HOME REPAIR:
SHERMAN PARTIALLY CORRECTS BONA V. CLARK'S MOORE/MARSDEN MISTAKES

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Sherman Refused to Apply Bono's Modifications

On July 20, 2005, the Second District Court of Appeal filed its ruling in *In re Marriage of Sherman*, deciding not to publish it. On October 26, 2005, the California Supreme Court ordered the case officially published: *In re Marriage of Sherman* (2005) 113 Cal.App.4th 795.

Is there a message here? Does the California Supreme Court agree with *Sherman's* criticism of *Bono v Clark* (2002) 103 Cal.App.4th 1409?

Sherman refused to follow these two modifications[1] to the *Moore/Marsden* formula[2] that *Bono* suggested:

First Modification: *Bono* said the community pro tanto period shouldn't end at date of trial as stated in *Moore* and *Marsden* but, instead, should end at date of separation. (*Bono*, supra, at pp. 1426-1427.)

Second Modification: *Bono* said pre-contribution appreciation shouldn't merely be confirmed as the separatizer's separate property as stated in *Marsden*[3], but should also be added: (1) to the denominators of both the community property and separate property fractions, and (2) to the numerator of the separate property fraction. (*Bono*, at pp. 1426-1427.)

Sherman refused to apply either modification. *Sherman* explained how the first modification is wrong. Unfortunately, *Sherman* didn't explain how the second modification is wrong, but factually distinguished *Bono* instead.

This article discusses *Moore/Marsden*, *Bono*, *Sherman* and *Frick*, and explains how the second modification is wrong.

Bono's Facts

Bono involved $38,000 in pre-contribution[4] appreciation and $400,000 in post-contribution appreciation.

Before marriage, separatizer/ husband obtained a parcel of land for $12,000[5]. Husband owned the property free and clear on date of marriage. By the time the community made its first contribution to the property, the property's value had increased to $50,000 (the property's sole improvement was a 600-square-foot trailer with no electricity). Thus, there had been ($50,000 minus $12,000 equals) $38,000 in pre-contribution appreciation.

The community spent $78,000 converting the trailer into a 1,900-square-foot home. On date of separation, the property was worth $450,000. Thus, there had been ($450,000 minus $50,000 equals) $400,000 in post-contribution appreciation.

Husband filed for divorce, but died two months later. Wife sued Husband's estate, seeking *Moore/Marsden* reimbursement for the community.

Sherman Explained How the First Modification is Wrong

As explained above, *Bono's* first modification is that the community pro tanto period shouldn't end at date of trial but should, instead, end at date of separation.

The *Moore/Marsden* formula prorates post-separation appreciation between separatizer and community in ratio with their respective ownership interests in the property. *Bono*, by contrast, awards all post-separation appreciation to the separatizer.

Bono held that Family Code section 2552 [assets to be valued at trial date] was inapplicable because *Bono* was a probate case, not a dissolution case.

Bono based the first modification on Family Code section 771(a): "The earnings and accumulations of a spouse while living separate and apart from the other spouse ... are the separate property of the spouse."

Family Code section 771(a) shouldn't determine ownership of post-separation appreciation, because:

- Post-separation appreciation doesn't result from "earnings" of the Separatizer. Separatizer "efforts" don't make real estate appreciate; and
- post-separation appreciation is not an "accumulation" of only the separatizer but is, instead, an "accumulation" of both.

Separatizer and Community

In non-dissolution cases (e.g., partition cases or probate cases), just as in dissolution cases, the court must divide what exists – namely, the property at its *date-of-trial value*.

The *Moore/Marsden* fractions fairly allocate between the parties the appreciation from date of separation to date of trial, causing the separatizer's and community's respective interests to appreciate pro rata.

Sherman declined to follow the first modification, instead holding that *In re Marriage of Imperato* (1975) 45 Cal.App.3d 432, 435-437 [increase in marital asset's value between separation and trial to be pro rated between

separatizer and community] is the correct method for allocating property value increases. In *Imperato*, the separatizer was the spouse operating a community business after separation; in *Sherman*, the separatizer was the owner of real estate that was improved with community funds.

Sherman believed that date of separation valuation would "overlook" the inherent growth factor found in many assets, investment and re-investment of capital, market fluctuations, and numerous other components that can increase the value of most assets. [footnote 16: *Imperato*, at pp. 435-437.] The community should share in the post-separation increase in value of an asset which is not attributable to the efforts of one spouse." (*Sherman* at p. 802.)

The analyses in *Bono* and *Sherman* would have both benefited by acknowledgement of the fact that *Moore/Marsden* rights spring from *equitable ownership* principles (*Vieux v Vieux* (1926) 80 Cal.App. 222; *In re Marriage of Jafeman* (1972) 29 Cal.App.3d 244).

The fact is that since separatizer and community both own portions of the property, both portions should benefit pro tanto from all appreciation, whether pre- or post-separation.

Sherman Factually Distinguished the Second Modification

As explained above, the second modification is that pre-contribution appreciation shouldn't merely be confirmed to the separatizer as separate property as required by *Marsden*, but should also be added: (1) to the denominators of both the community property and separate property fractions, and (2) to the numerator of the separate property fraction

Sherman declined following the second modification by distinguishing the facts before it (in which community funds were used to pay mortgage principal 20 months after the property was purchased, and were used to improve the property *fewer than five years after the property was purchased*) from the facts of *Bono* (in which community funds were never used to pay mortgage principal, and weren't used to improve the property until *at least 17 years after*

the property was purchased). This will prove an unhelpful distinction: what *Moore/Marsden* formula should the court apply in the case you try tomorrow, in which community funds were used to improve the property *11 years after the property was purchased*?

Sherman exercised considerable judicial restraint in deciding to distinguish Bono's second modification factually, instead of exposing its fallacy.[6]

Sherman could have chosen to have criticized the second modification by pointing out that it gives the Separatizer an unfair "double dip" by both: (1) confirming the entire pre-contribution appreciation to the separatizer, then (2) using the pre-contribution appreciation to increase the separatizer's pro tanto share of the property's appreciation between date of contribution and date of trial ("Marital Appreciation") by adding the pre-contribution appreciation to the *Moore/Marsden* fractions.

This article levels that criticism against the second modification.

Moore/Marsden Calculation When Community Pays Mortgage Principal

The traditional *Moore/Marsden* computation of the community's interest in the separatizer's property occurs in two steps:

Step 1: The community is reimbursed its mortgage principal payments ("community contributions")[7]

Step 2: The community receives a pro tanto share of marital appreciation, calculated by multiplying marital appreciation by the "community fraction":

"Mortgage Payment" Proper Moore/Marsden Community Fraction Numerator:
 · Community mortgage principal payments

"Mortgage Payment" Proper Moore/Marsden Community Fraction Denominator:
 · Property purchase price

The separatizer's share of the marital appreciation is calculated by multiplying the marital appreciation by the "separatizer fraction":

"Mortgage Payment" Proper Moore/Marsden Separatizer Fraction Numerator:
 · Separatizer (pre-contribution and post-separation) mortgage principal payments, plus
 · Unpaid mortgage balance

"Mortgage Payment" Proper Moore/Marsden Separatizer Fraction Denominator:
 · Property purchase price

The separatizer shares only marital appreciation (not pre-contribution appreciation) with the community. All pre-contribution appreciation is confirmed dollar-for-dollar to the separatizer. Pre-contribution appreciation is *not* included in the *Moore/Marsden* fractions.

Proper Moore/Marsden Calculation When Community Pays for Improvements

In the traditional *Moore/Marsden* calculation, the property purchase price appropriately comprises the denominator of both fractions. The traditional calculation is mathematically valid as long as the community contributions (the community faction's numerator) comprise mortgage principal payments. Because the mortgage is part of the purchase price,[8] every dollar in the community fraction's numerator is also a dollar in the both fractions' denominators.

But both fractions' denominators must be increased when, as in *Bono*, the community contributions comprise payment for improvements.[9]

Recall that in *Bono*, because the separatizer owned his property free and clear throughout the marriage, the community never made any mortgage principal payments.

What the community did contribute was $78,000 to improve the property.

Since the $78,000 in community contributions comprises the numerator of the community fraction, the same $78,000 must be added to the denomina-

tors of the both fractions. After all, if $78,000 were added to the numerator of the community fraction without being similarly added to its denominator, the result would be a "top-heavy" fraction (i.e., a complex number) in which the numerator exceeds the denominator[10].

When community contributions comprise payments for improvements as well as mortgage principal payments, the community and separatizer fractions become:

"Improvement Payment" Proper Moore/Marsden Community Fraction Numerator:
- Community mortgage principal payments, plus
- **Community payments for improvements [CORRECT ADJUSTMENT]**

"Improvement Payment" Proper Moore/Marsden Community Fraction Denominator:
- Property purchase price, plus
- **Community payments for improvements [CORRECT ADJUSTMENT]**

"Improvement Payment" Proper Moore/Marsden Separatizer Fraction Numerator:
- Separatizer (pre-contribution and post-separation) mortgage principal payments, plus
- Unpaid mortgage balance

"Improvement Payment" Proper Moore/Marsden Separatizer Fraction Denominator:
- Property purchase price, plus
- **Community payments for improvements [CORRECT ADJUSTMENT]**

How the Second Modification is Wrong

The second modification leaves intact *Moore/Marsden's* Step 1 (reimbursement of community contributions to the community), but re-writes Step 2 *by adding pre-contribution appreciation to the numerator of the separatizer fraction and to the denominators of both fractions:*

"Improvement Payment" Proper Bono Community Fraction Numerator:
- Community payments for improvements

"Improvement Payment" **Improper** *Bono Community Fraction Denominator:*
- Property purchase price, plus
- community payments for improvements, plus
- **Pre-contribution appreciation [INCORRECT ADJUSTMENT]**

"Improvement Payment" **Improper** *Bono Separatizer Fraction Numerator:*
- Separatizer (pre-contribution/ post-separation) mortgage principal payments, plus
- Unpaid mortgage balance, plus
- **Pre-contribution appreciation [INCORRECT ADJUSTMENT]**

"Improvement Payment" **Improper** *Bono Separatizer Fraction Denominator:*
- Property purchase price, plus
- Community payments for improvements, plus
- **Pre-Contribution Appreciation [INCORRECT ADJUSTMENT]**

Under the second modification, the separatizer receives an unfair "double dip" from his pre-contribution appreciation:

- All pre-contribution appreciation is confirmed to the separatizer dollar-for-dollar (this computation, which is mandated by *Moore* and *Marsden*, is appropriate), then

- All pre-contribution appreciation is used again, this time to enlarge the separatizer fraction relative to the community fraction, thereby increasing the Separatizer's share of the marital appreciation (this computation, *Bono's* "second modification," is inappropriate, both mathematically and insofar as it is contrary to *Frick*, as demonstrated by the next two sections of this article).

Illogical Consequences of the

Second Modification

In order to understand the illogical consequences of the second modification, consider three alternative calculations of the community's pro tanto interest in the $400,000 in marital appreciation present in *Bono*. Each calculation presumes, as in *Bono*, that the property's purchase price was $12,000, that there was $38,000 in pre-contribution appreciation, that the community paid no mortgage principal payments, and that the community paid $78,000 for property-enhancing improvements. (In order to simplify the computations and facilitate the comparisons, only *Moore/Marsden* Step 2 is calculated.)

First Calculation

The first calculation, a proper "Improvement Payment" *Moore/Marsden* calculation, demonstrates the way *Bono's* facts should have been analyzed as required by *Moore* and *Marsden.*

"Improvement Payment" Proper Moore/Marsden Community Fraction Numerator:
- Community payments for improvements: $78,000

"Improvement Payment" Proper Moore/Marsden Community Fraction Denominator:
- Property purchase price: $12,000
- Community payments for improvements: $78,000
- TOTAL: $90,000

$78,000 X $400,000 = $346,667 community pro tanto share of marital appreciation $90,000

Second Calculation

The second calculation is *Bono's* erroneous calculation:

"Improvement Payment" **Improper** *Bono Community Fraction Numerator:*
- Community payments for improvements: $78,000

"Improvement Payment" **Improper** *Bono community fraction denomi-*

nator:

- Property purchase price: $12,000
- Community payments
  for improvements: $78,000
- **Pre-Contribution
  Appreciation**   **$38,000**
- TOTAL: $128,000

$78,000 X $400,000 = $243,750
Community pro tanto share of marital appreciation **$128,000**

Third Calculation

The third calculation uses *Bono's* erroneous method, but with one change: it presumes that the pre-contribution appreciation was *$538,000 instead of $38,000.*

Note that the amount of pre-contribution appreciation shouldn't affect the pro tanto fractions. For example, it shouldn't matter whether the separatizer acquired the property at birth (in which case there will be substantial pre-contribution appreciation) or shortly before marriage (in which case there will be little, if any, pre-contribution appreciation), provided that all pre-contribution appreciation is confirmed to the separatizer dollar-for-dollar.

Nevertheless, as can be seen from the following example, under the second modification the amount of pre-contribution appreciation greatly affects the pro tanto fractions:

"Improvement Payment" **Improper** *Bono Community Fraction Numerator:*
- Community payments for improvements: $78,000

"Improvement Payment" **Improper** *Bono Community Fraction Denominator:*
- Property purchase price: $12,000
- Community payments for improvements: $78,000
- **Pre-Contribution
  Appreciation**   **$538,000**
- TOTAL: $628,000

$78,000 X $400,000 = $49,682
Community pro tanto share of marital appreciation **$628,000**

The amount of pre-contribution appreciation shouldn't matter a whit to the community. The only thing the community needs to know about pre-contribution appreciation is: "Hands off! It belongs entirely to the separatizer!"

Frick Rejected the Second Modification

In re Marriage of Frick (1986) 181 Cal.App.3d 997, 1008-1009 appropriately rejected the second modification:

"The trial court applied the *Moore/Marsden* formula in determining the parties' respective interests in the real property [footnote 3 omitted]. Jerome, the separatizer, 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. *Jerome, in essence, seeks not only to be awarded all the premarriage appreciation, but wants that appreciation to be factored in when determining the respective percentage interest in the property. We do not believe this is proper.* Under the formula described above, Jerome indisputably was entitled to all the capital appreciation which accrued prior to marriage. The community until marriage had absolutely no interest in the property and, as such, should not and did not reap any of the benefits of the prenuptial appreciation. The issue is how to divide the appreciation accruing during marriage, i.e., what percentage goes to the separate property interest and what percentage goes to the community property interest. 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. It is this ratio (percentage) which best reflects the parties' respective interests in the property at the time the appreciation at issue is accruing. The community should share in the appreciation that accrues during marriage in the same proportion that its capital contribution bears to the total capital contribution required to own the property outright. This is the method of compu-

tation that has historically been followed in this state and we believe it is the appropriate one. *To do as Jerome asks would give him double credit for premarital appreciation in the value of this property. We see no justification for this approach. Indeed it appears to fail the test of fundamental fairness* [footnote 4 omitted]. (Emphases supplied.)

Conclusion

Both of *Bono v Clark's* suggested modifications to the *Moore/Marsden* formula are erroneous. Hopefully, future appellate cases will continue *Sherman's* good work in showing the errors of *Bono's* ways and, ultimately, the California Supreme Court will overrule *Bono.* ■

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1. Bono suggested another, perfectly reasonable, modification to the *Moore/Marsden* formula: the community's pro tanto period shouldn't begin until the community has made its first contribution (payment of mortgage principal under *Moore* and *Marsden*, payment for property-enhancing improvements under *Bono*) to the Separatizer's property. The California Supreme Court in *Moore* and First District Court of Appeal in *Marsden* would undoubtedly have adopted the same formula had those cases involved a substantial delay between the date of marriage and the date of the community's first monetary contribution to the Separatizer's property.
2. *In re Marriage of Moore* (1980) 28 Cal.3d 366; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426
3. *Moore* didn't discuss pre-contribution appreciation, since its facts contained none.
4. Jurists are more familiar with the terms between "premarital appreciation" and "post-marital appreciation" than with the terms "pre-contribution appreciation" and "post-contribution appreciation". As stated in footnote 1 above, the community's pro tanto period shouldn't begin until the community has made its first contribution. The terms "pre-contribution appreciation" and "post-contribution appreciation" properly establish the dividing line between the separate and community property interests where there has been a substantial delay between the date of marriage and the date of the community's first contribution to the Separatizer's property.
5. Although the Sixth District Court of Appeal remanded *Bono* for further factual findings, the Court made certain factual assumptions to enable it to create illustrative formulae for the trial court's guidance. Some of the monetary values in this article have been rounded to simplify analysis.

Listed in the table below are some of the more common forensic certifications:

FORENSIC CERTIFICATIONS

Certification	Certifying Body	Academic Affiliation	Background Checks	Recertification	Exams
CCE - Certified Computer Examiner	The International Society of Forensic Computer Examiners	Kenesaw State University and others	Yes	Biannual	Practical and Written
CFCE Certified Forensic Computer Examiner Note: This certification is limited to law enforcement	The International Association of Computer Investigative Specialists	None	Yes	Biannual	Practical and Written
CHFI - Certified Hacking Forensic Investigator	EC - Counsel	Accredited through the National Assoc. of Competency Assurance	None	None	Written
CSFA - Cyber Security Forensic Analyst	Cyber Security Institute - a private training company	None	Yes	Continuing education	Written and proctored practical examination
GCFA - GIAC Certified Forensic Analyst	SANS Institute	None	None	Four Years	Written

In addition to specific forensic certifications, many experts will have information security certifications. While these certifications do cover forensics, they are broader in scope and are intended for the corporate security professional. Examples of these certifications are the CISSP and the SSCP both by the International Information Systems Security Certification Consortium (ISC)2. The examination processes for these certifications are rigorous and require continuing education to maintain. The (ISC)2 certifications meet the ISO (International Organization for Standardization) requirements as well the Department of Defense's requirements for information worker certification and are highly regarded in the Information Technology industry.

Technical certifications also have value when examining an expert's credentials. Certifications and experience with par-

ticular operating systems, applications and network protocols can be key to the expert's ability to successfully analyze the evidence in the case. These certifications are offered by the vendors of the software used on the computer and can be quite difficult to obtain.

Conclusion

The application of the law to computer science is known as computer forensics. Computer forensics uses methods to acquire, authenticate and analyze digital evidence, so that it can be presented in court. Computer forensics has an application in the family law practice and should see increasing use in the coming years. Computer experts have credentials that have varying degrees of value to the attorney and the client depending on the case and type of expertise required. ∎

6. The *Sherman* Court may have considered itself prohibited from calculating the community's *Moore/Marsden* interest, since the parties stipulated at trial that the community's interest would be either $936,230 (if the traditional *Moore/Marsden* formula were used) or $680,759 (if the *Bono* formula were used).

7. "Community Contributions" are community payments of mortgage principal (such as the payments in *Moore* and *Marsden*) and/or community payments for property-enhancing improvements (such as the payments in *Bono*).

8. *Moore/Marsden* calculations ignore non-purchase-money mortgages. (*In re Marriage of Branco* (1996) 47 Cal.App.4th 1621, 1629.)

9. *In re Marriage of Allen* (2002) 96 Cal.App.4th 497, 501-502 and *In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962, 972 agree with *Bono's* conclusion that the Community should receive *Moore/Marsden* credit for buying improvements that enhance the value of the property by at least those amount the improvements cost.

10. The other change that must be made to the *Moore/Marsden* formula when Community Contributions comprise payment for improvements is that the amount of the Community-paid improvements ($78,000 in *Bono*) must be subtracted from the property's appreciation ($400,000 in *Bono*) during the pro tanto period before the appreciation is allocated between the Community and Separatizer. If the

$78,000 isn't subtracted from the $400,000, the *Moore/Marsden* formula won't work, since the formula will be treating the $78,000 twice: first by reimbursing the $78,000 dollor-for-dollar to the Community (*Moore/Marsden* Step #1), then by allocating the same $78,000 pro tanto between the Community and Separatizer as a portion of the $400,000 property appreciation (*Moore/Marsden* Step #2). This problem doesn't occur in the traditional *Moore/Marsden* calculation (where the Community Contributions comprise mortgage principal reduction payments), since in the traditional calculation the amount reimbursed dollar-for-dollar to the Community i*sn't part of the property's appreciation* during the pro tanto period: the reimbursed amount increases the property's equity, but not its value.