

ID: (Exam Number)

Name:

Exam Name: CommProp_Kosel_Final_UL09

Instructor: Kosel

Grade: _____

80+

1)

Dear Linda:

I am so sorry to hear of your loss and offer my deepest sympathies for you and your son, Carlos. The return of Maria has made this difficult time even more tasking. I hope my services can assist you and your family in getting through this period.

First, a brief overview of the marital property system in California. California is a community property state meaning all property acquired during a marriage is presumptively owned by the community itself. Upon divorce, all net community property is awarded equally on an in-kind (not aggregate basis). When a spouse dies, the decedent may devise 1/2 of the community property and 100% of his separate property. The surviving spouse receives all of her separate property and 1/2 the community property. If the decedent spouse does not leave a will then the community property becomes 100% the property of the surviving spouse and the separate property is divided according to the surviving heirs. You and Carlos would receive 1/2 the separate property each.

Unfortunately, the return of Maria has complicated your situation. Carlos did not divorce Maria, therefore technically she is his legal wife and is therefore entitled to a share in the community property. How much of the community property she may have claim to will depend on the date of separation. The community property presumption ends on the date of separation, thereafter all property acquired is then presumed to be separate property. Separation has occurred when one spouse forms the irrevocable intent to end the marriage than is communicated to the other spouse. The spouse who abandons must behave in a way that is consistent with separation. This means no

sexual relations, no cohabitation, no marital counseling, no family Christmas cards, and no having the remaining spouse do your laundry (Bargary).

Maria left the marriage of six years in 1991. Jesus never heard from her again and she did not return to her job as a dental receptionist. Although we have no information that she communicated the intent to end the marriage to Jesus, we can infer that her disappearance was communication enough. There was no further contact so no inkling that the marriage had not ended. The note itself may offer some further clarification. If the note is a goodbye note stating clearly that she intends to leave forever this is solid proof that the marriage had ended. Also, the note may reference some of the community assets/liabilities. It may even mention that she intends Jesus to own the community property as his own separate property. Since 1985, any agreement to transmute the character of property must be in writing and signed by both parties. Sometimes the person leaving the marriage feels guilty and assuages their guilt by "giving" the community to the remaining spouse. If the note does mention this then you will be in a very good position to claim 100% of the community property. Otherwise, I believe the court will set the date of separation as 1991 based on the fact that Maria disappeared and never contacted Jesus again.

The other major issue we have is the status of your marriage to Jesus. Since he never divorced Maria, she is still his legal wife. California does have a "putative spouse" designation in the family code. It states that a spouse who in good faith believes the marriage to be legal shall be termed a putative spouse and receive the benefits of the community property system (quasi community property). There may be a slight argument that you should have checked to see if the marriage was really over or at least Jesus should have known that the marriage was not legally ended (the

information states he felt "guilty). I don't think these arguments will hold any water because Jesus is no longer with us to tell us why he believed he could legally remarry and you were the innocent spouse. I doubt anyone could argue that every future spouse needs to check to make sure their betrothed is legally divorced. Therefore, you will be designated the "putative spouse" and receive all the benefits of the community property system.

Now let me explain the various community assets and how the court may divide them. I will list each separately to make it easier for you to understand and explain which assets Maria may have a claim to.

The Family Business

The business started as a food van in 1988 during the marriage of Jesus and Maria. Therefore, it is presumptively community property. Since the date of separation is 1991, Maria may claim the business as a community asset for the period of 1988-1991. We do not know what the business was worth in 1991 so it is difficult to say how much Maria may be entitled to. Usually we use the Pereira/Van Camp/Todd formula to value a separate property business enhanced with community property labor. Pereira takes the sp property and assigns a fair rate of return (10%) compounded over time. The remainder is the community property. This is used when the business success is due to the skill of the business owner as in this case, a chef, and it maximizes the separate property component. In Van Camp we are looking to maximize the community property portion. We use this when it is the nature of the business that accounts for its success and not the individual owner. We assign a fair wage to the business owner based on comparable salaries. Any historical underpayment over the time of the marriage is added together and becomes the community property portion with the

remainder to the separate property. Modernly, we perform both equations and then pro-rate any difference between the two amounts and the value of the business using the Todd formula.

Maria
Here we have a community property business that was enhanced with separate property labor after the date of separation, 1991. The court could do a reverse Pereira/Van camp/Todd using the current value of the business. Essentially finding the community property (Van camp) and separate property (Pereira) contributions and then using the Todd formula to pro-rate any difference between the two numbers. The court would then assign the community property portion to you and Maria according to the length of each of your marriages with the separate property being divided between Maria, yourself and Carlos.

Fastis
The court may take a look at the business as it was in 1991 along with all the assets and liabilities and divide the community of Maria and Jesus. Since the community likely had more liabilities than assets and Jesus was de facto assigned both, the court may find that the liabilities cross out the assets. Essentially, any value Maria may have received from the business was offset by the debt she left to Jesus. In this case the business would have been a separate property business enhanced with community property labor during your marriage to Jesus. The Pereira/Van Camp/Todd formula would be used to calculate the separate property and the community property and the results would be all of the community to you and 1/2 the separate property with the other half to Carlos.

The Cookbook

The cookbook was produced during your marriage to Jesus so presumptively it is community property. However, there are two issues here. One, the book was

assembled with recipes from the past 20 years so it could be said to have been conceived when Jesus was not married to you but instead married to Maria. Also, the recipes were family recipes so he could have conceived of them even before his marriage to Maria or as a child. Whether the book is community property or separate property will be up to the finder of fact who will look at any evidence (statements made on the show, in the book, made to friends/family etc). Jesus probably promoted the book on his show while married to you therefore there is an argument that some of the sales were due to community labor and are therefore community property. There also may be a problem with federal preemption. Since copyright law is federal law it preempts California community property law if the California law damages the intent of the federal law. Since the federal law is designed to encourage creativity by protecting the fruits of that creativity, it can be argued that the community property system, by awarding half of the "fruits" to the marital partner, undercuts the very purpose of the law. If the book is considered separate property then the royalties will be divided equally between the heirs. If the royalties are community property then you will receive them. However, the court will have to sort out this particular issue.

Term Life Insurance

Traditionally whole and term life was treated the same. Since the King ruling in the Logan case, term life is now apportioned in reference to the character of the last payment. This means that upon divorce or separation there is no residual value under the term life policy. Maria cannot make any claim on this asset. However, upon death, the community receives the benefit of the policy because the last transaction/premium was made during the marriage. Jesus designated 1/2 of the community property to his son and 1/2 to you and this is valid since he can devise his half of the community.

The Home

The home is presumptively community property because it was acquired during the marriage. The title is in joint tenancy which cannot exist in conjunction with community property. In 1984 the legislature enacted anti-Lucas statutes that said that upon divorce and jointly titled property will be treated as community property. This was a response to the Lucas ruling that basically said that title trumped and any separate property used to fund a community asset was a gift to the community asset and the community was not liable for reimbursement. Upon death the joint tenancy means what it says and survivorship rights go to the community. Since Jesus made not will devising his half of the family home, there is no issue here and the home will be 100% yours.

The defined contribution plan

The IRA is characterized with reference to the individual contributions. Jesus contributed \$2000 per year since 1989 so three years or \$6000 worth of the payments were made during his marriage to Maria, four years of \$8000 worth of contributions were made while separated, and fourteen years or \$28,000 worth of payments were made during his marriage to you. Each of these individual amounts will be added together and a fair rate of return will be assigned to each amount of sp/cp/cp2. Then the balance of the IRA will be apportioned accordingly. Jesus did make you the beneficiary so you will receive the community portion plus his separate property portion. If the court finds that the debts incurred during the marriage of Maria and Jesus (that she left to Jesus) do not offset the amount she would have received in 1991 then she may also get a portion of the IRA. This is unlikely since it looks as if the IRA was worth on \$4500 at the time of their separation although he had contributed \$6000. The value of the IRA had declined to she would have her cp amount reduced by that amount.

Debt and the effect of divorce on Maria and Jesus's marriage

Maria left Jesus with \$40,000 worth of debt. If they had divorced the debt would have also been allocated to the community. Spouses are liable for any debt they personally incurred as well as debt that the court assigns them. The court is free to allocate debt with the creditor's interest in mind. Therefore, if Jesus had been more able to pay the debt at the time of divorce then he may have been assigned a larger percentage of the debt. Creditors may approach the other spouse for debt that has not been paid by the spouse assigned to pay. The court is also free to offset the community debt with assets. Therefore, the court may have assigned more community assets (the family business, IRA,) to Jesus as well as the liability for the debt. If this had happened the business would have been Jesus's separate property before his marriage to you (Linda). Also, the IRA would have been either cashed out or jurisdiction would have been reserved for a later time. The business would have been apportioned too.

In conclusion, you are in a very good position based upon Maria's abandonment of the marriage in 1991 to gain a large percentage of the estate of Jesus. Any additional information you can find, such as the note itself, diaries owned by Jesus detailing the separation or any agreement, would help really solidify this case.

Please contact me with any questions you have. I look forward to discussing these issues with you personally,

Respectfully,

A. Lawyer

END OF EXAM