1)

Putative Spouse Status

Normally, a valid marriage is a prerequisite to characterization of any property as community property. However, there is an exception for what the Family Code terms a "putative marriage". If the elements of putative spouse status are met, any property that would have been termed marital property (community and quasi-community property) is deemed to be quasi-marital property and it can be divided in the same way that true marital property would be in a dissolution action.

The elements of putative spouse status are a good faith and reasonable belief that the marriage is valid. This is a subjective test. Only the spouse that meets these elements acquire putative spouse status.

Herbert had no reason to believe his marriage to Winona was not valid. He met Winona while she was on vacation celebrating her divorce from Greg. Presumably he knew this. There is nothing in the facts to suggest that he had any doubts at the time of marriage or at any point during the marriage. He did not learn of the failed dissolution between Greg and Winona until the current dissolution action was commenced. His subjective belief that his marriage to Winona was valid was reasonable and in good faith. He will qualify as a putative spouse and the quasi-marital property can be divided according to the Family Code.

Winona entered into her marriage with Herbert with a good faith reasonable belief that her dissolution with Greg was valid and therefore that her marriage to Herbert was valid. However, she soon thereafter learned that the dissolution from Greg was incomplete. At this point she lost any claim to putative spouse status as between her and Herbert. She knew her divorce from Greg was incomplete and any claim that she still thought her marriage to Herbert was valid would be unreasonable and in bad faith. She will not qualify as a putative spouse.

Herbert's Separately Title Property in Indiana

The fact that this property is located outside of California is not dispositive. There is a general presumption that any property acquired during marriage is community property. When spouses in a marriage are both domiciled in CA, any real property that is acquired out of the state is termed quasi-community property and is divided the same as community property at the time of dissolution. Although CA lacks the jurisdiction to directly control the titling of property out of state, it still has the power to characterize and divide said property. This can be achieved by an order directing the spouse who holds title to change the title or, more commonly, by awarding in-state assets of an equivalent value to the non-title holding spouse and leaving the out of state property with the spouse who holds title.

Even where the spouses are not both domiciled in CA at the time of acquisition the property is characterized as quasi-community if both are domiciled in CA at the time of dissolution and the property would have been community if they had both been domiciled in CA at the time of acquisition. Here, it appears that both spouses are domiciled in CA at dissolution and the general community property presumption would have applied had they also been domiciled here at acquisition. The court has personal

jurisdiction over both of them and can include the Indiana property in its characterization and division.

Herbert purchased the Indiana property during his marriage with Winona. This raises the general presumption of community property. Herbert has the burden to rebut the presumption by either tracing or by an express written agreement signed by Winona agreeing that the Indiana property is Herbert's separate property. There is no evidence of a written here and so Herbert must rely on tracing.

Tracing is the process of identify the source of an acquisition. Separate property does not lose it's character as such even where it is transformed during the marriage. If Herbert can trace the funds he used to purchase the property to a separate property source, the court will characterize the Indiana property as his separate property.

Direct tracing, as opposed to indirect (exhaustion method), would be necessary here. The facts support Herbert's position. He came into the marriage with $1million in an investment account. Herbert made no contributions to the account during the "marriage" with Winona, so there is no issue with commingling. The funds in the investment account are clearly his separate property since any property acquired prior to marriage remains separate absent a transmutation. Since property does not lose its character even if it is transformed, the Indiana property will also be his separate property if he can prove the investment account was the source of the funds. Herbert made a cash withdrawal of the money from the account and used the cash to purchase the property. Although it would have been cleaner from and evidence point of view to have the funds transferred directly to the seller, the evidence is still strong assuming that there is a record of his payment for the property. He will present the evidence showing his withdraw of the purchase money and his (presumably) soon-after payment for the property. This is likely sufficient to meet his burden to trace the property back to a separate property source and the property will remain his separate property.

The fact that he took title in his name alone as an unmarried man has no effect on this analysis. The general presumption is all that applies (and it does despite his false statement) and tracing is an appropriate method of rebuttal. Winona would have no interest in the Indiana real property or in the funds in the investment account.

Characterization of the CA Home

To begin, as established above, Herbert will qualify as a putative spouse and therefore has an 1/2 interest in any quasi-marital property. Winona cannot protect the CA home by asserting the invalid marriage as a defense.

Again, any property owned by a spouse prior to marriage remains their separate property (including the rents, profits, and _____) during and after the marriage absent a transmutation. Although Winona did have title to the CA property (recorded prior to her divorce-celebrating trip) there are some events that occurred during marriage that must be addressed.

First, Herbert has facts available that evidence a transmutation. A transmutation has the effect of changing the character of property, either from separate to community or the reverse. Since 1984, transmutations must be directly expressed in a witting made by, joined by, or entered into by the transmutation making spouse. Here, Winona

executed (validly, so her signature is presumed) a deed on the CA property during the "marriage" with Herbert. The deed directly express an intent on Winona's part to convert her "title and interest" as her sole and separate property to "Winona and Herbert, a married couple as joint tenants". The language could not be clearer here. It states that Winona is gifting her separate property to the community in very unambiguous terms. Herbert will likely be successful in arguing that this immediately gave him a community property interest in the CA home.

Second, there is another community property presumption that applies here, the joint title property presumption. This presumption is that any property that is jointly titled between the spouse is community property. Rebuttal is still allowed, but is limited to an express, written agreement between the spouses. There is no evidence of such an agreement. Winona will be unable to establish the CA home as her separate property. However, she can still seek reimbursement for her separate property contribution. Reimbursement allows for a spouse to recover their separate property contribution made to community property. Only the actual contribution is reimbursed, without interest. Here, her contribution would be the equity in the home at the time she and Herbert took title as joint tenants. Under this analysis, Winona gets her reimbursement and the remainder of the home is divided as community property.

Finally, there is the principle reduction on the mortgage that occurred during the marriage. Ordinarily this would trigger a Moore/Marsden analysis. In situations where one spouse comes into the marriage with separately titled property subject to a mortgage and the community reduces the principle balance, the community acquires a pro-rata share of the property and shares in any asset appreciation. The pro rata shares are calculated as follows: the separate property down payment and the loan proceeds, minus the community contributions to principle, are divided by the historic purchase price (if enough time elapses prior to marriage for there to be appreciation, the FMV at time of marriage instead of at acquisition). This is the separate property % of ownership. The community contribution is divided by the same value (again, either historic or at time of marriage) to determine the community property % of ownership. The separate property spouse and the community are both reimbursed for contributions and then the appreciation (difference between FMV at marriage and acquisition) is divided according the % of ownership shares. However, this only applies where the property title is held by one spouse alone. This was true for the first year of marriage, but not at the time of dissolution. The CA home will not be characterized and divided in this way.

Although of the two remaining options Winona would likely prefer the second, since this at least preserves her right to reimbursement, Herbert is likely to prevail in proving a transmutation. Again, the joint title deed could not be any clearer in establishing a transmutation. The CA home is now community property. As such, it will be divided equally between them.

The Investment Account

Winona's assertion will fail for two reasons. First, as discussed above, she does not qualify as a putative spouse. Even if the account would have been community property (assuming a valid marriage), she knew her marriage to Herbert was not valid and cannot claim putative spouse status. Second, the funds in the account are clearly Herbert's separate property. The funds were in the account prior to the "marriage,"

there were no contributions during the "marriage," and any increase in value keeps the source character, separate property. Winona will get no share of this asset.

2)

Setting aside the Judgment

The CA Civil Code permits a six month window to motion the court to set aside a final judgment for excusable neglect. Hayes is still within this time limit and could motion unter the general civil statute. However, there is a more appropriate basis for his motion.

The Family Code includes a specific statute for setting aside a final judgment of dissolution. As a prerequisite the moving party must show a material effect on their rights, that the results would have been different absent the complained of action or conduct. Once this is shown, the party can make their motion based on fraud, perjury, _____, duress, or a mistake of law or fact. Fraud and perjury have a statute of limitations of 2 years following discovery, or when the party should have discovered, the fraud or perjury. Motions based on duress or mistake must be brought within 1 year following the final judgment. Since only 4 months have passed since the entry of judgment both SOLs are met and Hayes can bring his motion under any theory that fits.

Fraud or mistake fit these facts best. Fraud because Wanda wilfully failed to disclose the secret account and funds. Mistake because Hayes agreed to the Marital Settlement Agreement (MSA) on the mistaken belief that all assets had been disclosed. The court is likely to grant his motion on either theory. Hayes can show harm since there is nothing to suggest the equity distributions were not community property and that he therefore had a 50% community property interest in them. Had he known about them he would have either argued for equal division or at the very least considered them in negotiating the MSA. This is clear harm. These same facts support the claim under mistake of fact. Strongest of all is the evidence of fraud. Wanda hid this money during the marriage and during the dissolution. This strongly suggests she did it with the intention of denying Hayes his community property interest. This is also in direct violation of her fiduciary duty to Hayes. She was required to deal with Hayes in good faith and fairness during their marriage. The duty continues during dissolution and up to the division of marital property (although limited to what relates to the marital property). Again, the facts are strongly in favor of Hayes' position.

Finally, there is precedent for the proposition that these omitted assets were not even a part of judgment. They were not a part of the dissolution and therefore the court has not made an order concerning them. Assuming they are community property, Hayes acquired his community property interest when they were acquired and the disposition of other community property assets did not affect his interest. Wanda will raise the term of the MSA that states that the "agreement represent a full and complete settlement of all of our respective property rights." However, Hayes can argue that his assent to this term was obtained by Wanda's fraud. He was entitled to rely on Wanda complying with her disclosure duties and her fraud vitiates this contract.

Hayes will have no trouble getting his day in court over these hidden assets. Whether based on the statutes or on precedent, the court is going to allow it.

The waiver of Final Declarations will not be an issue here. Although the Family Code does call for the preliminary and final disclosures prior to the entry of judgment, the party's can orally waive service in open court. Importantly, this is not a waiver of the right to have the other party disclose all relevant assets, it is a waiver of the specific form. The parties are essentially stating to the court that all disclosures have been made and the form is unnecessary. This was true on Hayes' part: this was a false statement from Wanda.

Testimony from a Mediator?

Mediation is approved by the Family Code as a route for the parties to reach an agreement on division of marital property and child/spousal support. In mediation, a neutral third party is chosen by the spouses to act as a mediator. The job of the mediator is not to decide the merits of the case, but to help the parties reach their own resolution. If mediation fails, the parties can proceed to arbitration or litigation.

The State has a strong interest in promoting the resolution of dissolution cases. Mediation reduces the cost and time required for litigation and encourages the parties to reach their own outcome, which they presumably would prefer over a judicial decision. As such, mediation proceedings are protected and testimony regarding mediation is not allowed into evidence.

In a prior case similar to this one, a trial court agreed with the party in Hayes' position and ordered the mediator to testify despite the objections. On appeal, it was held to be an error. Testimony from a mediator is not allowed for the reasons discussed above. Hayes will not be able to offer testimony from the mediator.

Hayes' Remedy

Wanda is likely to really regret her actions. The Family Code is clear in establishing that a spouse has a community property interest even in property that they are unaware of. The interest is created at acquisition and requires no action from the non-acquiring spouse. If it's community property, both spouses have an equal interest.

Wanda become an equity partner and began to receive equity distributions during the marriage. Any property acquired during the marriage is presumptively community property. This presumption does not apply to property acquired by gift or inheritance or to property traceable to a separate property source, but the facts do not establish either. These payments were earned by Wanda during the marriage. They are community property.

Where one spouse fails to disclose an asset and the failure to disclose amounts to actual fraud or malice under the Civil Code, a special Family Code section applies. This statute directs that the court can award the asset entirely to the other spouse: the non-disclosing spouse loses their community interest. Under these facts the court is likely to award the entire amount to Hayes. Wanda intentionally hid the money during the marriage in a secret account, she failed to disclose its existence during dissolution, and she lied in the MSA (also in making the waiver). This is the type of behavior the State has a strong interest in discouraging and the reason the special statute was enacted.

Additionally, another statute directs that in the event of non-disclosure the court *shall* impose sanctions on the offending spouse, including for attorney costs to the other spouse. The statute states that these sanctions are to be sufficient to serve as a deterrent to this type of behavior. Wanda will have to pay Hayes the cost for his attorney to deal with the undisclosed assent and whatever amount the court believes is needed to deter this behavior.

What About the Tax Bill?

The Family Code directs judges to make an equal division of assets and debts between the spouses. In an ordinary case this tax bill would be split between Hayes and Wanda. However, the Code does allow for some discretion where justice requires. What does justice require here? Wanda will argue that since she has already been penalized by the award of the entire asset to Hayes and the mandatory sanctions, justice requires that the tax bill go with the money. They tax is based wholey on the $500k and Hayes got all of it. Hayes can argue Wanda's own fraudulent and bad faith behavior brought this situation about. In fairness, she should also get the tax bill.

It seems likely that the best Hayes can hope for here is an equal division by the court. Although Wanda behaved badly, she is already paying dearly. It is even possible that the court will keep the asset and the tax bill together. However, knowing the IRS there are heavy penalties that have accrued and this is Wanda's fault. So maybe justice does require that she pay the consequences of her actions.

As a final note, even if the court does divide the debt between both, Hayes may be personally liable. This was a community debt and both are equally liable for it. The IRS might still prevail in an action against Hayes.

END OF EXAM