Question 2

In 1989, Herb and Wendy married while domiciled in Montana, a non-community property state. Prior to the marriage, Wendy had borrowed $25,000 from a Montana bank and had executed a promissory note in that amount in favor of the bank. Herb and Wendy, using savings from their salaries during their marriage, bought a residence, and took title to the residence as tenants in common.

In 1998, Herb and Wendy moved to California and became domiciled here. They did not sell their Montana house.

In 1999, Herb began having an affair with Ann. Herb told Ann that he intended to divorce Wendy and marry her (Ann), and suggested that they live together until dissolution proceedings were concluded. Ann agreed, and Herb moved in with her. Herb told Wendy that he was going to move into his own apartment because he "needed some space." Ann assumed Herb's last name, and Herb introduced her to his friends as his wife. Herb and Ann bought an automobile with a loan. They listed themselves as husband and wife on the loan application, and took title as husband and wife. Herb paid off the automobile loan out of his earnings.

In the meantime, Herb continued to spend occasional weekends with Wendy, who was unaware of Herb's relationship with Ann. Wendy urged Herb to consult a marriage counselor with her, which he did, but Herb did not disclose his relationship with Ann.

In 2003, Wendy and Ann learned the facts set forth in the preceding paragraphs. Wendy promptly filed a petition for dissolution of marriage, asserting a 50% interest in the Montana house and in the automobile. At the time of filing, the Montana bank was demanding payment of $8,000 as the past-due balance on Wendy's promissory note which has been reduced to a judgment. Also at the time of filing, Ann had a $15,000 bank account in her name alone, comprised solely of her earnings while she was living with Herb.

1. What rights do Herb, Wendy, and Ann each have in:
    a. The residence in Montana? Discuss.

    b. The automobile? Discuss.

    c. The $15,000 bank account? Discuss.

2. What property may the Montana bank reach to satisfy the past-due balance on Wendy's promissory note? Discuss.

Answer according to California law.

Answer A to Question 2

2)

1. Rights of Herb, Wendy and Ann

Herb married Wendy in 1989 while both were domiciled in Montana. In 1998 they moved to California, and California law applies here. One year later, in 1999, Herb began having an affair with Ann and moved out, telling his wife he "needed more space" but saw a marriage counselor with Wendy. When she discovered the relationship in 2003, she filed for dis[s]olution.

Community Property

Except as otherwise provided by statute, all property, real or person, whenever situated, acquired by a married person, during the marriage, while domiciled in California, is community property.

Quasi-Community Property

California law holds that real or personal property acquired before the couple was domiciled in California, or real property held outside of California is quasi-community property.

In California, quasi-community property is treated as follows: 1) For purposes of management and control, quasi-community property is treated as separate property; 2) In cases of death or divorce, or the rights of creditors[,] it is treated as community property.

Putative Spouse

Under the putative spouse doctrine, an otherwise valid marriage that is voidable for some reason (here, bigamy) may allow the putative spouse--who reasonably and objectively believes there is a valid marriage--to have rights similar to community property.

Herb moved out in 1999 and began having an affair with Ann, who knew that Herb was married to Wendy, but was told he intended to divorce her. She took Herb's last name, was known as his wife, and took title to a car as his wife. However, Ann knew Herb was still married to Wendy and that the "marriage" was not valid.

The putative spouse doctrine does not apply.

Marvin Relationship

Under the Marvin case, courts may enforce contracts between couples who are not

married, so long as they are not expressly based on performance of illicit sexual acts.

There is no mention of an express contract between Herb and Ann. The only possible "implied" contract is that Ann allowed Herb to move in with her in her apartment because he promised to divorce Wendy and marry her. Such an agreement was explicitly based on a meretricious relationship (committing adultery and divorcing his wife). Public policy requires that this contract not be enforced since it is a contract in derogation of marriage.

There is a small chance courts will enforce the promise as one merely for "housing" since Ann said Herb could live in her apartment. But this is highly unlikely.

The courts will not enforce any promise.

A. Residence in Montana

General Presumption

Under the general presumption, property acquired during the marriage is community or quasi-community property. The Montana residence was acquired during the marriage, with community funds (savings from salaries earned during the marriage). It was acquired in Montana, however, before they moved to California. Therefore, it will be presumed quasi-community.

Titled as Tenants in Common - Presumption (pre-1985)

Prior to 1985, it was presumed that when title was given to a husband and wife as "joint tenants" that they held property as joint tenants. To find community property, the couple had to 1) intend that it be taken as community, and 2) have a writing stating such. Since Herb and Wendy were not married until 1989, this presumption cannot apply.

Post-1985

After 1985, jointly titled property was considered community absent a desire to hold it jointly. No writing was required.

Here, there is nothing to indicate that Herb and Wendy desired the residence to be community. They were not even domiciled in a community property state. However, in such cases where they moved to California afterwards, California law will apply. The courts will probably consider the residence to be community. But this conclusion is not certain.

No Transmutation of Property

After the marriage, the property may be transmuted by a writing. There is no evidence of

such here.

Disposition

Depending on which way the court decides, the residence in Montana may be considered as owned by the community or by Husband and wife as tenants in common. Either way, at dissolution, it will be divided equally between Herb and Wendy.

B. Automobile

While married to Wendy, but during his relationship with Anne, Herb bought an automobile, with a loan, acquiring title with Ann as "husband and wife." Both Herb and Ann signed the loan application. Herb paid off the automobile out of his earnings.

General Presumption

Since the automobile was acquired during his marriage to Wendy, it will be presumed community property.

Possible Exception - Living Separate and Apart

Earnings while living separate and apart are not considered community property.

In 1999, Herb moved out of the dwelling he shared with Wendy and began living with Ann. He told Ann he intended to divorce Wendy, but never took affirmative steps to complete the divorce. During this time, he told Wendy he merely "needed some space" and let her believe he would return at some point. He spent occasional weekends with Wendy, attended marriage counseling with her, and never informed her of his relationship with Ann.

Herb will attempt to show he is living "separate and apart" because he intended the separation to be permanent and was going to divorce Wendy and marry Ann.

Wendy will contend, however, that it was not separate and apart. She will cite Herb's failure to tell her about Ann, his occasional weekends with Wendy, his attendance at marriage counseling, and his act of living this way for 4 years without ever filing for divorce.

The court will probably hold that the spouses were not living separate and apart, and that the earnings of Herb during this time were community property.

Herb and Anne's Title and Husband and Wife - Presumption

Herb and Ann will argue that they took title to car as husband and wife, and that this should control.

Wendy will argue several reasons the car should be community property.

Management and Control - Husband may not make a gift without written consent

As discussed supra, the courts should hold that Herb and Wendy were not living separate and apart, and that his income was community property. While husband and wife generally have equal management and control neither may give property away without the written consent of the other.

Herb attempted to give community funds to Ann by paying for a car and naming her as a joint tenant. This will not be allowed and the car will be considered community property.

Disposition at Divorce.

The car is community and will be divi[d]ed between Herb and Wendy. Ann will get nothing.

C. $15,000 Bank Account

Ann had a $15,000 bank account in her name alone comprised of her earnings while living with Herb. If they were husband and wife, or Herb was a putative spouse, this is presumed community. However, since they are living in a meretricious relationship, the funds were in an account in Ann's name, and were not commingled, they are separate property.

2. What property may the Montana bank reach to satisfy the past-due balance of Wendy's promis[s]ory note?

Prior to marriage, Wendy borrowed $25,000 from Montana Bank and executed a promis[s]ory note for that amount in the bank's favor. At the time Wendy filed for divorce, Montana Bank was demanding payment of $8,000 as the past-due balance on Wendy's promis[s]ory note which has been reduced to a judgment. This is a separate debt.

Time Judgment Was Entered

If the judgment was entered before Wendy and Herb were living separate and apart, i.e., before she filed for divorce, the bank may reach Wendy's separate property or the community.

Herb's Separate Property

Generally, the separate property of one spouse may not be reached to satisfy the separate debt of the other.

Community

If the judgment was reached before legal separation, then community is liable on the debt. However, the bank must first attempt to recover the judgment from Wendy's separate property.

Answer B to Question 2

2)

California is a community property state. All property acquired during marriage is presumed to be community property (CP). All property acquired before marriage or after permanent separation, or by gift, bequest, or devise during marriage, is separate property (SP). All property acquired while parties were domiciled in a non-CP state, that would have been CP if the couple had been domiciled in CA, is quasi-community property (QCP). The source of the funds for a purchase can be traced in determining whether an asset is CP or SP.

At divorce, each CP and quasi-CP asset is split 50-50 between each spouse, and each keeps their own SP.

State of Marriages

This is a complicated situation involving two supposed marriages. Two issues that will determine rights in the property are when H & W's marriage ended, and whether Ann & H have [sic].

The Residence in Montana

Hank (H) & Wendy (W) purchased the Montana home with savings from salaries during their marriage. Salaries acquired during marriage are all considered community property, and thus the home was entirely acquired with CP. In addition, H & W took title as tenants in common, a joint form of title. Under CA law, taking title in a joint form, such as tenants in common, creates a presumption that property is CO [sic]. Since H & W were domiciled outside CA in a non-CP state at the time of the acquisition, the home would be considered quasi-CP because it would have been CP if they had been domiciled in CA.

There is no information indicating the source of payments for principal & improvements, but presumably that has been the earnings of the couple & thus CP. Thus under CA law, the home would be classified entirely as quasi-CP.

<u>Effect of Separation</u>

However, any earnings from either spouse after "permanent separation" are considered to be SP. Here, the issue is whether there was a permanent separation when H moved in with Ann in 1999, or if it occurred in 2003, when W filed for dissolution. If the couple permanently separated before 1999, then any of H's or W's earnings used for principal payments or improvements on the house might be considered to be a SP contribution to a CP asset. Under CA law, such contributions are entitled to reimbursement at divorce.

Permanent separation occurs when the spouses are living permanently apart and when one spouse intends to permanently end the marriage. Here, W will argue that permanent separation did not occur until 2003. Prior to that, although H moved in with Ann, he continued to spend occasional weekends with W, and thus did not permanently live apart from her. Also, the fact that he continued to spend weekends with her is evidence that he did not intend to end the marriage; he was keeping his options open. H, however, will argue that he intended to permanently separate when he moved in with Ann in 2003. He told Ann that he was divorcing his wife, bought a car with Ann, listed themselves as husband & wife, & took title as husband as [sic] wife. He also refused to see a counselor with W [sic]. Hence, he intended to move out permanently.

On balance, because H never filed for divorce & continued to visit W, his intent to end the marriage is not clear; it appears that he was keeping his options open. Hence, permanent separation did not occur until 2003.

In that case, all of the contributions to the house are CP, and the house is classified as quasi-CP to H & W. Ann has no rights to the house on any theory (see discussion below).

The Automobile

The Automobile was purchased with a loan obtained by H & Ann. Thus the source of the loan was one-half H's credit, & one-half Ann's. However, H paid off the loan entirely with his own earnings, however [sic]. Since H was still married to W at the time (see discussion above), H's earnings were CP, because all earnings are considered CP. Thus the car was paid for entirely with CP.

All property purchased during marriage by either spouse is presumed CP. W will argue that since H purchased the car with CP, it remains CP, and thus she is entitled to a 50% interest in it. H may respond, however, that by putting title in his & Ann's name, he considered the car to be a gift from CP to his SP & Ann.

W will respond, however, that, under CA law, a spouse cannot make a gift of community property outside the marriage without the written consent of the other spouse. Here, W certainly did not give her consent. A gift of personal property made without the other party's consent may be reclaimed at any time, with any statute of limitations. Here, since H made the gift to A without W's consent, W may reclaim her share of the community property even after 4 years. In addition, since 1985, no gift changing the character of property has been presumed unless the adversely affected spouse consents in writing. If H asserts that he changed the character of the CP by putting it in his & Ann's name, the transmutation will be unsuccessful because W did not consent in writing.

Here, W will prevail, and the car will be considered as H & W's CP. The issue is A's interest in the car.

Putative Spouse Theory

Although A & H were living together, California does not recognize common law marriage. Thus, any rights Ann may have must be asserted under either a putative spouse theory or contract theory.

A may assert that she is a putative spouse. A putative spouse is one who reasonably believed in good faith that she was married. If the court concluded that one was a putative spouse, all property acquired during the putative marriage is entitled quasi-marital property (QMP) & treated like CP at separation or divorce. Although there has not been a definite decision, if one spouse believed in good faith there was a marriage even the bad faith spouse may be able to treat the property like QMP.

Here, H clearly did not reasonably believe that he was married to A because he knew that he had not divorced W & continued to see her. It would not be reasonable for him to believe that he was married to A.

A, however, may argue that she believed in good faith that she & H were married because [t]hey lived together, she assumed H's last name, they bought a car together, and H introduced her to his friends as his wife. She was unaware of his continued relationship with W. Nonetheless, H had told A when they moved in together only that he "intended" to divorce W & that he had not concluded dissolution proceedings. However, putative spouse status also requires that the belief be reasonable. While any belief of A in the marriage may have been in good faith, a reasonable person would verify that the dissolution proceedings had been concluded. In addition, A & H did not take out a marriage licence or have a wedding ceremony, nor did H tell her that they had a valid common law marriage; he simply suggested they move in together. Consequently, A had a good faith but unreasonable belief in the marriage, and is not a putative spouse. Consequently, none of the property she & Hal acquired while they lived together can be considered quasi-marital property.

Contract Theory

A may be entitled to reimbursement from H on a fraud or breach of contract theory for a share of the car. She may argue that the loan application and title constitute a contract between them [and] that she would have a one-half interest in the car. Although the car appears to be a gift, and none of her money went into the car, she may be able to recover from H on a contract theory.

The $15,000 Bank Account

The $15,000 bank account is in Ann's name alone and consists entirely of her earnings while she was living with H. If they were considered to be putative spouses, then the account would be quasi-marital property, and H & A would each be [e]ntitled to a one-half

share. Since they were not putative spouses, the account is Ann's separate property, and neither H nor W have any rights to it.

Property to Satisfy the Note

W's note is a debt that she entered into before marriage. Debts entered into before marriage are CP. The creditor may attach all CP and the debtor spouse's SP. Quasi-CP is treated like CP for the purpose of satisfying debts.

Here, neither H nor W have any rights to Ann's $15,000 bank account. Thus it may not be attached by any debtor. The car is CP, and thus the debtor may repossess the car to satisfy the judgment. The house is quasi-CP, and thus may be also be entirely attached by the debtor.

However, because the house is in Montana, a California court cannot directly order judgement on the house. W, however is subject to the jurisdiction of the CA court, and the court can therefore order her to transfer title to the house if needed to satisfy the judgment. Thus the debtor can reach the house.