were community property.

Community presumption applies, but only _____ evidence needed to show gift to W's separate estate was intended. **A: slight**

- 11b. [Feb. 1995, Feb. 1997] Same facts (community funds used) except that the deed names as grantee "Mary Jones, *as her sole and separate property*" [or word of like effect]. Hank contends that Greenacre is community property, and that he had no intention of making a gift of his community interest to his wife. He offers evidence to that effect. Result?

A: W's SP parole evidence rule has testimony

*As long as other spouse participated in transaction.

12. Same facts, except that Hank was not a party to the transaction in which title was taken in this fashion; Mary acquired the property with expenditure of community funds, without Hank's knowledge. [*Holcembach*, 1979]

A: Here other spouse H did not participate in transaction = fraud

F. APPLICATION OF "INCEPTION OF TITLE" TO ADVERSE POSSESSION

CASES

13. [Feb.1989] in 1984 Harry, while single, contracts to buy Tract 3 from Jones. Jones (a developer) gives Harry a deed that purports to convey Tract 3, but mistakenly contains a metes and bounds description of the adjoining Tract 2. Harry enters into possession of Tract 3 and occupies it continuously until his death in 1996. Under Texas's 10-year statute of limitations, Harry acquired title by adverse possession to Tract 3 in 1994. Harry marries Winona in 1990, and dies leaving a will that devises "all my property" to his brother Bob. Who owns Tract 3?

_____ Entered under *rightful claim* since reformation action would lie to correct the mistake in the deed. **A: H's S.P.**

A: Not a trespasser - Title by a poss "relates back" to date of start of "rightful claim"

Therefore, Tract 3 passes under Harry's will:

A: To Bob who has full title since it was Harry's SP

13a. . . . When Harry purported to buy Tract 3 in 1984, he noticed that a 200-acre tract immediately to the north was not being used, or apparently claimed, by anyone. (Actually, O owned the 200-acre tract.) Saying "Why not?"—not too loudly, in 1984 Harry began farming the 200 acres continuously until his death in 1996. Harry acquired title by adverse possession to the 200-acre tract in 1994.

_____ H was a *naked trespasser*; he entered without a rightful claim. **A: CP**

Falls under the rule that:

A: All prop acquired during marriage is CP unless shown otherwise. Property passed by AP in 1994 (after marriage)

G. LIFE INSURANCE POLICIES

14. H and W were married in 1990 in Ohio, a common law state. In 1994, H took out a \$100,000 life insurance policy from Prudential. H died in 2000; the proceeds of both policies were paid to H's sister Sue. Premiums on each policy have always been paid out of H's earnings. What portion of the insurance proceeds is H's separate property, and what portion is community property?

Yes Does the inception of title rule apply to life insurance policies?

First premium payment determines ownership.

This is true even of a term insurance policy (which is pure insurance, no cash surrender value or investment feature) if (as is typical) the policy is “guaranteed renewable” without evidence of insurability and/or guaranteed convertible to a case value-type policy.

Aetna (acquired during marriage; they were domiciled in Ohio): *

A: = S/P his salary is S/P

* Would be quasi-community property if issue arose in a divorce case.

Prudential (acquired during marriage; they were domiciled in Texas):

A: = C/P

Since H named his sister as beneficiary of the policy, W could attempt to challenge the beneficiary designation under the *fraud on the spouse* doctrine, discussed *infra*.

Aetna policy (H’s separate property): the community has an *equitable claim for reimbursement* since community funds were used to pay a portion of the premiums. (**Not** a claim for economic contribution because the case does not involve reducing secured debt or capital improvements.) On H’s death, W would be entitled to one-half of the CP funds used to pay premiums.

W would **not** have a reimbursement claim from the CP funds used to pay premiums on the Prudential policy even though the policy proceeds were paid to H’s sister. A reimbursement claim arises **only** when funds of one marital estate are expended on another marital estate. Here, CP was expended on CP.

14a [July 1991] Classify: Disability insurance policy W purchased from her employer with deductions from her salary.

A: CP bought with community funds

H. EMPLOYMENT RETIREMENT BENEFITS

15. [Feb. 2000; ten times since 1987] H was employed by Texaco in 1974 and married W in

1985. At the time of their divorce in 1996, H had completed 22 years of service with Texaco, the last 11 years of which while H and W were married. H was eligible for retirement at the time fo trial but had not retired. Had he retired on that date he would be entitled to retirement pay of \$1,200 per month. Does W have any interest in H's retirement? Why? If your answer is "yes," how should the court determine W's interest?

Employee retirement benefits accumulated during marriage (while domiciled in a CP state) are:

A: CP whether or not vested at time of divorce. (It's earned compensation)

Reason:

A: All earnings of either spouse = CP

This question involved *a defined benefit plan* (see page 12 for other type), where the amount of the retirement benefit is tied to years of service. A typical defined benefit plan provides benefits under a formula such as:

$$[2.2\%] \times [\text{years of service}] \times [\text{average of three years' highest salary}]$$

Where (as here) participation in defined benefit plan *began before marriage*, the CP component is computed pursuant to a fraction:

Numerator: _____
Denominator:

$$\text{A: } \frac{\text{11 yrs svc while married}}{\text{22 yrs @ time of divorce}} = \frac{11}{22} = \frac{1}{2}$$

½ is community prop

The result in #15 is subject to Texas Family Code § 7.001: "In a decree of divorce or annulment the court shall order a division of the [community] estate of the parties in a manner that the court deems *JUST AND RIGHT*."

[Feb. 1994] What two forms can the decree take, given that H may die before retirement, and may never received the monthly benefit?

#1: **"If, as and when received" decree; or**

#2: **Cash W out** by awarding her other assets of equal value, leaving entire pension plan with H.

15a. Suppose, instead, that there was no divorce; and that W died leaving a will that devised “all my property” to Steve, her son by her first marriage. Did W’s community interest in the Texaco pension plan pass under her will to Steve?

If the nonparticipant spouse (“NPS”) in a qualified pension or retirement plan **divorces** the participant spouse, her community property interest in a qualified plan is recognized; under federal law she can get a **QUADRO (qualified domestic relations order)**, and receive payments from the plan. Does the NPS have a devisable interest in a qualified plan if she **predeceases** the participant spouse? *Boggs v. Boggs (United States S. Ct. 1997) says:*

A: No: federal preemption. NCS interest terminates.

16. [July 1999, Feb. 2000] When W married H in 1986, she had \$36,000 in her retirement account under the Motorola **defined contribution** plan [other major type of pension plan; 401(k) plans are defined contribution plans], under which the employer and employee make contributions to an account for the employee, which grows with accrued interest and future contributions. Thus there is a dollar amount in the employee’s account at any given time. At retirement, this amount either is distributed in a lump sum or is paid in installments. When W divorced H in 1996, there was \$106,000 in W’s retirement account.

Separate property:

A: \$36,000 acct balance at time of marriage

Community property:

A: All the rest

17. H and W married in 1939; H employed by Southwestern Bell in 1940. Divorce in 1966; decree was silent as to H’s retirement benefit. H could not retire in 1966 because he under age 60. H retires in 1978. Under “Defined Benefit” plan based on average of highest five years’ salary and years of employment, H was entitled to \$950/month pension. W, suing to collect her share of the retirement benefit, argues that since they were married for 26 ears and h worked for 38 years, she is entitled to ½ of 26/38 of \$950/month pension. **NOT SO**, said *Berry v Berry* (Tex. 1983)). The court pointed out:

(1) H worked for 12 years after the divorce, increasing “years” multiplier from 26 to 38.
(2) After 1966, H received several raises, raising 5-year salary average. As post-divorce benefit increases were H’s SP, the fraction urged by W would give her a share of H’s separate property, not permitted.

[Feb.1993] Rather, the CP component of retirement benefit is benefit H would have received had he been able to retire in 1966, using a 26-year multiplier on average of five years’ highest salary up to 1966. The amount to which W is entitled is *not necessarily* ½ of that amount. The CP component is subject to a just and right division in a separate action brought for that purpose. [See #27]

But H couldn’t have retired in 1966; he was under age 60! No problem, said the court: We aren’t determining an actual retirement benefit, but the value of the CP in the benefit at time of divorce.

Bottom line [Feb. 1993, Feb. 1994]: ***Freeze value of retirement benefit as of date of divorce.***

18. [Feb. 1991] H (sergeant in the Marines) and W are divorced in 1988. The trial court awards all interest in H’s military retirement benefit to H, citing *McCarty v. McCarty* (U.S. 1981) as basis for denying W any community property interest in the military retirement plan. The divorce judgment was signed in 1988, and no appeal was taken.

_____ Was the trial court’s decision proper? **A: No, clear error**

McCarty: Court found, from “spendthrift” language in statute establishing military retirement plans, Congressional intent to apply federal preemption over state community property laws.

[Feb. 1994] However, Uniformed Services Former Spouses’ Protection Act (USFSPA) overturned *McCarty v. McCarty*: Spouses of military personnel **DO** have community property rights in a military retirement plan.

_____ Does that mean that W can bring an action to obtain her community interest in H’s military retirement? **A: No, b/c no appeal was taken from final judgement. Res judicata**

18a. BUT (1991 Texas case) ***military disability retirement pay*** is *not* community property under Federal preemption, and USFSPA doesn’t apply. Court was bound by Supreme Court decision directly on point.

18b. H suffered a work-related injury, resulting in permanent disability, six months before he married W. Ten months into the marriage, H settled his workman’s compensation claim for \$30,000. The benefit is: [*Lewis v. Lewis*, Tex. 1997]

_____ *The character of a workman's compensation benefit is determined when the loss of earning capacity occurred, not when the benefits are paid.*

A: H's SP - single when it occurred = his SP

I. BUSINESS INTERESTS

19. [July 1995, July 1996] H owned all of the stock of Jensen Mfg. Co., worth \$75,000 at the time of his marriage to W. H devoted 90% of his time to the business and drew a substantial salary; and the corporation paid H dividends and bonuses. H and W divorce after four years of marriage; the value of H's stock is \$1 million. Pointing out that H's earning power is a community asset, and that the great increase in value of the business resulted from H's personal effort, far in excess of the amount of time needed to merely maintain his separate estate, W claims an equitable ownership interest in the stock; or, alternatively, a right of reimbursement for the time, toil and talent expended by H in the business. Is she entitled?

_____ Does the "claim for economic contribution" statute apply, where one spouse's labor during marriage enhances the value of his separate property?

A: No, not secured debt cap improv

_____ Does W have an "equitable claim for reimbursement," then?

A: Yes

Jensen v. Jensen (Sct 1984):

1. *Stock in closely held corporation is H's separate property since owned before marriage.* Court rejected "community ownership: theory of other CP states as inconsistent with Texas' "inception of title" rule.
2. *Community entitled to reimbursement for value of time, toil and talent expended by H to enhance his separate estate...*
 - a. beyond that reasonably necessary to maintain and preserve the separate estate, and
 - b. Reduced by compensation received for H's time and effort in the form of salary, bonus, dividends, and other fringe benefits.

SUM-UP: For business owned before marriage [and thus separate property] that increases in value during the marriage: To determine amount of reimbursement claim (if any):

- MINUS**
- (1) *Value of time, toil and talent expended* [TTT]
What executives in comparable positions would be paid
 - (2) *Value of time etc. reasonably necessary to preserve H's separate estate*

MINUS (3) *Compensation received by H* in salary, bonus, dividends, fringe benefits

20. [July 1992] At the time of her marriage to H, W held an undivided one-third interest in a real estate partnership. The partnership increased in value during the marriage.

While the underlying partnership assets belong to the partnership entity, a partnership *interest* is either SP or CP. Here, W's interest is SP because owned before marriage.

All distributions to a partner during marriage, whether salary or distribution of profits, are:

A: CP

J. COMMINGLED BANK ACCOUNTS - THE "COMMUNITY OUT FIRST" RULE

21. [July 1997; six times since 1988] W inherited \$25,000 cash which she deposited in a bank account in her name; H could not draw on the account. W put income from her separate property (the income was, therefore, CP) into this account; W and H's earnings were deposited in another account. The bank account in W's name fluctuated; at one time the balance was as low as \$12,500. The amount on deposit was \$50,000 when H died. W contends that since she brought the \$25,000 cash into the marriage, she is entitled to that amount out of the bank account as her separate property. Should the court sustain W's position?

_____ While the community presumption applies to commingled bank accounts, and tracing to establish separate property is difficult, apply the community out first rule. **A: No**

also known as the _____

A: lowest intermediate balanced rule.

When SP and CP funds are commingled in a bank account, it is presumed that:

A: comm funds were withdrawn first. (Separate funds sink to the bottom)

Therefore, W is entitled (as her SP) to:

A: \$12,500

III. DIVISION OF PROPERTY ON DIVORCE

22. [July 1993] W's father deeded Blackacre to W and H as a gift, citing as consideration the "love and affection" which he bore his daughter and son-in-law. In a divorce action the trial court awarded the entire tract to W, and awarded other property of equal value to H. Was this action correct?

As a result of the gift, Blackacre was:

A: SP - 1/2 W SP 1/2 H b/c acquired by gift = tenants in common

Therefore, trial court's award of Blackacre to W was:

**A: not
proper**

[July 1995; three times since 1990] "Just and right" equitable division poser applies only to:

CP!! (and quasi comm prop). SP cannot be divested and awarded to other spouse.

Divorce court's only power over one spouse's separate property: Can be set aside for support of minor children of the marriage (*i.e.*, to secure payment of child support).

[July 1993] Same result where H and W were divorced in 1988 and in a just and right division a ranch (CP) was awarded 1/2 to H and 1/2 to W. In 1990, they reconciled and remarried, and H died in 1993. As far as the second marriage was concerned, the ranch was separate property (1/2 each) because it was owned *before* that marriage.

23. [Feb. 2000] Upon divorce, trial court awarded W community property worth \$300,000, awarded H community property worth \$100,000, *and* required H to assume community obligations of \$50,000. H challenges this property division on appeal. *What factors* would the appellate court consider in determining whether the decision of the trial court should be affirmed or reversed?

Wide latitude is given trial judge's determination. Not sufficient that the Court of Appeals might reach a different decision. Decision will be reversed only if division is so disproportionate as to be *manifestly unjust* and an *abuse of discretion*.

-- Age and physical condition of the parties.

- Relative ability and earning power of the parties.
- Relative needs for future support.
- Size of the estate.
- Benefits spouse would have received from continuation of marriage.
- Fault in breaking up the marriage.

_____ Can the court take fault into account if it is a no-fault divorce? **A: Yes**

But what about the fact that H was required to assume \$50,000 in CP obligations??

A: Community liabilities are also subject to “just and right division”

24. [July 1995] In a divorce action, the trial judge orders a division of the community property, awarding 75% of the property to the wife and 25% to the husband. On appeal, Court of Appeals rules that the trial judge’s division was “manifestly unjust,” *and* directs a different division of the community estate: 60% to the wife and 40% to the husband.

_____ Was the appellate court’s decision proper?

Court of Appeals must reverse and remand; but cannot render judgment.

A: statute says trial court shall make decision. Just remand for a new decision.

25. [July 1996] In the “just and right” division on H and W’s divorce in 1994, the court awarded 60% of the community property to W and 40% to H. W now asserts that an asset not disclosed in the divorce action was community property, while H contends that it was his separate property. In an action brought by W, the court determines that the asset was indeed community property of the marriage. What division of the asset should the court order?

Former law: For community property not partitioned on divorce, former spouses were tenants in common, each owning an undivided ½ interest.

Current law: Later-discovered CP not partitioned at divorce is **subject to just and right division** in separate action brought for that purpose.

Rationale:

A: otherwise H not penalized for hiding assets

Statute of limitations for such an action: _____ after other party repudiated claim of community ownership.

A: 2 years after W claims asset is CP NOT when divorced

26. [Feb. 1999] Hobie and Winkie were married 15 years when Winkie filed for divorce. Hobie earns \$72,000 per year (\$6,000/month) as a CPA; Winkie, with only a high school diploma, has not worked outside the home since their first child was born 12 years ago. They have three children (aged 12, 8 and 4). Is Winkie entitled to a *limited spousal maintenance* award?

To be eligible, (i) the couple must have been married for at least _____ years [unless other spouse convicted of family violence within past two years]; (ii) the spouse must *lack sufficient property to provide for her minimum needs*; and (iii) the spouse seeking maintenance must either (a) be unable to support herself because of a disability, or (b) be custodian of a disabled child, or (c) *lack employment skills adequate to provide for her minimum reasonable needs*.

A: 10 years

Maximum award is *lesser* of (i) _____ per month or (ii) _____ percent of the spouse's average monthly income; payments are to be limited to the shortest period that will enable the spouse to obtain appropriate employment or develop and employable skill. Payments cannot continue for more than _____ months (unless spouse was disabled at time of divorce).

A: (i) 2,500; (ii) 20; and 36

[July 2000] *Factors to consider in making award*: Winkie's lack of employment history and employment skills, her physical and mental condition, her contributions as a homemaker and contributions to Hobie's earning ability; Hobie's ability to meet his personal needs and child support obligation.

[July 2000] *Modification of limited spousal maintenance award*: Award can be modified *downward* (but not upward) upon showing that circumstances of either party have materially and substantially changed. (e.g., Hobie has less income.) Award *terminates* (i) on death of either party, or (ii) if Winkie remarries or cohabits with another person.

Winkie says "to heck with spousal maintenance! I want *alimony*, like spouses can get in every other state in the Union."

_____ Is Winkie entitled to alimony? **A: Hell no!**

"The statutes and public policy of this State do not sanction alimony after a judgment of

divorce has been entered.”

“Alimony is an allowance (in the nature of *future periodic payment* which a *court orders...* as a *personal obligation* for support after a final decree of divorce.”

Exceptions: **#1. Temporary support** (“temporary alimony”): Support payments “until a final decree is entered.”

#2. Contractual alimony: If the parties agree to a property settlement that includes periodic payments to a spouse, the fact that the agreement is incorporated into the divorce decree, does not make it court-ordered alimony.

#3. In rem periodic payments IF referable to property not easily divided.

27. [July 1988] H and W own, as community property, all 100 shares of stock in a closely held corporation that is managed and operated by W. The stock is worth \$150,000. The trial judge makes a “just and right” division that awards all of the stock to W, but orders W to pay H \$800/month for 10 years “in further settlement of the community property rights of the parties.” This is *not* part of a property settlement agreement; it is part of the court decree granting the divorce (and looks suspiciously like court-ordered alimony). Was the trial judge’s action proper?

_____ **IF #1** _____

AND #2 _____

A: Yes if #1 in rem judgement (no personal liab) and #2 relates to property not easily divided

28. Hank takes out a \$100,000 Aetna life insurance policy before his marriage to Wanda. (Under the “inception of title” rule the policy is Hank’s separate property.) After the marriage, Hanks names Wanda as beneficiary under the policy, and his mother Maude alternate beneficiary. Wanda divorces Hank; the insurance policy is not mentioned in the property settlement agreement or the divorce decree. H dies without having changed the beneficiary designation. Who takes the \$100,000 life insurance proceeds?

By statute (which also applies to beneficiary designations under employee pension plans*):

Divorce terminates former spouse’s rights as beneficiary. Read policy as though former spouse predeceased the insured...

Unless (1) H renames W as beneficiary after the divorce, or (2) divorce decree names spouse as beneficiary (*e.g.* as trustee of trust to provide support for couple’s children).

_____ *Does the “divorce revokes” statute apply if it is a qualified pension plan

governed by ERISA [Employee Retirement Income Security Act of 1974]?

A: No

“If this is a qualified plan governed by ERISA, federal preemption overrides the state divorce rule.” [Egelhoff, U.S. 2001]

28a. What if Aetna policy acquired under Employee Retirement Plan? TX Sup Ct = Federal Preemption. Fed law trumps TX code if they test in this area they must telegraph the answer. Fed preemption if qualified retirement plan or ERISA mentioned.

29. In the above divorce action, the court awarded the couple’s Honda to Wanda. After the divorce, the Honda is damaged in an accident, resulting in a \$5,000 collision claim. The Allstate insurance policy on the Honda names Hank as beneficiary. To whom should the \$5,000 be paid?

Wanda, because statute provides that with respect to casualty, liability or health insurance not dealt with in divorce proceeding, *proceeds are payable to spouse who was awarded the property*.

(Under the statute, “the insurance follows the property.”)

30. [Feb. 1990] W is a solo practitioner accountant. The most valuable asset of her business is the good will associated with her practice, which has been appraised as being worth \$100,000. How do we handle good will on divorce? [*Nail v. Nail*]

Good will of a professional practice:

A: is not property. It is not owned separate and apart from her person. Nothing to divide on divorce.

[July 1984] Compare Professional Corporation, where professional practice is incorporated and there are *shares of stock*. The shares of stock are *property*, and are subject to “just and right” division.

What if W had entered into a contract for the sale of her practice at the time of the divorce action?

A: very bad timing. K’s capable of division

31. W works as a nurse to put H through medical school. Shortly after beginning his practice, and before any community estate has been accumulated, H divorces W. In divorce action, court

awards W %50,000 “in division of the community estate of parties and to reimburse W for contributing to H’s education.” Proper? (*Fraustro v. Fraustro*)

_____ A professional education degree:

A: No, is not property

Rationale: To call a professional educational degree “property”:

A: would result in an award of post divorced earnings (S/P) and is prohibited

_____ Do these facts give rise to an equitable claim for reimbursement?

A: NO

The expenditures were not on *property*. An equitable reimbursement claim arises *only* when CP is expended to enhance the value of SP.

32. Luther left his wife Lois and their three kids in Lubbock and moved to Houston, where he married Daphne. During their (bigamous) marriage, Luther and Daphne acquired property worth \$200,000 from Luther’s salary.

_____ Is the \$200,000 community property of Luther and Daphne?

A: No, not legally married, can’t be CP

a. If Daphne was unaware of Luther’s marriage, she is called a _____ and the relationship is characterized as _____.

A: putative spouse; partnership or J.V.

Who owns the \$200,000 then?

A: make analogy to CP. Treat as tho married

Daphne:

A: Yz = 100,000 as CP

b. If Daphne *was* aware of Luther’s preexisting marriage, the relationship is characterized as:

A: meretricious

Who owns the \$200,000, then?

Daphne:

A: 0

Luther and Lois:

A: 200K as CP

c. What happens if Lois dies (or divorces Luther)?

A: Daphne & Luther are legally married when impediment is removed

IV. THE INCOME FROM SEPARATE PROPERTY IS COMMUNITY PROPERTY

This is the rule *unless* the spouses agree in writing that income from each party's separate property shall be separate property.

Exception: [July 1992, July 1995] Gift from one spouse to another: Income from gifted property is presumptively donee spouse's separate property.

A. TRUST INCOME INTERESTS

33. [Feb. 1987] Trust created by Hank's father provides: Income to Hank for life, remainder to his children. Classify Hank's income interest.

SP The *gift* to Hank *was of the income interest itself*, not the underlying trust principal that generates the income. Falls under the rule that property acquired by gift is SP. **BUT** [Feb. 1997] if Hank has the **unrestricted power to withdraw the principal** at (*e.g.*) age 40 and doesn't do so, all income thereafter is community property. (The point: Outright ownership was totally within his control.)

B. MINERAL INTERESTS

34. [July 1996] W owns mineral-producing properties as her separate property. Which of the following distributions to her are separate property and which are the community property of W and H?

_____ \$50,000 bonus paid by Texaco to W in consideration for her executing an oil and gas lease.

A: SP, piecemeal sale of separate mineral estate

_____ \$2,000 delay rental paid by Texaco the next two years.

A: CP, rental income

_____ [July 1996] \$50,000 paid to W as royalty from Texaco's bringing in a well the following year.

A: SP, sale of underbeing min estate

Bottom line: of all the regularly encountered mineral lease distributions, the only one that falls under the rule that "the income from SP is CP" is:

A: Delay rental

C. CORPORATE DISTRIBUTIONS

35. W owns 1,000 shares of GM stock and 1,000 shares of American Mutual Fund as her separate property. Which of the following corporate distributions are W's separate property and which are the community property of W and H?

_____ [Feb. 1987] \$2,000 cash dividend paid by GM in 1998 [July 1995: interest on bond]

A: CP

_____ 10% stock dividend declared and paid by GM in 1999.

A: SP

_____ [July 1999; frequently tested] Additional 1100 shares issued to W as result of 2-for-1 stock split declared by GM in 2000.

A: SP

_____ [July 1997; tested frequently] \$3,000 capital gain from W's sale of the stock in 2001.

A: SP

ALL proceeds of sale of a separate asset are SP, *including any capital gain.*

Bottom line: Of all the regularly encountered corporation distributions, the only one that falls under the rule that "the income from SP is CP" is

A: cash dividends

Mutual Fund sends W a dividend check for \$1,2000, of which \$400 represents “regular dividend income,” and \$800 represents “capital gains dividends.”

_____ \$400 regular dividend. [W’s share of dividend and interest income received on the securities held by the mutual fund]

A: CP

_____ \$800 capital gains dividend. [W’s share of gain resulting from sales of securities by the mutual fund – *Bakken v. Bakken*, CA 1974]

A: SP

D. INCREASE FROM ANIMALS

36. [Frequently tested] Hobie owned Serendipity, a thoroughbred mare, when he married Winkie in 1996. Serendipity had produced two colts when Winkie filed for divorce in 1999. Serendipity is Hobie’s separate property, of course, but the colts?

The colts are _____ **A: CP, the increase from SP animals are CP**

V. AGREEMENTS ALTERING THE CHARACTER OF ASSETS

A. PREMARITAL AGREEMENTS

37. Key features of Uniform Premarital Agreement Act:

- Must be *in writing and signed by both parties*.
- *No consideration* for the agreement *is required*.
- Parties can agree that income from each’s separate property shall be separate property.
- Agreement can govern the disposition of property on separation, divorce or death, including the making of a will or trust and the disposition of life insurance policies.
- Agreement can waive homestead rights, right to exempt personal property set-aside and family allowance, and can deal with *any other matter* including their personal rights and obligations.

_____ [Feb. 2001] Can the parties agree that, after the marriage, each party’s salary and wages shall be that party’s separate property? **A: Yes**

_____ [Feb. 2001] Can the parties agree that, after the marriage, H’s ranch (which he inherited) shall be held by H and W as community property?

A: Only spouses can convert SP to CP. Have to wait till married

_____ [Feb. 1998, Feb. 2001] Can a premarital agreement limit either party's obligation to furnish *child support*? **No**

Bottom line: In a premarital agreement the parties can agree on *anything EXCEPT* to (I) limit either spouse's child support obligation, or (ii) agree that, after they marry, one spouse's separate property shall be community property. [They can convert SP into CP *after* they marry, but not in a premarital agreement.]

37a. Daisy and Donald enter into a premarital agreement. Daisy divorces Donald several years later, and in the action seeks to set aside the agreement.

[Feb. 2001] What must Daisy establish to set aside the agreement:

That the agreement #1 was "*unconscionable when made,*"

- AND #2**
- (a) There was *no fair disclosure* of Donald's property or financial obligations;
 - (b) The *right to disclosure was not waived* in writing; *and*
 - ©) Daisy had *no adequate knowledge* of Donald's property or financial obligations.

Burden of proof on "unconscionability" issue (or that the agreement was signed involuntarily) is on *party seeking to avoid agreement* (here, Daisy).

A: matter of law

[Feb. 1996] Is the unconscionability issue a fact question for the jury or a matter of law to be decided by the court? **A: matter of law, decided by judge**

**Marriage of Bonds* (Cal. 2000): B's attorney drafted agreement and explained it to W: each shall keep his or her earnings as SP. W was told she could get her own attorney, but she said that's OK; as for earnings, "that's the way we do it in Sweden." They flew off to Las Vegas and were married the following day. Said the court: it was an *informal wedding*, she could have postponed it if she wanted attorney to review. It would be different (the court intimated) if she was presented with "sign or it's off" ultimatum 30 minutes before wedding in St. Patrick's Cathedral with the sanctuary filling, to be followed by a reception at the Country Club.

B. MARITAL AGREEMENTS

38. In 1995, W used separate funds to buy Dell stock for \$50,000. Aside from the Dell stock, W and her husband H have a fairly modest estate. After stock splits and all, the Dell stock is now worth \$1,000,000. If W were to sell the stock, she would face a hefty capital gains tax. If W predeceases H, the stock will receive a new basis on W's death—but H is two years older than W. What should they do?

1999 constitutional amendment: *Spouses can agree in writing (signed by both spouses) to convert separate property into community property.* W and H can enter into a conversion agreement, making the Dell stock community property. Under Int. Rev. Code § 1014(b)(6), as community property the stock will obtain a new basis on the death of the first spouse to die. Also, if H predeceases, he will have sufficient assets to utilize his \$1,000,000 (in 2002 and 2003) estate tax exemption. W will have made a gift to H, but there are no gift tax consequences because of the unlimited gift tax marital deductions.

Disadvantages of a conversion agreement:

If parties develop marital problems, the Dell stock, as community property, will be “on the table” for just and right division.

Some protection against creditors' claims will be lost.

W will lose the power of disposition over half of the property.

39. [Feb. And July 1997] Winkie's mother deeds land to her daughter Winkie and her son-in-law Hobie Gates as grantees, “to be held by them as community property.” Also, Hobie used inherited funds to buy 1,000 shares of AT&T stock, and had the stock issued in the names of Hobie and Winkie, “as community property.”

_____ Do we have a valid conversion agreement, making the property acquired by gift from mother (or the stock purchased by Hobie) community property?

A: No, nothing was signed by both spouses! They TIC 50% each

40. [July 1987] Hobie and Winkie own a ranch in Travis County and a farm in Bastrop County as CP, although title to both tracts is in Hobie's name. Hobie and Winkie enter into a written, signed agreement that partitions the ranch and farm, making them 1/3 H's separate property and 2/3 W's separate property. The agreement, acknowledged before a notary public, is recorded in the Travis county deed records.

_____ [July 1988] Can spouses make an unequal partition of community property?

A. Yes

*_____ With respect to the Travis County ranch, is the partition agreement valid as

against preexisting unsecured creditors? **A: Yes**

*Unless made with *intent* to defraud creditors

_____ With respect to the Bastrop County farm, is the partition agreement valid as against subsequent creditors or BOPS without actual notice of the agreement?

A: Must be recorded in county where land located, here = recorded in Travis Co not Bastrop Co

40a. [Feb. 1995, Feb. 1997] Same facts, except that H and W signed a written agreement providing that the Travis County ranch was to be H's separate property, and the Bastrop County farm was to be W's separate property.

_____ Valid agreement? **A: Yes, called an exchange agreement**

C. COMMUNITY PROPERTY SURVIVORSHIP AGREEMENTS

1987 constitutional amendment: "Spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." The survivorship agreement can be as to specific assets, or it can apply to all community property now owned or acquired in the future.

- a. ***Must be in writing and signed BY BOTH SPOUSES.*** Compare (*e.g.*) a joint and survivor bank account between Parent and Child. The right of survivorship is valid if the account agreement was signed (only) by the party who died. But for a H-W joint account of community funds, the right of survivorship is not valid unless the account agreement is signed by both spouses.
- b. ***Either spouse may revoke by written notice to other spouse.***
- c. ***Court Order Adjudging Agreement Valid.*** A survivorship agreement is effective without an adjudication. But since title passes by survivorship as a ***nonprobate transfer***, the spouse's ownership rights will not be established in probate proceedings. *Solution:* the statute authorizes a court proceeding in which, upon proof of a valid agreement and that the agreement was not revoked, the court enters an ***order adjudging the agreement valid.***
- d. ***Third parties dealing with decedent's estate without notice of agreement are protected.*** Suppose that the deceased spouse's executor, unaware of the existence of a survivorship agreement, sells assets subject to the agreement to a third party. The executor is not liable, and the ***BFP takes good title as against the surviving spouse.***

- e. ***Third parties dealing with surviving spouse without notice of revocation – six month rule.*** Suppose that a third party buys property from surviving spouse, unaware that the survivorship agreement had been revoked. As long as the sale was more than ***six months*** after decedent’s death, the purchases takes good title as against the decedent’s successors.

D. PALIMONY AGREEMENTS [Feb. 1997] “on consideration of nonmarital conjugal cohabitation” (*cf* Lee Marvin and Michelle) must be in writing and signed by the party sought to be charged.

VI. POWER TO CHALLENGE GIFTS OF COMMUNITY PROPERTY

A. FRAUD ON THE SPOUSE’S COMMUNITY SHARE

[Feb. 1999] One spouse can make “reasonable” gifts of community property, as long as such gifts are not so disproportionate as to be “in fraud of the spouse’s community rights.” Factors considered (“weigh the equities”):

1. ***Relationship of donee to donor spouse.*** A gift to an unrelated party [July 1989: W’s boyfriend] is presumptively fraudulent. Absent special circumstances (no Texas case has ever found them!) the gift can be set aside in its entirety if challenged during donor spouse’s lifetime, or as to one-half after donor spouse’s death.

But if the gift is to a relative [July 1989: small gift to W’s sister], this tends to support the gift against challenge.

2. ***Amount of gift in relation to community estate.***
3. Whether there are any ***special circumstances*** that justify the gift.
4. ***Whether spouse is adequately provided for*** out of remaining community estate.
5. Whether the gift was of ***the donor’s sole management community property.***

Same “fraud on the spouse” test applies if (*e.g.*) H, the insured, names [a] mistress, [b] child by his first marriage, as beneficiary of a community property ***life insurance policy****. In determining whether W can set aside the beneficiary designation as to her ½ CP, the test is the ***fraud on the spouse doctrine***, considering the “weigh the equity” factors.

*unless federal preemption under ERISA

B. WHETHER THE TRANSFER WAS “ILLUSORY”

41. H transfers CP stock titled in his name to a revocable trust that names daughter D as trustee: income to H (on behalf of the community) for life, then to W for life; on death of the survivor the property is to pass to D free of trust. Under the trust, ***D cannot sell, vote, or deal with the trust property without H's prior approval.*** On H's death the trust is to become irrevocable. H dies; W, who learned about the trust only 10 days before H died, seeks to have the trust set aside. Result? [*Land v. Marshall*]

Why wasn't this a "fraud on the spouse" case? [*Answer: Because issue was lost on appeal; lower court ruled no fraud on spouse, and issue not preserved on appeal. But if you are asked this question on the bar exam, you must discuss "fraud on the spouse" and 5-point test, supra.*]

Held: Because of the settlor's retained controls over the trustee, H's transfer was:

A: illusory and can be set aside! Transfer is illusory when it is colorable - not real

41a. Same facts as above (CP transferred to revocable trust) *except that* trust does not contain the italicized provision, and H cannot control the trustee in the trust's administration. Does the power to revoke the trust, by itself, make the trust "illusory" and subject to challenge?

No answer; argue both ways. In *Land v. Marshall*, court discussed in dictum whether the power to revoke (including threatening the trustee with revocation of trustee didn't do settlor's bidding) made the transfer illusory – but then said it would withhold a decision until issue was actually presented.

Note: The trust in *Land v. Marshall* was a valid trust for Trust law purposes even though H retained substantial controls. The "illusory trust" doctrine is a *marital property doctrine*.

VII. MANAGEMENT POWERS AND CREDITORS' RIGHTS

A. EFFECT OF DIVORCE ON PREEXISTING CREDITORS

42. [July 1982] H borrows \$50,000 from Bank on a note signed by H (but not signed by W). H and W divorce, and in a just and right division the court orders H to pay the \$50,000 debt. A year later, H files for bankruptcy; Bank files its claim but collects only \$20,000 in the bankruptcy proceeding. Bank sues W, seeking to collect \$30,000 from CP assets set aside to W in the divorce proceeding. Result?

Family Code: **Divorce does not affect the rights of preexisting creditors.**

Result if Bank sues W directly:

A: sum judgement. No personal liability she did not sign note

[July 1987] But what if W has also signed the \$50,000 note?

A: now personally liable

[Back to original facts; W did not sign the note.] If Bank gets a judgment lien against H, can it enforce the judgment lien on CP assets set aside to W?

_____ Judgment lien is valid:

A: No: only against judgment debtor, no one else

What, then, should Bank do?

Seek to have a **constructive trust** imposed on the property. Action must be **in rem** against the **property** in W's hands, because a personal action against W is not available.

B. CLASSIFICATION OF MARITAL PROPERTY FOR MANAGEMENT PURPOSES

-- W's separate property.

– **W's sole management community** – W's salary; income from W's separate property.

– **Joint management community** – If “sole management” CP of one spouse is mixed or combined with “sole management” CP of the other spouse, is subject to their **joint management, control and disposition**.

– **H's sole management community** – H's salary; income from H's separate property.

– H's separate property.

43. [July 1984] Joe visits Winkie's office and sees a beautiful painting on the wall. Joe, taken with the painting, persuades Winkie to sell it to him for cash. The next day Winkie's husband Hobie visits Joe and demands return of the painting (offering to refund the purchase price), telling Joe that the painting was his separate property which he was merely storing at Winkie's office.

_____ Can Hobie recover the painting?

A: No: W had apparent authority, in her possession

Property titled in one spouse's name (or one spouse's possession, if asset is not subject to documentary evidence of ownership) is presumptively subject to:

A: that spouses sole management, "protect BFP's"

C. LIABILITY FOR TORTS

44. [Feb 2001] W suffers \$25,000 judgment as the result of an auto accident in which she was the negligent driver. What assets can the judgment creditor reach?

Family Code: **All community property is subject to:**

A: tort liability of either spouse

Therefore, the tort judgment creditor can reach which of the following?

- W's separate property.
- W's sole management community property.
- Joint management community property.
- H's sole management community property.
- H's separate property.

A: first four - can attach all; last one no

What is the tort had been committed by W **before** the marriage:

Tort judgment creditor can reach **only assets over which W had management power:**

W's separate property; W's sole management CP; and joint management CP

D. LIABILITY ON CONTRACTS

45. [July 1988] W owns apartment at time of her marriage to H; she puts the rental income in a bank account on which H is not an authorized signatory. (The income from W's SP is CP.) H owes \$20,000 for supplies in connection with a farm that is community property subject to H's sole management. H has incurred a \$15,000 hospital bill. H has a small amount of cash in his own bank account; there is \$50,000 in W's account. What assets can H's creditors reach?

H's hospital bill: Under the Family Code, each spouse has the duty to support the other spouse and his or her minor children. Consequence: **Each spouse is (personally) liable for the other spouse's contracts for necessities.**

A: W is personally liable for hospital bill. can even reach her SP

[Feb. 2001] The \$20,000 for the farm equipment and supplies:

It's not a contract for necessities; therefore, as to this debt creditors can only reach **assets over which H had management powers**: Joint mgt CP, H's sole management CP, and H's SP.

_____ Can the creditor reach W's bank account?

A: No, her sole mgmt CP

46. [Feb. 1991] H owns the couple's residence in Dallas as his separate property. H and W own a ranch near Mineral Wells as CP. H is named grantee on the deeds to both parcels. H mortgages both parcels to Bank, without W's knowledge or joinder. He uses the proceeds of the loan on the residence to repair the roof. He uses the proceeds of the loan on the ranch to invest in pork bellies on the Chicago commodities market; that investment has gone...belly up. Can W set the mortgages aside...

a. As to the ranch [community property]?

A: No. Ranch was H's sole mgmt CP and he can mortgage w/o her joinder [the ranch was not the homestead]

b. As to the residence [H's separate property]?

A: Yes because it is the homestead. Joinder of both spouses required.