ACQUISITIONS WITH A MIX OF COMMUNITY AND SEPARATE FUNDS: DISPLACING CALIFORNIA'S PRESUMPTION OF GIFT BY RECOGNIZING SHARED OWNERSHIP OR A RIGHT OF REIMBURSEMENT

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I. INTRODUCTION

The California law concerning the rights of the community estate and a spouse’s separate property estate when both have contributed to the acquisition or improvement of property has long been attacked as confusing and illogical. An academic critic in 1966 concluded that there was no “reason in logic or policy” to support one of the cornerstones of California law in this area; overall, the cases were “unrealistic” and “caused confusion.”1 Three years later, in a study comparing California law in this area to the cases from other community property states, another scholar concluded that California law was clearly the worst: it was “confused and uncertain.”2 It “defie[d] not only classification but rationalization as well. It [was] based on misconceptions, faulty principles and errors compounded over the years.”3

More than twenty-five years later, the present analysis finds that the condition of California law concerning these issues has actually worsened to a considerable degree. Confusion has increased due to the addition of several additional caselaw rules to grapple with plus two statutes. One of these statutes provides yet another substantive rule for a particular class of mixed consideration cases, while the other — yet to be construed as to its application — may ultimately cause a dramatic change in existing caselaw.

To quickly depict the source of confusion in present California law in this area today, there is appended following this paragraph a summary list of the rules, both statutory and judge-made, that have been applied in mixed consideration cases where funds or labor of the

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1. Donald C. Knutzen, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. CAL. L. REV. 240, 260, 259 (1966), speaking primarily of the presumption of gift in cases where community funds were expended to benefit separate land. The article surveys many other areas of California community property law considered problematic by the author.


3. Id. at 405.
community as well as assets of one spouse's separate property estate are used to pay part of the purchase price for, to pay for physical improvements erected on, to reduce a purchase-money mortgage or a tax lien on, or to reduce a debt-service obligation related to an asset, usually land.

1. The law presumes a gift of all the funds or labor involved from the community estate to the separate estate or vice versa; any evidence of lack of donative intent is received to rebut the presumption. 4

2. Where title is in the names of both spouses, a gift to the community (or a joint tenancy estate) by the separate estate is presumed, but this presumption cannot be overcome by proving lack of donative intent but only by proof of agreement between spouses that no gift was being made. 5

3. It is presumed that the separate estate advancing funds is giving an interest-free loan to the estate co-owned by the spouses 6 until the termination of the community. This is the result of declaring the "remedy" for the spouse supplying the separate funds to be reimbursement for the amount spent that reduces principal indebtedness on a purchase-money or construction loan or which pays for a physical improvement on land, without interest and without sharing in the appreciation of the property. The presumption of outright gift (Rule No. 1, supra) applies to the interest component of a note payment. Both presumptions are rebuttable by any evidence of lack of donative intent. 7

4. Where a spouse's separate estate has advanced funds, the presumptions at divorce are the same as in Rule No. 3 above, except only a signed writing can overcome the presumptions. 8

5. Rule No. 4 is modified so that the presumption of an unrestricted gift of the interest component of a payment on a purchase-money or construction loan does not apply when all or a part of the property is co-owned by the spouses and the note payment is made by a separated spouse from his earnings. 9

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4. See Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931), discussed infra at text accompanying notes 89-95.


6. This term is used to include not only community ownership by spouses but ownership in the form of joint tenancy and tenancy in common.


6. Each estate making payments on a contract-for-deed acquisition obtains a pro-rata fractional share of equitable (and ultimately legal) title based on the full amount paid out (i.e., an “interest” component is not excluded) resulting in a cotenancy under which any rents and profits would likewise be owned as part separate, part community, and under which the fractional shares of ownership are subject to different laws of management and creditors’ rights.\textsuperscript{10}

7. Rule No. 6 above applies to payments made, even after title has passed, on a purchase-money note secured by a mortgage or deed of trust on the property, with the funds so applied “buying out” a fractional share of the title previously acquired by the estate initiating the purchase based on credit extended by the vendor or a third-party lender such as a bank.\textsuperscript{11}

8. Rules No. 6 and 7 are restructured so that the buy-in to title is limited to those funds applied to the purchase price, with so much of the payments as are properly allocated to interest (as well as taxes and insurance in the case of “escrowed” mortgage payment accounts) being subject to the rule of presumed gift.\textsuperscript{12}

9. Rule No. 8 is restructured so that the estate initiating the transaction (usually, in the cases, one spouse’s separate estate) is accorded a right of reimbursement at termination of the community for the amount of appreciation occurring before a note payment is made from funds of the other (community) estate. I.e., this appreciation is not allocated between the two estates based on the amount each will have paid on the purchase price by the time the community is terminated.\textsuperscript{13}

10. Where there is no presumption of gift or the presumption is negated, the estate paying for physical improvements made on land

\textsuperscript{10} (1989), discussed infra at text accompanying notes 225-26.


\textsuperscript{12} Giacomazzi v. Rowe, 109 Cal. App. 2d 498, 501, 240 P.2d 1020, 1022 (1952) (dictum), stating that “the community interest runs to the proportion of the purchase price contributed by the community.” See infra text accompanying notes 172-78, for a discussion of this case.

The court favorably cites contract-for-deed cases that did not exclude an interest component from the “purchase price.” See supra note 10. I am assuming the Giacomazzi court viewed the full amount of a mortgage payment as buying in to title.

\textsuperscript{13} See Marriage of Moore, 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980), discussed infra at text accompanying notes 190, 279-82.

\textsuperscript{13} See Marriage of Marsden, 130 Cal. App. 3d 426, 181 Cal. Rptr. 910 (1982), discussed infra at text accompanying notes 192-95.
owned by the other estate obtains not a right of reimbursement (Rule No. 3, supra) but — rejecting the fixtures doctrine — actual ownership of the improvement under a title different from that of the land itself.\textsuperscript{14}

11. Funds spent for such physical improvements on land "buy-in" to a share of title so that the contributing estate, through owning a fractional interest in cotenancy, will share in the appreciation enjoyed by (or loss in value suffered by) the improved property as a whole, not just, as in Rule No. 10, that due to the improvement itself.\textsuperscript{15}

12. Reimbursement is the remedy when one estate pays for physical improvements on land owned by another marital estate, but the amount reimbursed is not (as in Rule No. 3) the sum contributed but the value added (which can be less than or more than the amount spent) measured at the time the community ends upon death of a spouse or divorce.\textsuperscript{16}

13. Rule No. 3 above is modified in its application to some physical improvement cases so that reimbursement is for the greater of amount spent or value added — measured on the basis of conditions existing at the termination of the community — with the estate contributing funds not sharing in any overall loss in the value of the property.\textsuperscript{17}

14. Reimbursement is denied not on the theory of presumed gift but due to a conclusive presumption that the estate contributing funds has received a benefit from use of the land at least equal to the amount of the contribution.\textsuperscript{18}

15. There is no conclusive presumption of offsetting benefits as in Rule No. 14, but factual inquiry is made as to the actual value to the estate contributing funds arising out of use of the property owned (in whole or in part) by the other estate, and the claim for reimbursement owed at termination of the community is reduced or eliminated accordingly.\textsuperscript{19}

\textsuperscript{14} See Long v. Long, 88 Cal. App. 2d 544, 199 P.2d 47 (1948), discussed infra at text accompanying notes 270-75.

\textsuperscript{15} See Marriage of Sparks, 97 Cal. App. 3d 353, 158 Cal. Rptr. 638 (1979), discussed infra at text accompanying notes 264-67.

\textsuperscript{16} See Shaw v. Bernal, 163 Cal. 262, 124 P. 1012 (1912) (dictum), discussed infra at text accompanying notes 83-88.

\textsuperscript{17} See Marriage of Warren, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (1972), discussed infra at text accompanying notes 246-47.

\textsuperscript{18} See infra text accompanying notes 120, 123 and following note 262, noting how California Family Code § 2640 contains such a conclusive presumption of offset.

\textsuperscript{19} See infra cases discussed at text accompanying notes 315-17.
16. The contributing estate is reimbursed for the amount spent plus legal interest. This recent statutory approach applies to cases of expenditure of community funds to "improve" a spouse himself by educating him or her, but the notion that a contribution of funds for a purpose not benefiting the contributing estate directly should be viewed other than as an interest-free loan could be borrowed from the statute.

The rules stated in paragraphs 2, 4, 8, 9, 11, 13, 14, 15, and 16 above were formulated after the 1960's when the two commentators wrote that California law was already highly uncertain and confusing.

After a survey in Part II of this Article of the solutions under Spanish and Mexican law — the source of California community property — to these mixed-consideration problems, Part III takes a close look at how a strong presumption of gift became a part of California law. It will conclude that the cases creating this presumption should be overruled and that a California statute imposing it, in extreme form, in a specific situation should be repealed. Part IV illustrates how, in cases dealing with mixed acquisition payments, California has moved away from the Civil Law's inception of title doctrine to a buy-in to title theory. The Article recommends completing this process of displacing inception of title by overruling a case using that doctrine in characterizing a leasehold as separate or community property. Repeal of the statute mentioned above is also necessary to permit the courts to apply a uniform buy-in to title remedy.

Part V examines a split of California authority as to whether paying for a physical improvement on land not owned wholly by the payor estate results in acquiring a share of title or a right of reimbursement. The Article recommends that California overrule one of two lines of inconsistent cases and either use reimbursement as the remedy in all such cases or limit reimbursement to "maintenance" situations and employ the buy-in remedy for physical improvement cases that are in the nature of an investment of funds. The law on measuring reimbursement is canvassed in Part VI, including cases concerned with loss or reduction of a reimbursement claim because the claimant party had the benefit of use of or profits from the improved property. The recommendation here is that reimbursement not be eliminated or reduced except upon proof of the actual use value to the estate claiming reimbursement.

The Article concludes with Part VII, which observes how Arizona (and maybe Texas) has cleverly borrowed from buy-in theory to cal-

cuate the value of the remedy for the estate making an acquisition payment or paying for an improvement, while using reimbursement law to implement it. The ultimate conclusion is that, especially in light of a very recent change in the federal bankruptcy laws, the benefits of the Texas-Arizona approach may outweigh its detriments.

II. SPANISH-MEXICAN BACKGROUND — FAR FEWER RULES AND WIDESPREAD USE OF INCEPTION OF TITLE

Under the Civil Law of Spain and Mexico, an acquisition was either entirely separate property or entirely community, never a cotenancy comprised of shares owned by both the community estate and a separate estate (or by the community and two separate estates, the husband's and the wife's). If prior to marriage, a man or woman initiated acquisition of title, as by entering into a contract for purchase, his or her unmarried status at that time impressed upon the property to be acquired a separate classification. That after his marriage, the husband (then sole manager of the community) used community funds to make some (or even all) payments on the acquisition did not create a community interest in the property. Nor did the fact that the deed was delivered and title passed during marriage. Despite favoring community ownership, Spanish-Mexican law had an even stronger preference for unified ownership as expressed in the "inception of title" doctrine. In most families the most significant separate property asset was the family home and surrounding lands, which the law sought to have pass generation by generation to the eldest son, always remaining in the blood line. If the family home were even partly community rather than Husband's separate property, half the community share would be owned at Husband's death by the widow, who might remarry and give birth to a child not related to the deceased husband who might in turn inherit a fractional ownership in the "family" estate. For similar policy reasons, and


22. See, e.g., Basanoff, Bienes Castrenses, 8 N.M. Hist. Rev. 273, 282 (1933).

23. See Frique v. Hopkins, 4 Mart. (n.s.) 212, 220-21 (La. 1826), noting that although appearing to be nonlucrative acquisitions, lands granted to a married man by the Spanish administrators in the New World which he was to improve
also because of the Civil Law's acceptance of the fixtures doctrine, use of community funds to build structures on or otherwise improve separately owned land did not give the community an interest in the property.

If during marriage, a husband — it would not be the wife as she could not under Civil Law manage community funds — took some community cash and some cash separately owned by him and purchased property, it was community because of his status as a member of the marital community at that time. If Husband used his separate funds to build a structure on community land, the preference for unified ownership coupled with fixtures doctrine theory denied the separate estate an interest in the land. The same application of the fixtures doctrine was made in the converse situation where community funds were used to improve separate land.

In none of the situations above did Spanish or Mexican law recognize a presumption of gift. Instead the estate paying a share of the purchase price for, or paying for the structure built on, land owned by the other estate obtained a right to be reimbursed, assertable at the end of the community (which meant, since divorce was virtually unknown, at the death of one of the spouses). The logic of the community of acquests and gains (established in lieu of a universal community) was that the separate estates of both spouses contributed the assets brought to the marriage all potential for growth. If one million reales was the value of the separate estate brought to marriage, when death ended the community one million reales would properly be returned to the separate property owner in specie or via a claim for reimbursement. On this theory if a spouse brought money

and make his home were classified as separate property because, if classified as community, the estate intended to be the equivalent of an entailed mayorazgo in old Spain might “be divided with those of another bed, in case his wife survived him and married a second time.”

24. DEFUNIAK & VAUGHN, supra note 21, § 73, at 168, 171; JOAQUIN ESCRICHE Y MARTIN, DICCIONARIO RAZANADO DE LEGISLACION CIVIL, PENAL, COMERCIAL Y FORENSE 171 et seq. (“bienes gananciales” — ¶ 11).


27. Bartke, supra note 2, at 409-10.

28. See Bartke, supra note 2, at 409-10; FEBRERO, supra note 26, ¶ 17, at 102; JUAN DE MATIENZO, COMMENTARY ON THE NOVISSIMA RECOPILACION lib. 10, tit. 4, ley 1, Gloss II, ¶ 6, translated in 2 DEFUNIAK, supra note 21, § 78, at 143.

29. ALPHONSO DE AZEVEDO, COMMENTARY ON THE NOVISSIMA RECOPILACION
to the marriage or inherited money during the marriage, assets bought with such funds were community property, with the separate estate obtaining a right of reimbursement.

Nevertheless, and apparently in order to keep the family home within the bloodline (usually of the husband-father), a limited amount of tracing of separate assets was permitted. If land owned before marriage or inherited (or received by gift) during marriage were traded for another property, the newly acquired parcel would also be separate. Some Spanish jurisconsults — but not all — expanded this concept of tracing, taking the position that if a separately owned rancho were sold and the proceeds promptly reinvested in another parcel of land, separate identity was not lost if the deed expressed an intent for separate ownership.

At Civil Law all of the rents and profits accrued during marriage from separate property were community. Hence when a spouse’s separate estate was entitled to reimbursement for a cash contribution towards the purchase of community property or for having paid for a structure built on community realty, it was logical to return to the separate estate no more than the amount expended. To have reim-

lib. 10, tit. 4, ley 1, ¶ 12, translated in 2 DeFuniak, supra note 21, at 171; Matienzo, supra note 28, Gloss II, ¶ 3, translated in 2 DeFuniak, supra note 21, at 268-69.

30. Huie, supra note 25, 30 Tex. L. Rev. at 159, 26 Tul. L. Rev. at 428; FBrERO, supra note 26, ¶ 6, at 98; Gutierrez, supra note 21, Questio CXVII, ¶ 1, at 186-87; Matienzo, supra note 28, Gloss II ¶¶ 1, 3, at 140-141. See also Savenat v. Le Breton, 1 La. 520 (1830) (dictum) (rule not applied where succession of Wife’s parents, not Wife, bought land with cash of the succession and deeded it to Husband).

31. DeFuniak & Vaughn, supra note 21, § 77, at 180-81; Huie, supra note 25, 30 Tex. L. Rev. at 158, 26 Tul. L. Rev. at 427; Escribiche, supra note 24, ¶ 4, at 171; FBrERO, supra note 26, ¶(2d), at 98; Matienzo, supra note 28, Gloss II, ¶ 4, at 142.

32. Huie, supra note 25, 30 Tex. L. Rev. at 158, 26 Tul. L. Rev. at 427; FBrERO, supra note 26, ¶ 7 (1st), at 98 (stressing that the deed taken upon reinvestment must recite separate ownership); Gutierrez, supra note 21, Questio CXVII, ¶¶ 1-2, at 185-87 (acknowledging that Palacios Rubios disagreed and would not have permitted tracing through a sale and reinvestment of proceeds); Matienzo, supra note 28, Gloss II, ¶ 6, at 143 (noting the split of authority).

33. See, e.g., Escribiche, supra note 24, at 71; FBrERO, supra note 26, ¶¶ 1, 8, 42, at 97, 99, 115.

34. See Bartke, supra note 2, at 388-89 (discussing early Louisiana case law); and DeFuniak & Vaughn, supra note 21, § 77, at 182 (reimbursement was “for the money so spent”). Probably most of the time the Civil Law authorities spoke of reimbursement they referred only to the amount spent as the measure (as opposed to value added). See, e.g., FBrERO, supra note 26, ¶ 17, at 102 (when community funds spent to acquire separate property under inception of title doctrine nonowner
bursed with interest would have treated the separate estate as making an investment for gain, which was inconsistent with the basic theory of a community regime. When it was the community that was reimbursed, interest was also not granted.\textsuperscript{35} Almost always the community had already benefited from its contribution that paid for part of or added an improvement to property separately owned by one of the spouses, either because the land generated community profits or because it was occupied by the community as the family home. It was theoretically possible that community funds were used to pay for unimproved land — acquired under a pre-marriage contract for purchase — that was unsuitable for farming or grazing and which was bought on speculation to hold for resale. If the spouse separately owning this parcel was not in the business of buying and selling land, the capital gain on sale would be separate property, and the community would be treated unfairly when it was ultimately reimbursed without interest for the funds it had advanced. Apparently the jurisconsults expounding on problems raised by a community property regime never had heard of such a situation (buying land that could not even be rented out pending resale) or had never thought about it, for none of them discusses the problem of denying interest on the community reimbursement claim in this posture.\textsuperscript{36}

The above summary of Civil Law suggests that inflation apparently was not much of a problem in Spain and Mexico.\textsuperscript{37} Obviously, however, when land owned before marriage or inherited during it was held for many years and then sold, the sales price could be higher than the value of the land at the time of marriage or the time of succession or gift, due to fluctuation in land values caused by economic factors such as the prices being earned by crops suitably grown on the land, prices for minerals thought to be extractable from the land, etc. Apparently drawing from the notion that a spouse’s simply holding on to separately owned land could result in the separate estate’s enjoying a “natural” increase\textsuperscript{38} — so that at the end of mar-

\textsuperscript{35} See FEBRERO, supra note 26, ¶ 17, at 102.

\textsuperscript{36} See Bartke, supra note 2, at 389.

\textsuperscript{37} See the example above in which one million reales is returned to the separate estate at the end of a long marriage. None of the Civil Law commentators remarked that this might cause unfairness.

\textsuperscript{38} Several Spanish jurisconsults recognized a rule that natural increase of separate property during the marriage was a separate property gain. See FEBRERO, supra note 26, ¶¶ 9, 13, at 99, 101; and MATIENZO, supra note 28, Gloss I, ¶ 88,
riage the value of the separate estate was not, as posited above, always the same as that brought to the marriage — some jurisconsults took the position that in the case of a physical improvement (such as building a structure) to community land paid for with separate funds, the proper measure of reimbursement was not the amount spent but value added, measured at the date the community ended.\textsuperscript{39} These authorities were consistent in stating that, since this approach gave the separate estate a chance to share in the gain resulting from the improvement, that estate also risked sharing in the loss, when the value added was less than the amount spent. Since many such improvements were structures that would deteriorate over time, the chance that reimbursement under this approach would result in a loss\textsuperscript{40} probably was greater than the possibility of receiving more than the amount spent.

If use of separate funds to build a structure on community land entitled the separate estate to participate in subsequent gain (or share in any subsequent loss as the value of the improvement fell), the community that contributed its funds to pay for a structure on separate land could likewise share in the gain or loss attributed to that expenditure. That the community, while sharing in such a gain, was at the same time enjoying use of the structure or the profits from renting it out would not have barred the claim to share in any “natural increase,” since that kind of capital gain was viewed as something different from a fruit, rent or profit derived from the capital.

One who took the view that the marital estate paying for a structure on land owned by the other estate would participate in gain or loss could readily extend this notion so that the payment of an installment on the contract price by the community after a separate inception of title would create a right to share in natural increase proportionally.\textsuperscript{41} However, so far as I am aware, none of the Spanish or Mexican treatises discusses this problem specifically. The concept of buying-in to title was not part of Civil Law.

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\textsuperscript{39} Not all the Spanish writers agreed, and a split of authority, following the disagreement among the jurisconsults, appeared in the earliest American cases, some reimbursing for the amount spent and some basing reimbursement on value added. See Bartke, supra note 2, at 393-94; and Defuniak & Vaughn, supra note 21, § 73, at 172-73.

\textsuperscript{40} That is a loss calculated without valuing use to the separate estate that might possibly occur if, for example, a spouse’s parent or his or her child from another marriage lived in the house on community land built with that spouse’s separate funds.

\textsuperscript{41} See Gutierrez v. Gutierrez, 791 S.W.2d 659 (Tex. App. — San Antonio 1990), no writ.
The preceding points about the Spanish-Mexican law are pertinent to the examination in this Article of the far more complicated responses of California to these mixed-funds problems. The preference for a unified title (i.e., all community or all separate) resulted in simplified management and easier resolution of problems concerning creditors’ rights. Because a community-separate cotenancy was never created, one spouse alone was always able to sell or otherwise deal with the property. Likewise there would be no small, fractional interest reachable by the creditor of one spouse who could not levy on the major portion of the title. (Had Spain and Mexico employed California’s rule that rents and profits from separate property are also separate, there would have been an additional simplification: the profits derived from a capital asset could never have been a mixture of separate and community property.)

Not only was a “buy-in” to title a complication the Civil Law never dealt with, but problems arising out of a presumption of gift were avoided. Moreover, with one possible exception,42 the Civil Law equated making a contribution to the purchase price with paying for a physical improvement. In all instances the remedy was reimbursement. No situation was encountered in which it would have been logical to award reimbursement with interest. The only tension was whether to keep the reimbursement remedy simple by always reimbursing just for the amount spent — either in the form of a purchase-price payment or a contribution for a physical improvement — or to reimburse based on value added. Many jurisconsults were, in the case of the physical improvement, willing to depart from the simple rule by measuring reimbursement based on value added — measured at the time of reimbursement, which could be more or less than amount spent. Apparently the rule that rents and profits from separate property were community eliminated a need for the Spanish jurisconsults to deal with offsetting a community reimbursement claim in whole or in part due to use value to the community that had made a payment to acquire separate property or had paid for a structure on separate property. That is, if the property were occupied rather than rented out, the community owed no fair rental value because the occupancy had simply cancelled out community rental income rather than depriving the separate estate of a chance to make

42. That is, according to some (but not all) jurisconsults, the estate paying for a structure built on land of the other estate could be reimbursed for more than the amount paid, but the same estate making a contract-for-deed payment on an acquisition to which the other estate would get full title would be reimbursed just for the amount contributed. See supra text accompanying note 39.
profit (as would be the case in California).

III. THE EARLY CALIFORNIA DECISIONS AND THE DEVELOPMENT OF THE PRESUMPTION OF GIFT

A. Early Cases Rejecting a Buy-in to Title Should Not Be Construed as Recognizing a Presumption of Gift

The California courts first dealt with the issues considered in this Article in an 1860 case, Noé v. Card, in which, under Mexican rule, the husband had received during marriage a grant of land from the government that was ultimately held to have become his separate property due to the intention of the sovereign (i.e., the grant was essentially a gift from the sovereign). It was stressed on behalf of parties arguing for community property classification that as conditions to perfecting the grant the husband had to devote his labor to improving the land and pay certain fees (which the California Supreme Court said were the equivalent of taxes). Husband had in fact paid these fees with community funds. The court held that uses of community labor and funds in such manner could not affect ownership of the land as separate or community property. Rather, at Spanish-Mexican law "[t]hey only created a charge against the same, which was allowed in the liquidation of the community." In dictum the court laid out the Civil Law's inception of title doctrine and provided two illustrations: (1) exercise during marriage with community funds of an option to repurchase acquired before marriage, and (2) use of community funds to make a payment under a pre-marriage contract-for-deed purchase. In each instance the remedy to the community was reimbursement at its termination for the amount paid.

Noé v. Card was decided just four months before the California Supreme Court, in George v. Ransom, dramatically revised the

44. Id. at 597.
45. Id. at 597-98, 607-08.
46. Id. at 584.
47. Id. at 606-07.
48. Id. at 606.
49. Id. at 607 (citing Barbet v. Langlois, 5 La. Ann. 212 (1850); Lawson v. Ripley, 17 La. 238 (1841)).
50. Id. at 606 ("their cost only was allowed to the community"); id. at 607 ("reimbursement of the money paid").
51. 15 Cal. 322 (1860).
state’s regime of community property by holding unconstitutional the statute codifying the basic Civil Law rule that fruits, rents, and profits of separate property are community. Thus the Noé court had no reason to warn that such a development could require a correspond- ing reformulation of the law on reimbursement where separate funds were used for a contribution to community-owned capital and as a result the opportunity to earn separate profits was lost.

According to Richard Bartke, the presumption of gift that California engrafted on to the Civil Law — which greatly decreases the number of cases in which a court will award reimbursement or recognize an alternative remedy such as “buy in” to title — is traceable to the 1864 decision of Lewis v. Johns. There, through labor of the husband himself and employees paid by him, presumptively with community funds, a crop of wheat was grown on land separately owned by Wife. A judgment creditor who could reach community but not the wife’s separate property levied on the wheat. Post-George, the profit arising from Wife’s land was separately hers, and, the court said, any claim of the community on the facts was for reimbursement (a claim the creditor could not reach under the type of writ he was employing). Moreover, added the court in dictum, “In the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his services...” Nothing about this dictum suggests the court would also apply it to an advancement of community or Husband's

52. Id. at 323.
53. Bartke, supra note 2, at 406.
54. 24 Cal. 98 (1864).
55. Id. at 101. Actually, Wife owned only an undivided half interest in the land (and hence no more than half of the crop), the other half being owned by her brother, but that had no effect on the court’s analysis.
56. Id. at 102-03.
57. Id, at 103. Nothing was cited for this proposition. The most recent cite in the opinion before the quoted passage had been to George v. Ransom, 15 Cal. 322 (1860), and the constitutional provision the George court had relied on in reversing the Civil Law rule concerning classification of the rents and profits accrued during marriage from a spouse’s separate property. Perhaps the court felt that George had not done enough to correct some of the unfairness to wives existing under the community property laws of the 1860’s in California. See, e.g., Susan Westerberg Prager, The Persistence of Separate Property Concepts in California’s Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1 (1976) (Wife then could not manage her own separate property, could not devise any portion of the community property if she predeceased Husband, and was viewed as having no proprietary interest at all in community property during the marriage, not even her own earnings); William A. Reppy Jr., Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1058-59 (1975).
separate funds to benefit the wife's land (as opposed to his labor).

It is interesting that the Lewis v. Johns dictum, considered by one scholar to be the fountainhead of the presumption of gift rule, is now, apparently, viewed as implicitly rejected by California Supreme Court cases making Pereira and Van Camp apportionments in situations where community labor and separate capital combine to generate business profits. In the 1993 case, Marriage of Dekker, during marriage Husband managed a company partially funded with Wife's separate property capital, resulting in huge gains retained within the business. At divorce, Wife urged that Pereira/Van Camp apportionments of gain were made by the courts only when community labor of a spouse was applied to make his own separate capital productive of gains. Although it is unclear whether Wife specifically argued in terms of a presumption of gift, or relied on Lewis, that well-known concept was certainly presented by her argument. The court of appeal in Dekker held Husband was entitled to a community reward for his labor beyond compensation paid him as salary without mentioning need by him to overcome a presumption of gift.

The first pertinent post-Lewis case, Peck v. Brimmagim, decided in 1866, certainly casts doubt on whether Lewis — which referred to a possible right of reimbursement for the community — was viewed at the time as having established any kind of presumption of gift applicable in the contexts of acquisition and improvement of property with mixed separate and community sources. The husband in Peck had used community funds to buy land, directing the vendor to deed it to his wife. This transaction was found to be a gift not based on any presumption but on the husband's contemporaneous


59. The two much-cited cases that lend their names to the two competing formulae for apportioning return on separate capital and return on community labor are Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909), and Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921).


61. Id. at 847, 21 Cal. Rptr. at 644.

62. Id. at 850, 21 Cal. Rptr. at 646.

63. Id. at 853, 21 Cal. Rptr. at 648. Concededly the fact Husband was paid a salary readily could have been invoked by the court to rebut such a presumption, yet this was never mentioned.

64. 31 Cal. 440 (1866).

65. Id. at 441.
declarations of donative intent. Soon thereafter, Husband used community funds to build a house on the land, and as to this expenditure there was no evidence of his state of mind. When Husband died his administrator asserted the building of the house had created a community interest in the land which should be sold to raise funds to pay his creditors. In the wife’s suit to enjoin such a sale, the court held the community’s paying for the improvement did not create a community interest in the property, stating:

    The money was expended by the husband on his wife’s property, so far as the case shows, at his own instance. We do not undertake to say that the expenditure was or will be presumed to have been gratuitous, but no lien upon the lot or house arose in his favor by reason of his expenditure of the common property in the erection of the house.

The 1890 case of Flournoy v. Flournoy is sometimes cited as a presumption-of-gift precedent, but on analysis its ruling appears much narrower. In loaning money to Wife to initiate an acquisition of land, Husband had acknowledged to her the land would be her separate property. After Wife made some installment payments with her separate funds, unknown to her, her husband paid the final installment with his own separate monies. After the land was sold, Husband and Wife litigated inter se who would receive the proceeds. Husband’s contention that his payment bought-in to a share of title was rejected, the court adding that “[i]t must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife’s separate estate . . . .” But the court relied for this conclusion primarily on the husband’s prior assurances to the wife when he loaned her the money for the down payment and not on a broad proposition of presumed donative intent. Moreover, the spouses were not divorcing, and, time for reimbursement not having arrived, nothing the court said about the husband’s intention to benefit his wife by completing her acquisition of the title

66. Id. at 447-48.
67. Id. at 450. Any unsecured reimbursement claim arising out of the improvement that the husband might have had and that could after his death be asserted by his estate was not relevant in the action to determine if there was an interest in the realty that could be sold to raise community funds to pay creditors.
68. 86 Cal. 286, 24 P. 1012 (1890).
69. Id. at 291, 24 P. at 1012.
70. Id. at 290, 24 P. at 1012.
71. Id. at 291, 24 P. at 1012.
72. Id. at 294, 24 P. at 1013.
would have been inconsistent with a subsequent granting of reimbursement to him.

A 1909 court of appeals case sheds light on what the Flournoy court meant in declaring it would presume that the husband intended to “benefit the wife’s separate estate.” In Carlson v. Carlson,73 Husband provided two months of community labor to erect a dwelling on Wife’s separately-owned land.74 The trial court hearing their divorce accepted a “buy-in” argument, found there was a community interest over which it had jurisdiction, and ordered the wife to pay the husband $500, with the land to be sold to raise such sum if she did not do so.75 In discussing the cases where a husband had used community money for such an improvement, the court of appeal in Carlson concluded that the law “presumed that it was the intention of the husband to advance the money paid for the benefit of the wife’s estate, and that it was intended to accrue to her interest.”76 Flournoy was cited for this rule, but immediately thereafter the Carlson court explained it was holding only that the application of community funds or labor did not necessarily give the community a share of the title, because the presumption required the expenditure to be viewed as “a loan or a gift.”77

In a 1912 case, Ives v. Connacher,78 a 25% down payment on land was made with community funds, with title taken in the names of Husband and Wife.79 Three 25% purchase-money mortgage payments (plus interest) were to be made over three years, and the wife’s separate funds were used for the first two of them.80 When ownership was disputed after the wife’s death, the court stated the Civil Law rule concerning payments on a loan of funds used to buy land under the inception of title doctrine:

74. Id. at 301, 101 P. at 924.
75. Id. at 302, 101 P. at 924.
76. Id. at 303, 101 P. at 925.
77. Id. (emphasis added). See also Smith v. Smith, 47 Cal. App. 650, 191 P. 60 (1920), a quiet title suit between spouses, thus litigation ongoing before any right of reimbursement could be asserted. A dwelling erected on Wife’s separately owned land was paid for with a mix of her separate funds, Husband’s separate monies, and Husband-controlled community funds. Although the trial court found Husband had intended a gift, affirmance was based on application of the fixtures doctrine and the passage from Carlson concerning a presumed intent to benefit the wife’s separate estate. Under the theory for affirmation the husband at a later divorce would not have been barred from making a reimbursement claim.
78. 162 Cal. 174, 121 P. 394 (1912).
79. Id. at 175, 121 P. at 394.
80. Id. at 176, 121 P. at 395.
The purchase having actually been consummated, the property acquired, and the legal title having vested, the property was then community property of the spouses. It cannot be disputed, we think, that, where property is purchased and partly paid for with community funds, and a note and mortgage on the same are given to secure the unpaid balance, the property is community property. We do not see how the status of this property as community property can be held necessarily to have been changed by the mere fact that the first two notes secured by the mortgage were paid from the separate property of the wife. . . . [It is] to be presumed, nothing else appearing, that the money of the wife was advanced by her for the benefit of the community, to assist in discharging a lien on community property . . . .

_Ives_ was a quiet title action by Husband against the estate of the wife, and her personal representative did not crossclaim for reimbursement. The holding can mean no more than that there was no buy-in to title.

_Shaw v. Bernal_, decided later in 1912, did note that former California Civil Code section 164 implicated a presumption of gift. It provided a presumption that where title was in the wife's name the land was presumptively her separate property. This, said _Shaw_, required courts to presume a gift when the husband had bought land with his separate or with community funds and directed the vendor to deed the property to the wife. Such a holding could not be the source of a nonstatutory presumption of gift. The husband in _Shaw_ also used funds that the court considered might have been community to build a house on this land separately owned by his wife. Applying the fixtures doctrine, the court held such expenditure could not give the community an interest in the land. However, the court did not go on to hold this meant the husband was remissless on the theory he had given to Wife his half of the community funds used for

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81. _Id._ at 177, 121 P. at 395 (emphasis added). No authority was cited for the final passage of the quotation to the effect the wife was advancing her funds to benefit the community.
82. _Id._ at 175, 121 P. at 394.
83. 163 Cal. 262, 124 P. 1012 (1912).
84. Now this section is California Family Code § 803, and it applies only to an instrument naming Wife as grantee that became effective before 1975.
85. 163 Cal. at 266, 124 P. at 1013.
86. _Id_.
87. _Id._ at 267, 124 P. at 1014.
the house. Instead in dictum it noted that "authorities" provided that in such a situation the community might have "a right to reimbursement to the extent of the value added to the property." 88

B. The Presumption of Gift First Emerges in 1931

Finally, in 1931, a California appellate court considered the question whether the statements in prior cases that the law presumed the husband's contribution benefited the wife's estate also meant his separate estate or the community (depending on what kind of funds he had used) had also waived any possible claim for reimbursement. Dunn v. Mullan 89 was a quiet title action by the deceased husband's administrator against the deceased wife's administrrix. 90 The land was held to have been acquired as 50% community and 50% Wife's separate property, and the husband had applied community funds to erect a dwelling on the land and pay off mortgages taken out on the same day title passed (i.e., they appear to have been purchase-money mortgages, although that is not stated by the court). 91 After citing Flournoy and quoting from Carlson (the decision that had said treating the husband's advancement of funds as a loan was consistent with the applicable jurisprudence), the court in Dunn said in dictum:

We think the same reasoning which warrants a presumption that a husband did not intend by the expenditure of community funds for the benefit of his wife's separate property to create a lien upon said property compels the conclusion that he did not expect repayment for the community funds expended by him to improve his wife's separate property or to relieve it of an encumbrance. It is well established, that if a husband conveys to his wife his separate or community property, the mere fact of the conveyance itself will raise the prima facie presumption that he intended the conveyance to be a gift. It has also been held that any moneys furnished by the husband before or after marriage in payment of the purchase price of property taken in the separate name of the wife will be presumed to be intended as a gift . . . . 92

88. Id. at 268, 124 P. at 1014.
89. 211 Cal. 583, 296 P. 604 (1931).
90. Id. at 585, 296 P. at 605.
91. Id. at 588, 296 P. at 606.
92. Id. at 589, 296 P. at 607. The rule was soon extended to the situation where the presumed donor was not the party who actively applied the presumptively donated funds but just passively consented to the other spouse's action
This was dictum because the court held that it was not permissible in a quiet title action to assert a reimbursement claim after termination of the community by death on behalf of one spouse against the other.\textsuperscript{93}

Although the point continues to be dictum in what may be a majority of later cases citing Dunn,\textsuperscript{94} in a number of cases the quoted passage is applied as holding.\textsuperscript{95} A broad presumption of gift in which was in effect a gift to himself. See Wheeland v. Rodgers, 20 Cal. 2d 218, 222, 124 P.2d 816, 819 (1942) (Wife orally consented to Husband's use of joint tenancy funds to build structure on his separately owned land) (alternative holding); Marriage of Jafeman, 29 Cal. App. 3d 244, 256-59, 105 Cal. Rptr. 483, 491-93 (1972) (remand ordered for determination whether Wife consented to use of community funds by Husband to physically improve and make mortgage payments on Husband's separately owned land); Estate of La Belle, 93 Cal. App. 2d 538, 544-45, 209 P.2d 432, 435-36 (1949) (Wife consented to investment of community funds in Husband's separate-property business); Estate of Wooten, 64 Cal. App. 2d 96, 101, 148 P.2d 33, 34 (1944) (Husband moved community-owned house onto his separate realty with Wife's consent).

Of course no presumption of gift arose when the evidence showed the would-be "donor" spouse neither actively applied the funds at issue nor consented to the application — i.e., it was a situation of self-help by the would-be donee. See Marriage of Jafeman, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972) (Husband used community funds to make mortgage payments on, and improve, his separately owned land); Cullen v. Spremo, 142 Cal. App. 2d 255, 298 P.2d 579 (1956); Estate of Turner, 35 Cal. App. 2d 576, 96 P.2d 363 (1940) (Husband used community funds to remove liens for taxes and special assessments on his separate realty); Estate of Chandler, 112 Cal. App. 601, 297 P. 636 (1931) (Husband used community funds to pay off encumbrance on his separately-owned land); see also Provost v. Provost, 102 Cal. App. 2d 775, 780-81, 283 P. 842, 843-44 (1929).

\textsuperscript{93} The quoted passage appears in the Dunn opinion before the point about lack of jurisdiction, but the effect of the latter, in my view, is to qualify the discussion of reimbursement with the court in effect saying: "Since this is a quiet title suit, we do not have the authority to rule on a reimbursement claim, but if we did we would hold that . . . ." This seems more consistent with the overall opinion than a reconstruction in the following manner: "We think a court in a quiet title suit cannot decide reimbursement claims assertable at termination of the community, but even if we are wrong in that regard, no reimbursement was owed because . . . ." The latter view of Dunn makes the statements concerning presumption of gift alternative holding.

\textsuperscript{94} See e.g., See v. See, 64 Cal. 2d 778, 784-85, 415 P.2d 776, 780-81, 51 Cal. Rptr. 888, 892-93 (1966) (Dunn cited as court fashioned narrower rule denying reimbursement to separate estate that pays family living expenses); Estate of Armstrong, 241 Cal. App. 2d 1, 9-10, 50 Cal. Rptr. 339, 344 (1966) (Husband provided community labor to maintain Wife's separately owned business properties and urged this caused transmutation to community ownership rather than seeking a Pereira-Van Camp apportionment which court suggests was his remedy); Callnon v. Callnon, 7 Cal. App. 2d 676, 46 P.2d 988 (1935).

\textsuperscript{95} Marriage of Stoner, 14 Cal. App. 3d 858, 195 Cal. Rptr. 351 (1983) (Hus-
inter-spoolus dealings has thereby become a fixture of California marital property law.

C. An "Extra-Strength" Presumption of Gift is Created By the 1980 Lucas Case But is Then Legislatively Redesigned in 1984 Insofar as It Applies at Divorce

In 1965 the California legislature amended former California Civil Code section 164 to provide that

when a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife.96

Although the obvious intent of this provision was to empower the divorce court to award the home solely to one spouse97 as could be


In 1964 the divorce court could not disturb title to joint tenancy property because it was a class of separate property and no statute authorized division of separate property at divorce (other than quasi-community property). The family
done if the mode of co-ownership were community, in *Marriage of Lucas*, the California Supreme Court read much more into the statute. In *Lucas* the wife with her separate funds purchased a residence and had the title issued in the names of both spouses as joint tenants. Later she drew on more separate funds to pay for improvements, while the community made the payments on the purchase-money mortgage and paid real property taxes. The trial court found Wife had no intent to make any gift to the husband and that he in making mortgage and tax payments had no intent to make any gift to her. The supreme court held that Wife's "affirmative act of specifying a form of ownership in the conveyance of title" made applicable a stronger presumption than the general presumption favoring community ownership:

In the latter situation [of the general presumption], where there is no written indication of ownership interests as between the spouses, the general presumption of community property may be overcome simply by tracing the source of funds used to acquire the property to separate property. . . . It is not necessary to show that the spouses understood or intended that property traceable to separate property should remain separate.

The rule requiring an understanding or agreement comes into play when the issue is whether the presumption arising from the form of title has been overcome. . . . 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.

_Lucas' _extreme version of a presumption of gift — one that could not be rebutted by showing a lack of donative intent — was untied from the narrow statute addressing single family residences held in joint tenancy and was significantly broadened in *Marriage of_

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98. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).
99. Id. at 811, 614 P.2d at 286, 166 Cal. Rptr. at 855.
100. Id.
101. Id. at 812, 614 P.2d at 286-87, 166 Cal. Rptr. at 855.
102. Id. at 814-15, 614 P.2d at 288, 166 Cal. Rptr. at 857.
103. Id. at 815, 614 P.2d at 288-89, 166 Cal. Rptr. at 857 (citations omitted).
There Husband used what he claimed were his separate property funds to buy a commercial warehouse, taking title in the names of the spouses with no mention of joint tenancy. He asserted that he was entitled to establish separate ownership due to the nature of the consideration paid without proving a Lucas "agreement or understanding" with his wife. The Cademartori court disagreed, holding that Lucas had established a "single, logical rule." "Lucas declares that all express designations of ownership create a stronger presumption than the more general . . . presumption" of community ownership.

Does Lucas have any application when a spouse uses community funds to make a purchase-money note payment on property where title is in joint tenancy? Whether the community buys-in to a share of title, is left with a reimbursement claim, or sees its interest in the funds extinguished by transmutation is significant in creditors' rights cases, and when the marriage terminates by death of a spouse with a will leaving all of his or her community estate to someone other than the surviving spouse. By analogy to Lucas, an admission by the spouse applying the community funds to the note payment that he or she did not intend the joint tenancy title to control ownership of all interests in the property and that a community buy-in was intended would be ineffective in the creditors' rights context to create a community fractional interest the creditor could reach in addition to his debtor-spouse's half interest in joint tenancy. On the other hand, a transmutation cannot occur by the unilateral act of one spouse's dealing with community funds. While some older cases seemed to say a joint tenancy recital in a deed causes a presumption to arise that both spouses together transmuted community funds traced into the acquisition into joint tenancy, see, e.g., King v. King, 107 Cal. App. 2d 257, 259, 236 P.2d 912, 913 (1951), more recent decisions stress that evidence showed the spouses knew of the joint tenancy recital and base the finding of transmutation on this evidentiary fact rather than a presumption. See Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (1954). On the problem of whether a signed writing is required for a buy-in type transmutation, see infra text accompanying notes 210-32. However, if what is asserted against a creditor is not a transmutation of the community interest but its change in form from money to a right of reimbursement against the joint tenancy estate, consent of the spouse not applying the funds would not be required. This is simply an equal management transaction. I believe the courts will confine Lucas to gift situations; it does not apply to an alleged change from one form of 50-50 co-ownership to another form. Hence, the normal buy-in rule prevails over the special qualities of a joint tenancy recitation that underlie the Lucas holding. The community buys-in to a share of title. Certainly this must be the rule when the spouse not applying the funds and
Under the broad reasoning of *Cademartori*, subsequent cases applied the *Lucas* "agreement or understanding" rule to community funds deposited into a joint tenancy bank account and to rights under an executory contract for purchase of land reciting that title would be taken in joint tenancy unless both spouses prior to closing directed the vendor to use a different form of title, where, at the time of characterization, only separate funds of one spouse had been paid to the seller.

Under the logic of *Cademartori*, *Lucas* could also apply — so that an agreement or understanding must be shown to overcome the presumption of gift — when there is a separate property title in one spouse and the other spouse uses community funds (or his or her own separate property) to make a payment on a purchase money note. I have found no holding directly on point, but what seems to be dictum in the 1983 case, *Marriage of Stitt*, would apply *Lucas* in such a situation. There the husband participated in a transfer of title from co-ownership by both spouses into a deed naming Wife alone as grantee and containing a recital that she was unmarried, which the court understandably treated as if it were a recital of her separate ownership. The court said *Lucas* was applicable but found not consenting to their application dies first with a will leaving all his or her community estate or all his or her community interest in the property at issue to a devisee other than the surviving spouse. The unilateral act of the surviving spouse cannot deprive the decedent of his or her testamentary power over a half interest in the community funds.


110. Such would be the case if the date on the deed to one spouse alone were pre-marriage or the source of title was a decree of distribution after determination of ownership for intestate succession or the probating of a will with a devise to the spouse. A deed naming one spouse alone as grantee with a post-marriage date is not, for this purpose, a separate property deed even if separate property ownership is recited. See *Tolman v. Smith*, 85 Cal. 280, 24 P. 743 (1890).

111. 147 Cal. App. 3d 579, 195 Cal. Rptr. 172 (1983). This case involved a deed to Wife during marriage with the equivalent of a recital of separate ownership by her, so technically it was not a "separate property deed." See *supra* note 110. However, the husband participated in selecting the form of title and for that reason was treated by the court as if he had agreed to a separate property form of title. The invoking of *Lucas* may be dictum because the spouses did have the "agreement" *Lucas* requires so the court did not have to decide whether *Lucas* was the governing precedent.

112. *Id.* at 583, 195 Cal. Rptr. at 174.

113. *Id.* at 585, 195 Cal. Rptr. at 175. The pertinent part of the case reads:
that in fact the spouses had an understanding that despite the form of the second deed they were to remain coequal owners.

The logic of Cademartori would also lead to applying the Lucas rule not only at divorce but at termination of the marriage by death of a spouse and at litigation concerning characterization of property during marriage, e.g., when a creditor seeks to levy execution.

In 1983, seeking "to avoid the inequity incurred under the rule of In re Marriage of Lucas," the California Legislature enacted former Civil Code section 4800.2, which became effective in 1984. With nonsubstantive changes made when the statute was moved to the Family Code as section 2640(b) in 1993, it provides:

In the division of the community estate under this

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In November 1977, husband and wife transferred the property to wife "as an unmarried woman," triggering the rebuttable presumption that the parties intended to hold the property according to its record title. The form of the instrument was not conclusive of the status of the property.

The presumption may be rebutted by evidence of an understanding or agreement to the contrary. (In re Marriage of Lucas . . . .

Id. (citations omitted).

114. Cf. Estate of Luke, 194 Cal. App. 3d 1006, 1015, 240 Cal. Rptr. 84, 89 (1987), holding Lucas not applicable in a dispute under the ancestral property inheritance statutes with an intestate's former in-laws where one spouse died intestate after the death of the other spouse. The opinion implies that the court would consider Lucas applicable at death of the first-to-die spouse whose estate contests survivorship rights with the surviving spouse.


117. This term makes the statute applicable to quasi-community property as well as community. CAL. FAM. CODE § 63 (West 1994). Under California Family Code § 2581, there is a presumption applicable at divorce that property held under a joint tenancy or tenancy in common title is actually community. CAL. FAM. CODE § 2581 (West 1994). The presumption can be overcome only by written evidence, including a "clear statement" in the deed negating ownership in the form of community property. Such deed recitals or similar side agreements in writing affirming joint tenancy ownership must be rare. Thus, § 2640 will usually apply where the form of co-ownership is joint tenancy or tenancy in common.

The phrase "this division" in § 2640 indicates the statute applies only at divorce. (Section 2640 is in Division Seven of the Family Code, entitled "Division of Property" in a context in which it is obvious the division is made only at divorce or annulment.) Section 2640 thus is inapplicable when property is character-
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 the property 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 shall not exceed the net value of the property at the time of the division. 118

The statute defines the "contributions" that are reimbursed to "include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property." 119 Specifically excluded and nonreimbursable are "payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property." 120

The legislature thus showed its dislike of the presumption of gift that Lucas had created for down payments, improvements paid for with cash, and the portion of note payments on purchase-money and construction loans that reduces the principal indebtedness. Indeed, the distaste for a finding of gift when separate funds are used for such payments but the title is held in a form of coequal ownership by spouses is so strong that even an oral statement of gift proved by clear and convincing evidence is ineffective. 121

But section 2640 does not return California to pre-Lucas law,
under which, as will be shown, when the presumption of gift is overcome, the portion of the note payment made with separate funds that reduces principal indebtedness on the purchase-money note would buy-in to a portion of the title and share in the appreciation in value of the property. ¹²² That is, the pre- *Lucas* law treated the principal component as an investment. But, after rejecting a presumption of total gift, in making the remedy for the separate estate reimbursement *without interest*, section 2640 actually creates a form of gift: an interest free loan to the community.

When it comes to the interest component of note payments (either on the purchase-money note or notes memorializing a loan for construction or remodeling), the legislature continues the old case-law presumption of a total gift (not just an interest free loan). Depending on how section 2640 is construed, the statute may make the presumption of total gift even more potent than it was under *Lucas*. ¹²³ Moreover, if separate funds are used to make a very early note payment on the purchase-money obligation, it will be amortized as almost entirely interest so that section 2640 gives practically no relief from *Lucas*. As will be discussed in Part IV of this Article, a legislative embrace of the theory of offset for use value cannot explain why section 2640 has codified a presumption of gift for the interest component of note payments.

In sum, section 2640 is a truly strange statute, doing little to alter *Lucas* and California’s broad presumption of gift. In one narrow fact pattern — principal component paid with separate funds with

¹²² See infra text accompanying notes 172-80.

¹²³ California Family Code § 2640 mentions the interest component of loan payments only in its definitional part, subsection (a), excluding such part of the separate property payment from the “contribution” that gets reimbursed unless reimbursement is waived in writing. CAL. FAM. CODE §2640(a) (West 1994). The substantive portion of § 2640 cannot be construed as containing a flat ban on reimbursing for the interest component. The problem yet to be resolved is what is the effect of a statement by the owner of the separate funds who is drawing on them to make a note payment, made to his or her spouse, that no gift is being made of the interest component of the payment and that he or she expects to be reimbursed for it. That overcomes the presumption of gift if *Marriage of Lucas* is the source of law on what evidence will overcome the presumption. Section 2640 demands a signed writing only to create a gift of the portion of the note payment that reduces principal indebtedness. See supra text accompanying note 117-18. Conceivably a court could read § 2640 broadly, implying that the legislature must have intended a signed writing as the evidentiary basis for displacing the no-interest-on-reimbursement rule. A similar problem exists concerning an oral statement by the spouse of the party using his separate funds to make a payment on the purchase money note that the principal component of it (or all of it, for that matter) will buy-in to a share of title rather than being reimbursed.
the issue being litigated at divorce — section 2640 changes the presumed gift from a total gift to a presumed gift of an interest free loan, while making it harder than ever to overcome the presumption.\textsuperscript{124}

D. Recommendation: The Judicially Created Presumptions of Gift Should Be Abolished by the Supreme Court; Family Code Section 2640 Should Be Repealed

The review above of pre-\textit{Lucas} cases reveals that the so-called presumption of gift, prior to 1931, meant only that one spouse intended an expenditure made by him to benefit the title of the other spouse (or of the community if separate funds were expended). Prior to \textit{Dunn} in 1931, the spouse making the contribution was entitled to prove that he intended a “loan” (as stated in the oft-cited \textit{Carlson} case) — an interest-free (as reimbursement was to be as at Civil Law, apparently) and unsecured loan, since the early cases declined to imply a lien. The “logic” of \textit{Dunn} that no lien necessarily means no loan and hence no right of reimbursement is unpersuasive. It is common knowledge that, intra-family, loans are frequently made without the lending family member asking for security.\textsuperscript{125} Indeed, probably the overwhelming number of intra-family loans are unsecured.

Similarly unconvincing is the \textit{Dunn} court’s reliance on cases presuming a gift where the husband actually conveys title to the wife or directs a vendor who has received funds from him to put the title in the wife’s name. The contributor’s involvement in having the title placed in his spouse’s name provides far more basis for inferring donative intent than does his advancing money for a mortgage payment or paying for an addition to a house in the situation where title is already in the other spouse’s name. Perhaps the supreme court in 1931 was guided in part in fashioning the presumption of gift by a provision added to former Civil Code section 164 in 1889.\textsuperscript{126} It declared that if a deed or other instrument named Wife as grantee, a presumption arose that the property acquired under it was separately owned by her even though the instrument was executed during mar-

\textsuperscript{124} \textit{Marriage of Lucas} allowed an oral understanding between spouses to rebut the presumed total gift; Family Code § 2640 requires a signed writing to negate the gift of an interest-free loan.

\textsuperscript{125} \textit{See, e.g.}, Kershman v. Kershman, 192 Cal. App. 2d 18, 22, 13 Cal. Rptr. 288, 289 (1961) (Husband advanced, without taking a security interest, community funds to Wife to pay for remodeling of structure on her separately owned land; Wife later repaid Husband with her separate funds).

\textsuperscript{126} 1889 Cal. Stat. ch. 219, § 1, p. 328.
riage. This statute undoubtedly effectuated a community-to-separate transmutation in a number of situations where it applied and may have been based on a notion of a general acquiescence by the husband in a form of title that benefited his wife. The 1889 statute now applies only to pre-1975 acquisitions by married women\textsuperscript{127} and cannot be a basis for retaining the presumption of Dunn if it seems unrealistic.

Perhaps the Dunn court thought the presumption of gift it created was appropriate to give judicial assistance to married women who, as late as 1931, were discriminated against under California community property law. Although amendments to the Civil Code in 1891, 1901, and 1917, had given the wife veto power over gifts of community property and over sales or encumbrances of community household furnishings and realty,\textsuperscript{128} the wife still had no active management power over her own community earnings.\textsuperscript{129} But subsequent case law applied the presumption almost as often to benefit husbands as wives. Moreover, under present California law, the discrimination against wives is gone, so if helping out wives in need was the basis for Dunn, Dunn should be done with too.

Writing in 1966, Professor Knutsen concluded: "There does not appear to be any reason in logic or policy" for the presumption of gift. "There is no need to indulge in unrealistic presumptions of gift.\textsuperscript{130}

Whether the expenditure by one spouse was for part of the purchase

\textsuperscript{127} CAL. FAM. CODE § 803 (West 1994).

\textsuperscript{128} 1891 Cal. Stat. ch. 220, § 1, p. 425; 1901 Cal. Stat. ch. 190, § 1, p. 598 (each amending former CAL. CIV. CODE § 172); 1917 Cal. Stat. ch. 583, § 2, p. 829 (amending former CAL. CIV. CODE § 172(a)).


\textsuperscript{130} Knutsen, supra note 1, at 260. Bartke too, was critical of the California law on presumption of gift. See Bartke, supra note 2, at 405-10. For a more recent criticism of California's presumption of gift as unrealistic — because most of the time the contributing spouse has never thought about the effect of his or her actions — see Peter M. Moldave, Comment, The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds, 70 CAL. L. REV. 1263, 1278-80 (1982). See also Marriage of Hebrin, 207 Cal. App. 3d 1260, 1261, 255 Cal. Rptr. 488, 493 (1989) (presumption as applied in Lucas is "unjust doctrine").

The presumption of gift is recognized only in a minority of community property states. See, e.g., JOSEPH MCKNIGHT & WILLIAM REPPY, JR., TEXAS MARITAL PROPERTY LAW 178 (1st ed. 1983); Annotation, Use of Separate Property as Grounding Right to Reimbursement, Lien, or Charge, 54 A.L.R. 2d 429 (1957) (only two states in addition to California apply the presumption).
price, for the purchase of a purchase-money encumbrance, to pay for a physical improvement, or to pay taxes and insurance with respect to the land owned by a different marital estate, Knutsen would treat the payments as "investments."\textsuperscript{131} This is not a matter of presuming the actual state of mind of the spouse making the payment but of structuring the law so that the contributing estate is not without a remedy. I am in full agreement with Knutsen.

Since the Dunn court in 1931 created the basic presumption of gift, the California Supreme Court can now dismantle it.\textsuperscript{132} As be-

\textsuperscript{131} Knutsen, supra note 1, at 260. Accord, Bartke, supra note 2, at 419.

\textsuperscript{132} But see Marriage of Gowdy, 178 Cal. App. 3d 1228, 224 Cal. Rptr. 400 (1986). Gowdy seems to hold that the presumption of gift is no longer good law in California, at least in cases where community funds are used to pay down the purchase-money note for a separate property acquisition. Two reasons were given. First, Gowdy purported to find a "conflict" between the presumption of gift cases and Marriage of Moore, 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980) (discussed infra at text accompanying notes 179-80). Gowdy, 178 Cal. App. 3d at 1230, 224 Cal. Rptr. at 402. In Moore, we are told only that after Wife brought to the marriage a separately-owned house encumbered by a purchase money mortgage, "they" (the spouses) used community funds to make note payments. 28 Cal. 2d at 370, 168 Cal. Rptr. at 662, 618 P.2d at 209. Wife must have been the moving force for these payments, for she stipulated that the community had bought into a share of title because of them, which she would not have done had she reasonably been able to invoke the presumption of gift doctrine based on Husband's participation in making the payments. Id. at 371, 168 Cal. Rptr. at 663, 618 P.2d at 209. Inconsistently with its announcement that Moore was in conflict with the presumption of gift cases, the Gowdy court commented that Wife's stipulation was "significant." Gowdy, 178 Cal. App. 3d at 1232, 224 Cal. Rptr. at 402. Because of the wife's stipulation in Moore, Gowdy simply is wrong in concluding that Moore implicitly overruled the presumption of gift case law dating back to the California Supreme Court's 1931 Dunn decision.

The second theory in Gowdy for holding the presumption of gift no longer applicable in cases where a spouse uses community funds to make payments on the purchase-money note of encumbered property that was separately owned by the other spouse was the enactment of what is now § 2640, effective in 1984, which did eliminate the presumption where separate funds were so employed and the title was in the names of both spouses. The Gowdy court said it would be "anomalous for us to hold that a spouse . . . who permits community funds to be used to reduce an encumbrance on the other spouse's separate property has fewer rights than a spouse who permits his or her separate property to be used for the same purpose with respect to a community property." Id. at 1234, 224 Cal. Rptr. at 404.

But if § 2640 is to be followed by analogy in community-contribution cases, why would the remedy be — as Gowdy declared — a buy-in as in Moore rather than reimbursement without interest as under § 2640 in cases of separate property contributions? Either the legislature has a broad policy for both types of cases or it does not and spoke in § 2640 to a limited fact pattern. Also, where legislative intent is unclear, surely only the California Supreme Court has the jurisdictional
tween the spouses, the new rule can be fully retroactive, since it is inconceivable that the presumptive donee could have taken any steps to his or her detriment in reasonable reliance on the presumption (which was rebuttable by evidence of lack of donative intent). If the court replaces the presumption of gift with a remedy under which the contributing estate buys in to a share of title, the new rule should be prospective only in cases where third parties have purchased what appeared to be property that was 100% separately owned by one spouse (i.e., because community contributions to the purchase price or to improvements had not bought in to a share of title).

Not only should the California Supreme Court overrule Dunn, but to the extent the Lucas version of presumption of gift survives enactment of what is now Family Code section 2640, the court should overrule it as well, or at least hold that, contrary to what Cademartori and its progeny thought, Lucas was tied to the narrow statute concerning ownership of a single family residence in joint tenancy. Such a latter holding would scuttle Lucas as much as its overruling, since the narrow statute has been replaced with one that presumes at divorce that all types of assets held in any form of husband-wife co-ownership are community property.

power to overrule the case-law rule it created in Dunn back in 1931.

133. I.e., Lucas applies at a time other than divorce, and it possibly applies at divorce when the title is not in the names of both husband and wife but in one spouse’s name alone in what appears to be a “separate property deed.” See supra text accompanying note 111.

134. CAL. FAM. CODE § 2581 (West 1994). Since Family Code § 2650 (dating from 1985 when enacted as former California Civil Code § 4800.4) authorizes the divorce court to divide joint tenancy and tenancy in common interests, the sole function of § 2581 is to make § 2640 (the reimbursement statute that abrogated Lucas in part) applicable to separate property contributions to joint tenancy and tenancy in common properties. There is reason for the legislature to revisit the question of dividing separate property at divorce in the case of an unequal tenancy in common. If the deed recites that Husband is 80% owner and Wife 20% owner, can 40% be viewed as the equivalent of community property so that the entire asset can be awarded to Husband in order to terminate the shared ownership? From a policy standpoint, ending the co-ownership by warring parties who cannot agree on a property settlement and turn to the courts to work things out is desirable. See Marriage of Knickerbocker, 43 Cal. App. 3d 1039, 118 Cal. Rptr. 232 (1974). Under present law a court could hold that the recital of 80-20 ownership is not a “clear statement” negating community ownership of 40%, thus making the basic presumption of community ownership under § 2581 applicable to a 4/10 interest. Existing § 2650, which simply announces that tenancy in common property is to be divided like community property, may be directed at tenancies in common owned 50-50 by the spouses, since nothing in its history suggests it was intended to introduce a concept of unequal division (which would occur if 80-20 property were treated as 50-50 property). A courageous court could construe § 2650 to au-
The likely effect of overruling Lucas on section 2640 in its application to separate property contributions to co-owned properties is to make the presumption of gift applied to the interest component rebuttable by any evidence of lack of donative intent.\textsuperscript{135}

Obviously, almost all of the arguments for overruling Dunn and Lucas can be made for repealing California Family Code section 2640. The gift it presumes — an interest-free loan — is as illogical as the broader presumption of gift under Dunn. The separate property owner seems no more likely to be thinking of an interest-free loan when he or she makes a note payment or down payment or pays for an improvement than he is of a total gift of the funds. A remedy not based at all on a theory of gift would treat the separate estate as buying in to a share of the title or as deserving of a claim for reimbursement with legal interest.

I urge repeal of California Family Code section 2640, but if there are reasons not to do so, surely those reasons would call for extending the presumption of a gift of an interest free loan to cases litigated during marriage and at termination of the community by death of spouse in which property has to be characterized because payments on a purchase-money note have been made by a marital estate not owning the property. I cannot imagine any reason for not having one rule to determine the rights of the separate estate and the community to apply at each of the three times of litigation: divorce, probate, and during-marriage.\textsuperscript{136}

\section*{IV. CALIFORNIA'S NON-ACCEPTANCE OF INCENTION OF TITLE IN FAVOR OF A BUY-IN REMEDY — EXCEPT IN THE CASE OF LEASEHOLDS}

\subsection*{A. Inception of Title Appears in Early Dictum}

As mentioned above, a basic principle of Spanish-Mexican Civil Law was the inception of title doctrine under which a person's mar-

\textsuperscript{135} See supra note 123.

\textsuperscript{136} Concerning the benefits of a uniform rule for similar legal situations under community property regimes see Malmquist v. Malmquist, 106 Nev. 231, 240 n.1, 792 P.2d 372, 378 n.1 (1990) (opting for a scheme in which the separate property contributions to payments on a purchase money note that acquired a community title should as freely buy in to a share of title as do community funds used for note payments where title is separately in one spouse); and McCurdy v. McCurdy, 372 S.W.2d 381 (Tex. Civ. App. — Waco 1963), writ ref'd, (urging consistent use either of inception of title plus reimbursement approach or pro-rata sharing of title approach in similar situations).
ital status when he or she began initiation of an onerous (i.e. non-donative) acquisition permanently controlled its classification as separate or community, precluding any mixed form of ownership based on subsequent events. In California the 1860 case of *Noe v. Card*[^137] laid out the inception of title doctrine in extensive dictum.

It transpired, however, that in California, unlike the situation in most community property states,[^138] the inception of title doctrine obtained almost no application. Although referred to in dictum on occasion after *Noe*, the doctrine has actually been clearly applied[^139] only in one maverick case. Perhaps the first reported opportunity for use of the inception of title theory was the 1886 case, *Harris v. Harris.*[^140] There, Wife took possession of land before marriage under a federal land grant program. After marriage she obtained a patented title, based on occupancy by her both before and after marriage plus payment of fees with funds that were presumptively community. The court held that the land was entirely Wife's separate property. One theory was that her husband had transmuted from community to Wife's separate property any community interest that might have existed (e.g., by tracing to the funds used for the payment to the government). The alternative holding was that the land was separately owned by Wife because that was the intent of the grantor, the federal government. No community property authorities were cited for this; rather the alternative holding seems more drawn from the court's construction of the federal land grant statute than from any concept of inception of title.

A similar case was *Morgan v. Lones,*[^141] decided in 1889. Before marriage Wife had obtained a “possessor title” to public lands to which the United States held legal title.[^142] The federal government later conveyed the land at issue to the city of Nevada City in trust for the “benefit of the occupants thereof.”[^143] Thereafter, Husband applied to the city for a deed.[^144] Husband paid fees required by the city using his separate funds, but the deed named Wife as sole grantee.

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[^137]: See supra text accompanying notes 43-50.
[^139]: Ives v. Connacher, 162 Cal. 174, 121 P. 394 (1912), discussed supra at text accompanying note 78. *Ives* seemed to be stating the inception of title rule, but the party who could claim reimbursement — an element of the doctrine — had not done so.
[^140]: 71 Cal. 314, 12 P. 274 (1886).
[^141]: 80 Cal. 317, 22 P. 253 (1889).
[^142]: Id. at 318, 22 P. at 253.
[^143]: Id.
[^144]: Id.
ee. The court's holding that the husband had no interest relied on the language of the federal homestead statute and the court's construction of the trust created in the grant to the city. No community property authorities were cited, although in Morgan, as in Harris, the inception of title doctrine would have supported the court's judgment.

The 1901 adverse possession case of Siddall v. Haight has been cited — erroneously — by me and some other legal writers as applying the inception of title doctrine. Siddall was a malpractice case against an attorney based on his failing to have levied execution against certain land to obtain payment on a judgment against Husband. The defense was Husband had no interest in the land so no reason to levy on it existed; Wife was sole owner. A close reading of the decision reveals the court held Wife sole owner based on a theory of gift and not inception of title. The opinion expressly observes there was no evidence that Wife took possession of the land, owned by her sister, before marriage. Rather there was during marriage "an executed parol gift to Mrs. Thompson [wife] by her sister, and so far as anything appears, the adverse possession under which Mrs. Thompson was decreed title was the possession thus given . . . ."

No case involving inception of title was cited by the Siddall court, nor could the doctrine have aided Wife's claim. At Civil Law it was marital status at the time of the initiation of an acquisition that

145. Id.
146. Id. at 319, 22 P. at 253.
147. 132 Cal. 320, 64 P. 410 (1901).
149. See DeFuniak & Vaughn, supra note 21, § 65, at 139; George McKay, Community Property § 597, at 405 (2d ed. 1925) ("The doctrine that if the initial right is separate, all into which that right develops is separate, finds confirmation in Siddall v. Haight . . ."); Anthony J. Pagano, The Characterization and Division of Community Property § 20.03[2], at 20-59 to 20-60 (Grace Ganz Blumberg ed., rev. ed. 1988) ("California, generally thought to be an apportionment state, has used inception-of-title in adverse possession cases" — citing Siddall), in 1 Valuation and Distribution of Marital Property (Matthew-Bender, 1989 rev. ed.); 5A Am. Jur. 2d Community Property § 26, at 650 and n.87 (1976) (semble).
150. Siddall, 132 Cal. at 320-21, 64 P. at 410.
151. Id. at 321, 64 P. at 411.
152. Id. at 323, 64 P. at 411.
153. Id. at 322, 64 P. at 411.
154. Id. at 323, 64 P. at 411. This makes no sense. Wife's possession under license could only become adverse by some act during her possession taken under license that was hostile to the licensor and not consistent with the notion of a gift.
determined whether there was a community or separate inception of title.\textsuperscript{155} In 
Siddall that would have been the moment when Wife's possession changed from licensed to adverse possession, at which time she was married. At Civil Law if a married person used separate funds (or other form of separate property) to initiate an acquisition, as by making the initial payment on a contract for deed purchase, this created a community inception of title.\textsuperscript{156} Siddall does not seem to hold that Wife there received a gift from her sister of some limited interest in land and converted it into fee simple absolute by adversely possessing the land, but such a theory would apply the tracing principle (Wife expanded her rights that began during marriage by gift) rather than use the inception of title doctrine.

B. Pro-rata Sharing Approach Adopted in 1926 Contract-for-Deed Case

The first reported California case presenting facts that allowed the court to squarely apply the inception of title doctrine was 
Vieux v. Vieux,\textsuperscript{157} decided in 1926. In Vieux, the would-be husband made, before marriage, an initial $280 payment under a contract-for-deed for acquisition of land.\textsuperscript{158} After marriage the spouses used $553.68 of community funds to make installment payments.\textsuperscript{159} They then obtained $2200 by making an oil lease of the property and used those funds to pay off the remaining balance on the contract.\textsuperscript{160} In litigation between the spouses over how this land was owned, the trial court must have applied inception of title, for its holding was that there never had been a community interest in the land.

Reversing, the court of appeal seemed to initially hold the parcel

\textsuperscript{155} See Marriage of Joaquin, 193 Cal. App. 3d 1529, 239 Cal. Rptr. 175 (1987); Giacomazzi v. Rowe, 109 Cal. App. 2d 498, 240 P.2d 1020 (1952) (dictum); Colden v. Alexander, 141 Tex. 134, 147, 171 S.W.2d 328, 334 (1943); DeFUNIAK & VAUGHN, supra note 21, § 65, and accompanying text.

\textsuperscript{156} See supra note 30 and accompanying text; Huie, supra note 25, 30 Tex. L. REV. at 158, 26 TUL. L. REV. at 427-28. See also LA. CIV. CODE ANN. art. 2338 (West 1980); Curtis v. Curtis, 403 So. 2d 56 (La. 1981). Huie notes that the rule clearly applied where the purchase was initiated (or made lump sum, for that matter) during marriage with cash that was brought to the marriage or acquired during marriage by succession or gift. When a parcel of separately owned land was traded for another parcel, separate property ownership was maintained by tracing to the source. See supra note 31 and accompanying text.

\textsuperscript{157} 80 Cal. App. 222, 251 P. 640 (1926).

\textsuperscript{158} Id. at 224, 251 P. at 641.

\textsuperscript{159} Id.

\textsuperscript{160} Id. Apparently title was issued in Husband's name alone; I infer this from the court's statement that he deeded the land to his parents by way of gift.
was entirely community due to an "understanding" between the spouses (transmutation), but ultimately concluded there was a coten-
ancy between the community and Husband's separate estate based on
their contributions to contract payments. The community share
was 553.68/833.86. The Vieux court thought inception of title was
inconsistent with the basic statutory rule that all property acquired
during marriage that was not separate was community as that rule
would apply to the 553/833 share that had not been paid for prior to
marriage and thus not in the court's view yet "acquired." This
probably was error. What was then section 164 of the Civil Code,
stating that all property "acquired after marriage" by a spouse that
was not separate was community, enacted in 1871, used the same
terminology of the first legislative enactments of 1850, following a
constitutional convention that adopted the Spanish-Mexican law of
marital property (including, necessarily, what "acquired" meant). In
the view of Civil Law a pre-marriage inception of title equated to
a pre-marriage acquisition.

161. Id. at 229, 251 P. at 643.
162. Id. The $2200 obtained from leasing the land would be owned in the
same fraction as the land was owned at the time of the lease and so was disre-
garded by the court in formulating the fractional ownership. Vieux seems to have
permitted that portion of the contract-for-deed payments that would have been
treated for income tax purposes as interest income to the seller (with a probable
interest deduction for the buyer) to buy-in to title. To that extent it is overruled
by Marriage of Moore, 28 Cal. 3d 306, 371-73, 168 Cal. Rptr. 662, 663-64, 618
P.2d 208, 209-10 (1980), disallowing a buy-in for the interest component in the
mortgage-payment (as opposed to contract-for-deed) context. See infra text accom-
panying note 190, for a discussion of the Moore case.

163. It would seem that equitable conversion had occurred before marriage for
the entire title or for no portion of it. That is, all portions of it were either ac-
quired because equitable conversion had occurred or not acquired either because
there had been no equitable conversion — perhaps because vendor had not perfect-
ed his title before the buyer's marriage — or because the court wanted a legal
title to find "acquisition." On California law concerning when execution of a con-
tract for sale of land causes an equitable conversion in some situations, see gener-

164. The early statute using the concept of "acquired after marriage" was
enacted by 1849-50 Cal. Stat. ch. 103, pp. 254-55. For discussion of how the Cali-
fnia constitutional convention knowingly adopted Mexican and Civil Law for the
marital property provision in the state's initial constitution, see Browne, Report
of the Debates in the Convention of California on the Formation of the
State Constitution in September and October 1849 257-69 (1850); Prager,
supra note 57, 8-24.
C. Pro-rata Sharing Rule Extended to Mortgage-Finance Acquisitions

The Vieux court’s rejection of inception of title in favor of pro rata sharing could have been confined to contract-for-deed acquisitions and not extended to the more common situation of acquisition via mortgage financing. In the latter, the unmarried person has received a deed giving him full legal title, although most likely subject to an encumbrance to secure his payment of funds borrowed from a lending institution to pay the vendor (or in the case of owner-financing his note to the vendor). When the grantee marries before paying off that secured debt, he has not acquired before marriage an unencumbered title, but certainly he has acquired considerably more in the eyes of the law than the contract-for-deed buyer in Vieux.

In what appears to be the first post-Vieux reported case involving acquisition by mortgage financing before marriage with the debt finally discharged after marriage, the court ducked the issue of Vieux’s applicability. In Wedemeyer v. Elmer, Wife had brought to marriage land owned by her subject to a deed of trust securing the unpaid portion of her purchase price. After marriage she completed the payments by drawing on a bank account in her name containing community earnings plus rentals from the subject property. Those rentals would be 100% her separate property so long as the community acquired no interest in the property and provided no substantial labor in the management of the rental unit. The trial court held that Wife’s use of funds drawn from the commingled account transmuted the entire parcel to community property. Reversing because of this obvious error, the court of appeal suggested that the proper solution to the problem was to presume that separate property rentals were taken from the account to make note payments on the purchase price (they were sufficient to cover all such payments, apparently). Thus, Wedemeyer turned out not to be a

166. Id. at 337, 91 P.2d at 642.
167. Id. at 337-38, 91 P.2d at 642-43.
168. See generally, Beam v. Bank of America, 6 Cal. 3d 12, 98 Cal. Rptr. 137, 490 P.2d 257 (1971) (income is part community, part separate when community labor is applied to make separate capital productive). See also supra note 59.
169. Id. at 337, 91 P.2d at 642.
170. Id. at 338, 91 P.2d at 643.
171. Contra, Marriage of Higinbotham, 203 Cal. App. 2d 322, 249 Cal. Rptr. 798 (1968) (holding the law does not presume separate rentals are withdrawn from an account containing community monies as well to make payments on the pur-
“mixed consideration” case.

The pro-rata sharing approach of Vieux was extended in dictum to post-marriage payments made on a purchase-money note after title had been granted to one of the spouses before his marriage in Giacomazzi v. Rowe172 in 1952. There the husband was grantee, paying $325 and receiving title subject to a deed of trust before his marriage.173 After marriage he paid off the secured debt with community funds.174 The trial court held the property was entirely separate under inception of title.175 “[T]he character of the property is to be determined by its status as of the time of its acquisition,”176 and that time was pre-marriage, the trial court reasoned. The court of appeal conceded that inception of title was the approach taken in other states to such a mixed-funds problem but declared that Vieux’s pro-rata sharing solution to the problem was “fairer.”177 This became dictum when the court went on to find Wife had transmuted whatever interest in community she acquired in the land to Husband’s separate property.

The Giacomazzi dictum became so frequently employed in reported cases,178 however, that in a leading 1980 case, Marriage of Moore,179 involving an acquisition by mortgage-financing the spouses stipulated that although the down payment was made with Wife’s separate funds, subsequent use of community funds to make note payments caused the community to obtain a share of ownership. The only dispute in Moore was how to calculate the fractional shares.

chase money note executed to acquire the rented-out property separately owned by Husband). In Higinbotham, however, the wife managed the family money and the husband apparently was not in the position to offer self-serving testimony that he intended to use the separate funds in the commingled account when he made note payments. Cf. Marriage of Mix, 14 Cal. 3d 604, 122 Cal. Rptr. 79, 536 P.2d 479 (1975).

173. Id. at 499, 240 P.2d at 1021.
174. Id.
175. Id. at 500, 240 P.2d at 1021.
176. Id.
177. Id. at 502, 240 P.2d at 1022.
178. See, e.g., Estate of Neilson, 57 Cal. 2d 744, 744-45, 22 Cal. Rptr. 1, 7, 371 P.2d 745, 751 (1962); Bare v. Bare, 256 Cal. App. 2d 684, 64 Cal. Rptr. 335 (1969); Forbes v. Forbes, 118 Cal. App. 2d 324, 325, 257 P.2d 721, 722 (1953). In these cases it is not sometimes clear whether the mode of acquisition was contract-for-deed or mortgage financing. What is significant is the courts’ apparent acceptance of the notion that after Giacomazzi it makes no difference.

Since 1980 the pro rata sharing approach laid out in Moore has been applied in so many cases where no mention is made that a party who might have asserted inception of title had stipulated to use of a buy-in-to-title approach that the buy-in rule must be considered settled law in California cases involving acquisition by mortgage-financing.\textsuperscript{180}

D. Inception of Title Re-Surfaces in a Leasehold Case

By 1987, inception of title had been clearly rejected in California for contract-for-deed and mortgage-financing cases and had never been applied in any other situation involving an acquisition of property — as opposed to physical improvements cases — such as the obtaining of title by adverse possession or under a homestead statute requiring occupation over time of the land. Nevertheless, the doctrine became the basis for a court of appeal's holding that year in an "acquisition" case. In Marriage of Joaquin\textsuperscript{181} before marriage Husband entered into a five-year lease with an option to renew.\textsuperscript{182} After marrying he exercised the option.\textsuperscript{183} Divorce soon followed, at which Wife contended the then existing leasehold was a community asset.\textsuperscript{184} Applying the inception of title doctrine, the court related the renewed lease back to the granting of the right to renew, and thus the leasehold was Husband’s separate property.\textsuperscript{185} Alternatively, the court viewed the renewal period as a mere extension of the original lease.\textsuperscript{186} The Joaquin court quoted at length the Giacomazzi dictum concerning how the inception of title doctrine functions but failed to note that Giacomazzi had said that the pro-rata sharing approach was fairer.

Pro-rata sharing certainly could have been applied in Joaquin.

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\textsuperscript{182} Id. at 1532, 239 Cal. Rptr. at 176.

\textsuperscript{183} Id.

\textsuperscript{184} Id. If the rental owed under the renewed lease was below market value the leasehold would have a value to be charged to the husband as part of his half of the community assets when it was assigned to him by the court. (The California rule that a landlord cannot unreasonably withhold consent to an assignment or sublease that the tenant wishes to make, Kendall v. Pestana, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985), adds to the value of the leasehold estate when the rent provided for in the lease agreement falls below market value.).

\textsuperscript{185} 193 Cal. App. 3d at 1533, 239 Cal. Rptr. at 177.

\textsuperscript{186} Id. at 1534, 239 Cal. Rptr. at 177.
Surely for purposes of the community property presumption, the leasehold at issue was acquired during marriage and thus presumptively 100% community property. Husband could establish a separate property fractional interest in it by proving the amount of rentals paid with separate funds of his since the option to renew was acquired (which would be compared to rentals paid with community funds to create the cotenancy fractions). If the earliest rent payments, for which Husband's separate property was used, had not been made, the landlord would have terminated the leasehold and with it the right to renew. Thus, it seems proper to view the rental payments during the first five year term as in part paying for the right to later obtain a renewal term of five-years. Once the option to renew is exercised, rent payments during the new five-year term pay not only for a period of occupance but to assure that the leasehold is not terminated and that future benefits will be enjoyed.

Thus, the result under pro-rata sharing analysis rather than inception of title is exactly the same whether the leasing arrangement is for two five-year terms (the second being optional) or one ten-year term which has time remaining on it when the community is terminated. Fractional shares of ownership of the leasehold by the community and separate estates are calculated by comparing the amount of rental each estate has paid by the time the issue is litigated. The fractional shares change month to month depending on the percentage of prior rental payments paid with separate and community funds.

Drawing an analogy in the leasehold context to the approach used by courts in cases of term life insurance — an area where most cases seem to use the pro rata sharing approach — seems sound. Those cases compare the amount of community and separate funds

187. See William A. Reppy Jr., Community Property in California 61-65 (2d ed. 1988) (most California cases at least say in dictum that the general presumption in favor of the community arises only after proof of a post-marriage acquisition date). In any event, the leasehold at issue was undeniably possessed by Husband during marriage and was presumptively community on that basis under cases such as Lynam v. Vorwerk, 13 Cal. App. 507, 110 P. 355 (1910).

188. Where it is not applied, there is no reverting to inception of title. Rather the court views the most recent period of term life insurance coverage as a distinct contract paid for only with the funds used for the premium for that period, with prior premiums paid thus being ignored. Marriage of Spengler, 5 Cal. App. 4th 288, 6 Cal. Rptr. 2d 764 (1992) (limited to employees' group life insurance); Estate of Logan, 191 Cal. App. 3d 319, 236 Cal. Rptr. 368 (1987) (conceding that the most recent period of coverage cannot be severed from prior terms and the premiums paid for them when, due to physical condition, the insured was uninsurable at the beginning of the term at issue).
used to pay all the premiums during the course of coverage in assigning fractional ownership interests of the policy during the term of coverage in effect when the court must make the classification.189

I see no reason for rejecting inception of title in every context in which it could be applied except acquisition of a leasehold estate. Whatever policy reasons caused the courts to reject inception of title in favor of pro rata sharing in contract-for-deed and mortgage-financing cases were pertinent in Joaquin. Consistency in California law will be obtained by the overruling of Marriage of Joaquin.

E. Calculating the Fractional Shares Under Buy-in to Title
Methodology

1. The Interest Component of Note Payments Does Not Buy-in to a Share of Title

To evaluate the correctness of the Giacomazzi court's observation that buy-in to title is "fairer" than a remedy based on reimbursement, a close examination is appropriate of just how the buy-in works when applied to various fact situations (and then to compare how the reimbursement approach can be modified to achieve some of the same features of the buy-in approach).

Marriage of Moore190 greatly restricted the extent to which the estate making a payment on a purchase-money note buys-in to a share of the title previously vested in a different marital estate. The court there held that the interest component of such a payment is disregarded in calculating the fractional shares of the two estates in the property. Under Moore, where one spouse at the time of marriage separately owns land subject to an encumbrance securing a purchase-money obligation, each $1 of community funds paid post-marriage that reduces the amount of the principal indebtedness replaces $1 worth of ownership of the separate estate based on acquisition by credit.

Moore can be read as reasoning that the payment that reduces the principal indebtedness actually does acquire an interest in land at the time of payment by increasing the equity in the property. (Note that under this theory the acquisition is both from the original


190. 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980).
purchasing estate that loses a fraction of ownership and from the lender who reduces his or her security interest.) This logic could not apply in the unusual situation where the purchase-money note is not secured at all, for in that situation the equity is 100% from the date title is granted. Nevertheless, at least one decision holds that payments on the unsecured loan buy in to a share of title.\textsuperscript{191} The decision is sound, since the reason for the buy-in rule — as opposed to use of the Civil Law's reimbursement remedy — is to give effect to the likely intention of the parties involved (if they have any intent at all) that the note-payment transaction is an investment in the growth of the property being paid for.

Not so rare may be the situation where, for business reasons, a buyer grants the party making the purchase-money loan a security interest in real estate that the buyer already owns free and clear rather than in the parcel being bought on credit. Example: future Husband buys a vacant lot for $120,000, making a $20,000 down payment with his separate funds and signing a promissory note in favor of his vendor for $100,000. The buyer plans to erect an office building on the lot and has learned that he can get the best terms for a construction loan if he can provide to the lender in that transaction a first mortgage on the parcel where the building will be erected. The vendor will not agree to subordinate his purchase-money security interest to the construction loan, so the buyer grants to the vendor a security interest in Blackacre, which Husband-to-be owns free and clear and which is worth more than $120,000. The buyer now marries and uses community funds to pay down the purchase-money note, reducing the scope of the encumbrance on Blackacre and increasing his equity in Blackacre.

Although the note payments made with community funds do not increase any equity in the parcel bought on credit, the basic theory of pro-rata sharing of ownership that underlies Moore requires the courts to recognize that each $1 of community funds that reduces the principal indebtedness under the purchase-money note buys-in to a share of title in the vacant lot where the office building is to be erected.

\textsuperscript{191} Estate of Ball, 92 Cal. App. 2d 93, 206 P.2d 1111 (1949) (purchase of corporate stock with proceeds of unsecured loan).
2. Pre-marriage Appreciation is Owned Solely by the Separate Estate but not as a Fractional Share of Title

_Marriage of Marsden_,\(^{192}\) decided two years after _Moore_, substantially modified _Moore_ so that the present buy-in rule is often referred to as the _Moore-Marsden_ rule.\(^{193}\) _Marsden_ addresses the situation where the future spouse buys property on credit before marriage and holds it for a pre-marriage period during which it appreciates in value. The owner then marries and begins using community funds to make payments on the purchase-money note. _Marsden_ holds that the value of pre-marriage appreciation\(^{194}\) is assigned to the separate property component of the separate-community cotenancy. Thus, if the purchase price is $100,000 and the value at time of marriage is $150,000, the separate estate gets a "_Marsden_ credit" of $50,000.\(^{195}\) As will be shown, this credit is somewhat like a rein-


\(^{194}\) The _Marsden_ line of cases has assumed that as soon as the spouse who acquired ownership while single does marry, community funds will be drawn on to make payments on a purchase-money note. Thus, the cases speak of allocating the value of pre-marriage appreciation to the separate estate. However, by the logic of _Marsden_, if the acquiring spouse continues after marrying to draw on separate funds to make such payments for a period of time before shifting to community funds for that purpose, he or she would be entitled to the value of appreciation up to the time of the shift in the character of funds drawn on. Once the shift occurs, future shifts back and forth — as now separate, now community funds are used to make note payments — apparently are ignored in applying _Marsden_, although I am aware of no square holding to that effect. I.e., a _Marsden_ allocation is perhaps made only once.

_Marsden_ apparently has yet to be applied in a reported case where the community buys land on credit and makes payments on the purchase-money note for a while and then a "shift" occurs and one spouse begins using separate funds (probably because there has been a separation and earnings of each spouse are now under California Family Code § 771 his or her separate property). I see no reason why the community should not under analogy to _Marsden_ get credit for all of the appreciation occurring before the "shift" to separate property payments. Subsequent appreciation would be apportioned.

\(^{195}\) The _Marsden_ court said it would "credit the separate property interest with this prenuptial appreciation." 130 Cal. App. 3d at 438, 181 Cal. Rptr. at 916. The language is not as clear as could be but to me suggests the court thought it was increasing the separate property interest in scope rather than, as later held in the _Frick_ case, creating a mere right of reimbursement for the "credit." See _infra_ text accompanying note 196, for a discussion of _Frick_.
bursement claim to be asserted upon sale of the property or termination of the community.

No reported case that I can find has dealt with what can be called reverse-*Marsden*: Between the time of purchase on credit and marriage the property decreases in value. After marriage this unrecognized loss is offset by substantial appreciation. *Marsden* was based on the theory that appreciation there was acquired before marriage and thus meets the definition of separate property in California Family Code section 770. There is no statute defining anti-property, the unrecognized loss in reverse-*Marsden* situations. Nevertheless, the decrease should be taken into account by allocating between the separate and community estates (under rules stated below) post-marriage increase in value compared not to the purchase price but the value at the time of marriage (or more accurately when the community begins making note payments).

According to *Marriage of Frick*, 196 decided in 1986, under the *Marsden* fact pattern — purchase made before marriage by the husband-to-be — pre-marriage appreciation is ignored in apportioning post-marriage appreciation. This can be illustrated by a hypothetical. The purchase price is $100,000; the value at marriage $150,000, the value at divorce $250,000, and the amount of community funds employed post-marriage to reduce mortgage indebtedness $25,000 (i.e., the land was 75% paid for at the time of marriage). *Frick* holds the $100,000 post-marriage appreciation is 25% community by viewing only $75,000 as the contribution of the husband's separate estate. The argument rejected by *Frick* was that under *Marsden* the separate estate was to be viewed as contributing $125,000 by including the pre-marriage appreciation, so that the community's fractional share of post-marriage appreciation is 25/150, or 1/6 rather than 25/100, or 1/4.

Because of *Marriage of Frick*, one cannot, at the time of marriage, describe in terms of a fraction or percentage the minimum interest in the land that the husband's separate estate will own if the community makes all the rest of the note payments, thereby taking over the amount of ownership then held by the separate estate based on its credit (loan proceeds not repaid). If the separate estate had made a 25% down payment and paid monthly note payments sufficient to reduce by two thirds a $75,000 loan obligation, we can declare that the separate estate will always own at least 75% of the property. However — if there was pre-marriage appreciation — we cannot say that the community has the opportunity to acquire, by

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making the rest of the note payments, a full 25%, because the separate estate has a claim in or against the land under Marsden, which due to Frick cannot be treated as a fractional share of the ownership interest. (If it were so treated it would necessarily be part of the separate estate to which a portion of appreciation in value would be allocated.) After Frick the separate estate's Marsden claim is for a fixed sum. Apparently under Frick even after the note is paid off, future appreciation will be allocated 75-25 in the hypothetical fact situation. Thus the Marsden claim seems like a floating claim of ownership that will be recognized as an interest in the land only at the end of the marriage or earlier if the land is sold and there is on hand cash to pay off the Marsden claim. Contrary to the idea of buy-in to title, it is in some respects like a reimbursement claim. Perhaps future courts will try to give it is as much of a proprietary flavor as possible by holding it is secured by an implied-in-law lien on the community's interest in the land.\textsuperscript{197}

If the husband quitclaims his interest in the land to his children as a gift, does the Marsden claim constitute part of what is granted? If a creditor of Husband who can reach his separate property but not community property levies execution on the land does he get the husband's rights under Marsden? Should the creditor view the Marsden rights as incorporeal so that a garnishment action is necessary to reach them?\textsuperscript{198} Perhaps these problems are what Professor

\textsuperscript{197} In California, unlike most community property states, reimbursement claims based on physical improvements to land are not viewed as secured prior to litigation at the termination of the marriage by a lien arising by operation of law. See Bartke, \textit{supra} note 2; Dunn v. Mullan, 211 Cal. 583, 589, 396 P. 604, 606 (1931). But the Marsden claim, since it relates to acquisition of title, could be distinguished from reimbursement rights in physical improvement cases and a lien recognized.

If the wife declared bankruptcy, is the husband's Marsden claim a debt for which community funds equally managed by Wife are liable so that he must assert his Marsden claim in bankruptcy or have it "discharged?" The bankruptcy court may be selling the community interest in the land if it is not exempt, and Husband's Marsden right must in same way qualify the community interest. By some process he had better bring his Marsden claim to the attention of the bankruptcy court.

Note that the husband's right under Marsden may be personalty rather than realty when the issue arises whether he can orally assign it or whether the Statute of Frauds for real property transactions applies. If the community has a Marsden claim for appreciation, see \textit{supra} note 194, and under Frick it is a chose in action and not real property, one spouse alone can transfer it even though the community's titled interest could be alienated only by both spouses joining in an instrument, by virtue of § 1102(a) of the California Family Code.

\textsuperscript{198} I am aware of no California case where a creditor has successfully seized
Brandt had in mind in her 1994 article when she says California courts “have not always been clear about the nature of the interest so acquired” once inception of title is rejected and shared ownership results.199

Frick not only causes these many problems but is of dubious logic. Under California Family Code section 770(a)(1),200 all that owned by the husband in Frick before his marriage was his separate “property.” The day before he married he could have sold the land deeded to him, subject to the purchase-money encumbrance, and have realized the pre-marriage appreciation in value in the form of cash, which he could have invested in interest-bearing investments or investments held for appreciation and ultimate capital gains. Frick strips him of the proprietary right to realize and invest the amount of appreciation; Frick freezes its value and does not treat it like the rest of the separate property brought to the marriage. The statement in Frick that it is “capital contributions” by the separate and community estates “to the purchase price . . . which best reflects the parties’ respective interests in the property at the time the [post-marriage] appreciation at issue is accruing”201 is dubious. Where the purchase price was $100,000 but value at marriage $150,000, it seems clear that subsequent appreciation will be greater because of the additional $50,000 in value. It is a $150,000 parcel that appreciates after marriage.

Thus, there is a sound basis for overruling Frick, and to do so would allow the law to fix the minimum interest of the separate

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199. Elizabeth Barker Brandt, The Treatment of Community Contributions to Mortgage Payments (Including Principal and Interest) on Separate Property, 30 IDAHO L. REV. 697, 699 (1994) (stating California law is especially unclear when the issue arises before termination of marriage).


201. 181 Cal. App. 3d at 1009, 226 Cal. Rptr. at 771.
estate as a fraction of the whole property, an interest the separate property owner could readily sell or devise and which his creditors would reach when levying execution on the land. However, a contrary holding in Frick would add to the complexities of allocating appreciation. If the separate estate at the time of marriage is entitled to look to the value of its interest then in claiming a share of subsequent appreciation — rather than what it had paid on the purchase price — the community arguably can rely on the value of its fractional share of ownership, including appreciation, in asserting a right to share in subsequent appreciation when the spouses separate and one of them begins using his or her post-separation earnings to make continuing payments on the purchase money note. Indeed, every time there is a shift in the nature of funds used to make payments, an occasion for valuing the fractional shares of the various marital estates — including a share of net appreciation as of that time — would exist so that these values could be utilized in allocating subsequent appreciation. If during one such period of payment a net depreciation in value was suffered, that amount would apparently have to be allocated as well, reducing appropriately the value of the fractional shares as of the termination of the period of time of use of separate or community funds for making note payments with a shift to use of funds from the other estate. The law would obviously like to avoid these complexities, but Marsden’s recognition of a separate property right in pre-marriage appreciation seems to compel the overruling of Frick.

Analysis of other issues also suggests that Frick is a dubious precedent. Yet to be decided is whether Marsden’s apparent recognition of pre-marriage appreciation as a property right of the separate estate or Frick’s disregard of it is the proper approach when the issue is apportioning rents. Thus, suppose $1000 worth of net rentals are collected from the property when the ownership status is as follows: purchase price, $100,000; pre-marriage appreciation, $50,000; down payment and principal debt reduction by Husband’s separate estate, $25,000; reduction of principal debt by community, $25,000; remaining principal balance $50,000 (viewed under Moore as acquired with separate credit); present value of property, $250,000. If, for the purpose of allocating the rentals between the community and separate estates the value of the capital is the $100,000 purchase price — because Frick bars taking into account appreciation in value in allocating any form of post-marriage gain — the community share of rents is 25,000/100,000, or $250. If, under Marsden, one views the separate estate as having contributed pre-marriage appreciation to the capital, the community share of rents is 25,000/150,000, or $166.67.

It seems illogical to apportion the rentals by assigning pre-mar-
riage appreciation to the separate estate but not an appropriate portion of post-marriage appreciation to the community estate. Thus the choice seems not between Frick and Marsden, but between Frick and an expanded Marsden that would treat the rental property for purposes of allocating rents as having its actual present worth of $250,000. The community interest would be $25,000 paid by the community to reduce mortgage indebtedness and $25,000 worth of post-marriage appreciation (determined by looking to fractional shares of the purchase price). That is 50,000/250,000, or 1/5 of the rentals ($200). The “pure Frick” calculation that gave the community 25% of the rents is easier; the more complex calculation that takes into account appreciation and gives the community 20% of rents in the hypothetical case is more accurate.

The same problem will be faced in the debt-collection context. Suppose the judgment runs solely against Wife, and Husband has the separate property interest in the land. Under pure Frick the community interest the creditor can levy on is 1/4 in the hypothetical situation. If Marsden would add in pre-marriage but not post-marriage appreciation the result under it is a community interest of 1/6 for the creditor. Under what I have called expanded-Marsden, the creditor gets 1/5. The first and third solutions are the possible choices. Once again the third one — creditor gets 1/5 taking into account all appreciation and looking to actual current value of the property — is most accurate.

3. How Should the Law Handle Note Payments When the Original Purchase-Money Encumbrance Is Paid Off by Refinancing and a New Encumbrance Is Placed on the Parcel?

Still another issue involving application of Moore yet to be encountered — and one not involving a debate about correctness of Frick — is whether and to what extent the buy-in remedy applies to payments on a loan made subsequent to the purchase-money credit transaction but secured by the property being characterized. If the funds obtained via the loan secured by the new mortgage are in no way related to acquisition or improvement of the property, the mode of repayment of the loan and consequent removal of an encumbrance on the property should have no bearing on how the property is owned.202 The popular “home equity” loan by which taxpayers can obtain money on credit to make purchases yet deduct the interest

because their residence is put up as security\footnote{203} is an example.

If the second loan is a construction loan to obtain funds to build a structure on the land already mortgaged and the caselaw is followed that treats improving the land as an acquisition transaction rather than one for which reimbursement is the remedy,\footnote{204} payments on both notes will buy-in to title for the community.

Whatever the reason for the new loan, even when it is made after marriage the credit extended is very likely to be separate credit because of the nature of the security given. If new the loan is made soon after marriage, the community will have acquired very little interest in the land by way of reducing the original purchase-money principal indebtedness by making note payments. In California, loan proceeds obtained during marriage are classified as community or separate based on the intent of the lender, i.e., whether the lender was looking primarily to separate or community wealth for repayment.\footnote{205} But where security is taken, there is a presumption that the lender is looking to the security for repayment,\footnote{206} and if the se-

\footnote{203. See \textit{INTERNAL REVENUE CODE} § 163(h)(3) (1988).}

\footnote{204. See infra text accompanying notes 242-47. This is the minority position. This Article concludes with the suggestion that the \textit{value} arising from the improvement be calculated under the approach of these minority cases, but that the remedy be a reimbursement claim secured by a lien on the improved property. See infra text accompanying notes 319-41.}

\footnote{205. See \textit{Gudelj v. Gudelj}, 41 Cal. 2d 202, 259 P.2d 656 (1953) (loan proceeds classified on the basis of property the lender primarily looks to for repayment); \textit{Ford v. Ford}, 276 Cal. App. 2d 9, 80 Cal. Rptr. 435 (1969). See generally Richard L. Young, \textit{Community Property Classification of Credit Acquisitions in California: Law without Logic?}, 17 CAL. W. L. REV. 173 (1981); Comment, \textit{A Reappraisal of California's Intent of the Lender Rule}, 37 U.C.L.A. L. REV. 389 (1989). Where the evidence suggests the lender was relying on some community property and some separate property, no case has ever apportioned the loan proceeds into separate and community fractional shares. Rather \textit{Gudelj} says all the proceeds take on the character of the estate the lender primarily was relying on (If that cannot be determined, the general presumption of community ownership would control.).}

\footnote{206. See the \textit{Gudelj} and \textit{Ford} cases, \textit{supra} note 205; Estate of Abdale, 28 Cal. 2d 587, 592, 170 P.2d 918, 921-22 (1946); \textit{Marriage of Stoner}, 147 Cal. App. 3d 888, 195 Cal. Rptr. 351 (1983) (dictum); \textit{Bank of California v. Connolly}, 36 Cal. App. 3d 350, 111 Cal. Rptr. 468 (1973) (court applied presumption due to lender's having taken a security interest in separate property of Husband but found it overcome by lending officer's testimony that bank relied primarily on "general credit" of Husband — i.e., on his earning capacity, a community asset, and the un-}
curity is more than 50% separately owned, all of the loan proceeds will be separate property.

If the new loan is made after the community has, through making payments on the purchase-money note, acquired more than a 50% ownership of the property, the loan proceeds will be community property. If later — e.g., after a separation — one spouse’s separate estate begins making note payments, it should begin to buy-in to title if the loan taken out was to raise funds for construction and the remedy is buy-in to title upon repayment rather than reimbursement.

If the second loan transaction is strictly a refinancing of the outstanding principal debt on the original purchase-money note to take advantage of a lower interest rate that has become available, it can be treated in two ways. First, one would classify the loan proceeds as community or separate property, with the fractional shares of ownership in the land encumbered to secure the loan likely being controlling (i.e., the estate that has the greater interest owns the loan proceeds). These funds complete the buy-in process, as the original purchase-money obligation has now been satisfied. Payment of the new loan is not an investment in the land, because the investment stage has ended; at most payments may create a right of reimbursement. This simple approach seems especially attractive when the second loan is not secured by an encumbrance on the property being purchased. For example: Wife’s father makes a personal, unsecured loan of the money needed to pay off the original obligation.

specified property he managed, which would be presumptively community).

Note that the presumption that causes the loan proceeds to take on the same community or separate character as the security given seems necessarily to be conclusive when an anti-deficiency judgment statute, such as California Code of Civil Procedure § 580(b), applies to the transaction.

Especially where the anti-deficiency statute applies, a small separate down payment can control the characterization of substantial loan proceeds where security is taken in the property being purchased. Thus in Moore, the California Supreme Court specifically holds that the separate property down payment made by the wife during marriage caused the loan proceeds to also be separate property. Marriage of Moore, 28 Cal. 3d 370, 373, 618 P.2d 208, 211, 168 Cal. Rptr. 662, 665 (1980) (“the loan was based on separate assets and was thus a separate property contribution”). Contra Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (failing to apply the presumption that the lender is looking to the security for repayment).

207. On this issue — characterizing loan proceeds — the courts will face the same problem discussed above, see supra text preceding note 198 and subsequent to note 201, with respect to allocation of rentals and quantum of interest a creditor of one estate only can reach: should appreciation be taken into account (“expanded Marsden”) or should the court consider only how the original purchase price has been fractionally paid off (Frick)?
The second, alternative approach is to view the refinancing as a mere continuation in different form of the investment process. The community should continue to buy in to what began as a separate title under Moore as it makes payments that reduce the principal debt on the new loan, even if the loan proceeds themselves were community before they were applied to pay off the original loan. The second approach does not view the loan proceeds as terminating the investment activity, and the community funds arising under the new loan are not viewed as having completed the payment of the purchase price.

Under the second approach, a pro-ration of the refinancing transaction may be required. Often, if interest rates are low and the principal sum owed on the original purchase-money note not large in comparison to the value of the property at the time of refinancing, the spouse or spouses arranging for the new loan may borrow more money than is needed to pay off the first note. Thus, if the principal balance owing on the original loan is $60,000 and the new loan is for $80,000, only 75% of the principal component of future community payments on the new obligation will buy-in to a share of title. Suppose the additional $20,000 was invested in corporate stock. If the loan proceeds were separate property (because more than 50% of the security was separately owned), 25% of principal component of future note payments made by the community will "buy in" to a fractional share of the stock.

F. Is a Buy-in to Title a Transmutation, and if so Is It Exempt from the Statute of Frauds for Transmutations as a Mixing of Funds?

No reported case has considered whether a buying-in to a share of title under Moore-Marsden constitutes a transmutation. If it does, the issue arises whether California's Statute of Frauds for transmutations is applicable. This statute, now California Family Code section 852, became effective in 1985 after Moore and Marsden were decided but before many other buy-in cases, such the 1988 Frick decision, appeared. Apparently no post-1984 litigant has thought the

208. See McMorris v. McMorris, 654 So. 2d 742, 747 (La. App. 1995). If the proceeds of the new loan are used in part to pay off an interest delinquency, only so much of the new loan as went to pay principal could be viewed as continuing the process of paying the purchase price. Moore would require dividing the loan into two components. If, for example, 5% of loan proceeds went to pay off accrued interest owing, only 95% of the principal component of future note payments on the new loan could "buy-in" to title.

209. See supra note 191 and accompanying text.
Statute of Frauds for transmutations could apply and that it was worth arguing that as of 1985 the buy-in remedy was statutorily abrogated. We shall see that whether section 852, the Statute of Frauds, is a problem here probably depends on the meaning of the phrase "commingled or otherwise combined" in subsection (d).

1. "Replacement" Type Buy-ins to Title Are Transmutations

At present, the buy-in remedy in acquisition cases (and as applied in a few physical improvement cases discussed below\textsuperscript{210}) operates in one of two ways, the first of which rather clearly involves a transmutation. The strongest cases for finding a transmutation are those of acquisition by way of mortgage financing, for here a post-marriage payment with community funds that reduces the principal owed on the purchase-money note actually replaces — cancels out — a separate property interest vested pre-marriage due to recognition of separate credit or the expenditure of separately-owned borrowed funds. Example: before marriage Husband has paid with separate funds $50,000 of the $100,000 purchase price, $10,000 by way of downpayment and $40,000 through periodic payments that reduce the principal indebtedness.\textsuperscript{211} During the first year after marriage, the principal owed on the purchase-money note is reduced by another $5000 due to expenditure of community funds. The separate estate’s ownership is reduced from 100/100 to 95/100. Surely this is a separate-to-community transmutation even though the separate estate’s debt on the purchase-money note is reduced.\textsuperscript{212}

\textsuperscript{210} See infra text accompanying notes 264-74.

\textsuperscript{211} To simplify the example, assume there is no appreciation in value after the purchase.

\textsuperscript{212} See CAL. FAM. CODE § 850(b) (West 1994). A transmutation likewise occurs when the initial acquisition is during marriage, the spouses then separate, and one of them uses separate funds to make a note payment. The buy-in given under Moore-Marsden to the separate estate cancels out an interest of similar value previously owned by the community traceable to community-owned borrowed funds or community credit.

In rejecting the notion that a use of one marital estate’s funds to make a payment on a purchase-money note can buy-in to a share of title previously held by a different marital estate, the Supreme Court of Idaho declared such a buy-in would be a form of transmutation not recognized in that state: a non-gift exchange achieved by the unilateral act of one spouse rather than an agreement between both spouses. Winn v. Winn, 105 Idaho 811, 814 n.2, 673 P.2d 411, 414 n.2 (1983).
2. Buy-ins to Title in Which the Courts Increase the Denominator of the Fraction by Which the Cotenancy Shares Are Calculated May Not Involve Transmutations

In the other form of buy-in — applied in insurance contract cases and the few physical improvement cases that employ the doctrine — loss to the separate estate is not as clear because $1 of community funds spent does not cancel out $1 of separate ownership, although the fractional share of the separate estate decreases. Example (1): Husband pays $100 a month for five years for $1 million worth of term life insurance; he becomes uninsurable soon after acquiring the policy; he then marries and uses $100 of community funds for one month's premium. Example (2): Wife buys land for $50,000 with separate funds and then uses $50,000 of community funds to build a structure on the parcel, with the expenditure treated as buying-in to a share of title.

These transactions may not involve a transmutation even though the share of ownership allocated to the separate estate in the asset has been reduced from 100% to 60/61 in Example (1) and from 100% to half in Example (2). In Example (1), the community has spent money to "keep alive" the insurance contract. This benefits the separate estate, since if there were a divorce at a time the Husband was uninsurable due to bad health he would not have to have the value of the policy treated as entirely community property. If he instead died, premiums would be partly separate. In example (2) the separate estate benefits because rental value increases due to the construction of the house, and the separate estate will own a share of the rents. In each instance the law treats the transaction as an investment by the newly contributing estate, and since the other estate may suffer no loss there probably is no transmutation as that term is used in many cases.

However, one purpose of section 850 of the California Family Code appears to be to define the term "transmutation" as used in

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213. See infra text accompanying notes 264-74.

214. In each example the "benefit" need not involve a net increase in the overall value of the separate estate's interest. In Example (1), the separate estate's interest will not increase in value if the husband remains insurable. In example (2), the value of the separate interest could decrease if the structure is hideous so that value added for purposes of renting the property is less than the $50,000 spent by the community to erect the structure. In the latter situation "benefit" means an exchange of a right of 100% of rental of unimproved land to 50% of the rentals from improved land.

215. Section 850 begins by stating that the transmutations it defines are
section 852, and section 850 strongly suggests that the fact that a party who undergoes some shuffling of ownership rights suffers no net loss of value does not take the transaction out of the scope of "transmutation" covered by the special Statute of Frauds. Section 850 says that spouses "may by agreement or transfer, with or without consideration" transmute separate property to community, community to separate, and separate of one spouse to separate of the other. Does this not cover the situation where Wife, using her separate funds, pays Husband the fair value of corporate stock he has inherited in consideration for his transferring it to her to be her separate property? Is section 852, the Statute of Frauds, inapplicable because there is no way to know at the time of the transfer which spouse has an "interest in the property[217] that is adversely affected?"218 That is the spouse who must sign a writing under the special Statute of Frauds. If after the above transfer the stock increases in value more than Husband can earn by investing the money he received from Wife, Husband is the one who should have signed a writing; but if the stock decreases in value, Wife is the one adversely affected, and it is she who can void the transaction for lack of a writing signed by her.

Apparently the legislature deliberately wrote a statute calling for the signature of a party whose identity cannot be determined at the time of the transmutation in the form of a sale or exchange rather than by gift of a present property interest or recharacterization of future acquisitions (e.g., "anything I inherit will become our community property"). But the inability to know at the time of the transaction who has to sign the writing is a feature of the historical Statute of Frauds for real property transactions, contracts not to be performed within a year, etc. California Civil Code section 1624 requires in these cases that the "party to be charged" sign a writing, but this is the defendant in future litigation, and at the time of making the contract it is not known who may be suing whom in the future.

216. Id. (emphasis added).

217. In the context of a transmutation "with consideration" reference to "the property" is confusing. There will be at least two items of property involved in a trade or sale. Does the singular "the property" in § 852(a) mean that § 850, referring to a transmutation "with consideration," is not a definitional statute for the term "transmutation" as used in § 852? Or should "the property" mean both properties involved in the trade or sale type transmutation? I ask the California legislature to clarify this ambiguity.

218. CAL. FAM. CODE § 852(a) (West 1994).
Thus, California Family Code section 852 reasonably applies to interspousal transactions in which they trade benefits of equal value. This would cover a case where a spouse buys land for $50,000 of separate funds and, while it still has that value, sells to the community a half interest for $25,000 in community funds (which become the spouse’s separate property), creating a cotenancy. Example (2) in which the Wife allows a cotenancy to be created by the community’s paying fair value for a structure on her separately owned parcel is analytically similar, and Example (1) is surely the legal equivalent of Example (2) when the issue is whether the transaction involves a transmutation. Nevertheless, I shall assume that notwithstanding section 850’s recognition of a transmutation for consideration, because Examples (1) and (2) involve a reshuffling of benefits rather than a case of one spouse being at once “adversely affected” while the other is not, section 852 does not apply to them. The question is a close one, however, and legislative clarification by amendment of sections 850 and/or 852 is in order.

3. “Replacement” Buy-ins Will Not Involve Documents That Satisfy Section 852’s Express Declaration Requirement

The question still remains whether “replacement” buy-in cases like Moore that necessarily involve transmutations are, after 1984, not good law in recognizing an adverse effect to the estate that loses part of the title it had acquired on credit. If California Family Code section 852 is applicable, the separate estate cannot lose some of its interest in the land upon the community’s making a note payment unless there is a “writing [with] an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.”219 Almost certainly the only writing involved will be a check drawn on community funds payable to the holder of the promissory note signed by the original buyer. If this check was signed by the spouse who has no separate property interest in the land,220 section 852 could be satisfied only by proof that the separate property owner “consented to” the check.

But even if he did consent or he was the one who signed the check, that instrument simply cannot be found to contain an “express

219. Id.
220. Note that in the version of the buy-in where a post-separation mortgage payment with separate funds cancels out a community interest, see supra note 208, the party signing the check will invariably be the one benefiting from any buy-in resulting and will never be “the spouse whose interest in the property is adversely affected.”
declaration"\textsuperscript{221} that its effect would be to change a fractional interest of separate ownership in the land to community ownership. The check may show on its face that both spouses have an interest in the bank account from which the payment comes, but that is not an even an "express declaration" that community funds are being drawn on.\textsuperscript{222} Moreover, even if the face of the check said something like "Community Property Account," that legend does not hint that the negotiation of the check will cause a substitution of a community interest for a separate property interest in land acquired by making the purchase-money note being paid down.

At divorce, Family Code section 852 sometimes will not be a problem. Family Code section 2640 provides that at divorce use of separate funds to pay down the principal indebtedness on a community acquisition will not buy in to title but instead create a right of reimbursement for the separate estate. This seems to be a mere change in form of a separate property, asset even though, as has been shown, section 2640 structures the transaction as an interest free loan which partakes of a gift and certainly has an adverse affect on the separate estate. A mere change in form of an asset separately owned or owned by the community — even in a transaction causing a loss in property value to the owning estate — arguably does not fit any of the definitions of transmutation in section 850. Even if an adverse affect makes such a transaction a transmutation, section 852, the Statute of Frauds, is not applicable. Section 2640, which creates the gift of an interest free loan, applies to a narrow type of transaction in a particular context only (divorce). It is a specific statute. If construed so as to conflict with the more general section 852 by authorizing a transmutation without a writing, section 2640 will prevail.\textsuperscript{223}

Of course section 2640 does not apply at divorce in the situation where community funds are used to make note payments on a separate property acquisition. In this posture the spouse who is not the

\textsuperscript{221} This concept is very strictly construed by the California Supreme Court. See Estate of MacDonald, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911 (1990).

\textsuperscript{222} Many a spousal joint checking account has become the stage for a conmingling of funds when one spouse makes a deposit of separately owned money.

\textsuperscript{223} See, e.g., Warne v. Harkness, 60 Cal. 2d 579, 588, 387 P.2d 377, 382-83, 35 Cal. Rptr. 601, 606-07 (1963) ("where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute and controls"); County of Placer v. Aetna Casualty & Surety Co., 50 Cal. 2d 182, 189, 323 P.2d 753, 757 (1958); People v. Proctor, 18 Cal. App. 4th 1055, 1060, 22 Cal. Rptr. 2d 888, 891 (1993).
separate-property owner will urge a "buy-in" for the community under caselaw, and the issue of whether the buy-in is a transmutation will arise.

The inability of the separate estate to claim even reimbursement for the interest component of the note payment absent a Lucas "agreement or understanding" is perhaps strictly a caselaw rule even at divorce rather than a mandate of section 2640.224 There is a clear adverse effect to the separate estate under this rule, but the lack of creation of any community property interest may mean no transmutation is involved. In other words, the mere use of funds of the separate estate to pay a community debt and vice versa is not a transmutation as the term is defined in section 850 (which definition is carried forward to section 852, the statute of frauds).

Assuming Family Code section 2640 is construed as barring reimbursement for the interest component paid by the separate estate of one spouse on a co-ownership acquisition, the courts nevertheless recognize an exception, created by case law, to the rule. When this exception applies the courts will have to grapple with the applicability of Family Code section 852 to any alleged transmutation that occurs. Under Marriage of Hebrin,225 there is no presumed gift to the community (or joint tenancy) estate holding the title to the land of the interest component of a note payment made by the separate estate when the funds so expended were earnings of a payor living apart from his or her spouse made separate by Family Code section 771.226 Suppose a case where the separated spouse using separate

224. I.e., as discussed above, the definition in subsection (a) of § 2640 of the "contribution" that does get reimbursed so as to exclude the interest component of a note payment made by a spouse's separate estate is not necessarily a statutory mandate to deny reimbursement. See supra note 123.


226. Hebrin makes clear that the same exception is applicable when Lucas is invoked at termination of marriage by death and during the marriage in the creditors' rights context. It will be recalled that under Lucas a payment made with one spouse's separate funds that reduces a purchase-money debt on land held under a title naming both spouses as co-owners constitutes a gift unless there is an actual understanding between the spouses to the contrary. Hebrin qualifies Lucas in all cases where the separate funds used for the note payment were earnings of a separated spouse that were made separate property by Family Code § 771 and its living-apart doctrine. Marriage of Epstein, 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165 (1979), had held that the presumption of gift did not apply when funds made separate due to the separation of the parties were used to make a note payment where the title was in the names of both spouses. According to Hebrin, Epstein survived the later Lucas decision as an exception to Lucas. It follows that at litigation other than divorce the separate payment from earnings buys-in to title to the extent principal owing on the purchase-money note is re-
property funds for the mortgage payment orally waives his or her right of reimbursement assured by Hebrberg. Is this a transmutation? An oral agreement displacing the presumption of gift in favor of a right of reimbursement arguably is not a transmutation but just a change in form — trading cash for a right of reimbursement assertable at the end of the marriage. Surrendering a right of reimbursement created by Hebrberg causes separate funds to pay a community obligation (the interest debt which must be paid for the community to retain its title). As suggested above, under section 850’s definitions, the mere payment of a separate debt with community funds and vice versa is not a transmutation.

4. Making a Note Payment With Funds of One Estate to Reduce a Purchase-Money Encumbrance on Land Owned by the Other Estate Does Not Fit Into the “Commingling” Exception to Section 852

In any event there are several situations that can arise at divorce in which the maxim that the specific statute prevails over the general will not eliminate the question whether Family Code section 852 bars use of the buy-in remedy based on the making of note payments by a marital estate not owning the full title to the property involved. And, of course, Family Code section 2640 has no application when the issue of a buy-in that has the effect of a transmutation is litigated at termination of the marriage by death or when a creditor levies on the subject property. Where, as usually will be the case, there is no express declaration signed by the party adversely affected, the courts will have to determine the scope of subsection (d) of section 852, exempting certain transmutation transactions from the writing requirement. It provides: “Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.”227 Obviously subsection (d) addresses cases where both community and separate funds are combined to make a cash, lump sum

purchase price. There is also an apparent combining in the contract-for-deed situation, where title does not pass until all the payments have been made. In the case of mortgage financing, no technical combining of community and separate funds occurs, because title — if acquired, for example, pre-marriage — is fully vested in the original buyer based on his downpayment made with separate funds combined with separately-owned borrowed money or separate credit. Suppose such a buyer then marries and begins using community funds to make note payments. The promissory note may later be sold by the party holding it so that the present payee is not a party who ever had possession of any separate funds applied to the purchase. In this posture it cannot be said that any of the community funds paid to this payee were commingled with separate funds (under section 852(d)) because this payee’s bank account received a mix of community and separate monies.

More often than not the payee who starts to receive community funds to reduce the indebtedness on the purchase-money note will previously have received separate funds. It is even possible that it could be shown some of the separate monies previously paid were still in the bank account of the note holder when he received some community funds. The question arises whether commingling in the hands of the note holder is a commingling referred to in section 852(d). It may not be, for this section speaks of “property in which” community and separate funds are commingled or combined. Surely the property referred to is the land acquired by the spouse or spouse-to-be and not the bank account of the holder of the promissory note.

In the vast majority of cases, the land bought will have been encumbered by a mortgage or deed of trust to secure payment of the purchase-money note. In this posture, application of the separate followed by community funds to pay down the note increases the equity in the land by decreasing the amount of encumbrance.

228. It apparently follows that if a downpayment in a mortgage financing acquisition consists of a mix of community and separate funds and each acquires a share of title, there is the combination that makes § 852(d) applicable so that the principal component of any subsequent note payment can work a transmutation that alters the fractional shares of ownership between separate and community estates without need for a writing that satisfies § 852(a).

229. If a $500 check, used to make a note payment, is drawn on a bank account known to contain $300 of separate funds and $300 community, there necessarily is a commingling into the check. Subsection (d) of § 852 can perhaps be construed to apply so that the courts can allow a transmutation to occur in the absence of a writing. On the other hand, courts could hold that commingling in the check is not a commingling in the property (the land), which has already been fully acquired by the buyer using mortgage-financing.

230. At least the equity increases so long as the overall value of the land is
ally a commingling "in" the property?

It may be argued that subsection (d) must be read in light of pre-1985 cases like Moore that did view the use of community funds to make a mortgage payment on property previously all separate as an instance in which a community share of title was created, which is effectively a commingling. That is, the concept of commingling in the property, as used in subsection (d), refers to the buy-in recognized under the caselaw. Whether subsection (d) refers only to an actual commingling or as well to a commingling that is "fictionalized" by caselaw remains to be decided. The California legislature should amend section 852 to provide an answer in order to relieve the courts not falling at a greater rate per month than the principal owed on the promissory note is being reduced.

231. Beam v. Bank of America, 6 Cal. 3d 12, 22, 490 P.2d 257, 264, 98 Cal. Rptr. 137, 144 (1971), describing an alleged gift made by the husband in See v. See, 64 Cal. 2d 778, 51 Cal. Rptr. 888, 415 P.2d 776 (1966). The See husband drew on a bank account that usually contained a mix of separate and community funds to pay family expenses. The high level of such expenditures, plus the erratic flow of community funds into the account, made it likely that at some times Husband necessarily had to be dipping into separate monies because not enough community funds were on hand to cover his check. See seemed to say the husband was in these instances making a gift of his separate funds to the community. The Beam court, however, realized Husband had no donative intent and may have been unaware the bank account was out of community funds. The notion of a gift being made in See was thus a legal fiction. The notion that community funds used to make a mortgage payment on land previously owned solely by a spouse's separate estate get "commingled or combined" with funds separately owned by that spouse is even more clearly a legal fiction.

Another example of a "fictionalized" combining is presented by the facts of Paxton v. Bramlette, 228 So. 2d 161 (La. App. 1969). In Paxton, Wife had filed a declaration under what is now Louisiana Civil Code art. 2339 making the rents and profits of her separate property also separate (so that the uncommingling problem presented was legally the same as if the case had arisen in California). She had a corporation she controlled pay her as executive a salary which, she contended in litigation with her husband over property rights, was so large compared to her labor that it had to include dividends on her controlling block of separately-owned stock. She asked the court to divide the "salary" payments into two shares, one community as a return on her labor and one separate. In this case the wife probably was not knowingly combining community and separate funds. If her argument were accepted, the combining is a legal construct. In California, in this type of case, if the husband insists that the wife treated the payment as salary and hence community — in effect arguing he should be estopped from asserting the payments included a form of separate property dividend — is he asserting he transmuted separate dividend funds into community property? If his argument depends on transmutation, is it taken out of § 852's requirement of an express written declaration by Husband because the issue involves characterization of property — the checks to Wife — "in which separate and community property are commingled?" We do not know the answer.
from having to make a pure guess.232

G. Recommendations Concerning the Buy-in Caselaw

The buy-in remedy for note payments correctly treats as investments payments that are made for the purpose of acquiring property. The Frick233 case, however, causes much confusion and uncertainty in California law in this area by preventing the initiating estate’s claim to pre-“shift” appreciation from being viewed as a fractional interest in the land. We do not know whether pure Frick or what I have called “expanded-Marsden” will be employed when issues arise concerning allocation of rents, characterizing proceeds of a subsequent loan, and determining the size of the interest that a creditor of only one estate can reach. It is not even clear due to Frick whether the Marsden interest is personalty or realty. As I have indicated, overruling of Frick adds some complexities to the process of allocating appreciation between the community and separate estates, but Frick’s demise would resolve considerable uncertainty in this area of the law and make it more accurate in measuring the separate and community interests. On balance, Frick should be overruled.

One commentator, Professor Elizabeth Brandt, suggests that the buy-in approach in dealing with note payments creates recording act problems.234 This is true where the deed on its face shows ownership by one estate — e.g. it names just one now-married party as grantee and carries a pre-marriage date — yet another estate (e.g., the community) has bought in to a share of title.235 Whether the

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232. In William A. Reppy, Jr., Gilbert Law Summaries: Community Property § 176 (16th ed. 1994-1995), I state without qualification that making the note payment with funds from an estate not owning the property is a § 852(d) mixing or combining. Further consideration in preparation of this Article has lead me to conclude that the subsection is ambiguous in the context of such payments and a court decision either way on its applicability is possible.


235. The problem can also arise where the deed names Husband and Wife as grantees in the estate of joint tenancy and one of them seeks to convey his apparent half interest. If note payments have been made with separate funds of the other spouse, the payor’s separate estate will have an interest in the land inconsistent with the apparent title granted by the language of the deed. The community, too, could have bought in to a share of title that could be conveyed only by a deed signed by both spouses.

The problem does not arise where Husband and Wife are named co-grantees of land and there is no language in the instrument suggesting the form of ownership created is joint tenancy or tenancy in common. In this situation the
owner of an interest in the property inconsistent with record title can claim it did not pass under a deed signed only by the spouse appearing as grantee as grantee or whether the new grantee is protected by the Recording Act has not been decided in California. A somewhat analogous New Mexico case suggests that the buyer unaware of the community's unrecorded fractional interest takes free of it. Moreover, the alternative to California's buy-in approach — an alternative Professor Brandt seems to favor — has its own recording act problems. As Professor Brandt herself indicates, in most states the right of reimbursement arising under inception of title in favor of the community estate that does not buy-in to title is secured by a lien on the separately owned land arising as a matter of law. Yet there is no recordable writing alerting third parties to the existence of such a lien.

Community property presumption applies. California Family Code § 1102(a) requires both spouses to join in a conveyance of any interest in community real property, and the joinder of a spouse having a separate property interest due to a buy-in would operate to convey that interest to the buyer unaware of it. On the other hand where the instrument indicating ownership by the community had assigned personality and not realty to the spouses, either spouse can convey all of the community interest but not a separate property interest acquired by a buy-in through use of separate funds to make note payments.

236. Where the interest is community, the co-owning spouse who has not joined in the deed of conveyance usually can recover from the other spouse's grantee the entire community interest. Droeger v. Friedman, Sloan and Ross, 54 Cal. 3d 26, 283 Cal. Rptr. 584, 812 P.2d 931 (1991).

237. Jeffers v. Martinez, 93 N.M. 508, 601 P.2d 1204 (1979). There the recorded deed had a pre-marriage date and named the wife-to-be as sole grantee. Before she alone contracted post-marriage to sell the land, she executed a quitclaim deed from herself to herself and her husband, which was unrecorded. Under New Mexico law, N.M. STAT. ANN. § 40-3-13(A), if the spouses were permitted to prove there was a community interest in the land, the contract for sale could be avoided for lack of Husband's joinder in it. The New Mexico Supreme Court held that the state's Recording Act precluded the spouses from asserting against Wife's buyer — who had contracted with her alone in reliance on the state of record title — that the land had become community property.

On the other hand, in applying a special recording act enacted to protect grantees dealing with a married person as grantor who holds title in his own name alone and whose grantee does not in fact know it is community, the state of Washington has held the buyer or mortgagee is not a "bona fide purchaser" — a status required to invoke the protection of the California Recording Act — if he does not make diligent inquiry into the marital status of his vendor. Campbell v. Sandy, 190 Wash. 528, 69 P.2d 808 (1937). That case indicates that if such inquiry is not made and if the grantee or mortgagee could have determined the party he was dealing with was married, the grantee or mortgagee is imputed to have knowledge the property was community. In Campbell a mortgagee was required to make the inquiry even though the mortgagor included a recital in his instrument that he had been divorced from his wife.
Thus, recording act issues do not cause me to recommend against broad use of the buy-in remedy.

Further analysis of the strengths and weaknesses of the buy-in approach is postponed until this Article has explored how a modernized reimbursement remedy would function as an alternative approach. It can be stated with confidence here, however, that if the buy-in remedy is sound, Family Code section 2640 must be repealed so that a divorce court is allowed to treat separate funds that reduce the principal owed on a purchase-money note, with title in the names of both spouses, as an investment that shares in appreciation of the property.

V. CALIFORNIA'S PHYSICAL IMPROVEMENT CASES USUALLY APPLY THE FIXTURES DOCTRINE, BUT SOME USE BUY-IN TO TITLE AS THE REMEDY

A. The Majority of Cases Apply the Fixtures Doctrine So That the Payment for Improvements Has No Effect on Title; Reimbursement Is the Sole Remedy

A close ally of the inception of title doctrine at Civil Law was the doctrine of accession, known at common law as the doctrine of affixation: that which is affixed to the soil becomes part of the soil. Thus, when a house was built with community funds on separately owned land, the improved parcel remained entirely separate. Although inception of title could have been cited as the reason for this result, the courts would likely instead cite to fixtures doctrine authorities. The remedy to the community in such a situation was reim-

238. See infra text accompanying notes 319-41.

239. I use this term to refer to such improvements as building a house, adding a swimming pool, repairing a structure, laying down wall-to-wall carpet etc. This category is to be distinguished from "improvements" in the form of reducing or removing an encumbrance on property securing a purchase-money indebtedness. California cases have treated the removing of a tax lien by payment of real property taxes like physical improvements. See Marriage of Epstein, 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165 (1979); Somps v. Somps, 250 Cal. App. 2d 328, 338, 58 Cal. Rptr. 304, 311 (1967); Estate of Turner, 35 Cal. App. 2d 576, 96 P.2d 363 (1939); William Q. DeFuniak, Improving Separate Property or Retiring Liens or Paying Taxes on Separate Property with Community Funds, 9 Hastings L. J. 36, 37 (1957).

240. See, e.g., Watterson v. Cruse, 179 Cal. 379, 176 P. 870 (1918); Miller v. Waddingham, 3 Cal. Unrep. 375, 25 P. 688 (1891).

bursement. This Article has noted the lack of unanimity amongst Spanish jurisconsults as to how to measure reimbursement, with some stating the amount spent is reimbursed, some stating the measure was the value added by the improvement at the time reimbursement is ordered. Early Louisiana cases read the civilian authorities as calling for reimbursement for the lesser of these two sums.

As has been noted above, older California cases were, like the Spanish writers, inconsistent on how to measure reimbursement. In 1860 the California Supreme Court spoke of reimbursement of the amount spent, in 1912 of reimbursing for the value added. More recently, a court of appeal in Marriage of Warren laid out the applicable law as follows: in the "self help" situation where a spouse uses community funds to improve his own separate property, the community is reimbursed by the greater of the amount spent or value added (the latter apparently being measured, as was done by the Civil Law authorities taking that approach, at termination of the community).

Warren fashioned the new approach for "self help" cases on the theory the separate property owner was engaging in a constructive fraud and breaching a fiduciary duty, citing to former California Civil Code section 2236. I do not think the analogy to willful breach of trust is sound. Under community property law, a manager spouse is not held to the strict rules applicable to the trustee of an active

242. See supra note 39.
243. Depas v. Riez, 2 La. Ann. 30, 44 (1847); Succession of McClelland, 14 La. Ann. 762 (1859). See Huie, supra note 25, 30 Tex. L. Rev., at 165-69, 26 Tul. L. Rev., at 434-37; William A. Reppy Jr. & William Q. DeFuniak, Community Property in the United States 243 (1975). Deliberto v. Deliberto, 400 So. 2d 1096 (La. App. 1981), held that the early decisions were erroneous and that if the enhanced value exceeded the amount spent, the greater value was the amount to be reimbursed to the estate paying for the improvement.
244. See supra text accompanying note 65.
245. See supra text accompanying notes 89-93.
246. 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (1972). The Warren rules were restated in Marriage of Frick, 181 Cal. Rptr. 997, 1019, 226 Cal. Rptr. 766, 779 (1986). Warren suggested the rule in some older cases that reimbursement was measured only by value added was dictum, citing Estate of Barreiro, 86 Cal. App. 764, 261 P. 509 (1927).
247. 28 Cal. App. 3d at 782, 104 Cal. Rptr. at 863-64.
248. It provided at the time of the Warren decision: "A trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events and for the value of its use." (emphasis added). See current Cal. Prob. Code § 16440. The underscored language would suggest to me reimbursement for the amount spent plus legal interest rather than value added in excess of amount spent.
trust. In *Marriage of Mix*, a spouse commingled community funds with her separate funds in a bank account. Without any contemporaneous notation as to whether she intended to use community or separate funds, she drew monies from the account and invested them in real estate. When these investments turned out to be highly successful, at divorce the drawer-spouse was permitted to testify as to an intent, never before expressed, to use her own separate property (rather than community funds in the account at the time of withdrawal) for the investments, and the California Supreme Court held such self-serving testimony rebutted the pro-community presumption. A true trustee would not have been able to claim the investments for herself. So, if the Warren rule for self-help cases allowing reimbursement in excess of amount spent is a sound one, it should apply in other situations.

*Warren* cited no authority for its other conclusion that "[i]t is clear that the amount of reimbursement in the case of an agreement must be the amount expended." Actually, that proposition is not clear at all. In physical improvement cases not of the "self help" type, the "agreement" referred to by the *Warren* court is some discussion or writing showing that the party initiating the payment for the improvement intended no gift of the funds. But in providing reimbursement only for the amount spent with no chance of gain, either through a "buy-in" to a share of title or an award of legal interest, *Warren* actually creates a gift of an interest-free loan. I find this a highly improbably term to imply into the "agreement" that displaces the presumption of an outright gift of the funds or the payor spouse's interest in them. The more logical solution is to imply an obligation of the improved estate to pay legal interest due to the agreement that rebuts the presumption of gift.

1. Statutes Recognize the Appropriateness of Reimbursement With Legal Interest

In two statutes of recent vintage (1984), the California legislature has expressly recognized that in some reimbursement contexts interest on the reimbursement claim from the date of the contribution of funds is appropriate. Thus where community funds are used to provide education or job training for one spouse and the community has not obtained a return on this investment in human capital, at

251. 28 Cal. App. 3d at 783, 104 Cal. Rptr. at 864.
divorce the community is reimbursed "with interest at the legal rate."\textsuperscript{252} Also, if a divorce court orders one spouse to pay a community debt but the creditor pursues the other spouse, an original obligor, and collects from him or her, that party has a right of reimbursement against the ex-spouse who was ordered to pay the debt "with interest at the legal rate."\textsuperscript{253}

Ultimately, since the reimbursement claim at issue in physical improvements cases is created by the judges, they will decide if an award of legal interest is appropriate; however, the existence of these two recently-enacted statutes providing for interest should make the courts realize the issue is one of importance that they must address.

California Civil Code section 3287 provides:

(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to

\textsuperscript{252} CAL. FAM. CODE § 2641(b)(1) (West 1994) (formerly CAL. CIV. CODE § 4800.3, enacted by 1984 Cal. Stat. ch. 1661, § 2, at 5879). An amendment to § 2641 is urgently needed, because it now applies only where tuition was paid with "community or quasi-community property." Suppose college tuition for one spouse is paid for out of a bank account in the names of both spouses created under a signature card signed by both that expressly creates a right of survivorship. The card has been carefully drafted by the bank to meet the strict requirements of the Statute of Frauds for transmutations, Family Code § 852, as construed in Estate of MacDonald, 51 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911 (1990). I suspect that post-MacDonald most banks have, in order to assure right of survivorship as wanted by their married depositors, created deposit contracts the spouses will sign that are effective to transmute community deposits into joint tenancy funds. A creative construction of the reimbursement provisions of § 2641 to make them apply in cases like the above hypothetical may be impossible because the Legislature effective 1994 amended the statute to specify one type of separate property — quasi-community property — use of which to pay for college tuition for a spouse can create a right of reimbursement. It would seem more difficult for the courts to imply that § 2641 covers joint tenancy funds in this posture than under the original wording of the statute which spoke only of use of community money.

Subsection (d) of § 2641 seems to bar the courts from creating a common law right of reimbursement where joint tenancy funds are used. It provides: "Reimbursement for community contributions . . . is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party." CAL. FAM. CODE § 2641(d) (West 1994) (emphasis added). This subsection also apparently bars a common law reimbursement remedy when the marriage ends by the death of the uneducated spouse and before the community has received a return on its investment in the training of the educated spouse. In effect the educated survivor is the forced heir of the decedent's half of the community reimbursement claim that would have constituted a valuable asset had divorce rather than death ended the marriage. Has the legislature thought this through?

recover which is vested in him upon a particular day, is enti-
tled also to recover interest thereon from that day, except
during such time as the debtor is prevented by law, or by the
act of the creditor from paying the debt. 254

Why this statute has never been applied to a marital property reim-
bursement claim based on the contribution by one estate of a known
sum that benefits the other is unclear to me. It is true that under
marital property law the time for payment of the reimbursement
claim is the end of the marriage, but that rule does not mean the law
"prevented" (the term in section 3287) earlier payment. The 1984
statute providing for reimbursement with legal interest for commu-
ity contributions towards the education of one spouse demonstrates
there is nothing inconsistent with recognizing that the time of pay-
ment is termination of the marriage yet fairness requires an award of
legal interest. Perhaps section 3287 compels the courts to award legal
interest along with reimbursement in some physical improvement
cases.

2. Section 2640 Does Not Evince a Broad Policy Against
Reimbursement Awards With Legal Interest

On the other hand, in providing for reimbursement for separate
property 255 "payments for improvements" on property co-owned by
the spouses and separate property payments on a loan taken out "to
finance the ... improvement of ... property"256 co-owned by the
spouses, the California legislature specified in Family Code section
2640(b), that "[t]he amount reimbursed shall be without interest or
adjustment for change in monetary values."257 Should the courts be
guided by section 2640(b) in deciding whether to award interest in
situations involving physical improvements where section 2640 does
not apply? It does not apply at litigation after a marriage terminates

255. This term does not appear in the text of section 2640 but only in its
title. It is clear from the context of section 2640, however, referring to the division
of community property at divorce, that the reimbursement claims covered are those
asserted by a separate estate based on separate contributions that improved com-
community property and not community improvements of a spouse's separate property.
See also OFFICIAL CALIFORNIA LAW REVISION COMMISSION COMMENT TO SECTION
2640 (originally enacted in 1983 as former CAL. CIV. CODE § 4800.2 to reverse
Lucas "and cases following it which precluded recognition of the separate property
contribution of one of the parties to the acquisition of community property . . . .
"

256. CAL. FAM. CODE § 2640(a) (West 1994).
257. CAL. FAM. CODE § 2640(b) (West 1994).
by death of a spouse. Nor does section 2640 apply at divorce where the community seeks reimbursement for having improved separate property.

Where one estate is seeking reimbursement for a physical improvement via caselaw and not 2640, if it is not a self-help type case under present California law the claimant spouse must negate a presumption of gift. This can be done as in Warren (and the rule of the Lucas case) by showing the spouses had an “agreement” — although silent on the question of whether the arrangement was an interest-bearing loan — that there was no gift of the funds being advanced for the improvement. Section 2640 eliminates the presumption of gift in certain cases of separate funds used to improve land co-owned by spouses. In fashioning the no-interest rule, the Legislature that enacted what is now section 2640 likely had in mind a spouse who could not prove an agreement that could overcome the presumption of gift existing at caselaw, since those were the parties harmed by the Lucas decision. Indeed, section 2640 grants a right of reimbursement even when the spouses had an oral agreement that the advancement of separate funds was a total gift to the community as well as when the separate property owner had donative intent but did not express it. In both of these situations providing for payment of interest on the sum reimbursed would be clearly inappropriate, as the facts involve nothing like an investment of funds.

Section 2640 contains two limitations on the reimbursement remedy in addition to its no-interest provision that also are likely addressed at the situations where there is no oral agreement that the payment is not a gift, furthering the case that section 2640 should not be a guide where the spouses do have such an “agreement.” First, where the payment is on a loan for funds used to improve the property, so much of the payment that goes to satisfy interest owing on the loan is not reimbursed. Second, even the principal component may not be reimbursed if the overall “value of the property at the time of division” at divorce has fallen dramatically. E.g., a house was built on community land 30 years ago for $50,000 but never maintained, and the neighborhood has become a slum. The “improved” realty is now worth only $30,000. Reimbursement cannot exceed that amount. Both such limitations would be inappropriate where the

258. It is also inapplicable at litigation during marriage, but reimbursement claims are usually assertable only at termination of the marriage by death or divorce.

259. The “property” in the context of the hypothetical seems to refer to the land and house and not the house alone. If the house had burned down and if insurance proceeds were received or if an insurance claim is pending, the “proper-
spouses had a *Warren* "agreement" that no gift was being made.

In sum, the remedies under section 2640 seem to be fashioned for cases where the payor spouse could not overcome the judge-made presumption of gift or where the lack of donative intent was not communicated to the other spouse. It is not a statute to draw on by way of analogy to answer the question whether a common law right of reimbursement should provide for interest from the date of payment where there is an "agreement" between spouses that negates the presumption of gift. In such a situation the expenditure should be viewed as an investment that results in gain either by a buy-in to title or an award of legal interest at the time of reimbursement.

3. Legal Interest May Be Appropriate When the Presumption of Gift Is Rebutted Without Proof of an Agreement Between the Spouses

*Warren* addresses measuring the right of reimbursement in two situations: the self-help case and the situation where the presumption of gift is rebutted by proof of an agreement between the spouses. There probably is a third category of cases in which reimbursement will be awarded and a rule for its measurement is needed. It was suggested above that despite the logic of doing so and dictum in one case, 260 *Lucas* may not be applicable to the case of a community contribution to the improvement of property separately owned, especially where the date of delivery of the deed is a date during the marriage. With *Lucas* inapplicable the spouse paying for improvements may assert a community claim for reimbursement by proving absence of donative intent not communicated to the other spouse. I.e., a spousal "agreement" need not be shown. If the trier of fact believes the likely self-serving testimony of the claimant spouse about his or her intent not to make an outright gift of a half interest in the com-

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munity funds expended, it would be inappropriate to infer an intent to make a gift of an interest-free loan. 261

The party asserting a community reimbursement claim who overcomes the presumption of gift by evidence of uncommunicated lack of donative intent does not have as strong an argument that the no-interest rule of section 2640 should not apply by analogy as does the spouse who secured an oral agreement there was no gift. One argument he or she can make is that a foolish statutory rule should not be unnecessarily extended. Another would be that the no-interest rule of section 2640 must rest on a factual premise that the spouse asserting the nonstatutory reimbursement claim is inapplicable to his or her case. Section 2640 was a legislative response to the Lucas case, and it is likely the legislators had in mind when enacting it the fact pattern of Lucas. 262 There the wife had used separate funds both to make purchase-money note payments on and to pay for improvements on a residence she and Husband occupied (and which was titled in their names). The payments she made precluded a foreclosure of the property that Wife occupied, and she did have a benefit that the legislature might have felt should offset a claim that persons in her position in the future might assert for reimbursement with interest. (In my view such a theory is unsound; when occupying the house with her husband Wife, as I see it, acted as a member of the community and not as owner of a separate estate, but I cannot deny that the Lucas wife did in fact enjoy a benefit.) As was noted above, the Lucas court in denying all reimbursement to Wife unless she proved a no-gift agreement had been made with her husband relied on a statute dealing narrowly at divorce only with a "single-family residence" held in a co-ownership title. By the time the legislature sought to abrogate the Lucas no-reimbursement rule, however, courts of appeal had extended Lucas to cases involving properties other than residences, which would have included non-income producing land held for appreciation — i.e., an asset the separate-property contributor could not use. What is now section 2640 quite properly did not confine the anti-Lucas rule to residences, given the caselaw extension of Lucas, but the legislators may have overlooked the possibility that the spouse making a separate property contribution under the broad terms of the statute might receive no benefit at all to warrant an offset achieved by denying interest on the reimbursement award.

261. I am assuming a claimant spouse who will honestly admit he or she never thought one way or another about getting interest when reimbursed.
262. See supra text accompanying notes 98-103.
Where the statute applies by its terms, the courts have no choice but to deny interest on the reimbursement that is granted to one spouse’s separate estate. If in other situations, however, a spouse asserting a community reimbursement claim shows the community did not benefit from the improvement of the other spouse’s separate property, a court could reasonably conclude the statutory no-interest rule was not applicable by analogy, because section 2640 was directed at the typical case where the separate property contributor was using the improved community asset.

In sum, I think that, unless there is a buy-in to title for the estate paying for the improvement under the minority approach discussed below, if section 2460 does not by its terms apply, legal interest should be paid on the amount reimbursed at the termination of marriage without regard to the nature of the evidence that rebuts the presumption of gift (and also if the presumption is abolished as recommended in this Article). Because I can see no reason for measuring reimbursement differently in the self-help improvement situation, I urge the courts to reconsider Warren’s “value added” remedy for such cases. Warren’s rule results in an interest-free loan from the community to the separate estate of a spouse in the self-help situation where the value added is gone by the time the community is terminated and reimbursement claims can be asserted. This must be a common occurrence. Example: Ten years before divorce Husband used $10,000 of community funds to repaint a separately owned apartment house he rented out for separate property gains. Now at the time of divorce the structure needs to be repainted. Making the spouse who engages in this kind of self-help pay interest will prevent unfairness to the community. If the courts conclude that the self-help situation does warrant a different rule for measuring reimbursement than used in other types of cases, Warren should be reformulated so that the measure is the greater of value added or return of funds with interest. If, as is the thesis of this Article, there is a benefit in reducing the number of rules of law in the mixed-consideration cases, a unified approach can be obtained by using the latter measure of reimbursement in all cases not treated as a gift.

263. Another example where a value-added award is possibly (as a losing investment) unfair to the community is one spouse’s use of community funds to build a swimming pool on a parcel separately-owned by him and not occupied by the spouses. I understand it is common knowledge that the addition to resale value arising by adding a swimming pool is regularly less than the amount spent.
A Minority of Improvement Cases Permits the Payor's Estate to Buy-in to a Share of Title

1. Buy-in Based on the Amount Spent for the Improvement

In *Marriage of Sparks*,264 decided in 1979, the spouses bought land with community money. After Wife was given a substantial separate property gift, a portion of the land was carved out as a distinct lot on which a house was built for $46,668, paid for with Wife's separate funds. When the house was built, the community-owned lot on which it was situated was worth $17,000.265 At divorce, the appellate court affirmed the trial court's use of the buy-in to title approach for Wife's payment for the improvement. She became a 46,688/63,668 owner of the improved realty. At the time of divorce, not long after the completion of the house, the value of the improved realty had risen to $87,000, so the community and Wife's separate estate shared proportionately in the gain.266

The *Sparks* court apparently was aware that in almost all prior improvement cases reimbursement rather than buy-in to title had been the remedy employed. *Sparks* announced that "application of the law of fixtures would produce an unjust and unwarranted re-


265. The court's opinion never states what the original purchase price for the larger parcel was and does not suggest what proportion of that could be allocated to the area later carved out for the residential lot.

266. By valuing the community's ownership as of the time Wife's separate estate became a co-owner, the *Sparks* court effectively followed the *Marsden* rule that lets the estate that was the original owner of the land capture all the appreciation occurring before co-ownership began. But by using $17,000 as the community's share — rather than a likely lesser figure, a share of the community's purchase price for the larger parcel proportionate to the smaller lot carved out of it — in apportioning appreciation occurring after the co-ownership began, *Sparks* deviated from the *Frick* rule used in cases involving buy-in due to making payments on a purchase-money mortgage. I can see no reason for having a different approach to dividing the appreciation depending on whether buy-in occurs due to paying for an improvement or repaying part of a purchase-money loan's principal. This Article has already recommended the overruling of *Frick*. See supra text accompanying notes 196-200. The *Sparks* fact pattern well illustrates the wisdom of doing so. At one moment in time the community supplies land of known value and the wife's separate estate supplies a house, the cost of which presumably equates to value at the time of construction. These two contributions mark the participation of the two marital estates in a sort of joint venture, and subsequent appreciation should be allocated by tracking those contributions based on the values when the "joint venture" commences. In any event, *Frick* and *Sparks* cannot co-exist.
What the injustice would be was not explained, but the Sparks court must have assumed that reimbursement to Wife would have been just for the amount spent for the house, without interest, and not for value added. Either of the later approaches would have treated Wife's contribution as an investment, and the value-added approach probably would have allowed her to share in the appreciation of the improved parcel.

Similar to Sparks is the reasoning underlying the holding in a 1956 case, Garten v. Garten. At the time of marriage there, Husband owned as his separate property land the purchase price of which had been fully paid. Husband was in the process of building a house on the land, and construction was almost complete. After marriage Husband finished paying for the house and also paid off what Wife contended was a construction loan, secured by a mortgage on the land. The appellate court found insufficient evidence that Husband used only separate funds to make these post-marriage payments to his builder and lender. Garten gave the following guidance to the trial court on remand if Husband could not produce evidence he used separate funds:

It may be . . . that some community funds went into the completion of the house or were paid on the mortgage. It is only to this extent that the community has an interest in such separate property. Where payments are made with community funds on real property owned by one spouse before marriage "the rule developed through the decisions in California gives to the community a pro tanto community property interest in such property . . . ." . . . Under this rule, it follows that any payment of community funds either toward the completion of the house or on the encumbrance would . . . give the community a pro tanto interest in the property in the ratio that the payments with community funds bear to the value of the property.

267. 97 Cal. App. 3d at 356, 158 Cal. Rptr. at 640.
269. Id. at 493-94, 295 P.2d at 26 (citations omitted). With the final four words of this quote, Garten departs from Frick's rule for appportioning future appreciation in the same way that Sparks did. See supra note 266. The proposed overruling of Frick would make Garten good authority to follow. In Frick the husband who wanted pre-marriage appreciation owned by his separate estate to be counted in allocating post-marriage gain relied on Garten, which the Frick court was unable to distinguish.
2. Buy-in Based on the Value Added by the Improvement

A different form of shared ownership in the physical improvements context was recognized in the 1948 case of *Long v. Long.*

There Husband bought two contiguous lots for $350 before marriage; after marriage the spouses spent $2000 to build a house on them and devoted considerable community labor to the construction. The court said:

Even if the lots were the separate property of the plaintiff [husband] . . . the house did not lose its character as community property insofar as the defendant [wife] is concerned. The plaintiff is in error in his contention . . . that since the house was built on his separate property it also became his separate property. Buildings and improvements placed on separate property of a husband and paid for with community funds do not become the separate property of the husband in the absence of an agreement to that effect.

This rejection of the fixtures doctrine is untenable due to numerous problems it raises. It is conceivable that a house could be owned separately from the land it sits on, but could a new roof paid for with community funds put on a separately owned house be subject to distinct community ownership? A community paint job? Moreover, *Long's* theory would compel the court at divorce to award the house to the owner of the underlying land. Even assuming there is an easement of necessity across the land to get to the house, awarding the house to Wife while leaving Husband owning the land under it would severely decrease the value of each item of real estate.

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270. 88 Cal. App. 2d 544, 199 P.2d 47 (1948). The court's discussion about the house being community property while the land was separate seems to be dictum. Later in the opinion the court says the evidence supported a finding Husband had transmuted the separately owned land to community property, a finding essential to affirmance of the award of the land and house to Wife.

271. Actually he contended he and a third party were co-owners, but the court said that any third party interest could be disregarded in the litigation between the spouses.

272. In *Long* the court seemed to say that the house was owned by the community as an estate distinct from the land. Therefore it was not necessary to value in dollars the community contribution. Under *Sparks* the community labor would have been valued and that sum added to the out-of-pocket community expenses for materials going into the house in determining the community interest as a fraction of the improved property.

273. 88 Cal. App. 3d at 548, 199 P.2d at 50 (citations omitted).

274. The quote from *Long* seems to view the land and the house as distinct
Long does suggest, nevertheless, a different way to measure the degree of buy-in in physical improvements cases. One can take the "value added" measurement of Warren as used in self-help cases and apply it in any improvement situation to measure the fraction of ownership at the time of litigation held by the estate paying for the improvement. Under Sparks, appreciation occurring after creation of the co-ownership is allocated without regard to how much of it was due to the land and how much to the house, but rather how much each estate contributed to a sort of joint venture in improved realty. Long suggests determining how much of post-construction appreciation was due to the land, how much to the house. If the latter were hideous or in a style that has fallen out of favor, the marital estate paying for it wants Sparks. If the house was designed by a young architect who at divorce years later has become internationally renowned and whose fame has generated a unique market for his or her houses, the marital estate paying for the house is delighted to have the share owned by it determined on a value-added basis.

C. Recommendation Concerning Physical Improvement Cases

Under present law the majority of modern cases applies the fixtures doctrine to physical improvement cases and reimburses for the amount spent, thereby treating the marital estate paying for the improvement on property owned by a different estate as making an interest free loan. Only in the self-help type situation where the spouse separately owning the improved land uses community funds without the other spouse's consent to make the improvement does present law (the Warren case) depart from the interest-free loan approach. In this situation the community as part of its reimbursement remedy captures any value added by the improvement in excess of the amount spent. But this is valued at the time the marriage ends, and in some situations a value added in excess of amount spent arising shortly after the improvement was made will have dissipated as the improvement ages. I have suggested above that in the self-help physical improvement situation, the separate-property owner making use of community funds is not a wrong-doer, is not breaching any fiduciary obligation. No reason exists for the law to impose a special reimbursement formula for these cases for the purpose of penalizing the separate-property owner.

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items of property. Thus, there would be no tenancy in common existing between the divorced spouses, and neither could sue the other for partition.

275. By analogy to Marsden, all pre-construction appreciation is allocated to the estate owning the land.
All expenditures for physical improvements should be treated by the law as investments, absent actual proof of donative intent on the part of the spouse paying for the improvement.276 The improvements should be classified as either capital improvements — those that add something of continuing increased value, such as a new structure, landscaping project, etc. — or as maintenance improvements, such as repairs, repainting, reroofing and the like.277 Maintenance improvements should be given the status of investments by returning the money spent to the estate paying278 for the improvement with legal interest. This puts the improving estate in a no-lose situation, but the gain will be modest.

Capital improvements have been treated similarly to payments on the purchase price of an acquisition at Civil Law, as well as under Lucas, Moore, and Family Code section 2640. This uniform treatment is sound, and if California will continue to treat the principal component of purchase-money note payments as buying-in to a share of title, so should capital improvements. The Sparks case offers a buy-in to title approach for physical improvements that are capital investments that is easier to apply than the value-added approach suggested by Long. Under Sparks valuation of the share of title acquired is

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276. Donative intent can be for an absolute gift to the improved estate or for an interest-free loan to benefit that estate. In the latter situation the remedy for the improving estate is reimbursement without interest of the amount spent, offset by any use value to the estate claiming reimbursement, as discussed in Part VI of this Article.

277. Several authorities have drawn the distinction in measuring reimbursement between investment-type improvements and maintenance-type improvements, granting to the former a higher level of reimbursement. See, e.g., DeFuniak, supra note 239, at 37-39; Lawrence D. Kay, Comment, The Husband's Use of Community Property to Improve His Separate Property, 50 Cal. L. Rev. 844, 847 (1962). These writers would give investment improvements the benefit of value added (measured at the time of termination of the community) but maintenance improvements only a return of funds spent (i.e., a gift of an interest-free loan or a use-value resulting in a 100% offset is conclusively presumed). See also Moldave, supra note 130, at 1283 n.103. In Wisconsin, funds spent for improvements that increase the capital value of an asset buy-in to a share of title, while maintenance improvements (including the paying of real property taxes) do not buy-in and provide at most a basis for a reimbursement claim. Krueger v. Rodenberg, 190 Wis. 2d 368, 527 N.W.2d 381 (App. 1994); Estate of Kobylski, 178 Wis. 2d 158, 180, 503 N.W.2d 369, 377 (App. 1993).

278. "Payment" can be in the form of community labor applied to maintain separate property by a spouse who is cohabiting with the other spouse or separate labor by a spouse who is separated from the other spouse — under such circumstances that California Family Code § 771 applies — applied to community property. Of course, community or separate labor can be a component of a capital improvement as well as a maintenance improvement.
made only once: as of the date the improvement is paid for (or if there are multiple payments, probably when the last such payment is made, although the date when construction is complete, if earlier, also makes sense). Under the value-added approach to buy-in, on the other hand, it could be necessary to repeatedly assess the comparative values of the improvement and improved property (usually the structure and the land on which it is built). Thus, if improved realty is rented out and a creditor who can reach the property of only one marital estate (usually the community) levies execution on a bank account containing rentals collected over a lengthy period of time, a complicated apportionment would be necessary. Technically, a party litigating this issue could demand that for each month of receipt of rental in the bank account a determination be made of the percentage of value of the rental property consisting of the structure compared to that adhering in the land. A similar reconstruction could be necessary at the end of the marriage when community and separate estates are sorted out either for division at divorce or to give effect to a will of a deceased spouse who bequeaths all his separate property or his half of the community to a person other than the surviving spouse.

Since the estate paying for a capital improvement gets to buy in to title and has the chance to share in large capital gains (as well as a share of rental income if there is a true buy-in) and is not confined to a modest gain through payment of legal interest on the amount spent, this estate must, as does the estate making a purchase-money note payment to acquire buy-in rights, share in the risk of loss of the improved property. The Warren formula that reimburses for the greater of value added or amount spent (even without interest) would be inappropriate.

VI. CALIFORNIA SHOULD BASE ANY OFFSETS TO REIMBURSEMENT CLAIMS SOLELY ON PROVEN BENEFIT TO THE CLAIMANT ESTATE AND NOT ON CONCLUSIVE OR EVEN REBUTTABLE PRESUMPTIONS OF BENEFIT

A. The Per Se Offsets of the Moore Decision Are Illogical As Applied to the Interest Components of Mortgage Payments

A number of California cases — as well as Family Code section 2640 — call for reduction or elimination of a reimbursement claim on the theory the spouse asserting it has received an offsetting benefit. The benefits can be of three types: (1) the right to share in appreciation via investment (which arises when the payment buys-in to title); (2) the right to share in income such as rentals and dividends (also based on a buying-in to a portion of ownership); and (3) use of
the improved property.

Study of the law concerning such offsets can usefully begin with the 1980 decision of the California Supreme Court in *Marriage of Moore.*279 It crafted a flat rule barring any buy-in rights for the portion of payments on a purchase money note allocated to interest on the loan. *Moore* seems also to deny reimbursement to the community or separate estate paying the interest owed yet not owning in full the realty acquired by the purchase-money note being paid down. The *Moore* opinion declares such interest expenditures “should not be considered” in the division of property at divorce because they are “expenses incurred to maintain the investment.”280 As Professor Brandt explains, *Moore* considers payment of interest not part of the investment in the land.281 Surely, however, interest is essential to the making of an investment on credit,282 and the idea in *Moore* may be that what ever equitable basis there might be for reimbursement is offset because the payment purchases a right to share in accruing gain. There is nothing magical about a payment for “maintenance” of investment property that should cause it to be viewed conclusively as a gift. It will be shown that the first reason in *Moore* for denying a remedy to the estate paying the interest component of purchase-money note payments is unsound.

The second explanation in *Moore* for absence of a remedy is that if payments for interest on the loan, for taxes, and for insurance could either buy-in to title or create a right of reimbursement, “fairness would also require that the community be charged for its use of the property.”283 In *Moore* it was the community estate making interest payments on a residence that was initially entirely the wife’s separate property. In recognizing a per se denial of remedy, *Moore* may assume the estate making note payments will always be occupying the premises as a benefit to it or otherwise benefitting (as by receiving rentals). The court there also seems to assume that the value of the benefit will exceed the amount of the reimbursement claim, for the notion of the quoted passage is that any reimbursement tentatively provided for would necessarily be offset due to use value.

279. 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980), discussed supra at text accompanying note 190.

280. *Id.* at 372, 168 Cal. Rptr. at 665, 618 P.2d at 211.

281. Brandt, supra note 199, at 700. In the same passage of her article, Professor Brandt reads *Moore* as I do: as barring reimbursement as well as a buy-in right arising out of such expenditures. *Id.*


283. 28 Cal. 3d at 373, 168 Cal. Rptr. at 665, 618 P.2d at 211.
Each of these latter assumptions is flawed. The land could be unimproved, being held for resale and thus providing no current benefit. It could be a house occupied by the spouses, but the estate paying the interest could be (in a case factually the reverse of Moore) the separate estate of one spouse with title largely co-owned by both spouses in community or joint tenancy with litigation concerning rights of the parties occurring at termination of the marriage by death so that section 2640 did not apply. Providing housing for the spouses is a community obligation\textsuperscript{284} for which one spouse's separate estate should not be charged,\textsuperscript{285} even though he or she is one of the two parties in occupance. If the property is rented out, it is quite possible, as will be shown below, that the title, from which the rental springs for characterization purposes, is nearly 100% separate so that rentals are too, yet the community is paying substantial monthly interest on the purchase-money loan for the property. Finally, if the note payment made is one of the first of such payments, the interest component could well exceed fair use value of the premises occupied by the spouse or spouses making the payment.\textsuperscript{286}

1. Participation in the Investment Cannot Explain Denial of Reimbursement for Interest Payments if Participation Ends Before All Note Payments Are Made

As has been noted, Moore's first theory for a per se denial of reimbursement to the estate that owns no share or just a small fraction of the title yet pays the full amount of interest on the loan seems to be that the payor estate is buying-in to title to the extent of the principal component of the note payment, and the interest component

\textsuperscript{284} See Comment, Community Property: Commingled Accounts and Family-Expense Presumption, 19 STAN. L. REV. 661 (1967).

\textsuperscript{285} Under See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966), if a spouse deliberately uses separate property to pay for housing at a time there is no community property, reimbursement may be denied, but See would characterize the expense of housing initially as a community debt.

\textsuperscript{286} Assume a case where a person buys a residence for $120,000, making a $20,000 down payment and signing a purchase-money note for $100,000, payable at 10% interest. If the pay-off period is 10 years, the monthly payments are $1321.50. The first payment is 63.06% interest — $833.33. The second is 62.75% interest — $829.26, the third 62.44% interest — $825.16, etc. If fair rental value is 8% a year of capital value (an acceptable return, since tax liability on rental income is largely sheltered by depreciation), or $800 per month, use value is less than the interest component of monthly payments. The same relationship is seen when the pay-off period is quite long. If it is 40 years, payments are $849.15 per month. The first payment is 98.14% interest — $833.33. The second is 98.12% interest — $833.20, the third 98.11% interest — $833.07, etc.
is the credit cost of that participation. This theory is correct only if the estate taking over the note payments from the estate making the initial purchase is in fact able to pay all the remaining note payments. Due to the nature of amortization — early payments are mainly interest, the last payments primarily principal — the major investment of the interest component in the first payments is in the privilege of making the last payments by which a relatively large chunk of ownership is acquired compared to the share obtained by the initial payments. If a marital estate “invests” in that privilege but never enjoys the benefit because its participation in the buy-in process is terminated (e.g., by a divorce\textsuperscript{287}), reimbursement may be essential to prevent unjust enrichment of the other estate.\textsuperscript{288} It will be shown that reimbursement is one of several possible remedies, one or more of which California must adopt.

A hypothetical case will illustrate how Moore’s per se rule denying reimbursement for interest paid operates unfairly. Because it may be helpful to analyze the transactions in terms of parties who are distinct entities rather than married persons, one of whom acts in the dual capacities of owner of the separate property interest and half-owner of the community interest, I shall refer to the party initiating the acquisition (the spouse-to-be) as X and the entity taking over the note payments (the community in the Moore fact pattern) as Y.

X buys Blackacre for $120,000, making a cash $20,000 down payment and borrowing $100,000 from Bank, which X delivers to his vendor. The promissory note is at 9% interest and calls for monthly payments of $800\textsuperscript{289} for 30 years. After five years and $48,000 worth of note payments, X has paid down the purchase money note by $4120. That sum is so small because, amortized over 30 years, note payments made in the initial years are largely interest. The property is now worth $172,000 due to hypothesized appreciation.

An event happens that puts X in a position whereby it is very

\textsuperscript{287} Example: Shortly before marriage Husband buys land on credit. During two years of marriage the community makes extensive note payments but acquires only a small fraction of the title. Divorce ensues at which the court can award the entire property only to the spouse who separately owns a share of it. The contract right to make the continuing payments, including the last ones that are so favorably weighted, will go with the land to the separate property owner, the husband.

\textsuperscript{288} Thus, I cannot agree with Professor Brandt when she says of California law: “Furthermore, the community estate would not be entitled to any reimbursement for interest paid because it is part of the necessary cost of maintaining the community’s capital investment.” Brandt, supra note 199, at 698.

\textsuperscript{289} Actually, the amortized payment is $804.60, which I have rounded off for convenience in the text, but which is used in the calculations that follow.
difficult for him to make future note payments with his own funds. (In the community property context, this is the buyer's marriage, converting the flow of income from his labor from separate property to community.) X turns to Y for help. Moore in effect envisions X and Y as making a deal in the form of a conditional sale from X to Y of the right to complete the contract, by making all future payments on the purchase-money note to X's lender, and thereby acquire 79.9% of Blackacre. (X wants to retain the equity he presently has so he will not sell to Y all of his interest in the parcel.) X realizes he has been making very large interest payments while acquiring quite little equity, but these interest payments (totalling $43,880) have enabled X to obtain $52,000 worth of appreciation. A condition of the deal is that X will have a claim against Y for that $52,000, payable when the relationship between X and Y terminates (in the martial property context this is the separate property owner's right to pre-marriage appreciation under Marsden, which Frick converts into something like a reimbursement claim).

It is assumed between X and Y that Y will finish making all the note payments, even though no contractual provision guarantees that for Y. It is because of this assumption that Y is willing to begin making note payments that are now about 90% interest, while acquiring only a tiny ownership interest through the making of such initial note payments. Y is looking forward to the stage of final note payments that will generate relatively large chunks of ownership for the same $800 per month. Although X and Y expect that Y will complete the payments, as a matter of law their arrangement is terminable upon the death of either one of them and also upon a severing of their relationship by court decree (divorce). Y knows a little bit

290. X's $20,000 down payment plus $4120 principal reduction combined are $24,120, which is 20.1% of the purchase price of $120,000. As will be explained, if Y completes the arrangement and obtains the full 79.9% interest it will be subject to X's Marsden-Frick claim at a future date for $52,000 worth of appreciation in the value of Blackacre that accrued between the time of X's purchase and the making of the X-Y deal.

291. The unfairness of Frick is evident here. X feels he is entitled to be paid $52,000 in cash for the appreciation or continue to hold it as part of his interest in the land that Y will not be buying, an interest that would appreciate along with the equity interest not sold to Y that is measured as 20.1% of the purchase price. Our hypothetical X is quite unhappy with the way Frick forces him to structure the deal with Y to take over the note payments. He knows that a claim for $52,000 at some unknown time in the future is worth far less than his ownership of a share of appreciation as part of his retained fee simple fractional share in the property.

292. Although the proposition is surely dubious, I will assume that the fidu-
about principles of unjust enrichment and believes the law will provide a remedy if Y's expectation of completing the note payments is frustrated.

Ordinarily when one party has an enforceable contract to buy land from another, equitable conversion occurs and the law views the buyer for most purposes as owning the full interest he contracted for (here a 79.9% undivided share subject to a $52,000 claim). But because of the termination provisions, this is not the typical vendor-vendee relationship, and the law (Moore case) does not at once view Y as full owner of 79.9% of the title. (If it did, Y would obtain from the outset a full 79.9% of future appreciation, a right that Y would consider a fair exchange for making monthly note payments that are heavily weighted on the interest component so that they — without application of equitable conversion — result in little title vesting in Y.) Rather, the law views Y as acquiring month by month only a small fraction of the title, which itself will generate a claim for

ciary duty of the spouse initially buying the property (X), arising upon his marriage to the other spouse, with respect to community investment opportunities precludes him or her from simply terminating the community's buy-in program by resuming use of separate funds (perhaps from a fresh inheritance) to pay down the note. Thus, X does not have the right to reclaim at his or her pleasure the right to resume paying off the purchase-money note. On the concept of a separate estate's liability for usurping a community investment opportunity, see REFFY & SAMUEL, supra note 138, at 16-1 through 16-5; Marriage of Lucero, 118 Cal. App. 3d 836, 173 Cal. Rptr. 680 (1981). See generally CAL. FAM. CODE §§ 721(b) (West 1994) (spouse shall not take unfair advantage of other spouse), 1100(e) (West 1994) (spouse shall manage the community as one having a confidential relationship with other spouse). Or perhaps, due to its pre-marriage source, the right to complete payments to acquire the property remains despite the X - Y deal a separate investment opportunity, but the spouse making the initial purchase must compensate the community with interest for its loss when his or her separate estate takes over the note payments once again.

I further assume the purchasing spouse cannot eliminate the community's right to continue buying-in to title by giving away his or her interest after the community has begun to make note payments. If he attempts such a gift, at the very least the donees should stand in their donor's stead with respect to the right of the community to continue making payments on the purchase-money note. Probably this is true also as to unsecured creditors of the initiating spouse who have agreed to look solely to his or her separate estate for payment. That is, if they levy on the land at issue the non-debtor spouse can establish in litigation against them that the interest taken is subject to the community's right to continue buying out the separate estate's 79.9% interest that was acquired on credit. See Murphy v. Clayton, 113 Cal. 153, 45 P. 267 (1896) (party claiming unrecorded resulting trust interest in land titled in debtor has right superior to grantee's general creditors).

only a small amount of appreciation. The only reason Y is willing to make these payments heavily loaded with interest that buy no substantial share of the land is the prospect of making note payments at the end of the 30 year pay-out period that earn Y shares of title worth far more than average generated by each $800 monthly payment.

Y begins making the monthly payments. It maybe useful to analyze one of them in detail. In year six of the 30-year payout period, after making seven monthly payments, Y has gained a .51% interest in the title. His next $800 payment is 89% interest, so that Y gets another 90/120,000 share of title; now he owns .59% and will share to that extent in the next month’s appreciation of the land.\(^{294}\) If next month’s appreciation is a robust $1000, Y’s share is $5.90.

After five years Y has paid $48,000 in note payments constituting $6450 of principal and $41,550 of interest. His share of ownership is now 5.375%. The value of the land is now $200,000, let us assume. Then one of the events occurs that terminate Y’s ability to continue making note payments: X’s death, Y’s death, or judicial termination of the X-Y relationship. Moore seems to envision the buy-out arrangement ipso facto terminating, and Y’s interests being frozen as they exist fractionally at this time, while all further rights under the X-Y arrangement revert to X.

Y’s hope that principles of unjust enrichment will not let this happen should be vindicated. This can be done in one of four ways: (1) Give Y (or his estate if he has died) rather than X the right to complete the note payments owed to Bank over the remainder of the 30-year term;\(^{295}\) (2) view Y as dropping out of the contract but value

\(^{294}\) The sooner after X’s purchase that Y takes over the note payments the greater the unfairness to Y of a later termination of his ability to continue making the payments. Suppose Y makes the very first payment after X has paid $20,000 down and signed a promissory note for $100,000 at 9% interest for 30 years. The first payment is amortized as just about $50 in principal reduction and $750 interest. Assume that appreciation during the next month is $240 (an annual rate of 2.4%). Moore sees Y’s first note payment as buying-in to only a 50/120,000 share of title. At the end of the month Y gets 10 cents worth of appreciation despite having paid some $750 in interest. Had Y made an enforceable promise to take over the rest of the payments, equitable conversion would have occurred and Y would have obtained all the appreciation not allocated to the fractional share retained by X. But even though Y made no binding promise, X and Y shared an expectation that Y would complete the payments. In fairness, upon Y’s death at the end of the month, if the law terminates the buy-in opportunity for Y’s estate, X should reimburse the estate for $749.90.

\(^{295}\) Y would also at this time have to pay off X’s $52,000 Marsden claim. A court order awarding to Y the property right to complete the note payments could be coupled with the creation of a legal obligation on the part of Y to make pay-
the right to complete the buy-in process by making monthly payments that acquire increasingly larger chunks of title for the same $800 per month and order X to pay Y that sum; or (3) calculate what X should pay Y on a different basis: X to reimburse Y for the portion of interest payments properly allocable to Y's acquiring the right to make future payments weighted on the principal side;296 (4) award Y (or his estate) a share of appreciation of the asset during the time Y was making payments on the purchase money note based on a method of allocation not tied to the tiny shares of title he earned each month due to the small share of principal components contained in his amortized payments.

In sum, the problem with Moore should not, as one writer suggests,297 be viewed as merely one of allocation of appreciation once the community begins buying in to title. Remedy No. (4) above, reallocating appreciation, is not the only solution. Remedies Nos. 2 and 3 would directly reverse Moore's no reimbursement rule to cure the unfairness. As will be suggested at the conclusion of this section of this Article, the amount of reimbursement calculated under either formula should be reduced only by the amount of actual use benefit to the community. I can see no basis for a presumption of total offset; after all the spouse seeking to offset the reimbursement award is a member of the community too and has as much knowledge of actual community benefit as does the spouse seeking reimbursement.

Moore would not have been unreasonable had it rewarded the community that begins paying all the interest on the purchase-money loan with all of the subsequent appreciation not allocated to the separate estate's down payment and pre-marriage increased equity. As suggested above, that would, in effect, recognize equitable conversion of the interest traceable to separate credit extended at the time of purchase to the extent that the loan principal was not repaid when the community began making note payments, as if the community had made an enforceable contract to purchase such interest by completing the note payments. The Moore court's decision to instead "dribble" the title out to the community based on the extent to which

296. Y would not always have a claim for 100% reimbursement. Y should not if his participation in the buy-in is terminated after the amortization break-even point, i.e., after the principal component of payments has reached a level greater than the average principal component.

297. Moldave, supra note 130.
it pays over time for a reduction of principal indebtedness and to allocate appreciation based on the fractional share of title held by each marital estate is also not unreasonable, however. When, during marriage, the issue arises of how large an interest in the property a creditor of the community or of the spouse's separate estate can reach and how much the separate property owner can sell without joinder of the his or her spouse, the solutions reached under Moore are not objectionable. Moore's error is in effectively letting the separate estate obtain, at divorce, the benefits of the community's interest payments without having to pay for them. So far as I know, no spouse has ever specifically sought in a reported post-Moore case any of the four remedies I have proposed here for curing Moore's inequity. Such a claim should succeed even in a lower court, as any reading of Moore that reimbursement for interest paid is never appropriate is dictum only.

2. A "Time" Apportionment to Allocate Appreciation Has Been Nevada's Solution to the Inequity of Moore

The Nevada Supreme Court, sensing that something was wrong with Moore, has altered the California approach for allocating appreciation by adopting remedy No. 4 described above. In Malmquist v. Malmquist, the Nevada court held appreciation should be allocated by making a "time" apportionment of either all appreciation occurring after the original purchase or the appreciation occurring after the "shift" — when the marital estate that did not make the down payment begins to make periodic payments on the purchase money note. To illustrate one can apply Malmquist to the X-Y hypothetical above. It will be recalled X had for five years (60 months) made monthly payments of $800 when Y took over paying them. Y then made seven monthly payments that were roughly 89% interest. (Total: $5600, consisting of $4995 in interest and $605 reduction of principal.) In the hypothetical, appreciation during the five years X paid interest was $52,000. Assume during the seven months Y made the note payments appreciation is $1000 a month, or $7000. Nevada

298. Both spouses must join to convey the fractional interest owned by the community. CAL. FAM. CODE § 1102(a) (West 1994) (joinder required for transfer of "any interest" in real property owned by the community).

299. 106 Nev. 231, 240, 792 P.2d 372, 377 (1990) (adopting the proposals of Moldave, supra note 130). Nevada applies its formula to all appreciation including pre-marriage (or pre "shift") appreciation unless the latter constitutes the "vast bulk" of appreciation. Malmquist, 106 Nev. at 240 n.1, 792 P.2d at 378 n.1. If it does, Nevada applies Marsden.
has said it will apply Marsden if the “great bulk” of appreciation at issue occurred when the original purchaser was making note payments.\textsuperscript{300} Assuming 52/59 of the appreciation is the “great bulk,” the amount of appreciation to be allocated under Nevada’s Malmquist formula is $7000. Y has paid seven note payments and X 60, so Y gets 7/67 or 10.45% of the $7000 in appreciation, $731.50, despite having paid 100% of the interest for the period of appreciation. This is almost as unfair a result as that dictated by Moore.

If Marsden is not applied, the appreciation to be allocated by Malmquist’s “time” apportionment is $59,000, 10.45% of which is $6165.50. If Y’s participation in the completion of the note payments is now terminated, awarding him a share of appreciation worth $6165 to go with his $605 share of title acquired by paying down the principal on the purchase-money note gives Y an asset worth $6770 after paying $5600 ($800 for seven months). This puts Y in financial posture close to that resulting from use of one of the reimbursement remedies suggested—e.g., the interest component be repaid with legal interest.\textsuperscript{301}

Nevada’s Malmquist approach to allocation of appreciation can be adopted to deal with the problem caused by the Moore case or can be presented to California trial courts as a remedy in addition to the other three I have suggested above which the trial court can select in its discretion. Malmquist’s handling of the Marsden case must not be adopted. The Nevada approach is proper only if Marsden is never used and all appreciation over the purchase price is allocated by Malmquist’s “time” apportionment or if X gets all the appreciation arising before Y takes over the note payments under Marsden and Y gets 100% of the appreciation accruing during the time he makes those payments.\textsuperscript{302}

\textsuperscript{300} See supra note 299.

\textsuperscript{301} Reimbursement of the interest payments with legal interest would give Y about $5000. Rounding off each of the seven note payments of $800 Y made so as to treat each as constituting 89% interest, Y paid $712 in interest seven months ago, then six months ago, then five, etc. for a total of 28 months. The present legal interest rate in California is 10%. CAL. CODE CIV. PROC. 685.010. At 10%, Y gets just about $8 per each of the 28 months for a total of $168 to add to the $4995 reimbursed for sums paid on the interest debt. Although 10% is indeed the present legal interest rate, this seems so high compared to current prevailing interest rates that legislative lowering can be anticipated. At a more realistic rate, 8%, Y gets about $4.75 per each of the 28 months for a total of $133 to add to the $4995 reimbursed for sums paid on the interest debt.

\textsuperscript{302} The Malmquist court said:

[When the vast bulk of the appreciation occurs before marriage, it may be appropriate to award the separate property the entire amount of pre-
Moreover, the Malmquist remedy of making a "time" apportionment of appreciation does not help to rectify the unfairness of Moore in certain investment-type situations. Suppose a soon-to-marry person buys a rented-up apartment house, making a small down payment and using borrowed funds to pay the bulk of the purchase price. Because of the nature of the neighborhood in which the apartment house is situated, no appreciation in value is anticipated, but the flow of rents is a fine return on the investment, and income can be sheltered by depreciation. Soon thereafter the buyer marries and begins collecting separate property rentals. The buyer-spouse spends this income on family-upkeep and other investments and uses his or her earnings at a job to make payments on the purchase money note for the apartment house. These payments are over 95% interest in the first year, so the community buys in only a tiny fraction of title on which it can base a claim to collected rents. At divorce a year later, the community has obtained less than 5% of the rentals despite paying all of the interest, an obvious cost of generating the rentals. If, as expected, the value at divorce of the apartment house is simply the purchase price, Malmquist gives the community no more than does Moore. Since Nevada has recognized the unfairness of Moore, that state cannot rely on Malmquist's apportionment of appreciation remedy in all situations. It must have an alternative remedy a divorce court can use in its discretion, such as reimbursement of that portion of the interest components paid by the community that did not generate a share of the rents, returned with legal interest.

[106 Nev. at 240 n.1, 792 P.2d at 378 n.1 (emphasis added) (citations omitted). It is the language I have highlighted that is in error. Under a "time" apportionment the estate making the initial purchase and initial note payments cannot rely on the interest it paid to get 100% of the appreciation before the second estate takes over note payments plus a share of the subsequent appreciation.]

303. An increase in value in the future that simply parallels inflationary gain is no real return on investment. See Moldave, supra note 130, at 1283 n.99. Nevertheless, allocating appreciation that merely reflects inflationary decrease in the value of the dollar by using the Malmquist, rather than the Moore, approach is of some benefit to the community that is denied reimbursement for making post-marriage interest payments.
B. Moore Correctly Refuses Reimbursement for Tax and Insurance Payments but Only if the Value of Occupancy or Other “Use” Benefit Fully Offsets These Expenditures

_Marriage of Moore_ was correct in holding that the community's payments of real property taxes and premiums for casualty insurance on the property the community is buying into by making note payments should not themselves also buy-in to title, for the same reason that interest payments do not — they are not acquisition costs. Moore is also correct that such payments need not always be reimbursed, but Moore is in error in apparently assuming that, having paid the taxes on and insurance premiums for real property owned wholly or in part by one spouse's separate estate, the community necessarily will obtain a “use” benefit of greater value that offsets any reimbursement claim that might be asserted on behalf of the community. If in fact both spouses occupy the real property at

304. Casualty insurance is a cost of a landlord's engaging in the rental business that the landlord undoubtedly passes on to his tenant — at least in large measure — in setting the rental charge. In the context of the community (equivalent to tenant) occupying a residence owned by one spouse's separate estate (landlord), where the community has paid for the insurance and reimbursement for such payment is dealt with as a distinct issue, in assessing how much rent the community owes to the separate estate fair rental value should be reduced below market value because the community (tenant) has paid what is the landlord's obligation.

The same point is true of real property taxes on separately owned land paid for by the community when the community occupies that land.

305. In the unusual case where spouses are not separated and one of them has a residence used by him or her alone — e.g., it is located at his jobsite away from the family home — such occupancy is community occupancy and should be valued to offset a community reimbursement claim. If the premises at issue are used as one spouse's place of business, again occupancy should be attributed to the community because the premises are being used to generate community income. However, in this posture, if the spouses are separated it is likely the more legally appropriate way to treat the separate estate's benefit from business use of a community-owned asset is to count the rental value as part of the community capital in making a “reverse” Pereira-Van Camp allocation, see supra note 59 and accompanying text, of the net profits earned by the separated spouse from applying his separate labors to capital that is entirely or partly community. See Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975). While reverse Pereira would effectively just reimburse the community for use of its capital, reverse Van Camp would reach a different result. Marriage of Watts, 171 Cal. App. 3d 366, 217 Cal. Rptr. 301 (1985), where the separated physician husband applied his medical skills to make community-owned medical equipment (as well as, apparently, a community-owned office building) productive misleads in seeming to say reimbursement to the community was the sole remedy.
issue, total offset will usually be proper. Rarely will insurance and
tax expenses exceed the fair use value of a primary residence or even
a vacation cottage; when they do, partial reimbursement to the com-
community may be appropriate if the separate estate also benefited from
the payments.306

If the spouses are separated, the occupancy of one of them alone — at
least if not together with minor children of the marriage — should be viewed as
separate occupancy which could not offset any community reimbursement claim.
The separated spouse occupying a community residence owes, at termination of the
community, fair rental value to the community. See, e.g., Watts, 171 Cal. App. 3d
366, 217 Cal. Rptr. 301. Suppose the residence occupied by a separated spouse,
say Husband, is owned as a cotenancy partly by the community and party as
Husband’s separate property. In the nonmarital cotenancy situation, one cotenant
who does not owt the other from possession does not owe the other a fraction of
fair rental value corresponding to the other’s share of ownership. See Zaslow v.
Kroenert, 29 Cal. 2d 541, 548, 176 P.2d 1 (1946); Pico v. Columbet, 12 Cal. 414,
420 (1859); Teixeira v. Verissimo, 230 Cal. App. 2d 147, 155, 48 Cal. Rptr. 496,
501-02 (1966); RICHARD R. POWELL, REAL PROPERTY ¶ 603, at 50-51 (Patrick J.
Rohan rev. ed. 1993). Probably that rule will be carried over to the siltation of a
separate property/community property cotenancy, although I cannot find any case
on point. Note, however, that it does not necessarily follow that the lack of obli-
gation to affirmatively pay rent means there can be no use value to offset a reim-
bursement claim, since the latter is based on arguably different equitable consider-
ations. Suppose a case where the community, by making a few note payments,
obtains a 1% cotenancy interest in a residence formerly owned solely by one spouse
alone, say Wife. Both spouses occupy the premises. Wife (to eliminate any pre-
sumption of gift by Husband) after her marriage uses community funds to continue
making “escrowed” note payments that include sums not only for principal reduc-
tion on the promissory note but for interest, real property taxes, and casualty
insurance on the premises. At divorce when Husband seeks reimbursement for
the latter three components, can he avoid an offset asserted by Wife based on “use”
benefits to the community because the community owned a tiny share of the title
and was a cotenant with coequal right of possession? The issue has not been litig-
gated. I think that if the total of the three components over a period of time is
less than, in the hypothetical case, 99% of fair rental value it is unfair to award
the community reimbursement.

306. If the property that was partly community, partly separate property of
one spouse, were rented out, reimbursement would be appropriate to the extent
the community paid a greater share of these costs than its share of the rents
(which are apportioned according to its fractional share of the title).

I can conceive of a situation where the spouses occupy the land owned
largely or even exclusively by one spouse separately and the property taxes exceed
the value of use. Example: Husband owns separately a 100-acre parcel bought by
him with an eye to future subdivision into lots to be sold for separate capital
gains. The spouses meanwhile live in an old farmhouse located on one fenced-in
acre in a corner of the parcel and do not enter the other 99 acres. If the single
tax bill for the entire parcel was paid by the community, at the termination of
marriage the taxes paid should be pro-rated based on the value of the one acre
with the home on it compared to the value of the other 99 acres. The community
Maintaining insurance that covers loss by causalities such as fire and flood will benefit both estates. The coverage protects the capital investment in the occupied structure which may be primarily owned by one of the spouse's separate estates. 307 Such insurance also assures repairs can be made after a casualty so that the community can continue or quickly resume its occupancy. And the policy may cover personality owned by the community but located in the separately-owned structure occupied by the spouses.

Moreover, with respect to premiums for casualty insurance, under the Uniform Vendor and Purchaser Risk Act, which California has enacted, 308 possession by a party purchasing land, not whether equitable conversion has occurred, 309 controls allocation of the risk of loss that the insurance coverage protects against. The occupier is assigned the risk. Analogy can be drawn between the situation where a person occupies land under an executory contract of purchase and the situation where the community occupies land while "buying in" to a share of separate title. 310 Thus, the courts can be guided by the Uniform Act's placing the risk of loss on the occupier. Under this theory, if the community is occupying the premises it should be able to claim reimbursement for only that portion of the insurance premiums that corresponds to the fractional share of title that will still be owned by one spouse's separate estate after the community has com-

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is entitled to reimbursement of the part allocated to the 99 acres of open land held for resale by the husband separately.

Note that if Wife was the one drawing on community funds to pay taxes in excess of the community's use value, present California law would view her as presumptively making a gift of her community interest in the excess to Husband. Query why the presumption of gift should not apply to the occupancy by the wife of the husband's separately owned land so that the community cannot be charged with use value; i.e., possession was given with no retained right to offset use value against a reimbursement claim made against Husband. Abolishing the presumption of gift as urged in this Article eliminates these complexities and the noted inconsistency as to when a gift will be presumed is further reason for the abolition.

307. If the community has been paying taxes and insurance premiums by making "escrowed" note payments that include tax and insurance components, the community will have bought in to a share of title. It is possible, of course, that the separate estate has made all the payments on the purchase-money loan while the community is paying distinct tax and insurance bills.


310. I am here excluding the situation where the separate estate is making the note payments on a purchase-money loan or has already paid for the realty the community occupies and pays to have insured.
pleted paying all note payments due on the purchase-money loan.

C. Section 2640's Per Se Denial of Reimbursement for Interest, Taxes, and Insurance is Illogical, but Additional Caselaw Exceptions to the Statute Probably Cannot Be Made

As was noted above, Family Code section 2640, applicable at divorce where a spouse's separate estate makes purchase-money note payments on or pays for (by cash or credit) physical improvements to property co-owned by the spouses, may perhaps be construed to raise a flat bar to reimbursement for not only the interest component of loan payments but on separate funds spent for taxes and insurance. Because section 2640 also precludes a buy-in to title for the separate property contribution even to the extent it reduces principal owing on the purchase-money note — the remedy is reimbursement without legal interest — the theory for denying reimbursement for the interest component of note payments cannot be that this is an investment cost of the separate estate. The same point is even more clear for tax and insurance payments.

Nor can the theory for denying reimbursement for interest, tax, and insurance payments in section 2640 be an offset for use value in the typical case governed by the statute. If the property is a residence, it is likely to be occupied by both spouses — the community — and providing housing for the spouses is a community cost, not one charged separately to a spouse.311 If the property is rented out, 100% of the rentals will be co-owned by the spouses, because section 2640 does not allow the separate estate to buy in to title. If it is vacant land being held for resale, 100% of the capital gain will go to the spouses equally.312

The only explanation for the non-reimbursement provisions of section 2640 is a nearly conclusive313 presumption of gift, which makes even less sense then the rebuttable presumption of gift of the

311. See supra note 284 and accompanying text.

312. A separate use is conceivable. Example: As equal manager of community realty in a transaction not involving a conveyance, Wife installs her widowed mother in the community-owned home and begins using her separate funds to make note payments. In this rare situation, § 2640 may operate with some rationales in denying reimbursement for the interest component of Wife's note payments. Still, § 2640 is unfair in this situation in conclusively presuming the use value to the separate estate equals or exceeds the total carrying costs paid by the separate property owner in the form of interest, taxes and insurance premiums.

313. A written agreement providing for reimbursement and signed by the non-payer spouse would displace the presumption, of course. It has been noted that an oral agreement valid under Lucas may be as effective.
caselaw. The legislature supposedly envisions a separate property owner having a divided state of mind when making a note payment under an “escrowed” account that has four components: principal reduction, interest on purchase-money loan, funds escrowed for an upcoming tax payment, and funds escrowed for an upcoming insurance payment. With respect to the first, the payor is giving an interest-free loan; regarding the latter three his or her intent is an outright gift.

Once again I call for repeal of California Family Code section 2640. A new statute or caselaw developed to replace it should provide that the principal component buys in to share of title, while the other three components are reimbursed with legal interest, reduced by proven use benefit to the separate estate making the payments.

The exception to section 2640 in the *Hebbring* case, allowing reimbursement for the interest component paid by a separated spouse out of his separate-property earnings, of course extends to insurance and tax payments with such funds. I cannot imagine, however, what further exceptions the courts can carve out of section 2640 to make its application less unfair without doing violence to its plain language.

D. Recommendation: All Offsets to a Reimbursement Claim Should Be Based on Actual Proof of Benefit to the Estate Asserting the Offset

While *Moore* and section 2640 effectively apply a conclusive presumption that the estate paying interest, taxes, and insurance premiums receives a use value from the property owned by a different marital estate equal to or greater than the amount spent, several California cases eschew presumptions and call for actual proof of the use value before imposing an offset. The supreme court has said that reimbursement should be offset “where the payment was made on account of a debt for the acquisition or preservation of an asset the paying spouse was using and the amount paid was not substantially in excess of the value of the use.”

314. See supra notes 225-26 and accompanying text.
315. One sees this use of a presumption in cases from other states as well. See, e.g., *Preis v. Preis*, 649 So. 2d 593 (La. App. 1994) (car use eliminates reimbursement claim for car payments); Brandt, supra note 199, at 699.
316. *Marriage of Epstein*, 24 Cal. 3d 76, 84-85, 154 Cal. Rptr. 413, 418, 592 P.2d 1165, 1170 (1979) (quoting *Marriage of Smith*, 79 Cal. App. 3d 725, 747, 145 Cal. Rptr. 205, 216 (1978)). If evidence shows the use value can be calculated but is less than the amount paid, why should there not be some award of reimbursement even if the difference is less than substantial, especially at divorce in Califor-
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Tucker, this rule was cited where a separated husband had exclusive possession of a refrigerator that was, apparently, solely owned by the community at the time of separation. He made purchase-money payments of $30 a month from his separate funds and sought reimbursement for all such payments at divorce. Reimbursement was denied because use value was $30 per month.

A more finely tuned analysis is called for. Suppose use value was only $10 per month. If, as seems likely, the monthly payments were amortized payments on a purchase-money note and if they were among the final payments, more than two thirds of each of them would likely be buying in to a share of title to the appliance. That fraction of each payment is amply compensated by the buy-in. Only the remaining part of each payment — say roughly one third or $10 — could be asserted as a reimbursement claim, and under the hypothetical facts such a claim is offset by the $10 per month use value.

This kind of close analysis based on evidence submitted on behalf of the party claiming an offset — unaffected by any presumptions — should be required in any case where a reduction in the amount of reimbursement owed is sought.

If buy-in to title is the remedy for all investment-type expenditures in cases where one marital estate obtains a use value after paying for a physical improvement on or making a purchase-money note payment with respect to property owned in part by another marital estate, there will be no reimbursement claim to offset. The buy-in to title should not be retroactively reduced by the amount of use value, as this would deprive the estate making the payment of the ability to share in the investment. Rather the estate providing the use benefit has what has been called a "Watts charge,"

\[\text{niania where the law demands a precise 50-50 division of the community rather than the more common equitable division? See generally REPPY & SAMUEL, supra note 138, at 18-3.}\]


[Where the asset is not owned outright by the community but is being financed, and the monthly payments equal or exceed the reasonable value of the asset's use, the [separated] spouse may satisfy the duty to compensate the community for use of the asset by making the monthly finance payments from his or her separate property.

Id. at 890-91, 274 Cal. Rptr. at 197.

318. Marriage of Jeffries, 228 Cal. App. 3d 548, 553, 278 Cal. Rptr. 830, 833 (1991) (referring to Marriage of Watts, 171 Cal. App. 3d 366, 217 Cal. Rptr. 301 (1985)); see supra note 305. See also Marriage of Baltins, 212 Cal. App. 3d 66, 86, 260 Cal. Rptr. 403, 425 (1989), stating that what a "Watts charge" does is "reimburse" the estate providing the benefit to the estate that must pay for it, an odd
against the benefited estate, rather like a common count cause of action that is taken into account in dividing the community property and determining any monetary judgment one divorcing spouse owes the other (or in probate proceedings what the survivor owes the decedent's estate or vice versa).

VII. CALIFORNIA SHOULD CONSIDER ADOPTING THE ARIZONA-TEXAS CASE LAW THAT CALCULATES THE VALUE OF A BUY-IN TO TITLE UNDER MOORE-MARSDEN BUT MAKES A SECURED REIMBURSEMENT CLAIM THE PROCEDURAL DEVICE FOR ENFORCEMENT OF THE CLAIM

In the 1985 Arizona case, Drahos v. Rens, the day before his marriage Husband bought a house for $21,000, paying $7000 down and financing the balance on his separate credit. Community funds were used to pay off the purchase-money note, and at termination of the marriage the property was worth $80,000. The appellate court held that since the realty was acquired before marriage it had to be entirely Husband's separate property but that the community had acquired an equitable lien against it in an amount calculated under California's Moore-Marsden formula. For this mixture of buy-in theory to calculate the benefit to the community and inception of title to be true to the historical definition of separate property, the court relied on a prior Arizona Supreme Court case involving a physical improvement to separate realty provided for by the community that used an enhanced value test to measure the amount of reimbursement owed. In similar reliance on a physical improvements case that had employed enhanced value as the measure of reimbursement, the Texas Supreme Court declared in dictum in 1988 it would follow that approach.

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term to use when, for example, the spouses (the community) simply live in a separately-owned residence of one of them so that at termination of the marriage the non-owner has to pay half the fair rental value to the owner. Whether a "Watts charge" should bear legal interest is a point upon which I am not now prepared to opine.

321. Penick v. Penick, 783 S.W.2d 194 (Tex. 1988) (relying on Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985)). In Penick, community funds had been used to reduce the principal indebtedness on the purchase-money note for a separate property acquisition of Husband. The intermediate appellate court awarded reimbursement of the amount paid and refused to grant offset for the community's use benefit — a reduction of community-owned income taxes due to depreciation taken on the separate realty. Because Wife had not appealed to seek reimbursement for more than the amount spent, what the Penick court said in reversing due to erro-
The pros and cons of California’s true buy-in to title and Arizona’s use of the buy-in theory to measure the amount of reimbursement are as follows:

A. Management and Recording Act Problems

The Arizona approach seems superior in assuring more unified management than does the California approach. Thus, in the situation in which some separate funds have been used to pay down by a small amount of the principal owing on a purchase-money note for a community property acquisition of land, in Arizona the dual management statute for significant real property transactions applies to all interests in the property. But in California the spouse whose separate property estate has bought in to a share of title can, as cotenant with the community, lease the land (although not assuring possession exclusive of the other spouse). That spouse also can sell his undivided separate property interest to a third party, who could bring a partition action against both spouses representing the community.

Where the community has, in California, bought into a small share of title and the spouse who originally had exclusive separate property ownership seeks to sell the entire parcel, encumber it, or

nones denial of offset is dictum:

Why we should have two distinct sets of rules for two very similar claims for reimbursement [i.e., for building a structure and for paying down the purchase-money note] is another matter which is not entirely clear. One commentator has observed that there is no logical reason for calculating reimbursement differently in capital improvement cases and in purchase money cases . . . . We are likewise at a loss to make a meaningful distinction between these two types of reimbursement. We view the advancement of funds by one marital estate to another under either transaction, payment of a purchase money debt or as a capital improvement, as essentially identical and therefore subject to the same kind of measurement.

783 S.W.2d at 197. Gutierrez v. Gutierrez, 791 S.W.2d 659, 662 (Tex. App. — San Antonio 1990), no writ, declared the common measurement of value under Penick and the Anderson physical improvements case it relied on to be “enhancement in value to the benefited estate.” See also Jones v Jones, 804 S.W.2d 623, 626 (Tex. App. — Texarkana 1991), no writ. Nevertheless, no reported Texas decision seems to have realized that enhanced value in the case of a payment that helps pay off the purchase-money note entitles the contributing estate to more than the amount paid — to a share of subsequent appreciation. To the contrary, one intermediate appellate court purporting to apply Penick in a case where separate funds were used to pay off the purchase-money note for a community acquisition said: “[T]he value of the community estate was enhanced to the extent its debts were extinguished.” Graham v. Graham, 836 S.W.2d 308, 310 (Tex. App. — Texarkana 1992), no writ. Texas judges need to read the Drahos decision from Arizona to understand Penick.
make a long-term lease, the other spouse can effectively block the transaction by advising the third party of the community’s interest as a cotenant. In Arizona under Drahos, the community has a lien on the property securing its right to reimbursement. A would-be lessee of the separate property owner might be willing to take the lease subject to such a non-possessory interest. Arizona has yet to decide whether, in the event of sale of the property, the community lien is lifted from the land and attaches to the sales proceeds. 322 Without such a decision on the books, surely the would-be purchaser advised of the community interest by a nonconsenting spouse would withdraw from the transaction. In a case where the third party does not know of the community’s lien arising not by written instrument but as a matter of law, 323 probably the Recording Act has no more application to an implied-in-law lien than it does to an actual buy-in interest, because both are created without any instrument of conveyance to record. 324

322. If the sale were not for cash the lien could shift both to the down payment and the promissory note. If the sale was executory under a contract for it, the lien could attach to payments as made and to the separate property owner’s interest in the contract. Admittedly, the security is not as attractive when attached to multiple items of personalty rather than to one piece of real property. Nevertheless, I have no idea what Arizona’s decision will be when faced with the issue of what happens to the community’s lien to secure reimbursement when the separate property is sold.

323. In Jeffers v. Martinez, 93 N.M. 508, 601 P.2d 1204 (1979), discussed infra at note 237, where a bona fide purchaser dealing with Wife alone in reliance on a deed that seemed to make the land she was contracting to sell her separate property invoked the state’s Recording Act to take free of an unrecorded interest of the community, that interest was created by a deed she had signed that she had not recorded.

324. In California it is a “conveyance” that may be void for lack of recordation in favor of a bona fide purchaser who first records. CAL. CIV. CODE § 1214 (West Supp. 1995). Section 1215 says “conveyance” in the Recording Act “embraces every instrument in writing” that creates an interest in the land or encumbers it. Id. § 1215. This seems to codify the general rule elsewhere that the common law first-in-time rule and not the Recording Act applies to an interest created without any writing. See e.g., Mugaas v. Smith, 33 Wash. 2d 429, 206 P.2d 332 (1949), involving an unrecordable interest acquired by adverse possession by a party whose possession subsequently had ceased so that no inquiry notice was imparted. However, the community property buy-in or lien interest could be reduced to a recordable document unlike the adverse possession interest in Mugaas. California Family Code § 1101(c) — known as the add-a-name statute — provides a “court may order that the . . . title of community property held in some other title form shall be reformed to reflect its community character . . . .” Id. Given the plain purpose of the statute to prevent one spouse from dealing unilaterally with property in his name alone when the other spouse should be participating in the transaction, it can be construed as allowing the spouse of the separate property title
B. Security and Bankruptcy

Unlike most community property states, California has never held that a reimbursement award based on the improvement of property owned by one marital estate paid for by a different marital estate is secured by a lien or equitable charge arising as a matter of law at the time of expenditure. If California should adopt the reimbursement approach of Arizona's *Drahos* case, it is important that the automatic lien be part of the new remedy so that the estate reimbursed has the same security against discharge in bankruptcy and seizure of the property by creditors as it would have under the buy-in-to-title approach. As noted above, the Recording Act probably has no application to either such a lien or a share of title acquired under present buy-in law. The lien becomes most important when one spouse declares bankruptcy and the other wishes to assert that the reimbursement right in favor of the estate making a purchase-money note payment or paying for a capital improvement is secured by a lien on reality of which the trustee in bankruptcy takes possession. 325 The non-bankrupt spouse wants both the inchoate claim and the lien to survive bankruptcy.

If a divorce court awards or confirms property subject to a lien to one spouse, it can be important that the lien was created as a matter of law well before divorce proceedings and hence is not a judicial lien that can be avoided in bankruptcy in certain circumstances

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325. Where one spouse alone is the bankrupt, the basic rule is that all property liable for his or her debts is part of the estate passing to the trustee. See generally REFFY & SAMUEL, *supra* note 138, at 17-26 through 17-28. If Husband is the bankrupt and he has no "necessaries" creditors, see CAL. FAM. CODE § 914 (West 1994), his separate property and community property will be taken to pay creditors. If California, as suggested at *supra* note 197, holds that a right of reimbursement is too uncertain an interest to be levied on or seized by garnishment under state law, the question arises whether this is an exemption that may be pre-empted by federal bankruptcy law or a rule of state law that the reimbursement claim is not property. If California law says the claim is secured by a lien on reality, surely it must be proprietary in nature. As stated in *supra* note 197, it seems impossible to value, however, and for that reason federal bankruptcy law might yield to the state law position that creditors cannot seize it.

326. If the property is separately owned by one spouse subject to a lien to secure a community reimbursement award (which at divorce is reduced to a lien securing half of the former community claim that now runs in favor of the other ex-spouse), proper terminology is that the property is confirmed, not awarded to, the owner-spouse.
under section 522(f)(1)(a) of the Bankruptcy Act. If the lien is initially created by the divorce court, it is avoidable unless the encumbered property interest was also created by the divorce court. Thus, if community-owned Blackacre is the sole asset divisible at divorce, and a court in Washington, Texas, or other state that makes unequal divisions of the community awards Wife 75% subject to a lien judicially-created at divorce to secure a money judgment in favor of Husband, at ex-Wife’s bankruptcy the lien is unavoidable on 25% of Blackacre. The law views Wife as receiving from Husband an encumbered interest in Blackacre rather than owning a 25% share that the court encumbered.

Suppose the divorce is in California with its equal division rule. There are two community assets of equal value, Whiteacre and Redacre. The court awards the former to Husband and the latter to Wife. It also orders Wife to pay Husband reimbursement for having used separate property funds of his to build a structure on Redacre and imposes a lien on Redacre to secure Wife’s payment. Although there is no actual change in the value of realty owned by the divorcing spouses in this equal division, Husband’s half interest in Redacre is transferred to Wife, and she is viewed as receiving an encumbered half interest rather than attaining a proprietary interest owned by her free and clear that is then judicially encumbered.

In any event, the greatest security for the Drahos interest is obtained through a lien arising not judicially as a matter of law at the time that California under Moore and Sparks would view a buy-in to title as occurring.

If a judicially-created lien is the remedy, or if California should decline to secure a reimbursement claim, a recent change in the bankruptcy law probably reduces the risk that a spouse receiving a reimbursement award at divorce (or in litigation attendant to dissolution of a marriage by death) should suffer its discharge in the

327. 11 U.S.C. 522(f)(1)(A). The debtor, to avoid the lien, must be able to claim the encumbered property is subject to an exemption. In the reported divorce case the property has been the debtor’s home, and the homestead exemption has been asserted. Avoidable nonjudicial liens are non purchase-money liens on household furnishings and tools of the trade. 11 U.S.C. 522(f)(1)(B). Suppose Husband to-be buys machinery for the shop where he works (tools of the trade) on credit from Seller, who takes a purchase-money security interest. The buyer marries and pays off Seller with community funds. I suggest a lien for reimbursement arising as a matter of law in favor of the community is not a purchase-money lien under § 522(f)(1)(B). Only Seller’s lien meets the definition of a purchase-money encumbrance.

obligor's bankruptcy. Public Law 103-394 amended section 523(a)(15) of the Bankruptcy Act to provide that a non-alimony "property" type award at divorce — as a reimbursement award is — is no longer freely dischargeable but is instead excepted from discharge unless the obligor lacks the ability to pay the debt from income or property not necessary for support of himself and his dependents or discharge would cause "a benefit to the debtor that outweighs the detrimental consequences to a . . . former spouse."

This new rule applies only when the debt is "incurred by the debtor in the course of a divorce or separation." What of the argument of a debtor-spouse seeking discharge after divorce of an unpaid reimbursement debt who urges that under California law the debt was incurred when a note payment was made or improvement was paid for? The divorce court just ordered its payment, he contends. The argument is strongest if California law will recognize a lien arising at the time of such expenditure, but, as has been shown, such lien is not avoidable. Since the encumbered property is likely to have sufficient value to cover the debt, the issue of when the debt arose may become moot. If however, the lien to secure reimbursement is inferior to security interests of subsequent lenders who will seize the full value of the property, leaving the reimbursement claim effectively unsecured, the issue arises whether the divorce court's order that the debt is payable at some designated future time is the equivalent of the "incurr[ing]" of the debt under amended section 523(a)(15). Surely Congress did not intend to discriminate against non-alimony "property" type awards arising in community property states that deal with husband-wife co-ownership of property due to marital status during marriage as well as at divorce. I think courts will hold the divorce court's order to pay is the equivalent of the "incurr[ing]" of the debt under section 523(a)(15).

No such argument can be made when discharge of a reimbursement debt is sought during marriage. At this stage the non-obligor spouse must rely on the lien to protect his or her claim. If the lien is inferior to security interests of other creditors that exceed the value of the property, the inchoate reimbursement claim apparently will be discharged.

330. As suggested above, this would not be due to the operation of the Recording Act but rather to some equitable quality of the implied-in-law lien that should make it inferior even though first in time to a lender's deed of trust.
331. If the lien arises at common law rather than under § 2640, the fall in value of the encumbered property could leave the reimbursement claim partly unsecured, and the issue noted in text would arise as to the unsecured part.
C. Ownership of Rentals and Other Profits

Arizona has yet to tell us what happens when the community makes some payments on the purchase-money note on property originally separately-owned by one spouse and subsequently that spouse rents out the property.\textsuperscript{332} Since the profit-producing capital is 100% separate property of one spouse, it would seem the rentals must be as well.\textsuperscript{333} If, however, the principal component of the payment on a purchase-money note and the expenditure for capital improvement are to be treated truly as investments, the estate so investing cannot be denied a proportionate share of the rents or other profits from the capital asset.\textsuperscript{334} A share of rentals will have to be added to the amount to be reimbursed. Since the cash rentals could be invested had the estate to be reimbursed received them in cash under a buy-in-to-title approach, the rentals component of the reimbursement claim should bear legal interest. This is probably no more complex than tracing the cash rentals and dividing between the two marital estates that co-own them profits earned via investment, which must be done under current California law.

D. Creditors' Remedies

Under California's present buy-in law, where the community has been making payments on the purchase-money note for an acquisition that was originally separate property of one spouse, the creditor of the other spouse can levy execution on the ownership interest of the community, buy it at execution sale, and then bring as a cotenant a partition action to force sale of the property for cash.\textsuperscript{335} Because

\textsuperscript{332} It could be the couple's residence for many years after marriage, during which the purchase-money obligation was paid off with community funds, title having been acquired by one spouse alone before marriage. The couple then moves to a different residence, which is the occasion for renting out the former home.

\textsuperscript{333} Arizona Revised Statute § 25-213 provides: "All property, real and personal, of each spouse, owned by such spouse before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is the separate property of such spouse." ARIZ. REV. STAT. ANN. § 25-213 (1991).

\textsuperscript{334} See Carol S. Bruch, The definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 HASTINGS L.J. 771, 789 (1982) (California buy-in remedy appropriately allows estate making some purchase-money note payments a pro rata share of subsequent profits).

\textsuperscript{335} The assumption here is the asset is not partitionable in kind — either because of its size or because of the small fractional share owned by the community.
the spouses know the creditor can ultimately force a sale, they are under pressure to borrow money to pay the debt and avoid execution. In the reverse situation, where the community was the original purchaser and the non-debtor spouse has bought in to title, the buy-in frustrates the creditor of the other spouse by preventing the creditor's levy of execution from obtaining a 100% marketable title. Under Arizona's Drahos case in this situation (title in the community, non-debtor spouse having a reimbursement claim secured by a lien), the issue yet to be decided in Arizona is whether the lien is superior to the claims of a judgment creditor. If it is, the property will be unattractive to non-creditor bidders at an execution sale of the property. Pressure is on the spouses once again to pay the debt.

In the situation where the community has the reimbursement claim and the creditor can reach community property but not the separately-held title of the non-debtor spouse, the present California law is far more favorable to the creditor than the Arizona approach. As has been noted, there is almost no authority as to whether a creditor can garnish a community reimbursement claim. Note that what might be garnishable is not the entire reimbursement claim, which will grow in the future if the community makes additional payments on the purchase money note for the separate-property acquisition, but the portion of the ultimate claim based on note payments made before the garnishment. If the creditor can reach this part of the ultimate reimbursement claim, the creditor cannot thereafter force the separate estate to pay money until the termination of the marriage. The garnishor's rights cannot rise above those of the debtor holding the claim. At termination of the marriage the right of reimbursement may be offset due to "use benefits." Surely there is no market for the cause of action due to uncertainties concerning the time and amount of ultimate payment by the garnishee-spouse's separate estate.

How, moreover, is the court to value what the creditor has seized by way of garnishment when the creditor, claiming the cause of action is worth less than the creditor's judgment, seeks to levy on other community properties or separate property of the debtor spouse to make up the deficit? These kind of problems are likely to lead a court to hold that the inchoate right of reimbursement is too contingent a property right to be subject to garnishment. This creates an exemption for a community investment that can be very substantial.

336. See supra note 198.
337. Consider the situation where Wife-to-be buys a vacant lot for $50,000, paying 10% down, and immediately marries. The community pays off the purchase-
E. Recommendation Concerning Arizona’s Drahos Case

Disregarding creditors’ rights issues, Arizona’s Drahos remedy seems slightly superior to California’s buy-in approach, primarily because it does not fragment management. The present California law is very favorable to creditors; Arizona law is almost unmanageable if the reimbursement right is subject to garnishment and harsh for creditors if such a claim cannot be garnished. I do no more than urge the California Law Revision Commission to weigh the pros and cons of the two approaches. One of the reporters for the American Law Institute’s Principles of the Law of Family Dissolution: Analysis and Recommendations, states that he anticipates section 4.06 of the Principles will provide that contributions from one marital estate to an acquisition initiated by another marital estate will acquire a “shared equity interest.”

VIII. CONCLUSION

California law concerning mixed-consideration acquisitions needs to be reformed. All aspects of the presumption of gift should be eliminated (which requires repeal of Family Code section 2640). Consistency requires overruling Marriage of Joaquin with its revival of the defunct inception of title rule. Contributions should be treated as investments that “buy in” to a share of title to the extent they pay down the principal component of the purchase-money note for an acquisition or pay for a capital improvement. Other contributions — such as the interest component of note payments, payments for real property taxes, and payments for “maintenance” type improvements — should be reimbursed at termination of marriage with legal interest. Marriage of Frick, which denies the estate initiating a purchase full investment in appreciation, should be overruled. Various remedies must be used to counter the unfairness of Marriage of Moore insofar as it allows termination of the marriage before a

money note and pays $150,000 for a structure on the land. The improved property has doubled in value to $400,000. The reimbursement claim here that the husband’s creditor would like to garnish is worth $390,000.

341. 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980), discussed supra
purchase-money note is paid off by the marital estate that has taken
over payments to deprive that estate of the anticipated future return
for note payments with large interest components. A “use” offset
should never be presumed by either a rebuttable or conclusive pre-
sumption (another reason to repeal Family Code section 2640) but
should require proof of the actual value of the benefit to the estate
claiming reimbursement.

at text accompanying notes 190, 279-82.