

MOORE/MARSDEN: WHEN CASH SHOULD BE KING

RONALD S. GRANBERG, J.D., CFLS, DIRECTOR NORTH-ELECT

SALINAS

RON@GRANBERGLAW.COM

Ron Granberg is a solo practitioner in Salinas. He became a Certified Family Law Specialist in 1986. Mr. Granberg teaches Legal Research and Writing, Computer Assisted Legal Research, and Civil Litigation at the Monterey College of Law. He was president of the Monterey County Bar Association in 1992. He is the author of California Legal Research, "You're Just Not My Phenotype" (Family Law News, State Bar of California, Family Law Section, Fall 1995), "Parents Wrangle at Their Own Risk" (ACFLS Newsletter, Spring 2001) and "Lawyers Play Philosophy Game in Court" (Los Angeles Daily Journal, May 3, 2002).

Introduction

If the community has made payments reducing the principal balance of a mortgage secured against property owned by one spouse ("the Separatizer"), upon divorce the Separatizer owes the community reimbursements pursuant to *In re Marriage of Moore* (1980) 28 Cal.3d 366 and *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426.

The *Moore/Marsden* formula credits the Separatizer with the entire mortgage. This article contends that the credit is unfair to the community because a mortgage is not an asset. Because the community is credited only with cash payments, the Separatizer should be credited only with cash payments.¹

The legislature should replace the *Moore/Marsden* formula ("the Current

Formula") with a modified formula ("the Proposed Formula"), based only on the community's and Separatizer's respective cash contributions to the property.

The Current Formula

Under existing law, a *Moore/Marsden* reimbursement is calculated as follows:

Step 1:

The community is reimbursed the payments ("the Community Principal Payments") that it has made which have reduced the mortgage principal.

Step 2:

The community receives a percentage (calculated by "the Community Fraction") of the property's post-marital appreciation.

The Community Fraction's numerator is the Community Principal Payments.

The Community Fraction's denominator is the price the Separatizer originally paid for the property. The purchase price includes the mortgage.

The Separatizer retains as separate property the remainder of the post-marital appreciation, calculated by "the Separatizer Fraction."

The Separatizer Fraction's numerator is the down payment the Separatizer paid against the property, plus the mortgage, minus the Community Principal Payments. The denominator of the Separatizer Fraction (like the denominator of the Community Fraction) is the purchase price.

The Fractions' purpose is to fairly apportion the post-marital appreciation between Separatizer and community. The Fractions would achieve that purpose if

they ignored the mortgage and, instead, included only the cash payments of the Separatizer and the community.

The Proposed Formula

The Community Fraction's numerator properly credits the community with the Community Principal Payments. This element of the *Moore/Marsden* calculation should remain unchanged.

The Separatizer Fraction's numerator properly credits the Separatizer with the down payment (a cash payment). Unfortunately, however, the numerator improperly credits the Separatizer with the mortgage (not a cash payment) and improperly ignores the Separatizer's premarital and post-separation cash payments (collectively, "the Separatizer Principal Payments") which reduced the mortgage principal. The Separatizer Fraction's numerator should consist wholly of the down payment and the Separatizer Principal Payments.

The Fractions' denominators should not be the purchase price, but should be the cash payments made by the community (i.e., the Community Principal Payments) and by the Separatizer (i.e., the down payment and the Separatizer Principal Payments).

A Hypothetical Case

Under the hypothetical facts described below, the Separatizer has purchased property shortly before marriage with a minimal down payment.

Before marriage: H purchases property for \$500,000 (\$500 down payment, \$499,500 mortgage); and H pays down the mortgage by \$300. (No increase in property value between purchase and marriage.)

During coverture: Community pays down the mortgage by \$50,000.

After separation: H pays down the mortgage by \$200. (Property experienced post-marital appreciation of \$400,000.)

Analysis Under the Current Formula

Community Fraction:

Community Principal Payments ÷
Purchase Price
\$50,000 ÷ \$500,000 =
10% Community Percentage

Separatizer Fraction:

[Down Payment + (Mortgage –
Community Principal Payments)] ÷
Purchase Price
[\$500 + (\$499,500 – \$50,000)] ÷
\$500,000
[\$500 + \$449,500] ÷ \$500,000
\$450,000 ÷ \$500,000 =
90% Separatizer Percentage

Community Interest:

Community Principal Payments	\$50,000
+ 10% of post-marital apprec.	<u>40,000</u>
= Community Interest	\$90,000

Separatizer Interest:

HSP down payment	\$500
+ HSP premarital loan reduction	300
+ HSP post-sep. loan reduction	200
+ 90% of post-marital apprec.	<u>360,000</u>
= Separatizer Interest	\$361,000

To W:

Half of Community Interest	\$45,000
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To H:

Half of Community Interest	\$45,000
Separatizer Interest	<u>361,000</u>
Total	\$406,000

Analysis Under the Proposed Formula

Community Fraction:

Community Principal Payments ÷
[Community Principal Payments +
Down Payment + Separatizer Principal
Payments]
\$50,000 ÷ [\$50,000 + \$500 + \$300 +
\$200]
\$50,000 ÷ \$51,000 =
98% Community Percentage

Separatizer Fraction:

[Down Payment + Separatizer Principal
Payments] ÷ [Community Principal
Payments + Down Payment +
Separatizer Principal Payments]
[\$500 + \$300 + \$200] ÷ [\$50,000 +
500 + \$300 + \$200]
\$1,000 ÷ \$51,000 =
2% Separatizer Percentage

Community Interest:

Community Principal Payments	\$50,000
+ 98% of post-marital apprec.	<u>392,000</u>
= Community Interest	\$442,000

Separatizer Interest:

HSP down payment	\$500
+ HSP premarital loan reduction	300
+ HSP post-sep. loan reduction	200
+ 2% of post-marital apprec.	<u>8,000</u>
= Separatizer Interest	\$9,000

To W:

Half of Community Interest	\$221,000
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To H:

Half of Community Interest	\$221,000
Separatizer Interest	<u>9,000</u>
Total	\$230,000

Comparison of Formulae Results

Current Formula:

To Separatizer	\$406,000 (90%)
To Non-Separatizer	<u>\$45,000 (10%)</u>
Equity	\$451,000 (100%)

Proposed Formula:

To Separatizer	\$230,000 (51%)
To Non-Separatizer	<u>\$221,000 (49%)</u>
Equity	\$451,000 (100%)

Difference:

To Separatizer	– 176,000 (39%)
To Non-Separatizer	+ 176,000 (39%)

Refinanced Mortgages

Two cases (unfortunately, neither case a model of clarity) have discussed what happens if the community refinances the Separatizer's mortgage: *In re Marriage of Stoner* (1983) 147 Cal.App.3d 858, and *In re Marriage of Branco* (1996) 47 Cal. App.4th 1621.

Branco held that a community-refinanced mortgage is properly included in the Community Fraction's numerator to

the extent that it paid off the Separatizer's existing mortgage. "We can discern no meaningful difference, for purposes of determining whether the community acquires an interest in real property, between the use of community funds to make payments on one spouse's preexisting loan and the use of proceeds from a community property loan to pay off the preexisting separate loan." (*In re Marriage of Branco*, supra, at p. 1627) "Applied to the present case, the community property interest in the home would be computed by dividing the community's contribution to the purchase price of the home (payments reducing principal made with community funds on the original loan, if any, plus the principal balance of the loan paid off with proceeds of the Bank of America loan) by the purchase price." (Id, at p. 1629)

Two problems arise under the Current Formula when the Separatizer's mortgage is refinanced. The first problem is to characterize the refinanced loan as community or separate under the "intent of the lender" test of *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179. The characterization is important under the Current Formula, but irrelevant under the Proposed Formula. The second problem is that, for reasons beyond the scope of this article,² a *Moore/Marsden* calculation fails under certain circumstances if the refinanced loan is characterized as a community obligation.

Arguments Supporting the Current Formula

Proponents of the Current Formula contend that the *Moore/Marsden* calculation should continue to credit the Separatizer with the mortgage because:

1. But for the mortgage, the Separatizer could not have bought the property and the community would have had no investment opportunity at all.
2. The mortgage has disadvantaged the Separatizer by increasing his or her debt-to-income ratio and thereby reducing his or her borrowing ability.
3. The mortgage has disadvantaged the Separatizer by imposing liability on him or her (this contention is weakened, however, by the Separatizer's anti-deficiency protections under Code of Civil Procedure section 580, subdivisions (b) and (d)).

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Arguments Supporting the Proposed Formula

Proponents of the Proposed Formula contend that a fair *Moore/Marsden* calculation doesn't credit the Separatizer with the mortgage because:

1. A mortgage isn't an asset, and shouldn't be treated as one.
2. Fair apportionment of appreciation must consider only the relative financial sacrifices made by the Separatizer and the community. Sacrifices are measured in cash.
3. Public policy favors the community over the Separatizer. For example, *Bono v Clark* (2002) 103 Cal.App.4th 1409, 1429, observed that what it termed its "extension of the *Moore/Marsden* rule"³ was "consistent with California's 'partnership' model of marriage, which strongly favors community property."

Wanted: A Unified Theory

Trial courts cannot use the Proposed Formula because no precedent supports it. Trial courts must continue to treat the three reimbursements (community-to-separate, separate-to-community, and separate-to-separate) unequally:

1. Community property contributed to separate property is reimbursed under the Current Formula;
2. Separate property contributed to community property is reimbursed "without interest or adjustment for change in monetary values" (Fam. Code §2640, subd. (b)); and
3. Separate property of one spouse contributed to separate property of the other receives no reimbursement (*In re Marriage of Cross* (2001) 94 Cal.App.4th 1143)

Legislation should be passed adopting the Proposed Formula for all three.

Footnotes

- 1 Despite *In re Marriage of Branco* (1996) 47 Cal.App.4th 1621, the community shouldn't be credited with the entire mortgage either, even if it is considered a "community mortgage."
- 2 Attorney's BriefCase's excellent program, "Pushing the Limits: An In-Depth Analysis of *Moore/Marsden* Issues," presented by Thomas W. Wilson, Esq., analyzes this issue. A copy of the program materials may be purchased for \$50.00 from Attorney's Briefcase (www.atybriefcase.com, info@atybriefcase.com).
- 3 *Bono* "extended" the *Moore/Marsden* rule for the benefit of the community only by agreeing with *In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962 and *In re Marriage of Allen* (2002) 96 Cal.App.4th 497 that the rule applies to community-paid improvements. *Bono* "extended" the *Moore/Marsden* rule for the benefit of the Separatizer in three ways: a) by delaying the commencement of the post-marital appreciation period (i.e., the period during which appreciation is shared with the community) from date of marriage to date of improvement, b) by accelerating the end of the post-marital appreciation period from date of trial to date of separation, and c) by adding pre-improvement appreciation to the numerator of the Separatizer Formula and to the denominators of both Formulae.