PART II

ESSAY EXAM QUESTIONS AND SAMPLE ANSWERS
ESSAY QUESTION NO. 1

Assume all of the following events took place in California unless otherwise stated. Answer according to California law.

Henry and Wendy were married in 1990. From 1990 to 2000 they lived in the State of Columbia. In 1995 Wendy inherited $50,000 from her father. Wendy deposited the inherited funds into an investment account in her sole name at National Brokers. During the marriage Wendy deposited her earnings from part time employment into the National Brokers investment account.

In 1996, Henry and Wendy bought a house in the State of Columbia. Wendy contributed $25,000 from the National Brokers investment account to the down payment. Henry and Wendy took title to the Columbia house as joint tenants. During the marriage, Henry’s earnings were used to pay the mortgage on the house.

In 2000 Henry and Wendy moved to California. They sold the Columbia house and used the proceeds to purchase a house in Watsonville, California. They took title to the Watsonville house as joint tenants. All mortgage payments on the Watsonville house were paid with Henry’s earnings.

In 2001, Henry and Wendy consulted Alvin, an estate planning attorney who advised them to hold all of their assets as community property. Alvin advised them that doing so would result in significant tax savings following the death of one spouse. In accordance with this advice, Henry and Wendy signed a “marital property agreement” prepared by Alvin. The agreement stated: “Henry and Wendy hereby agree that all of the property listed on Exhibit A, whether separate property, community property or quasi community property, will hereafter be community property of the parties. This agreement is being entered into for estate planning purposes only.” The National Brokers investment account and the Watsonville house were listed on Exhibit A. Henry and Wendy also signed Wills and other estate planning documents providing for disposition of their community property at death.

In 2010, Henry and Wendy separated and Henry filed a petition for dissolution of marriage. Discuss the parties’ respective rights in the following assets:

1. The National Brokers Investment account, which is still in Wendy’s sole name.
2. The Watsonville house, which is still in joint tenancy.
SAMPLE ANSWER TO ESSAY QUESTION 1

1. National Brokers Investment Account

Classification of marital property is determined by the law of the spouses’ domicile at the time of acquisition. An asset acquired by spouses who are not domiciled in California at the time of acquisition cannot be classified as California community property (CP). The account was opened before Wendy (W) and Henry (H) moved to California, so the account cannot be classified as community property. However, the account might be quasi-community property (QCP). Property acquired by a non-domiciliary can be classified as QCP in a California dissolution of marriage proceeding like the one pending between H & W, if the property would have been community property had the parties been domiciled in California.

Property acquired during marriage is CP, unless it was acquired by gift or inheritance. Property acquired before marriage is separate property (SP). The facts do not state whether the account was opened by before or during marriage. If before marriage, the account would be classified initially as Wendy’s SP.

If the account was opened during marriage, it could be QCP if it would have been CP had W & H been domiciled in California at the time. To determine this, one of two presumptions would apply: 1) the general CP presumption (property acquired during marriage is presumed CP); or 2) the form of title presumption (ownership is presumed to be as stated in the title). Where a married person takes sole title, the form of title presumption gives way to the general presumption, which is more specific as applied to married persons. Therefore, if it was opened during marriage, the account would be presumed CP (QCP) under the general presumption.

The general presumption can be rebutted by tracing or a contrary agreement. The facts do not indicate a contrary agreement, but W may be able to trace some or all of the funds in the account to her inheritance, which was her SP because it was acquired prior to marriage.

W deposited the SP inheritance in the account, which traces it to the account initially. However, W also deposited earnings in the account. Earnings received during marriage are community property. We are not told when or how often earnings were deposited. Any earnings from the period of Columbia domicile would be QCP and those deposited after moving to California would be CP. By depositing both SP and QCP/CP earnings into the account, W commingled the funds in the account.
Commingling occurs when CP and SP are combined into a common mass or pool. Commingled funds are presumed to be CP, or in this case, QCP/CP. The presumption may be rebutted by tracing to a SP source.

Tracing may be direct or indirect. Direct tracing involves using actual records, supplemented by testimony, to establish, at the time of any withdrawal of funds, that the withdrawal was either community property or separate property. Indirect tracing is accomplished by applying a presumption that community expenses are first paid by CP funds. At the time of a withdrawal, the withdrawn funds, to the extent they are used to pay community expenses, are presumed CP. This reduces or eliminates any CP in the withdrawn funds or in the funds remaining in the account, leaving SP funds remaining.

Only one year passed between W’s inheritance and the purchase of the Columbia house. We are not given enough facts to determine if W can directly or indirectly trace the $25,000 down payment to her separate property inheritance. If she can, this would leave $25,000 of her SP inheritance remaining in the account, possibly still commingled with QCP and CP earnings. There are insufficient facts determine whether W could directly or indirectly trace the funds remaining in the account at dissolution. If there were no other withdrawals or very few withdrawals, tracing may be very easy. However, if there were other withdrawals over time, W would need to trace the funds in the account at the time of each withdrawal. If she is unable to trace her SP, the presumption that the funds are QCP will not be rebutted.

Additionally, the 2001 marital property agreement would probably be considered a valid transmutation agreement. A transmutation agreement entered into after January 1, 1985 must be in writing and signed by the party whose interest is adversely affected, and it must contain an express declaration that a change in the character of the property is intended. The 2001 agreement was signed by W and it was clearly intended to make the funds in the account CP. Language limiting the effect of a transmutation agreement to estate planning purposes only has been held to be not valid, so that language in the 2001 agreement would likely be disregarded. Therefore even if W were able to trace some of the remaining funds to her inheritance, the account would still be CP/QCP. However, because this is a dissolution proceeding, W would be entitled to statutory reimbursement of any SP remaining in the account that she is able to trace, unless it is shown that she signed a written waiver of reimbursement.

Any SP will be confirmed to W. Any CP or QCP will be part of the CP/QCP estate to be divided between H & W in the dissolution proceeding.
2. The Watsonville house

In a dissolution of marriage proceeding, property acquired in joint names during marriage is presumed to be community property. This is a statutory presumption applicable only in Family Law proceedings. It is more specific than the general CP presumption or the title presumption discussed above because it is limited to jointly held property in the context of a dissolution proceeding. Where more than one presumption is applicable, the most specific presumption controls. Therefore, this statutory presumption controls.

Here, the Watsonville house was acquired during marriage in joint names. H & W were domiciled in California at the time. So the house would be presumed to be CP (and not QCP).

This presumption may only be rebutted by a written agreement or a clear statement in the deed. The facts do not indicate either of these, so the Watsonville house would be found to be community property. In addition, as discussed above, the marital property agreement was probably a valid transmutation of any SP interest in the Watsonville house.

W may have a claim to reimbursement of any SP she can trace to the Watsonville house. A party who contributes SP to the acquisition of a CP asset is entitled to statutory reimbursement of the amount contributed (without interest or appreciation, and limited to the value of the asset to which it is traced) at the time of dissolution of marriage. This right can only be waived in writing.

Part of the purchase price for Watsonville is traceable to the proceeds of sale of the Columbia house. A right of reimbursement can be traced to previously owned property. W may be able to claim reimbursement for some portion of the funds used to buy Watsonville if she can trace the $25,000 down payment on the Columbia house to her SP inheritance, as discussed above, unless she previously signed a written waiver of reimbursement, which the facts do not indicate.

H made payments on the Watsonville house from his earnings. Earnings during marriage are community property, so H did not contribute any SP and he cannot claim reimbursement. Similarly, H’s earnings contributed to the mortgage on the Columbia house were QCP since they would have been CP but for the lack of California domicile, so his Columbia earnings used to pay down the Columbia house mortgage would be QCP and also not reimbursable.
ESSAY QUESTION NO. 2

Assume all of the following events took place in California unless otherwise stated. Answer according to California law.

In 2005, Gwen, a woman, and Marie, a woman, signed a Declaration of Partnership pursuant to the laws governing California Registered Domestic Partnerships. They mailed the signed Declaration to the Secretary of State. Unbeknownst to Gwen and Marie, the Declaration was never received by the Secretary of State. Therefore, their registered partnership was not valid.

At the time they signed the Declaration of Partnership, Marie owned Marie’s Photo Lab, a photography and photo processing business. From 2005 to September 2010, Gwen and Marie worked together in Marie’s Photo Lab. In 2002 Gwen designed an online custom greeting card component of the business, which became quite successful.

Marie’s photo lab grew steadily during the partnership, adding employees and increasing its sales volume each year. The value of the business increased from $100,000 in 2005 to $175,000 in 2010.

In September 2010, Marie died intestate as a result of a traffic accident.

Marie is survived by her parents, Don and Rose and by Gwen, all of whom claim a share of Marie’s estate. The main asset of Marie’s estate is the business known as Marie’s Photo Lab.

Discuss the rights of Gwen, Don, and Rose to a share of Marie’s Photo Lab.
SAMPLE ANSWER TO ESSAY QUESTION 2

The parties’ rights to a share of Marie’s Photo Lab (the lab) turn on 3 issues: 1) Gwen’s possible status as a putative spouse; 2) the classification of the lab; and 3) the laws of intestate succession.

1. Putative Spouse Doctrine

Beginning in 2005, the year Gwen (“G”) and Marie (“M”) attempted to register, registered domestic partners have the same rights and obligations as married persons. These include community property (CP) rights and the right to receive property under the laws of intestate succession. The registered partnership of G and M was not valid, so they did not have the same rights has registered partners. However, under the putative spouse doctrine, Gwen may be entitled to claim a share of the lab.

A putative spouse is someone whose marriage is not valid, but who had a good faith belief in the validity of the marriage. This doctrine has been applied to registered domestic partners. Property acquired during the putative relationship will be classified as quasi-marital property (QMP) if it would have been community property (CP) had the parties’ partnership been valid in an annulment or estate proceeding.

A good faith belief is subjective, but it is determined by an objective standard. That is, would a reasonable person in G’s circumstances believe that the registration was valid. The facts say that G and M did not know that their declaration was not received, and they worked together in the lab, suggesting that they believed they were in a valid partnership. On the other hand, a reasonable person might have realized that the Secretary of State sends a certificate once the declaration is received and might have inquired when no such certificate arrived. But the concept of registered partnership was very new in 2005, and a reasonable person might not realize the need for a certificate. Given that the putative spouse doctrine is equitable, it is likely that a court would grant putative spouse status to G in these circumstances, rather than leave her with no right to a share of property acquired during the purported partnership.

If G is not a putative spouse, she will need to file a claim against the estate and establish the right to a share of the lab based on some contract or quasi contract with M. Since G worked in the lab, this might be possible, especially if she were underpaid for her efforts.


2. Classification of the lab

If G is a putative spouse, she may have a QMP interest in the lab.

Separate property (SP) is any property owned prior to marriage (or partnership) and property acquired during marriage or partnership by gift or inheritance. M owned the lab at the date of registration, therefore it would have been classified as her SP. The lab increased in value during the purported partnership, while G and M both worked at the lab. Where a SP business operated by one or both partners increases in value during the partnership, a portion of the increase is considered attributable to the partner’s efforts and is characterized as CP (here QMP). One of two approaches is ordinarily used to apportion the QMP and SP interests in the increase in value, and the court has discretion to use one of these approaches, or a different approach, so long as the result achieves substantial justice between the parties.

The *Pereira* approach is usually used when the personal services of one or both partners is the primary factor in generating the increase in value. In *Pereira*, a reasonable rate of return, established by the evidence, is assigned to the original SP value of the business, and this percentage is multiplied by the number of years of the marriage. The total return is considered the SP portion of the increase in value, and any remaining increase is considered CP (QMP). In the absence of evidence of a reasonable rate of return, the court may use the rate on judgments, which is currently 10%. Here, if the court used 10% as the rate of return on the original of $100,000, this would yield a total return of $50,000 for the five years of the putative partnership. This would be classified as M’s SP. The remaining $25,000 of increased value would be considered QMP.

The *Van Camp* approach assigns a reasonable (hypothetical) compensation to the spousal (partner) services to the business for each year of the marriage/partnership. From this, any compensation received from the business, including payment of personal expenses, is deducted. If the hypothetical compensation exceeds the compensation received, the excess is treated as CP. This is deducted from the increase in value, and any remaining increase is considered SP. Here, there are no facts to indicate the reasonable (hypothetical) compensation to be attributed to the services of both M and G to the business, nor is it known what they were paid. If the court determines that M and G adequately paid themselves for their services to the lab, then there would be no CP (QMP) share of the increase in value. If they were not paid the full hypothetical compensation, then the amount they were not paid for the five year period would be deducted from the increased value and the remaining increase would
be SP.

In choosing between *Pereira* and *Van Camp*, the court could consider the fact that G’s new line contributed to the success of the lab, plus the fact that both partners worked in the lab, which would indicate that *Pereira* should be used. On the other hand, if there were evidence that market conditions and M’s capital investment in the lab were the primary factors in creating the increase in value, then *Van Camp* would likely be chosen.

### 3. Intestate Succession

Whichever method is used to apportion the increase in value between QMP and SP, the laws of intestate succession dictate the distribution of M’s SP and any QMP between G and M’s parents Don (D) and Rose (R), because M died without a will (intestate).

If G establishes that she is a putative surviving partner, she would receive the surviving spouse share of any QMP. The surviving spouse is entitled to receive 100% of the decedent’s interest in any CP (QMP). The decedent’s share is one-half, since the surviving spouse (partner) already owns a one-half interest in any CP. So G would be entitled to M’s one-half interest in the QMP portion of the lab in addition to her own half interest.

Different rules apply to the distribution of SP. Where a decedent leaves a surviving spouse (partner) and parents, but no children or grandchildren (issue) any SP is divided equally between the surviving spouse and the parent or parents. The share attributable to the parents is divided equally between them. This means that G would receive one-half M’s SP interest in the lab (the original investment, plus the portion of the increase classified as SP). D and R would share equally the other half of M’s SP interest in the lab.
California is a community property ("CP") state. CP is all property acquired by a married person while domiciled in California except gift or inheritance. Separate property ("SP") is all property acquired before marriage, after separation, or by gift or inheritance, and all rents, profits, and interest thereof. A change in form does not change the character. In classifying assets we must examine the source, action, and applicable presumptions. California Registered Domestic Partnerships apply the same rules as community property ("CP"). For simplicity, the term "CP" shall be used to refer to property of the partnership.

Putative Spouse
Where a marriage is invalid but one or both spouses had a good faith belief in the validity of the marriage, the court may declare the spouse or spouses to be putative spouses. Property which would have been CP or quasi-community property ("QCP") had the marriage been valid is deemed quasi-marital property ("QMP"). At dissolution, CP rules apply to QMP. Here, the facts state that Gwen ("G") and Marie ("M") signed a Declaration of Partnership pursuant to the laws governing California Registered Domestic Partnerships. Since the Declaration was never received by the Secretary of State, their registered partnership was not valid. However, it would appear that both G and M followed all the necessary steps to properly enter into a Registered Domestic Partnership and both were unaware of the defect in registration. G & M carried on as though the partnership were valid, and it is therefore likely that the court would find a good faith belief by both parties in the validity of the partnership. As such, a putative partnership would be declared.

Classification of Marie's Photo Lab ("MPL")
Property acquired prior to registration is the SP of the partner who acquired it. The facts state that M owned MPL at the time the parties signed the Declaration, indicating
that M had previously acquired MPL. As such, it would be deemed M's SP. Normally, all rents, profits, and interest of SP are also SP. However, work and efforts by the partner are deemed to be a community asset. Where a SP business appreciates during the partnership through efforts by the partner, the community may earn an interest in the appreciation. In determining the SP and CP interests in the appreciation, the court may use any method which results in substantial justice. The two most common methods used are *Pereira* and *Van Camp*.

**-Pereira**
Where appreciation of the SP business is deemed to result primarily through the business plan or market, a reasonable rate of return on the initial SP investment is confirmed as SP, with the remainder of the appreciation going to the community. If the *Pereira* rule were used here, and for example the court determined that a reasonable rate of return on MPL was 10% per annum, then the result would be ($100,000 initial value X 10% per year X 5 years of appreciation during the partnership = ) $50,000 being confirmed as M's SP. The remaining $25,000 of appreciation would be deemed CP.

**-Van Camp**
Where appreciation of the SP business is deemed to result primarily from the efforts of the owner spouse, then a reasonable value of those efforts is awarded to the community, less any compensation already received, and any remaining appreciation is confirmed as SP of the owner spouse. For example, in applying *Van Camp*, if the court found that M would have received wages totalling $40,000 per year, and also found that $30,000 per year was received from MPL in order to pay community debts/obligations, then a total of (($40,000 - $30,000) X 5 years = ) $50,000 would be awarded to the community, and the remaining $25,000 of appreciation would be confirmed as SP.

Since both M & G worked together at MPL, and G designed an online custom greeting card component of the business which contributed significantly to the business growth,
G's contributions to the business would need to be taken into consideration as well. The court would likely apply a Van Camp analysis and establish a reasonable value of both M's efforts as well as G's efforts (in particular, from 2007 on) in determining the community share of the appreciation. Taking into account G's efforts, it is likely that most, if not all, of the $75,000 appreciation of MPL during the partnership would be classified as CP, with the original $100,000 value at the time of signing the Declaration being confirmed as M's SP.

**Probate**

Where a spouse dies intestate, California Probate law applies. The decedent's interest in any CP assets is awarded to the surviving spouse. Here, since a putative partnership likely would be found, G would be awarded the entire CP interest in MPL, as determined above. How the decedent's SP is distributed will depend upon how many surviving family members there are. Where the decedent is survived by a single child, or by parents, siblings, or issue of the above, the surviving spouse receives one-half the decedent's SP, with the remaining one-half divided amongst the others. Where there is more than one child, or the issue of a deceased child plus a surviving child, then the surviving spouse receives one-third the decedent's SP, with the remaining two-thirds divided amongst the others.

Here, no children appear exist, and M is survived by her parents. As such, one-half of M's SP interest in MPL would be awarded to G, with the remaining one-half going equally to Don and Rose.

**Note**

It should be noted that if a putative partnership were not found, a significantly different result would occur. In such a situation, MPL would be deemed entirely M's SP. While it is possible the court would, in the interests of justice, award G some level of compensation for her work at the business, that would be the limit of her interests in any property. Without a putative relationship, there would be no CP interest in MPL, and G would have no probate/inheritance rights to any of M's SP.