

QUESTION 5

In 2003, while planning their wedding, Harry and Wanda, a California couple, spent weeks discussing how they could each own and control their respective salaries. Sometime before their wedding, they prepared a document in which they stated, "After we marry, Wanda's salary is her property and Harry's salary is his property." At the same time, they prepared a separate document in which they stated, "We agree we do not need legal advice." They signed and dated each document. They subsequently married.

In 2004, Harry used his salary to buy a condominium and took title in his name alone. Harry and Wanda moved into the condominium.

In 2005, Harry and Wanda opened a joint savings account at their local bank. Each year thereafter, they each deposited \$5,000 from their salaries into the account.

In 2015, Harry discovered that Wanda used money from their joint account to buy rental property and take title in her name alone.

In 2016, Harry and Wanda permanently separated and Wanda moved out of the condominium. Wanda thereafter required emergency surgery for a medical condition, resulting in a hospital bill of \$50,000. Harry later filed a petition for dissolution of marriage.

What are Harry's and Wanda's rights and liabilities, if any, regarding:

1. The condominium? Discuss.
2. The joint savings account? Discuss.
3. The rental property? Discuss.
4. The hospital bill? Discuss.

Answer according to California law.

QUESTION 5: SELECTED ANSWER A

Community Property and Separate Property

California is a community property (CP) state. Property acquired during a valid marriage while domiciled in CA is presumed to be CP. Property acquired before marriage or after permanent separation is presumed to be separate property (SP). Property acquired during marriage through gift, bequest, devise or descent is also presumed to be SP. Under the source rule, tracing will be permitted to determine the source of the funds, and therefore the character of the asset as CP or SP. Upon divorce, CP will be divided equally in kind unless some special rule requires deviation from this equal division, or the spouses agree otherwise in writing or orally in open court.

Prenuptial Agreement

Spouses may deviate from the community property presumption by agreeing that their salaries, for instance, which normally would be a product of community labor during the marriage and thus CP, be SP. They may do so before the marriage through a written prenuptial agreement. Prenuptial agreements must be voluntary and not unconscionable. A court will find a prenup to be unconscionable if the terms are unfair, or if a spouse did not know the extent of the other spouse's property before signing the agreement. Additionally, prenuptial agreements must be in writing. A court will find that a prenup is not voluntarily executed if a spouse is not represented by counsel before signing the agreement. In order to rebut the presumption of involuntariness without counsel, the spouse not represented by counsel must be advised to seek the advice of counsel in writing, and must waive that right in writing, and if she does waive that right, she must be allowed 7 days between the presentation of a prenuptial agreement and the signing of it, and she must also write, in a separate writing, that she understands the rights she is giving up, and from whom she received the information regarding what the extent is of her spouse's property.

Here, while planning their wedding, Henry and Wanda, both California residents, spent

"weeks" discussing "how they could each own and control their respective salaries." Although it is not clear how long before the wedding this occurred, merely, "sometime before their wedding," they jointly "prepared a document in which they stated, 'After we marry, Wanda's salary is her property and Harry's salary is his property.'" They both signed and dated this document. Simultaneously, they "prepared a separate document in which they stated, 'We agree we do not need legal advice,'" which was also signed and dated by both of them. After doing so, they married.

Formalities of Prenuptial Agreement Not Followed: Voluntariness and Unconscionability

As discussed above, a prenuptial agreement must be in writing. It appears from the facts that Henry and Wanda were attempting to create a prenuptial agreement through the "document" that they prepared "sometime before their wedding" in which they agreed that Wanda's salary is her "[separate] property" and Harry's salary is his "[separate] property." Although couples may choose to contract around the general CP presumption through a prenuptial agreement, they must do so voluntarily and it must not be unconscionable. Because neither spouse was represented by counsel, the agreement is presumed to be involuntary. As stated above, this presumption can be rebutted if the spouses who are not represented by counsel are advised to seek counsel and explicitly waive that in writing. Here, it appears that the couple attempted to waive this right to counsel by stating, "We agree we do not need legal advice." This may be a sufficient writing in a court's opinion to waive the right to counsel. Nonetheless, there is still a problem with voluntariness, here. Even if this right is waived in a signed writing, the unrepresented couple must still be given 7 days with which to mull over the prenuptial agreement.

Either spouse (depending on the asset discussed below) may argue that because they spent "weeks discussing how they could each own and control their respective salaries," this was more than enough to satisfy the 7 day rule. However, because the agreement was signed simultaneously with their waiver of counsel, and there is nothing in the facts to demonstrate that there was a period of 7 days AFTER presentation of the document and signing, given that the facts only state "sometime before their wedding" they prepared a document. If this document was prepared and signed 2 hours before

the wedding, this would not be deemed voluntary, and may even be deemed unconscionable by a court given its unfairness.

Additionally, neither spouse executed an additional separate document stating that they understood the rights that they were giving up and that they stated the source where they got information about the other spouse's financial assets and liabilities. Therefore, this prenuptial agreement will not be deemed voluntary. However, it probably will not be deemed unconscionable because it does not appear that the terms were patently unfair, given that both spouses were attempting to transmute their salaries into SP, and it does not appear that either spouse was hiding substantial debts or liabilities or significant assets from the other spouse.

In sum, this prenuptial agreement is not likely effective. This will mean that the analysis below will reflect the fact that earnings during marriage will remain CP for purposes of the analysis. Nonetheless, I will still discuss the possibility that this agreement is valid within each spouse's argument, and how that may arguably alter the characterization of property, below.

What are Harry's and Wanda's rights and liabilities regarding:

1. The Condominium

Title Presumption

Property titled in one spouse's name alone is *not* presumably SP in CA.

Here, Henry will argue that he took title in the condominium alone, and therefore it is his separate property.

Wanda will argue that this is not conclusive in California, because ownership does not necessarily follow title. Wanda has the stronger argument here. She will argue that the court must trace, using the source rule to determine the character of the condo.

General CP Presumption

Assets acquired during marriage are presumably CP.

Wanda will argue that because the condo was purchased during the marriage, in 2004, it was presumably CP. She will argue that it is irrelevant that the condo was titled in Henry's name alone, because the court can trace.

Tracing: Source Rule

Under the source rule, a court will trace the assets used to purchase a particular property during marriage to determine its character.

Wanda will argue that by tracing, the court will determine that the condo was purchased with Harry's salary during marriage, and therefore it is CP.

Harry will argue that the prenup was valid, in which they agreed that his salary during marriage would be his separate property, and therefore by purchasing the condo with his salary, which is SP, and since SP breeds SP, the condo is also his SP.

Harry's argument will likely fail because, as discussed above, the prenup is likely invalid and therefore the salaries of both spouses earned during marriage will be community property, and therefore by purchasing the condo with CP funds, the condo itself is CP and it is immaterial that it is titled in Henry's name alone.

Transmutation

Spouses may alter the character of property from CP to SP, or from one spouse's SP to the other spouse's SP, or from SP to CP. After the "easy transmutation period" ended, courts now require transmutations to be in writing, and consented to or accepted by the spouse whose property is changing in nature, and the writing must explicitly state that a change in property is occurring.

Harry will argue that a transmutation of the CP condo occurred when he titled it in his sole name. He will argue that this was a gift from the community to his separate

property, and that titling it in his own name was sufficient for a transmutation.

Wanda will argue that this was not sufficient for a transmutation because she did not consent to the change of CP to SP and given that she is the adversely affected spouse, her consent or acceptance was required, and that there is also no writing in the title document stating that the property is changing in form from CP to SP. Wanda has the stronger argument here, and the title of the property will not be deemed a transmutation.

Gifts Between Spouses

As a last ditch effort, Harry will argue that the condo was a gift between spouses and therefore was a valid transmutation that did not need to be in writing. An exception to the writing requirement for valid transmutations is when a gift of a personal nature is given from one spouse to another, and that gift is used primarily by the recipient spouse and is not substantial in nature, taking into consideration the financial situation of the couple.

Wanda will argue that a condo is not tangible personal property, and a condo is also substantial in nature, financially, given that they did not come into the marriage with significant amounts of SP, and moreover, the condo was used by both of them because they both "moved into the condominium." Therefore, Harry's argument that the condo was a gift from CP to SP will fail.

Conclusion

The condo is CP because it was purchased with earnings during marriage and the prenup is likely invalid. Therefore, it will be subject to equal division in kind upon divorce and Harry and Wanda will each take 50% of the proceeds from the sale of the house, assuming it is sold.

2. The joint savings account

Jointly Titled Property CP Presumption

In CA, when title to property is taken in joint form, there is a presumption that the

character of the property is CP unless in the title document or elsewhere it is stated that a portion or all of the property is to be reserved as an SP ownership interest. In this case, under *Lucas*, a court will not allow tracing to determine the funds used to purchase a jointly titled home through the source rule and the property will be deemed CP. However, this joint presumption does not apply to bank accounts. With bank accounts, a court will allow jointly titled bank accounts to be traced to determine the source of funds and how it should be characterized.

Tracing

Because both spouses deposited \$5,000 each from their salaries during the valid marriage in 2005 into the account, and these salaries were earned during marriage, property earned during marriage through community labor during the economic community is CP. In light of the fact that the prenuptial agreement is likely not valid, both spouse's salaries would be CP, and therefore the court would trace to the source of these funds and determine that the bank account is CP. If, for some reason, the court found that the prenup was valid, and therefore each spouse's salary was SP, then the account would be comprised of \$5,000 worth of Wanda's SP and \$5,000 worth of Harry's SP. However, this is unlikely.

Conclusion

Presuming that the prenup was invalid, the characterization of the joint savings account would be 100% CP, and therefore should be subject to the equal division in kind rule upon divorce, and whatever is left in the account will be divided equally between the spouses.

3. The rental property

Title Presumption

Property titled in one spouse's name alone is *not* presumably SP in CA.

Here, Wanda will argue that she took title in the rental property alone, and therefore it is

her separate property.

Harry will argue that this is not conclusive in California, because ownership does not necessarily follow title. Henry has the stronger argument here. He will argue that the court must trace, using the source rule to determine the character of the rental property.

General CP Presumption

Assets acquired during marriage are presumably CP.

Harry will argue that because the rental property was purchased during the marriage, in 2015, it was presumably CP. He will argue that it is irrelevant that the rental was titled in Wanda's name alone, because the court can trace.

Tracing: Source Rule

Under the source rule, a court will trace the assets used to purchase a particular property during marriage to determine its character.

Harry will argue that, by tracing, the court will determine that the rental was purchased with both spouses' salaries during marriage, and therefore it is CP. He will argue that because the funds were taken from the joint savings account, which is conclusively CP if the prenup was invalid, therefore Wanda used CP funds to purchase the rental, and therefore since CP breeds CP, the rental property is also CP.

Wanda will unconvincingly argue that the prenup was valid, in stark contrast to her earlier argument, stating that the couple agreed that her salary during marriage would be her separate property, and therefore by purchasing the rental with her salary, which is SP, and since SP breeds SP, the rental is also her SP.

Wanda's argument will likely fail because, as discussed above, the prenup is likely invalid and therefore the salaries of both spouses earned during marriage will be community property, and therefore by purchasing the rental with CP funds held in the bank account, the rental itself is CP and it is immaterial that it is titled in Wanda's name

alone.

Transmutation

Spouses may alter the character of property from CP to SP, or from one spouse's SP to the other spouse's SP, or from SP to CP. After the "easy transmutation period" ended, courts now require transmutations to be in writing, and consented to or accepted by the spouse whose property is changing in nature, and the writing must explicitly state that a change in property is occurring.

Wanda will argue that a transmutation of the CP rental occurred when she titled it in her sole name. She will argue that this was a gift from the community to her separate property, and that titling it in her own name was sufficient for a transmutation.

Harry will argue that this was not sufficient for a transmutation because he did not consent to the change of CP to SP and given that he is the adversely affected spouse, his consent or acceptance was required, and that there is also no writing in the title document stating that the property is changing in form from CP to SP. Harry has the stronger argument here, and the title of the property will not be deemed a transmutation.

Gifts Between Spouses

Finally, Wanda will argue that the rental was a gift between spouses and therefore was a valid transmutation that did not need to be in writing. An exception to the writing requirement for valid transmutations is when a gift of a personal nature is given from one spouse to another, and that gift is used primarily by the recipient spouse and is not substantial in nature, taking into consideration the financial situation of the couple.

Harry will argue that a rental property is not tangible personal property, and a rental property is also substantial in nature, financially, given that they did not come into the marriage with significant amounts of SP.

Wanda will counter that she, alone, was using the rental property, and therefore that property and any income, profits, or rents derived from it should be her SP because it

was used primarily by her. This argument will fail because it is not an item of tangible personal property and thus was not an exception to the transmutation in writing rule.

Wanda's argument that the rental was a gift from CP to SP will fail.

Rents, Issues and Profits

The rents, issues, and profits of CP will be CP, and the rents, issues, and profits of SP will be SP.

Because the rental property is CP, any rental income that Wanda derives by renting it out (the facts are silent about whether she has a tenant) will be CP, and therefore will be subject to the equal division in kind rule. Half of rents must be therefore shared with Harry.

Equal Management and Control

Each spouse has equal ability to manage and control CP. However, this is subject to certain limitations. For instance, a spouse may not sell or encumber personal property in the home or CP clothing belonging to either spouse or children without consent of the other spouse.

Gifts of CP

Moreover, spouses may not make gifts of CP without the written consent of the other spouse. A spouse may void the gift upon finding out about it.

Harry will argue that he did not consent to Wanda sneaking off and using money from their joint savings account to purchase the rental property and take title in her name alone. He will argue therefore that he should be allowed to void this transaction within one year of finding out about it. He will also argue that he can void this transaction because Wanda disposed of the CP without his written consent.

Wanda will argue that because she has equal management and control of the property, she does not need his consent to purchase a rental property with money from their joint

savings account because she has a community interest in both of their salaries, and therefore can do what she wants with the money given that she had equal withdrawal rights on the bank account. She will also argue that this was not a "gift" of CP because she got her substantial benefit of the bargain from it: namely, a rental in exchange for the funds.

Wanda, unfortunately, likely has the stronger argument here, and she did not need Harry's consent before purchasing the rental and he likely cannot void it and cause the seller to return any of the purchase price despite finding out about the sale/purchase within one year.

Breach of Fiduciary Duty

Spouses owe each other fiduciary duties similar to those of business partners. They owe each other the highest duty of good faith and to avoid self-dealing.

Harry will argue that Wanda breached her fiduciary duty to him as a spouse by going behind his back and taking their joint CP funds and buying a rental and titling it in her own name without his knowledge. He will argue that this breaches her duty of loyalty to him and that this act was not in good faith.

Harry likely has a strong argument here, and he may also argue that this lack of good faith should cause the court to deviate from the equal division in kind rule.

Conclusion

The rental is CP because it was purchased with earnings during marriage, which were held in the bank account which is CP, given that the prenup is likely invalid. Therefore, it will be subject to equal division in kind upon divorce and Harry and Wanda will each take 50% of the proceeds from the sale of the rental, assuming it is sold, and assuming the court does not find justification for deviating from this, in light of Wanda's lack of good faith and fair dealing when going behind Harry's back to purchase the rental.

4. The hospital bill

End of the Economic Community: Permanent Separation

The economic community begins during marriage, and ends upon permanent separation. Permanent separation is understood through physical separation plus an intent not to resume the marital relationship.

Separate Debts of Spouses

Debts acquired after permanent separation are SP and the debtor spouse will be liable to his creditors for such debt incurred.

Here, Harry will argue permanent separation occurred in 2016 per the facts when "Wanda moved out of the condo" demonstrating an intent to not resume the marital relationship, and therefore the hospital bill incurred is her SP and only she will be liable for it because the economic community had ended.

Wanda will argue that Harry had not yet evidenced an intent not to continue the marital relationship because he only filed for divorce after her surgery and therefore the economic community was still intact, and thus the debt is CP to be shared between both of them.

Harry has the stronger argument, because per the facts, Harry and Wanda had "permanently separated" prior to the surgery.

Necessaries of Life

Despite the general rule that debts incurred post-separation are the SP debt of the debtor spouse and that spouse only will be liable for that debt to creditors, there is an exception for the "necessaries of life" and debts incurred on their behalf post-separation but before divorce, because of the duty spouses owe to each other to take care of each other during marriage.

Wanda will argue that her surgery was an "emergency surgery for a medical condition,"

and therefore was a necessary of life similar to food and water. Harry will have a difficult time countering this, because a court is likely to hold that this is a necessary.

Therefore, despite Wanda being the debtor spouse, if she does not have sufficient SP to pay for the \$50,000 hospital bill, the hospital can attach to the CP of either spouse, and Harry may also be required to pay for the debt using his SP, because of the duty owed to take care of one's spouse prior to divorce, even after separation for necessities of life.

Conclusion

In sum, the condo is CP and subject to equal division, the bank account is CP and subject to equal division, the rental property is CP and subject to equal division unless the court finds that it should deviate from this rule because of Wanda's breach of her fiduciary duty, and the hospital bill, despite being Wanda's separate debt, is a necessary of life which Harry may be required to pay for with CP and/or his SP.

QUESTION 5: SELECTED ANSWER B

Harry and Wanda's Rights and Liabilities

California is a community property state. In a community property state, the marital economic community begins on the formation of a valid marriage, and ends with the death of a spouse, divorce, or permanent physical separation with intent of one spouse not to resume marital relations. Property, earnings, and debt acquired during the marriage is presumed to be community property. Property acquired by either spouse before the marriage, or at any time via gift, devise, or inheritance, is presumed to be separate property. Property acquired by the couple while living in a non-community property state, if it would be considered community property if acquired in California, is considered quasi-community property upon death of a spouse or divorce.

Valid Marriage

A valid marriage requires mutual consent, sufficient age (at least 18 years old) and legal capacity, and formalities, including a license and solemnization. Here, though the facts do not specify the details of Harry and Wanda's marriage, we can assume for the purposes of this question that they were validly married.

A valid marriage ends upon the death of a spouse, divorce, or physical separation of the spouses with intent of one spouse (or both) not to resume the marital relationship. Here, Harry and Wanda permanently separated and Wanda moved out of the condominium where they had been living together in 2016. Harry also filed a petition for dissolution of the marriage. These actions--the physical separation of the two and the petition for dissolution--indicate that the spouses intended to permanently separate and not resume the marital relationship in 2016.

Premarital Agreements

Before analyzing Harry and Wanda's rights and liabilities in specific pieces of property, we first must determine whether their premarital agreement is valid and effective. A premarital agreement may alter the couple's ownership status in property if it is valid. To be valid, a premarital agreement must be in writing and signed by both couples, though there does not need to be valid consideration exchanged. Additionally, the proponent of the premarital agreement (as of 2005) bears the burden of proving that the agreement was neither involuntary nor unconscionable at the time it was executed.

Voluntariness

To prove that the agreement was voluntary, the proponent of the premarital agreement must prove (1) that the other party was represented by independent counsel, or had knowingly waived in a separate, signed writing the rights to separate counsel after being fully informed of the advantages of such separate counsel, (2) that the other party, if not represented by independent counsel, was fully informed of the rights it was giving up, (3) that the agreement was not obtained by fraud, duress, or undue influence by one of the spouses, and (4) other factors that the court may think appropriate and just.

(1) Here, neither party was represented by independent counsel. Though the proponent of the premarital agreement may argue that the parties waived their right to independent counsel by saying, in a separate signed document, "We agree we do not need legal advice," it is not clear that this waiver was valid, because the parties likely were not fully informed of the advantages of obtaining legal counsel. It is possible that they could argue that they were both legally sophisticated--as evidenced by their knowledge that they needed a separate signed document to waive--but in the absence of additional evidence of this sophistication, a court would likely hesitate to enforce the agreement on this basis.

(2) Similarly, it is not clear from the writing signed by the parties--either the agreement

or the separate signed writing--that the parties were fully informed of the rights that they were giving up. Unless the proponent can produce evidence that the other party was fully informed, the court may decline to enforce the agreement.

(3) Here, the facts are unclear regarding whether there was fraud, undue influence, or duress. The party seeking to enforce the agreement would bear the burden of showing that these factors did not exist at the time the agreement was signed.

Unconscionability

To prove that the agreement was not unconscionable at the time it was executed, the proponent of the agreement would need to prove that the other party was fully informed of the assets and liabilities of the proponent party, or that the other party had waived such a right to full disclosure of the assets and liabilities of the proponent party, or that the other party actually knew or had reason to know of the assets and liabilities of the proponent party. In the absence of facts speaking to such disclosure, we assume that the agreement was not unconscionable for the purposes of this analysis.

Transmutation

Finally, in order to be a valid transmutation (agreement that changes the status of ownership of property), a premarital agreement or other agreement must expressly declare the intent of the parties--particularly the adversely affected spouse--to change the ownership status of property.

The spouse aiming to defeat the premarital agreement will argue that saying that "Wanda's/[Harry's] salary is her/[his] property" is insufficiently clear to demonstrate intent to make the property separate property because it does not use the word "separate." However, the other spouse will argue that the intent is clear. Since the earnings acquired during marriage would otherwise be community property, saying that it would be the earning spouse's property is sufficient to demonstrate the parties' intent

to make it separate property. The court would likely agree with the latter argument, since the intent to change the ownership status is clear.

Ultimately, however, since there was no independent legal counsel and the parties were likely not fully informed of the rights they were giving up, the party opposing the premarital arrangement will likely be able to prevent it from being enforced on the basis that it was not voluntarily signed.

The Condominium

Source of Funds and Time of Purchase

Property acquired during marriage from community property funds is presumed to be community property. This presumption holds true even if the spouse takes title in his or her name alone. The general community property presumption may be rebutted by a preponderance of the evidence.

Here, Harry used his salary to buy a condominium in 2004. The condominium was purchased after the marriage, using Harry's salary. Assuming that Wanda were able to defeat the premarital agreement and prevent it from being enforced, Harry's salary earned during the marriage would be community property. As a result, property purchased with this salary, as the condominium was, would be community property.

The Community Property Presumption

Harry will argue that the condominium should be his separate property. He may succeed in this argument if he can rebut the community property presumption by a preponderance of the evidence. Harry will argue that his title to the property in his name alone indicates his intent that the property should be his separate property. This alone, however, is not sufficient evidence to rebut the general community property presumption. Harry may also argue that he used separate property funds earned from

before the marriage to purchase the condominium in addition to some of his salary after the marriage. Harry may be able to prove that separate property funds were used to purchase the condominium by either directly tracing the funds used in the purchase to a separate property source (by showing that separate property funds were available and that he intended to use them in this purchase) or by indirectly tracing the funds via the exhaustion method (showing that community property funds commingled with separate property funds were exhausted by family expenses such that only separate property funds remained in the account that was used for the purchase). If Harry can succeed in this tracing, it will not change the status of the property, but Harry may be entitled to an equitable right of reimbursement for the separate property funds that he used in purchasing the property (without interest), and he may be entitled to a pro rata share of the property as separate property in proportion to the part of the purchase price paid with separate property funds.

However, in the absence of such evidence--and there is no such evidence suggested by the facts--we assume that Harry's salary referenced in the facts was earned between 2003 and 2004, and that it was thus community property.

The Special Presumptions

Harry may also argue that the Special Presumption of Title should be applied to the property. The Special Presumption of Title states that the property's title and the manner in which it is held is presumed to reflect the status of the property. But this presumption only applies at death, so it is inapplicable.

Instead, the Special Presumption that applies at divorce is the Special Community Property Presumption. This presumption states that any property jointly held by the spouses (as joint tenants or as tenants in common) is presumed to be community property at divorce. Wanda will likely argue that this presumption applies. Harry may attempt to defeat this presumption via clear and convincing evidence, which evidence (after 1984) must include an express statement in writing, demonstrating that the

property should be held as separate property. To defeat the presumption, Harry would need to produce in addition to this express statement--and there does not seem to be such a statement referring to the condominium--evidence of the sort discussed three paragraphs above. Again, in the absence of such evidence, Harry would not be able to rebut the community property presumption.

There are no transmutations suggested by the facts (again, assuming that the premarital agreement is unenforceable) that would change the ownership status of this property.

Dispositions

Thus, again assuming that the premarital agreement is unenforceable, the condominium is likely community property.

Upon divorce, the equal division rule applies, and community property is divided evenly between the spouses. Thus, Harry and Wanda are likely each entitled to 50% of the value of the condominium.

The Joint Savings Account

Source of Funds and Time of Purchase

The joint savings account was created in 2005. Both Harry and Wanda deposited \$5,000 from their salaries into the account. These deposits of \$10,000 a year over the course of 10 years would likely amount to \$100,000, plus whatever interest the account has earned in that time. This \$100,000 stemmed from Harry and Wanda's salaries. Again assuming that the salaries were community property, because they were earned during the marriage and the premarital arrangement is likely unenforceable, this bank account and the \$100,000 it contains is community property.

At divorce, the special community property presumption applies (see rule above). Since the bank account is held in both of their names--it is a joint account--it is presumed to be community property, and the income earned on the account is also presumed to be community property.

There is no transmutation affecting this joint account.

At divorce, community property is divided equally between the spouses. Thus, not addressing for the moment the funds removed from the account to pay for the rental property, which will be addressed below, Harry and Wanda are each entitled to 50% of the account. This would be \$50,000 (plus half of the interest) to Harry, and \$50,000 (plus half of the interest) to Wanda.

The Rental Property

Source of Funds and Time of Purchase

The rental property was purchased by Wanda in 2015, during the marriage. Wanda used funds from the joint account to purchase the property. Assuming that the funds in the joint account were community property, this would make the rental property presumptively community property, as it was acquired during the marriage with community property funds.

Wanda will argue that the rental property was held in her name and that it should thus be separate property. However, this is not enough to rebut the community property presumption. Additionally, the special presumption of title does not apply at divorce, only at death. So, unless she were able to enforce the premarital agreement, which she will likely not be able to do, Wanda will not be able to argue that the rental property is her separate property.

Breach of Fiduciary Duty

Spouses owe each other fiduciary duties. These duties include the duty to inform the spouse of the status of community property and the duty to obtain consent for major decisions affecting the disposition of community property. If a spouse violates his or her fiduciary duty to the other spouse, as a remedy, the other spouse may have his or her name added to the title of the affected property, the spouse may be entitled to a larger share of the community property, or, if the property was fraudulently concealed, the innocent spouse may request that the court order the other spouse to forfeit the property entirely to the innocent spouse.

Here, assuming the joint account was community property funds, Wanda may have breached her duty to obtain consent for major decisions. She did not notify Harry about using money from their joint account to purchase the rental property, and she took title in her name alone. It is possible that she also intended to keep the proceeds from this rental property, which would be community property themselves, for herself, which would be a violation of the duty of loyalty and highest good faith owed to her spouse. Since there is insufficient evidence of fraudulent concealment of this property, the court is not likely to order that Wanda forfeit the property entirely, but the court may award Harry a larger share of the community property as a result of Wanda's breach.

The rental property is thus community property. At divorce, it will be divided evenly between the two spouses, with Harry receiving a larger share as the court deems just due to Wanda's breach of her fiduciary duties.

The Hospital Bill

Debts of spouses acquired after permanent physical separation are generally the liabilities of the debtor spouse, with that spouse being responsible for the debt payment after divorce. However, even after separation, both the debtor and the non-debtor spouse may be personally liable for payments for the necessities of life of either spouse.

The court may divide liability for such debts according to each spouse's ability to pay.

The hospital bill was for an emergency surgery. Such an emergency surgery is a necessity of life, and, as such, both Wanda and Harry will be personally liable. Harry may have an equitable right of reimbursement for any of his funds used in payment for the hospital bill, however, if he can show that Wanda had separate property funds available at the time the hospital bill was paid.

At divorce, either Harry or Wanda may be personally liable for the hospital bill. Assuming that Wanda's \$50,000 share of the joint account is still intact, she may have had funds available for the payment herself. If this is true, Harry may be entitled to an equitable right of reimbursement for his own funds used to pay the hospital bill. Any funds that he used that made up for funds that Wanda did not have available will not be reimbursed to Harry.