







Introduction

This program explains reimbursement and other rights that arise when

SP is used to benefit CP

- **Fam C 2640(b)** reimbursement rights

One spouse's SP is used to benefit the other spouse's SP

- **Fam C 2640(c)** reimbursement rights

CP is used to benefit SP

- **Moore/Marsden** rights [*IRMO Marsden* (1982) 130 Cal.App.3d 426; *IRMO Moore* (1980) 28 Cal.3d 366]

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Introduction (cont'd)

➤ This program covers

1. Development of authorities defining the three categories of legal principles
2. Current authorities controlling the principles
3. Application of the principles to hypothetical fact patterns, and
4. "Theoretical approaches" to the principles that might be argued in an appropriate case ("Bob/Ron Dicta")

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Introduction (cont'd)

Each transaction involves the use of money, or some other asset, of one character (separate or community) . . .

. . . for the benefit of property of a different character (separate or community)

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Introduction (cont'd)

Remember, however, that reimbursement and/or other rights also arise when:

CP efforts are used to benefit SP
(*Pereira/Van Camp*) . . .

. . . or SP efforts are used to
benefit CP (*IRMO Imperato*)

Pereira v. Pereira (1909) 156 Cal. 1
Van Camp v. Van Camp (1921) 53 Cal.App. 17
IRMO Imperato (1975) 45 Cal.App.3d 432

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Introduction (cont'd)

- Today we examine reimbursement and other rights arising from the use of money or other assets of one character to benefit an asset of a different character . . .
- . . . and leave for another day examination of reimbursement and other rights arising from the use of efforts of one character to benefit an asset of a different character

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Both Sides
of a Coin

**SP Benefits CP:
Fam C 2640(b) Reimbursement**

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Fam C 2640(b) Reimbursements:
Existing Law

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Fam C 2640(b) Principles

IRMO Lucas (1980) 27 Cal.3d 808

Understanding the world before
Fam C 2640(b)

Will put our
Fam C 2640(b)
discussion into context

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Existing Law

IRMO Lucas

(1980) 27 Cal.3d 808

- H and W purchased a residence in joint tenancy during marriage, using W's SP as down payment
- T/Ct apportioned the residence equity: 88% WSP, and 12% CP
 - T/Ct did this by applying the formula described in **IRMO Aufmuth** (1979) 89 Cal.App.3d 446, in which a spouse making a SP down payment on CP receives SP interest in CP in the proportion the SP down payment bore to the CP purchase price

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Existing Law

IRMO Lucas (cont'd)

(1980) 27 Cal.3d 808

- CASCT reverses
 - "The act of taking title in a joint and equal ownership form is inconsistent with an intention to preserve a separate property interest. Accordingly, the expectations of parties who take title jointly are best protected by presuming that the specified ownership interest is intended in the absence of an agreement or understanding to the contrary."

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Existing Law

CC 4800.2 → Fam C 2640(b)

- Effective January 1, 1984, our Legislature adopted
- CC 4800.1, now **Fam C 2581**
- CC 4800.2, now **Fam C 2640(b)**

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Existing Law

Fam C 2640(b)

- January 1, 1984, effective date
- Not retroactive
 - So you must remember **IRMO Lucas** – which still controls SP contributions made before 1-1-84!
- A **Fam C 2640(b)** reimbursement right exists only in a Family Code Division 7 ("Division of Property") proceeding
- The asset must be CP for a **Fam C 2640(b)** reimbursement right to exist regarding it

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The Statute – Waiver of 2640(b)

No Oral Waivers

- A **Fam C 2640(b)** waiver must be in writing
- Unless in writing, donative intent won't waive a **Fam C 2640(b)** reimbursement right
- Not even stipulated donative intent
 - Expressed by retitling SP as CP
IRMO Witt (1987) 197 Cal.App.3d 103
 - Expressed in a premarital agreement
IRMO Carpenter (2002) 100 Cal.App.4th 424

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The Statute – Fam C 2640

Measuring the Reimbursement Right

- How do we measure the **Fam C 2640(b)** reimbursement right?
- The right is **limited** at two times
 - **Fam C 2640(a)**: The right is limited **at time of inception**
 - **Fam C 2640(b)** The right is limited **at time of division**

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Fam C 2640(a): Limitation at Inception

“‘Contributions to the acquisition of property,’ as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.”

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The Statute – Fam C 2640

Let's Break Down Fam C 2640(a)

- Acquisition contribution
 - SP cash contributed
 - SP property transmuted
- Loan principal pay down
- Improvements
- (Don't limit your thinking to mortgages: "payments that reduce the principal of a **loan used to finance the purchase or improvement** of the property...") [Emphasis added.]

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The Statute – Fam C 2640

Fam C 2640(b): Limitation at Division

- **Fam C 2640(b)** reimbursement rights exist only in a Family Code Division 7 proceeding
- **Fam C 2640(b)** reimbursement rights do not apply
 - In a probate proceeding
 - In a collection suit by a creditor
 - In a bankruptcy case [*In re Mantle* (9th Cir 1998) 153 F.3d 1082]

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In re Mantle

(9th Cir 1998) 153 F.3d 1082

- Divorcing spouses sold their residence
- The \$67K sale proceeds (including \$62K that W contended were W2640(b)) were held in escrow
- The divorce court hadn't yet ruled on W's **Fam C 2640(b)** reimbursement rights when H filed Chapter 7
- Trustee argued that the entire \$67K was CP (and, therefore, was an asset of the bankruptcy estate)

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Mantle

Cont'd

- Bankruptcy court entered judgment for trustee, ruling that the entire \$67K was CP
- BAP: Reversed bankruptcy court
- 9th Cir: **REVERSES** BAP, agreeing with trustee and bankruptcy court
 - The entire \$67K was CP
 - Because divorce court hadn't yet quantified ("created?") W's **Fam C 2640(b)** reimbursement rights when H filed his chapter proceeding

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Fam C 2640(b): Limitation at Division

"In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division."

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The Statute – Fam C 2640

Limitation at Division (cont'd)

- The right includes no interest or share in property appreciation
 - "The amount reimbursed shall be without interest or adjustment for change in monetary values...."
- The right is limited to the **equity** ("net value") **at the time of the division**
 - "and may not exceed the net value of the property at the time of the division."

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The Statute – Fam C 2640

Limitation at Division (cont'd)

- There are two reasons why the “equity at division” can be less than the “contribution at inception”
 - A decline in the market value of the property
 - A cash out refi reducing the equity in the property
- What happens when the equity at division is less than the contribution at inception?
 - If decline in value – reimbursement is reduced
 - If cash out refi – depends on where the cash went:
 - If squandered, see upcoming “A Short Marriage with Cash Out Refi” analysis
 - If invested, see **IRMO Walrath (1998) 17 Cal.4th 907**
 - Separatizer is given a “preferred creditor” status

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Fam C 2640(b): Nature of the Right

- What is the nature of this right of reimbursement? Is it
 - A property right?
 - A reimbursement right?
 - Something else?
- Consider the concept of “burden,” which will prove useful in
 - “A short marriage with cash out refi”
 - **IRMO Walrath**

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Fam C 2640(b) Reimbursements

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Fam C 2640(b) Examples

How Fam C 2640(b) Reimbursement Rights are Created

Common methods by which **Fam C 2640(b)** reimbursement rights are created

SP funds used to acquire jointly-titled residence during marriage	SP residence transmuted to CP during marriage	SP funds used to open a jointly-titled financial institution account during marriage [see Prob C 5305 and 5307]
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Acquisition of CP House with HSP Down Payment

Item	At Date of Purchase
Purchase price	\$ 800K
Mortgage	\$ -300K
Down Payment	\$ 500K
H2640(b)	\$ -500K
On date of purchase SP equity = total equity	

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Transmutation of SP House to CP One Day After Marriage

- Under **Estate of Bibb** (2001) 87 Cal.App.4th 461 a grant deed is a **Fam C 852(a)** transmutation
 - The deed is not, however, a waiver of **Fam C 2640(b)** reimbursement [**IRMO Witt** (1987) 197 Cal.App.3d 103]
- The SP reimbursement right “at inception” is the SP equity at date of transmutation
 - **IRMO Witt** (1987) 197 Cal.App.3d 103
 - **IRMO Perkal** (1988) 203 Cal.App.3d 1198

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Transmutation of HSP House to CP One Day after Marriage

Item	At Date of Transmutation
FMV	\$ 800K
Mortgage	\$ -300K
Equity	\$ 500K
H2640(b)	\$ -500K
On date of transmutation SP equity = total equity	

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Transmutation of SP House to CP Two Years after Marriage

- Transmutation of SP house to CP *two years after* marriage – *after* mortgage payments and improvements were paid for with community funds
- Remember: it's the *SP equity* that is the measurement of **Fam C 2640(b)** reimbursement at inception!

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Two Years after Marriage (cont'd)

With respect to a transmutation of SP house to CP two years after marriage

- Any CP mortgage principal payments prior to transmutation require a **Moore/Marsden** calculation
- Any CP payments for improvements prior to transmutation also require a **Moore/Marsden** calculation
- ("Moore" on **Moore** later)

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Transmutation of HSP House to CP Two Years after Marriage

Item	At Date of Transmutation
FMV	\$ 800K
Mortgage	\$ -300K
Equity	\$ 500K
M/M CP interest	\$ -75K
SP equity = H2640(b)	\$ -425K
On date of transmutation SP equity is less than total equity	

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Fam C 2640(b) Examples and Application

Loss of Equity Due to Decline in Value

Remember: A date of division limitation on **Fam C 2640(b)** reimbursement is that it “may not exceed the net value of the property at the time of the division”

So... what about loss of equity because of a decline in fair market value?

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Limitation of Reimbursement to Date of Division Equity

Item	At “Inception”	At “Division”
FMV	\$ 800K	\$ 600K
Mortgage	\$ -300K	\$ -250K
Equity	\$ 500K	\$ 350K
HSP 2640	\$ -500K	\$ -350K
Date of division equity is less than date of inception H2640(b), so H2640(b) is limited to \$350K		

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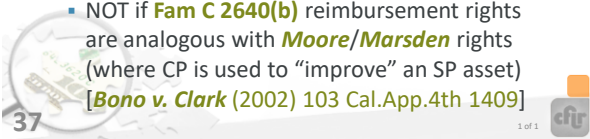
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Fam C 2640(b) Examples and Application

Improvements to CP House with SP Funds

- SP is used to make improvements to a CP house
- What about the swimming pool?
 - Does the contribution for improvements have to increase the value of the community asset to give rise to the reimbursement right?
 - NOT if **Fam C 2640(b)** reimbursement rights are analogous with **Moore/Marsden** rights (where CP is used to “improve” an SP asset) [**Bono v. Clark** (2002) 103 Cal.App.4th 1409]



Fam C 2640(b) Examples and Application

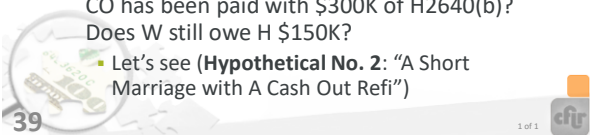
Loss of Equity Due to a Cash Out Refi

- What about loss of equity because of a cash out refi?
- It depends on what happened to the cash!
- Was the cash
 - Squandered? See “A Short Marriage with Cash Out Refi”
 - Invested? See **IRMO Walrath**



Community Obligation Paid with Cash Out Refi Proceeds

- Hypo: H and W owe a \$300K community obligation (CO)
 - If disso court assigns the CO to H, does W owe H \$150K?
 - Of course! (**Hypothetical No. 1:** “A Short Marriage with No Cash Out Refi”)
 - But what if, by the time of the divorce trial, the CO has been paid with \$300K of H2640(b)? Does W still owe H \$150K?
 - Let's see (**Hypothetical No. 2:** “A Short Marriage with A Cash Out Refi”)



Hypothetical No. 1

A Short Marriage with
No Cash Out Refi

Hypothetical

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Hypothetical No. 1 (cont'd)

Monday

- H and W marry;
H owns HSP Blackacre
(FMV = \$800K, no mortgage)

Tuesday

- H and W host \$300K party
(community obligation (CO))

Wednesday

- W is added to Blackacre's title

Thursday

- Separation; W files divorce petition

Friday

- Divorce trial

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Hypothetical No. 1: Issue

- (Events are compressed into a week to illustrate the fact that Blackacre's value doesn't change between date of refi and date of trial)
- If H is assigned the \$300K party obligation, will W owe H \$150K?
- H correctly contends: YES!
 - Look at the CP Balance Sheet!

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Hypothetical No. 1: CP Balance Sheet

Blackacre			To H	To W
FMV	800K			
Mortgage	(0)			
Equity		800K		
H2640		(800K)		
Blackacre (CP interest)			0	
Party obligation			(300K)	
Totals to parties			(300K)	0
To equalize, W owes H \$150K				

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Hypothetical No. 2

A Short Marriage
with a Cash Out Refi

Hypothetical

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Hypothetical No. 2 (cont'd)

Monday

- H & W marry;
H owns HSP Blackacre
(FMV = \$800K, no mortgage)

Tuesday

- H and W host \$300K party (CO)

Wednesday

- W is added to Blackacre's title;
H & W jointly borrow \$300K
(cash out refi of Blackacre),
which they use to pay the party CO

Thursday

- Separation; W files divorce petition

Friday

- Divorce trial

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Hypothetical No. 2

Let's Predict Some T/Ct Rulings**Question**

- Is the \$300K secured note a community obligation?

Answer

- Yes

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Hypothetical No. 2

Let's Predict Some T/Ct Rulings (cont'd)**Question**

- To whom will Blackacre be awarded?

Answer

- To H

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Hypothetical No. 2

Let's Predict Some T/Ct Rulings (cont'd)**Question**

- Will the \$300K secured note remain with Blackacre?

Answer

- Of course

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Hypothetical No. 2

Let's Predict Some T/Ct Rulings (cont'd)**Question**

- Who will pay the \$300K secured note?

Answer

- H will pay the note – because H will be awarded Blackacre, and the note will remain with Blackacre

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Hypothetical No. 2: Issue

- Since H will pay the \$300K secured note, will W owe H \$150K?
- H contends: YES!
 - It's the same situation as Hypo No. 1!

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Hypothetical No. 2: H's Balance Sheet

Blackacre			To H	To W
FMV	800K			
Mortgage	(0)			
Equity		800K		
H2640		(800K)		
Blackacre (CP interest)			0	
Party obligation			(300K)	
Totals to parties			(300K)	0
To equalize, W owes H \$150K				

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Hypothetical No. 2: Issue

- But W contends: No!
 - Now the balance sheet looks like this



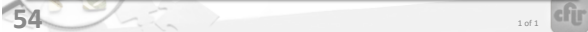
Hypothetical No. 2: W's Balance Sheet

Blackacre			To H	To W
FMV	800K			
Mortgage	(300K)			
Equity (reduced)		500K		
H2640 (reduced)		(500K)		
Blackacre (CP interest)			0	
Totals to parties			0	0
Result: Equal division				



Hypothetical No. 2: H's Balance Sheet

Blackacre			To H	To W
FMV	800K			
Mortgage	(0)			
Equity		800K		
H2640		(800K)		
Blackacre (CP interest)			0	
Party obligation			(300K)	
Totals to parties			(300K)	0
To equalize, W owes H \$150K				



Hypothetical No. 2

Difference Between Hypos No.1 and No.2

- The only difference between Hypothetical No.1 and No. 2 is that
 - In Hypo No. 1, the party obligation is an **existing community obligation**
 - Whereas in Hypo No. 2, the party obligation **has been paid off with cash out refi proceeds from H2640(b) property!**



Hypothetical No. 2

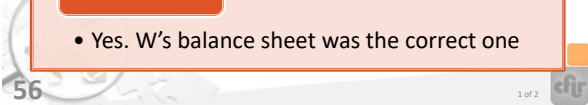
California Law & Cash Out Refi Proceeds

Question

- Does California law really require that H's decision to allow the party obligation to be paid with cash out refi proceeds cost him \$150K?

Answer

- Yes. W's balance sheet was the correct one

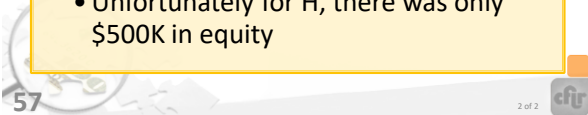


Hypothetical No. 2

California Law (cont'd)

Reason

- At time of trial, there was *insufficient equity* in Blackacre to reimburse H for his full \$800K in Fam C 2640(b) reimbursement rights
- Unfortunately for H, there was only \$500K in equity



Hypothetical No. 2

H

- “The \$300K mortgage is every bit as much a community obligation as was our \$300K party bill”

W

- “I agree that it is”

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Hypothetical No. 2 (cont'd)

H

- “And since the court has assigned to me for payment our \$300K community obligation mortgage, you owe me \$150K”

W

- “That’s not true; the \$300K community obligation mortgage reduced Blackacre’s equity, thereby reducing your **Fam C 2640(b)** reimbursement right”

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Hypothetical No. 2 (cont'd)

H

- “I acknowledge that, under **IRMO Walrath**, a **Fam C 2640(b)** reimbursement right can be eroded when cash out refi proceeds are invested”
- “But my **Fam C 2640(b)** reimbursement right shouldn’t be eroded when cash out refi proceeds are squandered”

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Hypothetical No. 2 (cont'd)

W

- "A **Fam C 2640** reimbursement right IS eroded by a squander, as demonstrated here"
- "Compromise legislation replacing **IRMO Lucas'** gift presumption with **Fam C 2640(b)** gave separatizers PROTECTIONS and RISKS"
- "A **PROTECTION** if at date of trial the **Fam C 2640(b)** property has sufficient equity to reimburse the separatizer's contribution, but a **RISK** if it doesn't"

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Hypothetical No. 2 (cont'd)

H

- "California family law presumed interspousal GIFTS under certain circumstances before Civil Code sections 4800.1 and 4800.2 became effective on January 1, 1984. Those 'romantic' days are long gone. If I am saddled with the entire \$300k community obligation mortgage I, in effect, have made a \$150k GIFT to you. That can't be the law."

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Hypothetical No. 2 (cont'd)

W

- "It certainly is the law"
- "I admit that, pursuant to **IRMO Perkal (1988) 203 Cal.App.3d 1198**, on Wednesday your **Fam C 2640(b)** reimbursement right totaled \$800K – the equity in Blackacre when you put it in joint title"
- "BUT since Blackacre had INSUFFICIENT EQUITY on Friday to reimburse you a \$300K portion of your \$800K contribution, you aren't reimbursed it"

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Hypothetical No. 2 (cont'd)

H

- “Except in a negative CP estate (which ours isn’t), **Fam C 2622(a)** and **2550** require a judge to equally divide community obligations”
- “If our judge follows that law here, you will owe me the \$150K”

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Hypothetical No. 2 (cont'd)

W

- “A judge applying **Fam C 2622(a)** and **2550** in the manner you request would be reversed for having violated **Fam C 2640(b)**”
- The more specific statute controls
- “**Fam C 2640(b)** is SPECIFICALLY applicable to your reimbursement rights, whereas **Fam C 2622(a)** and **2550** are mere GENERAL provisions”

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Hypothetical No. 2 (cont'd)

H

- “Since you gained an UNFAIR ADVANTAGE over me when I permitted the party obligation to be paid with cash out refi proceeds from Blackacre, an **IRMO Delaney (2003) 111 Cal.App.4th 991** presumption of undue influence has arisen”

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Hypothetical No. 2 (cont'd)

W

- “There was nothing ‘unfair’ about the advantage I gained – my advantage is simply the legal result of **Fam C 2640(b)**”
- “If you want to discuss ‘unfair,’ let’s talk about the **IRMO Lucas** gift presumption that **Fam C 2640(b)** replaced”
- “If **IRMO Lucas** were still the law, you wouldn’t have even the \$500K reimbursement right you do have – you should count your blessings!”

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Hypothetical No. 3

A Longer Marriage
with a Cash Out Refi
and Inflation

Hypothetical

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Hypothetical No. 3: Issue

- If, in effect, a “HOLE has been dug” in separator’s reimbursement right in Blackacre due to a falling market
- Will a rising market “refill the HOLE”?

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Hypothetical No. 3 (cont'd)

Monday

- H & W marry;
H owns HSP Blackacre
(FMV = \$800K, no mortgage)

Tuesday

- H and W host \$300K party (CO)

Wednesday

- W is added to Blackacre's title;
H & W jointly borrow \$300K
(cash out refi of Blackacre),
which they use to pay the
party CO

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Hypothetical No. 3 (cont'd)

Thursday

- Separation; W files divorce
petition

Three Years
from Friday

- Divorce trial;
Blackacre FMV is \$1,200,00
because during the three
years, Blackacre appreciated by
\$400K

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Hypo No. 3: Blackacre Before Inflation

W's View	
FMV	\$ 800K
Mortgage	(300,000)
(Eroded) CP subj H2640	(500,000)
CP	\$ 0

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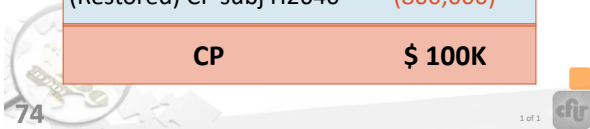
Hypothetical No. 3: Issue

- What effect did the \$400K in post-refi inflation have on the amount of H's **Fam C 2640** reimbursement right?
- Did the inflation "refill the HOLE"?
- H contends: Yes!



Hypo No. 3: Effect of Inflation

H's View	
FMV	\$ 1.2M
Mortgage	(300,000)
(Restored) CP subj H2640	(800,000)
CP	\$ 100K



Hypothetical No. 3: Issue

- W contends: No!
- Based on **See v. See** (1966) 64 Cal.2d 778



Hypo No. 3: Effect of Inflation

W's View	
FMV	\$ 1.2M
Mortgage	(300,000)
(Eroded) CP subj H2640	(500,000)
CP	\$ 400K

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Hypo No. 3: Does *See* Apply?

- A spouse who *uses SP to pay a community expense* is not entitled to reimbursement [*See*]
- W contends that, similarly, a spouse who *uses "CP subj H2640" to pay a community expense* is not entitled to reimbursement

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Hypothetical 3

Does *See* Apply? (cont'd)

- Wife is wrong: *See* does not apply
- Why not?
 - Because the CO was paid with CP, *not with HSP*
- Why is that?
 - Because H2640 is *NOT HSP*: It is a "burden" attached to CP!

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Hypothetical No. 3: Conclusion

H wins in Hypo No. 3 for the same reason that he lost in Hypo No. 2

Now, at time of trial, there is SUFFICIENT EQUITY in Blackacre to provide H his full \$800K in **Fam C 2640(b)** reimbursement

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Fam C 2640(b) Reimbursements:
Existing Law



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IRMO Walrath Principles

Existing Law

IRMO Walrath (1998) 17 Cal.4th 907

- The decision includes a majority opinion and two dissenting opinions
 - Brown majority opinion
 - Kennard dissent
 - Baxter dissent
- The decision creates a forced allocation of **Fam C 2640(b)** rights among assets
- The decision limits how much **Fam C 2640(b)** reimbursement can be obtained from each asset
- The decision is applicable from 1-1-84 to (at least) 12-31-04 (discussion of SB 1407 follows)

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Blackacre/Whiteacre & Walrath

If Blackacre and Whiteacre both retain value, **IRMO Walrath** is irrelevant

Since there's sufficient equity in each property to reimburse separator

But if Blackacre or Whiteacre lose value, **IRMO Walrath** becomes highly relevant

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Philosophy Behind Fam C 2640

- Because separator **can't profit** from the SP investment, separator receives special protections
 - Separator's reimbursement right is **last to be depleted** from decrease in property's market value and/or from decrease in property's equity through cash out refi
 - If future inflation, mortgage principal reduction and/or capital improvements replenish the property's equity, separator's right of reimbursement is **first to be replenished**

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Fam C 2640(b)

In 1998, **Fam C 2640(b)** provided

"...unless a party has made a written waiver of the right to reimbursement... the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source."

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Fam C 2640(b) (cont'd)

Quoted again, with emphasis

"...unless a party has made a written waiver of the right to reimbursement... the party shall be reimbursed *[issue: reimbursed from where?]* for the party's contributions to the acquisition of

the property

[issue: does "the property" mean Blackacre? Whiteacre? Both?]

to the extent the party traces the contributions to a separate property source." [Emphasis added.]

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"To" and "From"

Should **Fam C 2640(b)** be interpreted to mean that if a separator made contributions

- **TO** a particular asset, the separator has the right to be reimbursed
- **FROM** that same asset?

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The Three IRMO Walrath Opinions

- To the extent that the asset in question has sufficient equity at time of trial, the separator may be reimbursed **the amount allocated to Whiteacre from**
 - Brown majority opinion: Whiteacre
 - Kennard dissenting opinion: Whiteacre and/or Blackacre
 - Baxter dissenting opinion: Any marital asset

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Separatizer Protection

- Brown “pro rata reimbursement” approach
 - Protects the separatizer, and
 - Respects the term “the property”
- Kennard “reimbursement from either property” approach
 - Protects the separatizer *better*, and
 - Still respects the term “the property”
- Baxter “reimbursement from any community asset” approach
 - Protects the separatizer *best*, but
 - Doesn’t respect the term “the property”

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Existing Law

Is *IRMO Walrath* Still Controlling Law?

- SB 1407 (Stats 2004, Ch 119, Kuehl)
- The primary purpose of SB 1407 was to create **Fam C 2640(c)**
- But SB 1407 also amended the specific language in **Fam C 2640(b)** that was central to the *IRMO Walrath* decision

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The New Fam C 2640(b)

As rewritten by SB 1407

“...unless a party has made a written waiver of the right to reimbursement, the party shall be reimbursed for the party's contributions to the acquisition of

**PROPERTY OF THE
COMMUNITY PROPERTY ESTATE**

*[Does this mean Blackacre? Whiteacre?
Both? Any marital asset?]*

to the extent the party traces the contributions to a separate property source.” [Emphasis added.]

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Existing Law

SB 1407 (Stats 2004, Ch 119, Kuehl)

- What is the impact of SB 1407 on the **Walrath** decision?
- “The Legislature, of course, is deemed to be aware of...judicial decisions...in existence, and to have...amended a statute in light thereof.”
[**People v. Harrison** (1989) 48 Cal.3d 321]
- It could be reasonably contended that SB 1407 adopted the Kennard dissent

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Issue

- Does SB 1407 retroactively apply to a pre-2005 contribution of SP?

Answer

- “No”

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Fam C 4 and IRMO Fellows

- **Fam C 4** states the general rule that all Family Code amendments are fully retroactive
- **IRMO Fellows** (2006) 39 Cal.4th 179 gave **Fam C 4** an expansive interpretation, resulting in expansive application of the code section

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Fam C 4 and IRMO Fellows (cont'd)

- BUT **Fam C 4(h)** states the exception
 - "If... the court determines, that application of a particular provision of the new law... in the manner required by this section... would **substantially interfere with ... the rights of the parties** ... in connection with an event that occurred or circumstance that existed before the operative date, **the court may, notwithstanding this section ... apply ... the old law** to the extent reasonably necessary to mitigate the substantial interference." [Emphasis added.]

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IRMO Buol (1985) 39 Cal.3d 751

IRMO Fabian (1986) 41 Cal.3d 440

IRMO Hilke (1992) 4 Cal.4th 215

IRMO Heikes (1995) 10 Cal.4th 1211

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SB 1407 (Stats 2004, Ch 119, Kuehl)

- Effective date, January 1, 2005
- **IRMO Walrath** majority decision clearly controls from January 1, 1984 through December 31, 2004: **11 years!**

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Fam C 2640(b) Reimbursements:
Existing Law

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IRMO Walrath Examples

Basic
IRMO Walrath
calculation

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Blackacre Refi/Whiteacre Purchase

What should happen when

- Blackacre is CP subj \$200K H2640
- Blackacre's \$500K in equity is
 - \$300K unburdened CP
 - \$200K burdened CP (burdened with H2640)
- The parties remove \$100K in cash out refi proceeds from Blackacre, then
- Use the \$100K to buy jointly-titled Whiteacre?

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Let's See That in Table Form

H2640 Equity (HSP Down Pmt)	\$200K (40%)
CP Equity*	\$300K*(60%)
* CP equity may have resulted from: CP down payment, CP mortgage principal reduction, CP improvements, and/or inflation	

- H and W take \$100K cash out refi from Blackacre, using proceeds to purchase jointly-titled Whiteacre
- Issue: Where did the \$100K in cash out refi proceeds come from?



Possibility #1: \$100K Came from CP

Equity	Blackacre	Whiteacre
H2640	\$200K	\$-0-
CP	\$200K	\$100K
TOTAL	\$400K	\$100K

- H's entire H2640 is forced to remain in Blackacre
- **Result**: If Blackacre tanks while Whiteacre soars, H gets hurt

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Possibility #2: \$100K Came from H2640

Equity	Blackacre	Whiteacre
H2640	\$100K	\$100K
CP	\$300K	\$-0-
TOTAL	\$400K	\$100K

- \$100K of H2640 is forced to move to Whiteacre
- **Result**: If Whiteacre tanks while Blackacre soars, H gets hurt

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Possibility #3: \$100K Pro-Rated

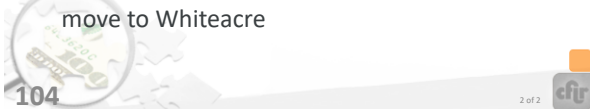
Equity	From Blackacre	To Whiteacre
H2640	\$100K x 40% =	\$40K
CP	\$100K x 60% =	\$60K



Possibility #3: Pro-Rated (cont'd)

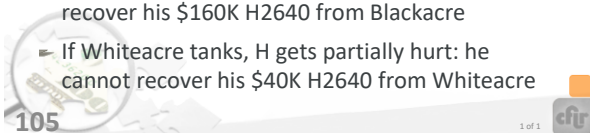
Equity	Blackacre	Whiteacre
H2640	\$160K	\$40K
CP	\$240K	\$60K
TOTAL	\$400K	\$100K

- A \$40K pro rata portion of H2640 is forced to move to Whiteacre



IRMO Walrath: \$100K Pro-Rated

- "Possibility #3" is what **IRMO Walrath** provides
- \$40K of H2640 is allocated from Blackacre to Whiteacre
- So long as there's sufficient equity in each property, H will recover all of his H2640
- If Blackacre tanks, H gets partially hurt: he cannot recover his \$160K H2640 from Blackacre
- If Whiteacre tanks, H gets partially hurt: he cannot recover his \$40K H2640 from Whiteacre



IRMO Walrath: \$100K Pro-Rated

Blackacre Down, Whiteacre Up

	Blackacre	Whiteacre
H2640	\$160K	\$40K
Equity	\$50K	\$200K
H only gets	\$50K	\$40K

- Although H2640 in Blackacre was \$160K at inception, H is limited at division to the \$50K equity in Blackacre
- Since H2640 in Whiteacre was allocated as \$40K at inception, H is limited at division to the \$40K recovery from Whiteacre, and cannot recover anything from Whiteacre's excess equity

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SB 1407

IRMO Walrath
calculation

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Two IRMO Walrath Opinions

- To the extent that the asset in question has sufficient equity at time of trial, the separator may be reimbursed **the amount allocated to Whiteacre from**
 - Brown majority opinion: Whiteacre
 - Kennard dissenting opinion: Whiteacre and/or Blackacre

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Fam C 2640(b)

H's Recovery under SB 1407

	Blackacre	Whiteacre
H2640	\$160K	\$40K
Equity	\$50K	\$200K
H gets	\$50K	\$150K

- H's **Fam C 2640** in Blackacre was \$160K at inception
- Obviously, H is limited at division to all of the \$50K equity in Blackacre
- However, **H can recover the other \$150K of his \$200K SP contribution from Whiteacre's excess equity**

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Separatizer Protection

- Brown "pro rata reimbursement" approach
 - *Protects the separatizer*
- Kennard "reimbursement from either property" approach
 - *Protects the separatizer **better***

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Fam C 2640(b) Reimbursements:
Existing Law

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Fam C 2640(b) In Review

Fam C 2640(b) in Review

SP Reimbursement Rights Timeline

- **IRMO Lucas**: Before 1-1-84
- **Fam C 2640(b)**: After 12-31-83
- **IRMO Walrath**: From 1-1-84 until (at least) 1-1-05
- SB 1407: May modify **IRMO Walrath** after 1-1-05
 - No **Fam C 2640(b)** rights unless the asset is CP
 - No oral waiver of **Fam C 2640(b)** rights

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The Statute – Fam C 2640

Fam C 2640(a): Limitation at Inception

- Scope **Fam C 2640(a)** contributions include
- Acquisition contribution
 - SP cash contributed
 - SP property transmuted
- Loan principal pay down
- Improvements
- (Don't limit your thinking to mortgages: "... payments that reduce the principal of a loan used to finance the purchase or improvement of the property . . .")

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The Statute – Fam C 2640

Fam C 2640(b): Limitation at Division

- Applies only in a Family Code Division 7 proceeding
- The right includes no interest or share in property appreciation
- The right is limited to the equity at the time of the division
- Separatizer is given "preferred creditor status": the reimbursement right is the last to be depleted and the first to be replenished ("A Longer Marriage with a Cash Out Refi and Inflation")

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The Statute – Fam C 2640

Limitation at Division (cont'd)

- What happens when the equity at division is less than the contribution at inception?
- If decline in value – reimbursement is reduced
- If cash out refi, and the cash was:
 - Squandered – remember “A Short Marriage with Cash Out Refi”
 - Invested – see **Walrath**
- Think of the reimbursement right as a “burden”

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**Fam C 2640(b): Walrath**

- **IRMO Walrath** forces a pro rata allocation of pure CP/H2640(b) burdened CP from Blackacre into Whiteacre
- If SB 1407 didn't affect **IRMO Walrath**, separatizer is limited to pro rata reimbursement from Blackacre and Whiteacre
- But if SB 1407 modified **IRMO Walrath**, separatizer may obtain “extra” reimbursement from the property with “extra” equity

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Both Sides
of a Coin

**SP Benefits Other Spouse's SP:
Fam C 2640(c) Reimbursement**

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Fam C 2640(c)

Fam C 2640(c)

- Prior to **Fam C 2640(c)**
 - **IRMO Cross** (2001) 94 Cal.App.4th 1143: The case and the basis for its decision
- Enactment of **Fam C 2640(c)**: SB 1407
- The statute – effective 1-1-05
 - Not retroactive so you must remember and apply **IRMO Cross** to contributions made before 1-1-05
- Limited to contributions made during marriage

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Fam C 2640(a): Limitation at Inception

“‘Contributions to the acquisition of property,’ as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.”

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Fam C 2640(c): Limitation at Division (cont'd)

“A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to [Section 852] or a written waiver of the right to reimbursement. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.”

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Fam C 2640(c)

Fam C 2640(c)(cont'd)

- Like **Fam C 2640(b)**:
 - Without interest or change in monetary value
 - Limited to the equity at the time of the division
- **Walrath** would not likely apply to **Fam C 2640(c)** reimbursements, as it contains the same language that is used in amended **Fam C 2640(b)**

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Fam C 2640(c)

Fam C 2640(c)(cont'd)

- Unlike **Fam C 2640(b)**, **Fam C 2640(c)** is not limited to a Family Code Division 7 proceeding
 - **Fam C 2640(c)** reimbursement rights may exist in probate, creditor, and bankruptcy actions
- A **Fam C 2640(c)** contribution **DOESN'T SURVIVE** a transmutation!
 - (Unlike a **Fam C 2640(b)** contribution!)

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**Transmutation of HSP House to WSP**

Item	At Date of Transmutation
FMV	\$ 800K
Mortgage	\$ -300K
Equity	\$ 500K
H2640(c)	nothing at all!
transmutation preserves Fam C 2640(b) rights but transmutation waives Fam C 2640(c) rights	

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Both Sides
of a Coin

**CP Benefits SP:
Moore/Marsden Rights**

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Fam C 2640(b) Reimbursements

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Moore/Marsden Principles

Moore/Marsden Rights

Moore/Marsden

- **IRMO Moore** was decided just three months after **IRMO Lucas**
- **IRMO Moore**
 - Why was the case decided in this way?
- **IRMO Marsden**: How was the case factually different from **IRMO Moore**?
 - There was premarital appreciation in **IRMO Marsden**, but none in **IRMO Moore**

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Moore/Marsden Rights

Moore/Marsden (cont'd)

- The philosophical underpinnings for the “two-step process” required by **Moore/Marsden**
- Under the “two-step process,” the community receives
 - **Step I:** Dollar-for-dollar reimbursement
 - **Step II:** A pro tanto interest in appreciation

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**Moore/Marsden** (cont'd)

- What payments create **Moore/Marsden** rights?
 - Principal reduction payments
 - Payments for improvements
 - Community **not** credited with interest, property tax, or insurance payments [**IRMO Nelson** (2006) 139 Cal.App.4th 1546]

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Moore/Marsden Rights

Moore/Marsden (cont'd)

- The community owes the separator no **Watts** charges for the community's use of the asset
 - Authority: **IRMO Nelson**, quoting **IRMO Moore** by implication

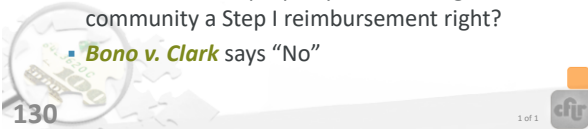
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CP Used to Make Improvement to SP House

- **IRMO Allen** (2002) 96 Cal.App.4th 497
- **IRMO Wolfe** (2001) 91 Cal.App.4th 962
- **Bono v. Clark** (2002) 103 Cal.App.4th 1409
- So... what about the swimming pool?
 - Must the contributed improvements increase the value of the property in order to give the community a Step I reimbursement right?
 - **Bono v. Clark** says "No"



Moore/Marsden Rights

Other **Moore/Marsden** Issues to Examine

- Should the pro tanto period BEGIN on the date of marriage, or on the date of the first CP contribution?
- Should the pro tanto period END on the date of trial, or on the date of separation?
- Should the pro tanto denominator be the purchase price, or the market value of the property on the date of the first CP contribution?



Moore/Marsden Rights

Other **Moore/Marsden** Issues (cont'd)

- What should be the effect of a declining real estate value on a CP **Moore/Marsden** interest?
 - Consider proposed solutions A through E
- What should be the result if the parties take a cash out refi from **Moore/Marsden** Blackacre, then purchase jointly-entitled Whiteacre with the cash?
 - Moorath?
 - Moorebeam?
 - Grinimoore?



Moore/Marsden Rights

Other *Moore/Marsden* Issues (cont'd)

- If *Moore/Marsden* Blackacre undergoes a refi subject to *IRMO Grinius* (1985) 166 Cal.App.3d 1179, what should be the effect on the pro tanto fractions?
 - See *IRMO Stoner* (1983) 147 Cal.App.3d 858 and *IRMO Branco* (1996) 47 Cal.App.4th 1621
- Should the *Moore/Marsden* formula be changed to ignore the unpaid loan balance?

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Fam C 2640(b) Reimbursements

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Moore/Marsden Examples

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Moore/Marsden Examples & Applications

Basic *Moore/Marsden* Calculation

Moore/Marsden Calculation

	FMV	Mortgage	Equity
Purchase	\$500K	\$400K	\$100K
	100K	(20K)	
DOM	\$600K	\$380K	\$220K
	200K	(50K)	
DOT	\$800K	\$330K	\$470K

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Moore/Marsden Formula

Step I

- Gives the community a dollar-for-dollar reimbursement: \$50K

Step II

- Gives the community a pro tanto share of appreciation during marriage: $\$50K/\$500K \times \$200K = \$20K$

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Moore/Marsden Examples & Applications

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Two Pro Tanto Fraction Issues

Moore/Marsden Calculation

- Should the pro tanto period BEGIN on the date of marriage, or on the date of the first CP contribution?
- Should the pro tanto period END on the date of trial, or on the date of separation?



Moore/Marsden Calculation

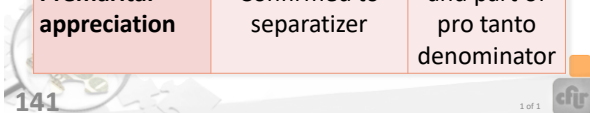
Bono Applied 3 Modifications

“...we consider it appropriate to depart from the *Moore/Marsden* approach in three respects.” [Bono]



Moore/Marsden & Bono

	<i>Moore/Marsden</i>	<i>Bono</i>
Pro tanto period begins	Date of marriage	Date of contribution
Pro tanto period ends	Date of trial	Date of separation
Premarital appreciation	Confirmed to separitizer	Confirmed and part of pro tanto denominator



Bono & IRMO Sherman

	<i>Bono</i>	<i>IRMO Sherman</i>
Pro tanto period begins	Date of contribution	OK
Pro tanto period ends	Date of separation	No
Premarital appreciation	Confirmed AND part of pro tanto fractions	(Issue avoided: Cases factually distinguished – parties stippled)

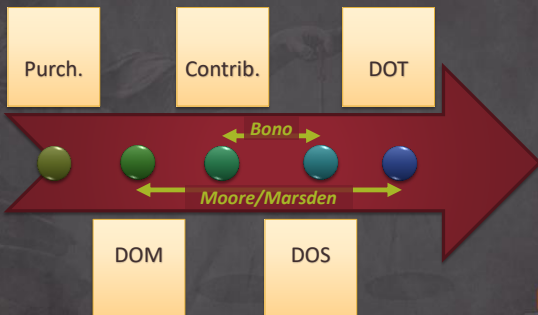
IRMO Sherman (2005) 133 Cal.App.4th 795

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The M/M and Bono Time Periods

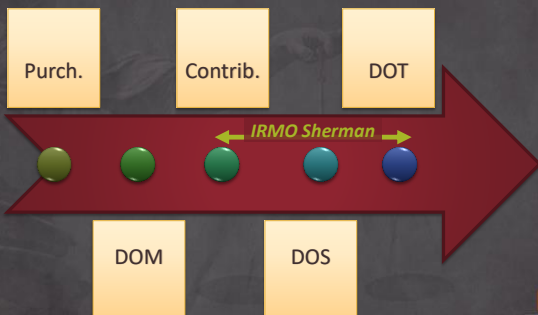


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The Sherman Time Period



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IRMO Sherman (2005) 133 Cal.App.4th 795

- On July 20, 2005, CA-2 handed down its unpublished decision: **IRMO Sherman**
- On October 26, 2005, CASCT ordered **IRMO Sherman** officially published
- Is there a message here?





A Third Pro Tanto Fraction Issue

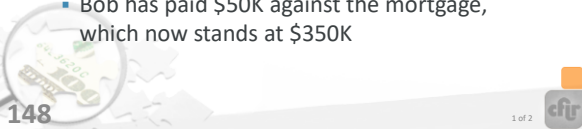
Moore/Marsden Calculation

- Should the pro tanto fraction denominator be
 - The purchase price, or
 - The market value of the property on the date of the first CP contribution?



Compare: Business Partnership

- Five years ago, Bob bought Blackacre for \$500K, making a \$100K down payment
- Today, when Bob offers Ron a business partnership
 - Blackacre's value has increased by \$400K, and is now worth \$900K
 - Bob has paid \$50K against the mortgage, which now stands at \$350K



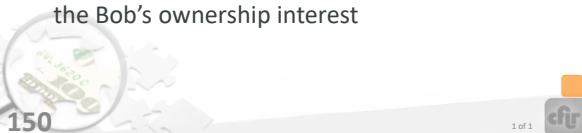
Compare: Business Partnership (cont'd)

	FMV	Mortgage	Equity
Purchase	\$500K	\$400K	\$100K
	+ 400K	(50K)	
Today	\$900K	\$350K	\$550K



Bob Brings a \$550K Asset to the Table

- Bob's contribution to the partnership is an asset currently worth \$900K (equity: \$550k)
- The fact that Bob purchased Blackacre for \$500K (equity: \$100k) is irrelevant . . .
- . . . because neither the purchase price nor the purchase equity defines the **current value** of the Bob's ownership interest



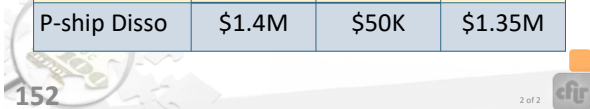
Facts at Partnership Dissolution

- By the time of partnership dissolution
- Blackacre's value has increased by another \$500K, and is now worth \$1.4M
- The partnership paid \$300K against the mortgage, which now stands at \$50K



Facts at Partnership Dissolution

	FMV	Mortgage	Equity
Purchase	\$500K	\$400K	\$100K
	+ 400K	(50K)	
Partnership	\$900K	\$350K	\$550K
	+ 500K	(300K)	
P-ship Disso	\$1.4M	\$50K	\$1.35M



Partnership Offer ("Buy in Now")

At disso, joint ownership of:

#1	\$300K
#2	$\$300K / \$900K \times \$500K = \$166,667$
TOTAL	\$466,667



Marital Offer ("Buy in Then")

At disso, joint ownership of:

#1		\$300K
#2	$\$300K / \$500K \times \$500K =$	\$300K
TOTAL		\$600K

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Quoting *IRMO Frick*

- "The trial court applied the above formula in determining the parties' respective interests in the real property. Jerome contends, however, the trial court erred by calculating the separate and community property percentage interest based on the purchase price of the property rather than on the fair market value of the property at the time of marriage."

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Quoting *IRMO Frick* (cont'd)

- "We believe fairness dictates that the separate and community property's respective interest should be based on the ratio of capital contribution to the purchase price."

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Bono v. Clark (2002) 103 Cal.App.4th 1409

- “There is [another] way in which our approach to pre-marital appreciation departs from the traditional *Moore/Marsden* formula: the point at which separate property appreciation is recognized in the calculation.... In *Marsden*, the court credited the [separatizer’s] separate property estate with premarital appreciation, but it did not incorporate that premarital appreciation into its calculation of the respective separate and community percentage interests.” [**Bono**]

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Traditional and *Bono* Denominators

<i>Moore/Marsden, IRMO Frick</i>	
Purchase price	\$500
Premarital appreciation	\$400K
FMV on DOM	\$900K
<i>Bono</i>	

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The Pro Tanto Denominators

- If **PREMARITAL APPRECIATION** is included in the denominators of the *Moore/Marsden* pro tanto fractions, then the denominators are equal to DOM FMV instead of the **PURCHASE PRICE**
- Stated more **SIMPLY**, use the date of marriage value

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Moore/Marsden is Unrealistic

- **Moore/Marsden** permits the “new partner” (the community) to benefit from the property’s pre-partnership appreciation
- **Moore/Marsden/Nelson** ignores the value of property use by the “new partner” (the community)



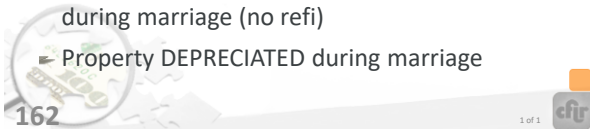


Moore/Marsden if the Property's Value Declines

Moore/Marsden Facts

Depreciated Property

- H bought Blackacre before DOM (Blackacre remained in HSP title throughout marriage)
- H paid:
 - Down payment at purchase date, and
 - Loan principal payments before DOM
- Community paid loan principal payments during marriage (no refi)
- Property DEPRECIATED during marriage



Moore/Marsden Issues

Depreciated Property

- Should the community's **Moore/Marsden** rights:
 - Be REDUCED by a pro rata share of the depreciation during marriage (Step I reimbursement REDUCED by Step II pro rata depreciation allocation)?
 - Be LIMITED to the date of trial equity in the property?
 - Focus on EQUITY instead of appreciation?
 - Consider the unpaid LOAN BALANCE?

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Moore/Marsden Issues

Let's See the Depreciation in Table Form

	FMV	Mortgage	Equity
Purchase	\$900K	\$810K	\$90K
	No change	(30K)	
DOM	\$900K	\$780K	\$120K
	(200K)	(180K)	
DOT	\$700K	\$600K	\$100K

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Traditional *Moore/Marsden* Formula

Step I

- Dollar-for-dollar reimbursement to the community of its \$180K loan principal payments

Step II

- Pro tanto allocation between community and separator of the property's APPRECIATION during marriage


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3 Depreciated *Moore/Marsden* Solutions

	Solution	To Community
Solution A	Full Step I reimbursement to the community	\$180K
Solution B	Step I reimbursement reduced by share of Step II loss	\$140K
Solution C	Step I reimbursement, limited to date of trial equity	\$100K

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Additional Possible Solutions

	Solution	To Community
Solution D	Divide the equity, ignoring the loan balance	\$60K
Solution E	Divide the equity, considering the loan balance	\$140K


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Depreciated Property Solutions

Solution A

➤ Full Step I reimbursement to the community: \$180K CP

\$180K	Due to community
(\$100K)	Date of trial equity
\$80K	Paid by separator

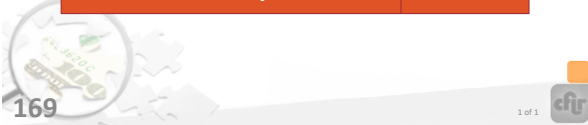
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Depreciated Property Solutions

Solution B

- Step I reimbursement, reduced by share of Step II loss: \$140K CP

Reimburse principal pay down	\$180K
$\$180K/900K \times (200K) =$	(\$40K)
Due to community	\$140K

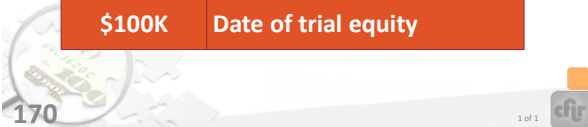


Depreciated Property Solutions

Solution C

- Step I reimbursement limited to date of trial equity: \$100K CP

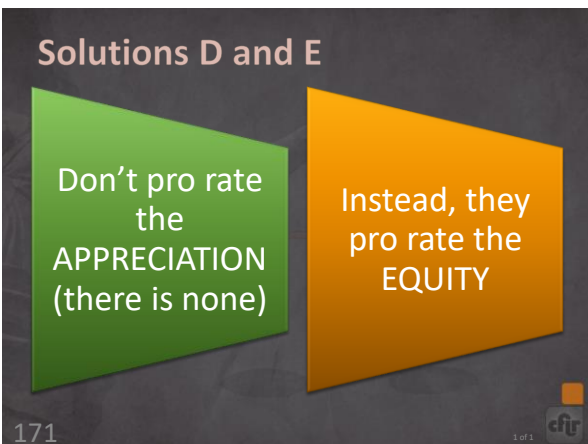
\$180K	Community's principal payments
(\$80K)	Not reimbursable due to lack of equity
\$100K	Date of trial equity



Solutions D and E

Don't pro rate
the
APPRECIATION
(there is none)

Instead, they
pro rate the
EQUITY



Solution D

Divide the equity, ignoring the loan balance: \$60K

Solution D believes that "Cash is King"

Facts required for Solution D

Amounts of CASH CONTRIBUTIONS made by separatizer and community

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Solution D (cont'd)

	FMV	Mortgage	Equity
Purchase	\$900K	\$810K	\$90K HSP
	No change	(30K) HSP	
DOM	\$900K	\$780K	\$120K
	(200K)	(180K) CP	
DOT	\$700K	\$600K	\$100K

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Depreciated Property Solutions

Solution D: Cash Contributions

\$180K	Community's total
90K	Separatizer's down payment
\$30K	Separatizer's principal payments
\$120K	Separatizer's total
\$300K	Grand Total

CP = \$180K/\$300K = 60%

HSP = \$120K/\$300K = 40%

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Solution D

CP share

- $60\% \times \$100\text{K}$
equity = \$60K

HSP share

- $40\% \times \$100\text{K}$
equity = \$40K

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Solution E

Divide the equity, considering the
loan balance: \$20K CP

Solution E believes "the loan balance counts!"

Facts required for **Solution E**

Amounts of cash contributions made by
separatizer, community & unpaid loan balance

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Solution E (cont'd)

	FMV	Mortgage	Equity
Purchase	\$900K	\$810K	\$90K HSP
	No change	(30K) HSP	
DOM	\$900K	\$780K	\$120K
	(200K)	(180K) CP	
DOT	\$700K	\$600K HSP	\$100K

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Depreciated Property Solutions

Solution E: Cash/Loan Contributions

\$180K	Community's total
90K	Separatizer's down payment
\$30K	Separatizer's principal payments
\$600K	Separatizer's loan balance at DOT
\$720K	Separatizer's total
\$900K	Grand Total

$CP = \$180K / \$900K = 20\%$
 $HSP = \$720K / \$900K = 80\%$

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Solution E

CP share

- $20\% \times \$100K$
equity = \$20K

HSP share

- $80\% \times \$100K$
equity = \$80K

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A Legal "Buffet Table"

	CP	SP
Solution A	\$180K	(\$80K)
Solution B	\$140K	(\$40K)
Solution C	\$100K	-0-
Solution D	\$60K	\$40K
Solution E	\$20K	\$80K

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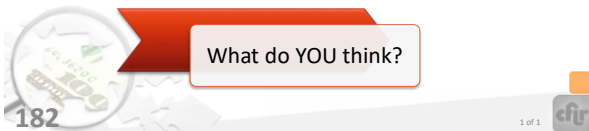


Which “Negative Moore/Marsden” Solution is Best?

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An Opportunity for Change

- Should the **Moore/Marsden** rules be changed to further benefit the community or the separatizer?
- Is this an opportunity to right wrongs?
- Does existing **Moore/Marsden** precedent unduly benefit the community? The separatizer?



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Moore/Marsden Currently Favors Separatizer

Because

- **Moore/Marsden** gives the community NO CREDIT for its mortgage INTEREST payments, property TAX payments, and/or INSURANCE payments
- Unless there has been a **IRMO Grinius** refi, the unpaid mortgage balance BENEFITS THE SEPARATIZER in the pro tanto calculations [**IRMO Grinius** (1984) 166 Cal.App.3d 1179]

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Moore/Marsden Currently Favors Community

Because

- **Moore/Marsden** grants the community
 - A co-ownership interest in the property that is enforceable at DEATH, as well as in divorce
 - A pro tanto SHARE IN APPRECIATION
 - (in both of these ways **Moore/Marsden** is more advantageous than **Fam C 2640**)
- The community pays the separatorizer NO **WATTS** CHARGES for its use of the property [**IRMO Nelson** (2006) 139 Cal.App.4th 1546]

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Moore/Marsden Currently Favors Community (cont'd)

Because

- COMMUNITY INCOME TAXES HAVE BEEN REDUCED if (as is likely) the parties have jointly claimed the mortgage interest and property tax deductions
- The community pro tanto fraction is multiplied times the property appreciation THROUGHOUT MARRIAGE, despite the fact that the community payments were NOT MADE AT THE BEGINNING OF THE MARRIAGE

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An Opportunity for Change

- If this is an opportunity to right wrongs
- What wrongs need to be righted?
- And how?

What do YOU think?

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Reasons to Favor the Community

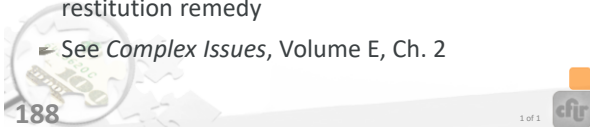
- Authorities recognizing the community's right to reimbursement for payments benefiting SP
 - **IRMO Frick** (1986) 181 Cal.App.3d 997
 - **IRMO Epstein** (1979) 24 Cal.3d 76
 - **IRMO Walter** (1976) 57 Cal.App.3d 802



Reasons to Favor the Community

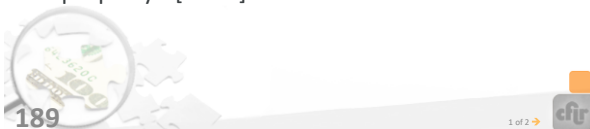
Another Theory

- A separatizer using CP to benefit SP breaches his/her fiduciary duty to the community
- Which results in the imposition of a constructive trust over the SP pursuant to **CC 2224**
- The community receives reimbursement as a restitution remedy
- See *Complex Issues*, Volume E, Ch. 2



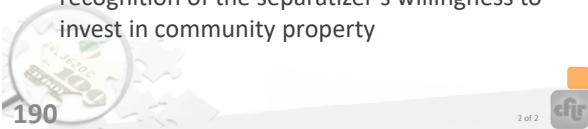
Reasons to Favor the Community

- "If the trial court determines that the improvements to the trailer did not enhance the property's value, [the non-separatizer Wife's] recovery will be limited to reimbursement of one-half of the community funds spent on improving the [separatizer's] property." [**Bono**]



Reasons to Favor the Community (cont'd)

- **Moore/Marsden** should reward the community with priority creditor status, in recognition of the community's willingness to invest in separitizer property
- The same way **Fam C 2640** rewards the separitizer with priority creditor status, in recognition of the separitizer's willingness to invest in community property

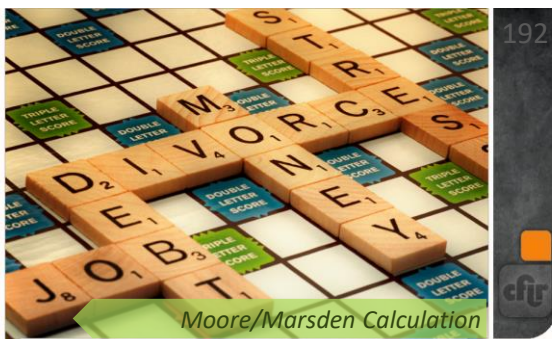


Reasons to Favor the Separitizer

Counter-Argument to the Foregoing

- The **Fam C 2640** separitizer is MORE worthy of priority creditor status than is the **Moore/Marsden** community
 - Because the **Moore/Marsden** community has a hope of receiving return on its investment, whereas the **Fam C 2640** separitizer has no such hope





Cash Out Refi of a
Moore/Marsden Property

Moorebeam/Moorath Hypo Facts

- Blackacre is HSP with a CP **Moore/Marsden** interest
- \$300K in cash out refi proceeds are borrowed against Blackacre
- The \$300K in proceeds are used to purchase CP Whiteacre (acquired in joint title)



Moorebeam/Moorath Issues

- What relative CP and HSP interests have been transferred into Whiteacre?
- What relative CP and HSP interests remain in Blackacre?



4 Approaches to Cash Out Refi

Beam "family expense tracing" doctrine

- "FIRST OUT" refi proceeds are CP

Walrath "pro rata" doctrine

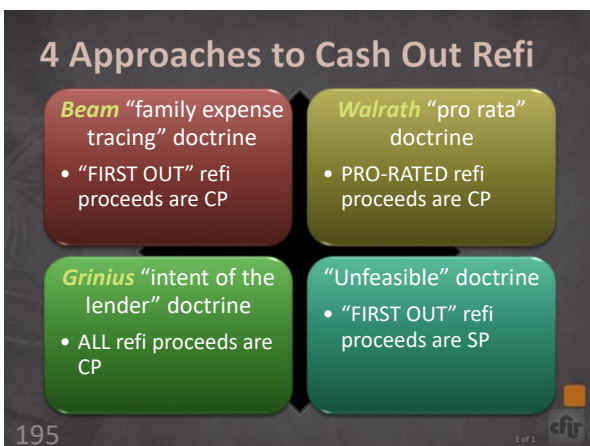
- PRO-RATED refi proceeds are CP

Grinius "intent of the lender" doctrine

- ALL refi proceeds are CP

"Unfeasible" doctrine

- "FIRST OUT" refi proceeds are SP



No Precedent Yet

No appellate case has yet said what happens when

CASH OUT LOAN PROCEEDS

are taken from "HSP with **Moore/Marsden**"

Is "Moorebeam/Moorath" in your office now?

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Moore/Marsden Calculation

After a Cash Out Refi

	FMV	Mortgage	Equity
Purchase (= DOM)	\$600K	\$150K	\$450K
	+ 200K	(150K)	
Day before Refi	\$800K	-0-	\$800K

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Moore/Marsden

#1	Reimbursement	\$150K
#2	$\$150K / \$600K \times \$200K =$	\$50K
TOTAL		\$200K

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\$300K Out of Blackacre

\$300K cash out proceeds

What is
the
\$300K

Blackacre = HSP

- FMV = \$800K (no mortgage)
- \$200K **Moore/Marsden**

H & W jointly borrow \$300K in cash out refi proceeds from Blackacre, which they use to buy Whiteacre (titled as CP)

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Moore/Marsden Calculation

Two Approaches to Cash Out Refi

1. "Take CP first approach" (**Moore** + **Beam** = "Moorebeam")
 - First \$200K is CP
 - Other \$100K is HSP
2. "Pro rata approach" (**Moore** + **Walrath** = "Moorath")
 - 75% x \$300K = \$225K: HSP
 - 25% x \$300K = \$75K: CP

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"Moorebeam" Approach: CP First

\$200K is CP, remaining \$100K is HSP

Judge Able agrees, because consistent with **IRMO Beam**

Judge Adept disagrees, because inconsistent with **IRMO Walrath**

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"Moorath" Approach: Pro Rata

$\$75\% \times \$300K = \$225K$: HSP
 $25\% \times \$300K = \$75K$: CP

Judge Adept agrees, because
 consistent with *IRMO Walrath*

Judge Able disagrees, because
 inconsistent with *IRMO Beam*

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If *Moorebeam*, the Result as to Whiteacre:

- If the \$300K comes "CP FIRST" out of Blackacre as
 - \$200K = CP equity
 - \$100K = HSP equity
- Will Whiteacre also be owned PRO RATA?
- Or will H be limited to a \$100K **Fam C 2640** reimbursement right?



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H will be limited to a
 \$100K **Fam C 2640**
 reimbursement right
 (**Fam C 2851**)

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\$100K HSP into Whiteacre



Whiteacre is owned:
CP subj \$100K H2640

\$300K → Cash out
proceeds

FMV \$900K

Mortgage (\$600K)

Equity \$300K

\$100K H2640

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Similar Result if \$225K HSP



Whiteacre is owned:
CP subj \$225K H2640

\$300K → Cash out
proceeds

FMV \$900K

Mortgage (\$600K)

Equity \$300K

\$225K H2640

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Moore/Marsden Calculation

Third Approach to Cash Out Refi

- "All CP approach" (**Moore** + **Grinius** = "Mooregrin")
- Entire \$300K is CP
- No portion is HSP
- AND the \$300K obligation is all community!



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Similar Result if \$225K HSP



Whiteacre is
100% CP

\$300K → Cash out
proceeds

FMV \$900K

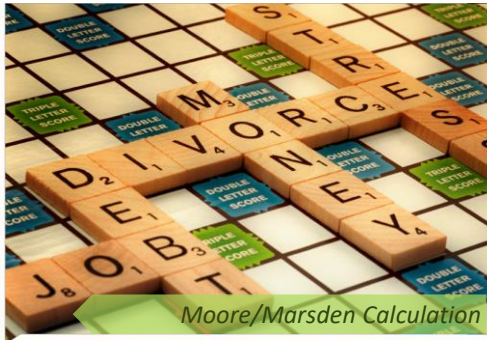
Mortgage (\$600K)

Equity \$300K

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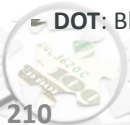
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The *Branco* Problem

IRMO Branco Hypo Facts

- **Day before DOM:** H buys Blackacre for \$500K
 - \$100K down payment and \$400K mortgage
- **During marriage:** \$15K CP principal loan payments
- **IRMO Grinius** CP refi of \$385K unpaid loan balance
- **DOT:** Blackacre FMV = \$900K




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IRMO Branco Hypo Facts (cont'd)

Blackacre	Date of Purchase	Date of Trial
FMV	\$500K	\$900K
Mortgage	(\$400K)  (\$385K)	
	SP	CP
Equity	\$100K	\$515K

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IRMO Branco Hypo

Before the refi, the community had a SMALL INTEREST in Blackacre

Resulting from \$15K in CP loan principal payments

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CP Equity Before Refi

CP pro tanto percentage:
\$15K/\$500K = 3%

CP appreciation amount:
.03 x \$400K = \$12K

CP M/M interest:
Step I: \$15K
Step II: \$12K
Total: \$27K

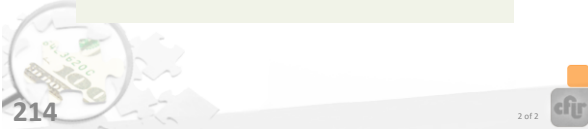
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CP Equity Before Refi (cont'd)

	Without Refi
CP equity	\$27K
HSP equity	\$488K
Total equity	\$515K



CP Equity After Refi

After the refi, the community had a LARGE INTEREST in Blackacre

Resulting from \$15K in CP loan principal payments

AND a \$385K unpaid loan balance (\$15K plus \$385K equals \$400K)



CP Equity After Refi (cont'd)

CP pro tanto percentage:
 $\$400K / \$500K = 80\%$

CP appreciation amount:
 $.80 \times \$400K = \$320K$

CP M/M interest:
 Step I: \$15K
 Step II: \$320K
 Total: \$335K





CP Equity After Refi (cont'd)

	Without Refi	With Refi
CP equity	\$27K	\$335K
HSP equity	\$488K	\$180K
Total equity	\$515K	\$515K

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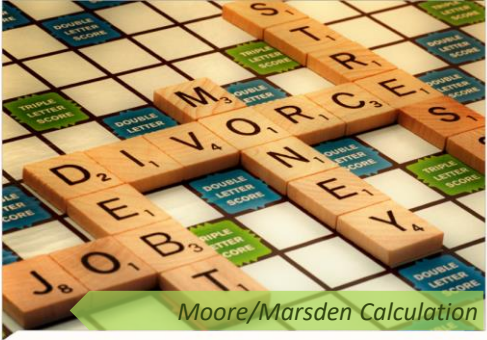




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Moore/Marsden Calculation

What If the Loan is Ignored

Trial Judges Arguably Have Discretion

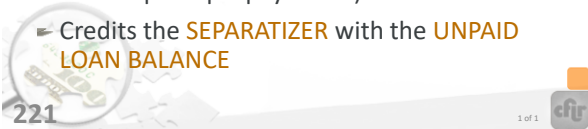
- “Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.”
[*Ginns v. Savage* (1964) 61 Cal.2d 520]




Moore/Marsden & Unpaid Loan Balance

The *Moore/Marsden* formula:


- Credits the COMMUNITY with its CASH contributions (e.g., its payments that reduce mortgage principal)
- Credits the SEPARATIZER with her/his CASH contributions (e.g., down payment, pre-marital principal payments)
- Credits the SEPARATIZER with the UNPAID LOAN BALANCE



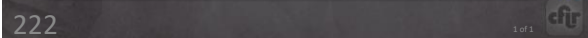
Under M/M, Loan Balance Benefits Separatizer




Community's CASH principal payments *are compared to:*




Separatizer's ENTIRE UNPAID LOAN BALANCE!




However, If Unpaid Loan Balance is Ignored



Community's CASH loan principal payments *are compared to:*





Separatizer's CASH loan principal payments

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Traditional *Moore/Marsden* Step II


- CP principal payments
- *Divided by* purchase price
- *Multiplied by* FMV appreciation




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***"Cash is King"* *Moore/Marsden* Step II**

- CP principal payments
- *Divided by* total principal payments
- *Multiplied by* FMV appreciation



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Moore/Marsden Calculation

Effect of Unpaid Loan Balance

- H purchases property before marriage
- Purchase price = \$500,000
- HSP down payment = \$500
- Mortgage = \$499,500
- Before marriage, H pays down mortgage = \$300
- Community pays down mortgage = \$50,000
- After separation, H pays down mortgage = \$200
- During marriage, property appreciates = \$400,000

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Moore/Marsden Calculation

Effect of Unpaid Loan Balance (cont'd)

- If the loan balance is CONSIDERED

- W: \$45K (10%)
- H: \$406K (90%)
- Total: \$451K (100%)

- If the loan balance is IGNORED

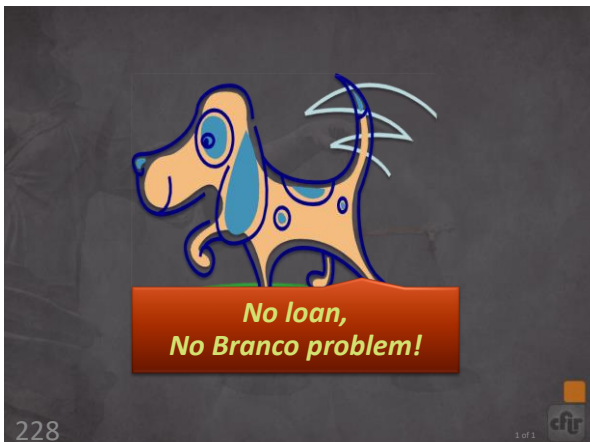
- W: \$221K (49%)
- H: \$230K (51%)
- Total: \$451K (100%)

**Non-separatizer W
receives \$176K
MORE and
separatizer H
receives \$176K LESS**

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Theoretical "Better" Approaches

Additional Moore/Marsden Issues

- **IRMO Frick** (1986) 181 Cal.App.3d 997, **IRMO Epstein** (1979) 24 Cal.3d 76, and **IRMO Walter** (1976) 57 Cal.App.3d 802 provide authority for additional CP rights
- The amounts of all CP payments for improvements must be added
 - To the denominators of both pro tanto fractions, and
 - To the numerator of the community's pro tanto fraction

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Theoretical "Better" Approaches

Additional Moore/Marsden Issues (cont'd)

- The \$1K CP principal reduction payment made on the last day of the pro tanto period
- **Shouldn't** be given as much significance as a \$1K payment made on the first day of the pro tanto period 20 years earlier
- Consider arguing that the CP pro tanto interest resulting from monthly principal reduction payments should be "scaled" for what could be a relatively-level increase in the property's value during marriage

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Fam C 2640(b) Reimbursements:
Existing Law

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Moore/Marsden in Review

Theoretical "Better" Approaches

Moore/Marsden in Review

- "Two-step process" for community
 - **Step I:** Dollar-for-dollar reimbursement
 - **Step II:** A pro tanto interest in appreciation
- What payments create **Moore/Marsden** rights?
 - Principal reduction payments
 - Payments for improvements
 - Community **not** credited with interest, property tax, or insurance payments

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Theoretical "Better" Approaches

Moore/Marsden in Review (cont'd)

- The separator receives no **Watts** charges for the community's use of the asset [**IRMO Nelson**]
- Should the pro tanto period BEGIN on the date of marriage, or on the date of the first CP contribution?
- Should the pro tanto period END on the date of trial, or on the date of separation?
- Should the pro tanto denominator be the purchase price, or the market value of the property on the date of the first CP contribution?

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Moore/Marsden Rights

Moore/Marsden in Review (cont'd)

- What should be the effect of a declining real estate value on a CP **Moore/Marsden** interest?
 - Consider proposed solutions A through E
- What should be the result if the parties take a cash out refi from **Moore/Marsden** Blackacre, then purchase jointly-entitled Whiteacre with the cash?
 - **Moorath?**
 - **Moorebeam?**

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Moore/Marsden Rights

Moore/Marsden in Review (cont'd)

- If a **Moore/Marsden** property undergoes a **Grinius** refi what should be the effect on the pro tanto fractions? [**IRMO Branco**]
- Should the **Moore/Marsden** formula be changed to ignore the unpaid loan balance?



