

Community Property

Professor Joel Rubin

Final – Summer 2013

Model Answer

Model Answer

Question One:

The issues that Wilbur wants to be advised on are his interest, if any, in the Cabin that is in Harold's name, the deferred compensation accounts in Harold's name and the savings accounts in Harold's name. This is very difficult as there is little precedent situation such as this.

Had Wilbur and Harold been married at or shortly after the inception of their relationship this would be a fairly simple question, as the cabin would have been acquired after the date of marriage and the bulk of Harold's deferred compensation and savings would have been acquired after the date of marriage. Generally, assets acquired after the date of marriage are community property and a Court must divide community property equally.

However, that was not the case. Indeed, Wilbur and Harold were not married until 2008, although they did become Registered Domestic Partners (hereinafter "RDPs") as of 2000. They may or may not have had a Marvin type of agreement from the inception of their relationship and if that is the case that would impact Wilbur's interest in all of the assets in Harold's name. A Marvin type contract need not be in writing and can be implied from the conduct of the parties. So long as the consideration for the Marvin contract is not "meretricious" activity then the contract may be upheld. Wilbur would certainly be arguing that he and Harold had agreed to share all that was acquired during their relationship. There is substantial evidence to support this claim, including their living together, Wilbur working less to attend to domestic duties, their becoming RDPs, their first invalidated marriage and the various social events where their relationship was witnessed by numerous persons and statements were made about sharing everything. The exact date of the commencement of this agreement is somewhat unclear. However, it is clear that as of the party after their 2000 RDP ceremony they announced their agreement to share everything, although an earlier date may well be found from their conduct. If the Marvin contract is upheld, and this would have to be a separate civil action and cannot be consolidated with the family law case, then Wilbur would have a substantial interest in all of the assets. The balance of this answer will assume, for whatever reason, that there is no valid Marvin claim.

If there is no valid Marvin claim, they certainly became RDP's in 2000. However, when they first became RDP's, RDP's did not have the "rights, privileges and burdens" of married couples. They did have a marriage license and ceremony in 2004. However, those marriages were specifically declared invalid by the California Supreme Court in August of that year such said marriages would have and could not even be relied on for a "putative" spouse claim, as it was clear that the marriages were "void" and therefore no good faith belief of a valid marriage could exist. Although a putative spouse claim is likely without merit, as stated above, this is likely fairly meaningless in this matter in light of subsequent legislation regarding RDPs.

In 2003 the California legislature did enact legislation giving RDP's the "rights, privileges, and burdens" of married persons. However, this legislation was not to take effect until 2005 and existing RDP's were given an opportunity to "opt out". It is clear that Wilbur and Harold did not "opt out". The more important question is what is the effective date on which RDP's are to be considered "married" for community property purposes. There is currently no case law on this subject, such that a firm answer is unknown. It certainly could not be earlier than 2003 and very likely would be 2005.

Also, a major issue is the possible retroactive effect of the 2003 legislation. Under the Heikes case and similar cases, vested property rights cannot be altered by subsequent legislation unless there is an overriding state interest. In the instant matter, without a successful Marvin claim, Harold's deferred compensation, savings and the cabin were his separate property and it will likely be very difficult to successfully argue that there will be any retroactive effect to the 2003 legislation. As to that portion of the savings and the deferred compensation acquired after the date that an RDP is considered to have the rights, duties and burdens of married persons, that would be community. As the cabin was purchased, by Harold, in 2002, prior to the change in the status of RDPs, that cabin would likely remain Harold's separate property, subject to Moore-Marsden interest from the date that RDPs had the rights, privileges and burdens of married persons. That interest would be calculated using the criteria set forth in the Marsden case, as follows:

1. Determine purchase price
2. Determine CP principal pay down and divide by purchase price to determine CP percentage -- Balance and difference is SP percentage
3. Determine FMV @ Trial
4. Determine appreciation pre-marriage

5. Determine appreciation during marriage
6. Subtract appreciation during marriage from FMV
7. Total Down payment and SP loan payments, both pre-marriage and after separation
8. Total items 7, 6 and 4, as well as the SP percentage of item 5 for the total SP interest
9. CP interest should be the difference and should equal the amount of the CP loan payments plus the CP percentage of item 5

As RDPs have had the rights, privileges and burdens of married persons since at least 2005, if not 2003, the fact that the parties were legally married in 2008 does not substantially impact the analysis of the claims in this matter, beyond the procedural aspects that the matter would be a dissolution of marriage, as the marriage supersedes the RDP.

Also, although the placing of Wilbur's name on the title to Cabin, in 2012, did make the property community property, as of that date, this did not give Wilbur an equal ownership interest, as Harold would be entitled to reimbursement per Family Code Section 2640. As this was just before what is currently happening, it is doubtful that there would be any substantial community equity in the property.

Summarizing, if there is a valid Marvin claim then Wilbur will have a substantial interest in the savings and deferred compensation in Harold's name and would likely be an equal owner of the cabin. If there is no valid Marvin claim then Wilbur's interest in the cabin would be limited to what is available under Moore-Marsden, going back to the date, between 2003 and 2005, when the Court would find that an RDP obtained the rights, privileges and burdens of a married person, as well as one-half of any post-2012 appreciation, and Wilbur's interest in The savings and deferred compensation accounts in Harold's name would be limited to the contributions and growth thereon going back to this same date.

Question Two

There are two major issues about which Howard is requesting advice. Those are the character of The apartment building in Wanda's name and the date of separation.

The character of the apartment building is the simpler of the two issues. Initially, this was Wanda's separate property at the time that the parties were married and has remained solely in her name. Further, it is apparent that no community funds were used regarding this property, as the evidence is clear that the property generated excess income. There is no information that any substantial community efforts were used to otherwise benefit the property. Therefore, unless the paperwork that reflects that all property owned by either party was placed into the Trust can be construed as a transmutation, the apartment building is Wanda's separate property and the community has no interest in this asset.

Pursuant to Family Code Section 852, for there to be an effective transmutation there must be an unequivocal writing that changes the character of the subject property. In the instant matter the trust document stated that all of the property of the parties would be held as community property. However, the Deed to the apartment building was never changed. A mere statement that a item is being transferred to a trust is not sufficient. In *Marriage of Holteman*, there was express language, indeed a separate "Transmutation Agreement" that specifically stated that the "character" of the property was being changed from separate to community. That is not what happened in this matter and therefore it is highly unlikely that a Court would consider that the character of the apartment building had changed.

In the event that a Court would find that the character of the apartment building had changed and that apartment building did become community property in 1985, Wanda would have a difficult time proving that she retained any separate property interest in the apartment building as at that time a transfer of separate property to community property was considered a "gift" as the separate property portion and an agreement would have to be shown for the separate property interest to be retained. Although, under the authority of *Marriage of Lucas* that agreement need not have been in writing, proving a non-written agreement would be quite difficult. Although this is an interesting legal issue, as it is unlikely that the apartment building did become community property no substantial resources should be spent on this issue.

The more difficult issue is that of the "date of separation". It is clear that if the date of separation is five years ago, as Harold argues, that a substantial portion of his retirement account and the shares of stock he received during this period would be his separate property. It is important to note, at this point that as to the shares of stock, these

were the actual shares and no mention of "stock options" (the ability to buy shares at a specific price) was mentioned in the facts. Therefore, whatever the date of separation would be, those contributions to the deferred compensation accounts and the shares of stock received after the date of separation would be Harold's separation property.

Determining a "date of separation" can be very difficult, when there is no agreement by the parties, and the legal standard is not particularly definitive. Ultimately the Court has to determine the date of which there was a complete and final breakdown of marriage and this will be the date of separation. Various factors, including but not limited to physical separation are to be considered. However, no single factor is determinative.

In the instant matter the facts, Wanda living exclusively with Jerome, no longer sleeping with Harold, taking separate vacations with Jerome, and not making this arrangement "public", substantially resemble those of *Marriage of Manfer*, beyond the time frame, where the parties physically separated beyond attending particular social functions and "agreed" to delay in the filing of the dissolution. In this instance the reason for the delay was for business as opposed to personal reasons. It is also important to note that in the instant matter the children were informed of the decision and were aware that Wanda was living with Jerome and only going to social functions with Harold for business purposes. However, if Wanda were to challenge the earlier date of separation requested by Harold, there are facts, such as the lack of a change of address, the amount of the leaving a number of her personal items at the family residence, and the amount of time that passed prior to the filing of the dissolution, that could convince a Court that there had not yet been an irretrievable breakdown of the marriage five years earlier.

Although one might expect a Court to follow *Marriage of Manfer*, on the present facts, there is likely a great deal of money at stake regarding this issue and Harold should be advised that Wanda may well contest the issue and he would need to be prepared for that.

Question 3A:

If a Court must make an order for commencement of payments from a working spouse, whose retirement benefits could be in pay status, to a non-working spouse, the date of the commencement of the payments,

in accordance with Marriage of Cornejo, would be the date the motion is filed requesting said payments.

Question 3B:

With the exception of Community Estate Personal Injury Damages, as set forth in Family Code Section 2603, a Court can only award 100% of a community asset to a party, pursuant to Family Code Section 1101(h), if there has been a breach of fiduciary duty, as set forth in Family Code Section 721 and 1100, when that breach falls within the ambit of Section 3294 of the Civil Code.

Question 3C:

The six different basis for setting aside a Judgment, pursuant to Family Code Section 2122 are:

1. Actual Fraud
2. Perjury
3. Duress
4. Mental Incapacity
5. Mistake
6. Failure to comply with disclosure requirements

Question 3D:

The Van Camp Formula is used when the Court has determined that the division of the community property and separate property interests in a business, that is held as separate property, should be divided with community receiving fair compensation for services rendered and the balance of any increase in value going to the operator of the business.

The formula is as follow:

1. Determine reasonable compensation for the period involved.
2. Deduct from that amount the amount of community expense for the period involved. This amount is the community interest.
3. The remainder is awarded to operator of the business as separate property.