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===== Start of Answer #1 (1190 words) =====

California is a community property (CP) state. Except as provided by statute, all property acquired by a married person while married, whether real or person, wherever situated, while domiciled in CA is CP. FC § 760.

SP is all property acquired before marriage, or property obtained during marriage by gift, bequest, devise or descent, as well as the rents, issues and profits from SP. § 770.

The courts will characterize property as CP or SP based upon either its source, the conduct of the parties, or statutory presumptions that might apply. Married couples can also enter into a Marital Settlement Agreement (MSA) that the court will incorporate into the final judgment of dissolution, and thereby forgo the necessity of dividing the marital property equally according to FC § 2550. However, § 721 requires that transactions between spouses that each spouse act in good faith and fair dealing with the other, and that no spouse take unfair advantage of the other. The fiduciary duty is the same attributed to non-married business partners as express in the Corporations Code. (Bonds, Burkle, Delaney). When one spouse gains an advantage over the other, a presumption of undue influence arise and can be rebutted by a preponderance of evidence that the disadvantaged spouse entered into the agreement freely and voluntarily, with full knowledge of all of the facts, and a complete understanding of their effects.

While the court has authority to set aside a judgment under § 2121, they will not set it aside simply because there was an unequal division of assets. ²¹²³ § 2657. Rather, H must show that W breached her § 721 and §1101 fiduciary duty through either fraud, duress, mistake, perjury or incapacity § 2122. ~~The time frame in which he has to make a motion to set the judgment aside~~ depends upon which theory he asserts coupled with the amount of time that has elapsed since judgment or time he discovered the inequality. Here, judgment was entered on August 15, 2010, and he discovered the inequities on September 15, 2010. ^{or later} If he asserts that W was fraudulent in not disclosing the true value of her business, he would have had one year from the time of discovery or time he should have discovered it. Considering more than a year has passed, H will not be able to assert that W acted fraudulently to set aside the judgment.

Similarly, to assert that H made a mistake in relying upon W's stated values, he would have to

bring the motion within one year of judgment, which would have expired August 15, 2011. And to assert that W committed perjury in the declarations, he would have to have moved to set the judgment aside within one year of having discovered the perjury - again outside the time frame available. The only theory H can assert, given the time frames, is duress. To assert duress, H would have to bring the motion within 2 years of judgment. Fortunately, he has 6 more days until the deadline is expired--August 15, 2012. Given the facts that W managed all of the finances in the marriage and that all of the values were provided either directly by W or by people she knew personally, including the mediator and the realtor, H should prevail in asserting that he signed the agreement under duress and the court will therefore set it aside under FC § 2122. Nevertheless, H will still need to demonstrate that he was specifically harmed to have the judgment set aside (Steiner v. Housseini). *not liberty*

To determine whether he was harmed, as well as to determine what will happen if the judgment is set aside, an analysis of each asset must be undertaken.

The Residence

In 1985, W's parents gave W \$100,000 as a down payment for the house and the title was taken in the names of H and W as joint tenants (JT). As W received the money as a gift from her parents, even though during marriage, it is SP (§ 770). Prior to January 1, 1984, a SP contribution to the community was considered a gift to the community. However, the legislature enacted § 2640 which established that SP contributions given to improve CP (including down payments) were subject to reimbursement unless the party expressly waived reimbursement in writing. Consequently, the SP down payment will be reimbursable if W can trace the funds back to the SP source.

Another statute enacted in 1984 was § 2581 that established that property taken in joint and equal form is presumptively CP. The presumption can be overcome by clear and convincing evidence that the intent of the parties was to keep the property as SP as indicated on the deed itself or some other form of title, or by showing an express written agreement between the parties indicating the same. Consequently, the residence will be characterized as CP. And W will have a right of reimbursement of her \$100,000, without any interest or appreciation. § 2640. Given that, the CP portion of the residence to be divided equally is \$400,000.

The Commercial Building

The commercial building was CP acquired during the marriage and is therefore CP § 760. The JT presumption applies here as well, as title was taken in JT. Considering the value of the building was \$550,000 according to W's loan application, and there was outstanding debt of \$100,000, the asset and the debt would be apportioned equally. (Wilson, §2550, §2620). The court, however, has the authority to assign individual assets to accomplish an equal division. § 2601. Consequently, the Commercial Building will be apportioned equally at a net value of \$225,000 each.

W's Business

W opened her business in 1987, which was during the time of the marriage. According to §760 all assets acquired during marriage by a married person are CP. Her efforts and personal time invested into the business was community effort, and therefore the business, albeit wholly managed and developed by her, was CP in its entirety. Consequently, the business is a community asset and should be divided equally according to § 2550. W's declaration of the business being worth \$400,000 was exactly as she stated in the loan application and should be divided accordingly. That the business has grown in value over the past two years is not dispositive. The business should be divided equally at \$200,000 each.

Other Issues

Mediation--Unless the parties agree, the communications discussed during mediation will not be allowed to show unfair advantage by W (Kieturakis). However, H can show the disparity of the amounts on the declarations W provided and the loan documents.

Duty of Disclosure--Under FC 2100 et seq. each spouse in a dissolution proceeding has a duty to disclose the full and accurate details regarding all assets and liabilities that either spouse has or might have an interest in. Failure to do so is a breach of the party's fiduciary duty.

Conclusion

Given the party's MSA will be set aside based upon duress, the court will divide the community assets 50/50, giving H and W each \$625,000. In addition, W will receive reimbursement for the \$100,000 down payment as it was SP.

*Except for agreeing for a later date of knowledge, when
local laws allowed more 2172 possible; this was a very
good answer -*

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===== End of Answer #1 =====

2)

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===== Start of Answer #2 (1182 words) =====

California is a community property (CP) state. Except as provided by statute, all property acquired by a married person while married, whether real or person, wherever situated, while domiciled in CA is CP. FC § 760.

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The courts will characterize property as CP or SP based upon either its source, the conduct of the parties, or statutory presumptions that might apply. Married couples can also enter into a Marital Settlement Agreement (MSA) that the court will incorporate into the final judgment of dissolution, and thereby forgo the necessity of dividing the marital property equally according to FC § 2550. However, § 721 requires that transactions between spouses that each spouse act in good faith and fair dealing with the other, and that no spouse take unfair advantage of the other. The fiduciary duty is the same attributed to non-married business partners as express in the Corporations Code. (Bonds, Burkle, Delaney). When one spouse gains an advantage over the other, a presumption of undue influence arise and can be rebutted by a preponderance of evidence that the disadvantaged spouse entered into the agreement freely and voluntarily, with full knowledge of all of the facts, and a complete understanding of their effects.

To address H's concerns regarding the businesses if H divorces W, each business must be characterized as to whether it is SP or CP as well as any community interest if they are determined to be SP.

Hank's Place

H acquired Hank's Place prior to marriage and accordingly it is SP (§770). However, after marriage, the community contributed to the growth and profits of the business and thus the community is entitled to reimbursement. To determine what portion of the business growth belongs to the community depends upon whether the growth in the value of the business was due to the community's efforts - in this case H's hard work during the marriage-- or whether the business grew on its own, with little to no community effort. If it can be determined that the growth was due to community effort, the Pereira formula should be applied. If it is due to market growth or other factors outside of the community, the Van Camp formula should apply.

Pereira--In applying the Pereira formula, the community gains the advantage of the business growth, based upon the theory that the community contributed the effort behind the growth and should be compensated for that effort. Consequently, the formula determines the amount of growth attributable to market increase or other outside factors by multiplying the business asset by a fair rate of return, and characterizes that as SP. The remainder is characterized as CP.

Thus $SP = \text{Value of Business Asset} + ((\text{Value of Business asset} \times \text{a fair rate of return}) \times (\text{number of years in the marriage}))$

The remainder is CP.

Here, H acquired Hank's Place two years prior to marriage in 1988 and worked hard at it until 10 years ago, for a total of 14 years--12 of which were during marriage. Consequently, there is sufficient evidence that the growth of the business should be attributed to the community.

However, over the past 10 years, the business has grown as a result of the market as well as effort outside of the community. Consequently, H could argue that the growth has taken place largely over those last years and that the value of the growth is not attributable to the community. In that case, the Van Camp formula should be used to determine the CP contribution to the business growth as it benefits the separatizer. The formula provides for a fair salary to the community and subtracts the community's living expenses as represented by the actual salary taken and characterizes the remainder as SP.

Thus, CP = fair salary during the marital relationship - salary taken.

The remainder is SP.

Here, despite Hank showing up once a week to show patrons he was still a significant factor, it is arguable whether his showing up (potentially classified as CP) added significantly to the growth of the business. In addition, he spent most of his time and effort over the past 10 years working in the new business. Consequently, he can argue that the Van Camp formula should be used.

In reality, the best solution will be to hire an expert who can determine the value of the business at the time of marriage, at the time H stopped working so hard, and at the present time. In doing so, the Pereira method can be used to value the community contribution for the first 12 years of the marriage and the Van Camp method can be used to value the last 10 years.

Hank's Spreads

According to §760 all assets acquired during marriage by a married person are CP. This business was acquired during marriage and is therefore CP in its entirety. Consequently, the business is a community asset and should be divided equally according to § 2550. The court has the authority to assign the asset to one party or the other to effectuate an equal division of CP under § 2601.

W's Fiduciary Duty

As stated above, FC § 721 requires that transactions between spouses that each spouse act in good faith and fair dealing with the other, and that no spouse take unfair advantage of the other. The fiduciary duty is the same attributed to non-married business partners as express in the Corporations Code. (Bonds, Burkle, Delaney). In addition, § 1100 provides that each spouse has the management and control of all the assets and has a fiduciary duty under §721 to manage them for the benefit of the community. §1100 also provides that neither spouse can dispose of community assets without the written consent of the other spouse (despite the impracticality of that).

FC § 1101(g) provides that given a breach of the fiduciary duty by one spouse, the court SHALL provide the other spouse with at least 50% of the funds expended in breach of the duty, and the court SHALL require the breaching spouse to pay attorney's fees and court costs. FC § 1101(h) provides that if the breach is due to oppression, coercion or fraud the breaching party SHALL pay at least 100% of the breached amount. (Rossi) - *concealed asset, must file same as this report*

Here, W's escapades with Jacques is certainly a breach of the fiduciary duty to manage and control the assets of the community according to her §§721 and 1100 fiduciary duties, but taking personal trips with community money, albeit for clandestine purposes does not give rise to fraud, coercion or oppression. Consequently, W will be subject to 1101(g) sanctions and will be required to pay Hank at least 50% of the money spent as well as attorney fees and court costs. H does not need to wait to divorce W to recover those costs under 1101(g), but may bring an action for breach of her fiduciary duty at any time, even during the marriage.

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===== End of Answer #2 =====

3)

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===== Start of Answer #3 (310 words) =====

a. Since January 1, 1985, effective transmutation of property requires an express declaration in writing signed by the negatively affected party . FC § 852. The declaration must communicate a clear and unambiguous intent to transfer title to the other party (Bibb).

b. When personal injury damages are received by an injured party during the marriage, the damages are community property (CP) § 780. Upon dissolution, the court has the ability to allocate the remaining award to the injured party without offset, and must award at least 50% tot he injured spouse § 2603. (Devlin)

c. Community payments made to reduce the mortgage of SP require the application of the Moore/Marsden Rule. Because the community has contributed to the principal reduction of the mortgage, the community is able to be reimbursed for both the reduction in principal as well as the appreciation attributable to the percentage contributed. To determine the amount to be reimbursed the following formula should be applied:

CP = Principal Payments of the Community(PPCP) + (CP% x Marital Appreciation)

$CP\% = PPCP / \text{Purchase Price}$

$SP = \text{Down Payment} + \text{Separate Property Principal Payments (SPPP)} + \text{Premarital Appreciation} + (SP\% \times \text{Marital Appreciation})$

$SP\% = 100\% - CP\%$

To determine the Marital Appreciation, determine the Fair Market Value (FMV) at time of trial and subtract the FMV at time of marriage.

To determine the Premarital Appreciation, subtract the FMV at time of marriage from the purchase price.

d. The court presumes that the community has benefitted from one spouse's education, degree or license paid when the education was received 10 years or more from the date of judgment. In addition, the court presumes that the community has benefitted when the other spouse has also received an education with community funds, and when the burden of spousal support has been reduced as a result of the spouse's education. FC § 2641.

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===== End of Answer #3 =====

END OF EXAM