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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of GERALD
GIROUARD and LISA FRAZIER.

GERALD P. GIROUARD,
Appellant,

v.

LISA D. FRAZIER,
Respondent.

A131286

(San Mateo County
Super. Ct. No. FAM 094581)

I. INTRODUCTION

Appellant Girouard, the former husband of respondent Frazier, appeals from a judgment of dissolution entered by the trial court, a judge pro tem stipulated to by the parties. Appellant contends that the court erred by giving respondent a reimbursement from the community property estate for one-half of the value of a community property investment in two pieces of appellant's separate real property both of which were sold during the marriage. The trial court ordered this reimbursement pursuant to the rule of *In re Marriage of Moore* (1980) 28 Cal.3d 366 (*Moore*) and *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426 (*Marsden*). We conclude that, under the facts present here and the applicable law regarding the *Moore/Marsden* rule, the trial court erred. We hold that respondent was not entitled to any additional monetary payment at the time of the parties' divorce because of the *Moore/Marsden* interest in appellant's two previously-

held properties. We thus reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

II. STATEMENT OF FACTS

A. *Background*

The parties were married on September 27, 2001, and separated on May 5, 2007. Both parties are licensed real estate brokers and they engaged in several complex real estate transactions during the course of their marriage. This appeal pertains to three specific real estate assets: (1) 727 Oakview Way in Redwood City (727 Oakview); (2) 731 Oakview Way in Redwood City (731 Oakview); and (3) 662 West Glen Way in Woodside (the Woodside property).

On February 6, 2001, just prior to the parties becoming engaged to be married, they bought a home at 727 Oakview and a vacant lot at 731 Oakview (jointly, the Oakview properties). Appellant used his separate property funds to purchase the Oakview properties, but the parties took title as tenants in common, with each having a 50 percent interest. A few weeks later, however, on February 23, 2001,¹ respondent executed two grant deeds in favor of appellant, thus relinquishing any interest she had in the Oakview properties.

In 2002, appellant sold 731 Oakview, but he exercised an option to repurchase that property in 2003 as part of a joint venture with a third party. During the marriage, a home was built on 731 Oakview and substantial improvements were made to 727 Oakview. In around April 2003, the parties began using 727 Oakview as their primary residence.

On April 24, 2003, respondent signed another deed pertaining to the Oakview properties, an Interspousal Transfer Deed. Pursuant to that deed, respondent wife granted her appellant husband the two Oakview properties “as his sole and separate property.”

¹ Our statement of facts incorporates the factual findings of the lower court with one exception. In the statement of decision, the trial court twice stated that these deeds were dated “February 23, 2010.” Clearly, this is incorrect; the correct year was 2001.

In December 2003, the parties purchased the Woodside property for \$1,500,000, taking title in their joint names. This asset was acquired as part of a “reverse exchange” transaction pursuant to which 731 Oakview was sold in May 2004.

On June 27, 2006, 727 Oakview was sold and the parties moved their primary residence to the Woodside property.

B. *The Dissolution Action*

On May 9, 2007, appellant instituted this action by filing a petition for dissolution of the marriage. During 2007, three preliminary matters were decided pursuant to stipulations between the parties. First, on June 11, attorney Dennis Durkin was appointed and designated temporary judge and charged with determining all issues in this case. Second, on September 13, Lisa Jolicouer, CPA, was appointed as the trial court’s expert pursuant to Evidence Code section 730. Third, on December 19, the trial court entered a judgment bifurcating the issue of marital status from other issues in this case and terminating the parties’ marital status. There remained, however, several financial issues to be determined.

In the meantime, on April 16, 2008, the parties sold the Woodside property. As best we can determine, neither party has ever disputed that the Woodside property was a 100 percent community property asset and that it constituted the primary material asset of the marriage at the time of separation. The proceeds of the Woodside sale were divided equally, with each party receiving a payment of \$945,042. However, these amounts were deposited into two blocked accounts at First Republic Bank that remained subject to the court’s jurisdiction pending resolution of the financial claims of the parties.

C. *Expert Reports*

In April 2008, Jolicouer sent the parties three reports in which she summarized preliminary findings pertaining to her review of several real estate transactions that occurred during the marriage, including transactions pertaining to the three real estate assets at issue in this appeal. The purpose of Jolicouer’s review was to identify community and separate property interests in the properties and also to trace funds

utilized during the various transactions. All three reports contain requests that appellant provide additional information and missing documentation pertaining to the transactions.

On September 10, 2008, Jolicouer sent the parties an “Asset Tracing Report” which contained the results of her review of the real estate transactions discussed in her April 2008 reports. Jolicouer reported that she was asked to perform two “tracings” in connection with the Oakview properties, one based on the legal theory that these properties were appellant’s separate property and the second based on the theory that the parties each owned a 50 percent interest in the Oakview properties as tenants in common.²

According to the Asset Tracing Report, under the separate property tracing methodology which assumed the Oakview properties were appellant’s separate property, Jolicouer “treated all debt and sale proceeds as [appellant]’s separate funds. To the extent determinable, these funds were traced to the improvement or acquisition of other properties. This analysis further determined the extent to which community funds were utilized in the improvement of the properties, providing for the related calculation of the amount the community is entitled to share in each property’s appreciation (aka Moore Marsden analysis).”

As part of her separate property tracing analysis, Jolicouer drew the following conclusion about appellant’s separate property contribution to the acquisition of the Woodside property: “Under the Separate Property tracing, [appellant] is considered to have funded \$269,048 of the purchase price and \$139,111 of the improvement costs of [the Woodside property.] As such, he is entitled to a reimbursement from the community in those amounts. See Schedule 2. The community funded all other remaining costs of the acquisition and improvement of this property.”

² Deciphering the conclusions of Jolicouer’s tracing is difficult for several reasons, not the least of which is that many of her assumptions and conclusions were explained and supported in schedules that were not introduced into evidence at trial and are not part of the record on appeal.

As part of her separate property tracing analysis, Jolicouer also conducted a *Moore/Marsden* analysis in order to calculate the interests that the community acquired in the two Oakview properties during the course of the marriage. In this regard, Jolicouer found that (1) the community contributed \$264,660 to the acquisition of 727 Oakview and thereby acquired a 12.97 percent interest in the appreciation of that property; (2) the community contributed \$89,462 to the initial acquisition of 731 Oakview and thereby acquired a 13.27 percent interest in that property; and (3) the community contributed \$61,519 to the re-acquisition of 731 Oakview in 2003 and thereby acquired an additional 7.13 percent interest in that property.

On July 15, 2010, Jolicouer sent a letter to appellant's counsel in response to his request that she provide her "bottom line" conclusions, depending on the court's resolution of several outstanding issues as they relate to the division of property. Jolicouer referred counsel to an attachment to her letter which she described as her "work which summarizes my results based on different scenarios." The attachment to Jolicouer's July 15 letter consists of 21 pages of tables and charts collectively referred to as a "Results Comparison."

One set of conclusions contained in Jolicouer's Results Comparison employed a methodology assuming that (1) the parties separated in May 2007 and (2) the Oakview properties were appellant's separate property. Under that scenario, Jolicouer's bottom-line conclusion was that the amount of funds due to respondent in excess of appellant at final disposition of the community estate is \$117,312. In a footnote associated with this conclusion, Jolicouer explained that this amount "represents the net difference that [respondent] is due in excess of [appellant] upon the final disposition of the community estate." Jolicouer calculated this net award by crediting appellant with a total reimbursement claim of \$204,895 and crediting respondent with a total reimbursement claim of \$322,207.

Jolicouer calculated appellant's reimbursement claim by adding (1) appellant's separate property contribution to the purchase of the Woodside property (\$269,048), (2) appellant's separate property contribution to the improvements of the Woodside property

(\$139,111), and (3) appellant's separate property contribution to the purchase of a different community property asset, a property located on 1300 Arguello Street in San Francisco (\$1,631). Jolicouer then concluded that respondent owes appellant one-half of the sum of these figures, i.e., \$204,895.

Jolicouer calculated respondent's reimbursement claim by adding (1) the community's *Moore/Marsden* interest in the two Woodside properties (\$468,359³), and (2) the amount by which appellant's post-separation personal expenditures of community funds exceeded respondent's post-separation expenditures of those funds (\$176,056). Jolicouer then concluded that appellant owes respondent one-half of the sum of these figures, i.e., \$322,207.

As noted above, the difference in these two amounts was the \$117,312 sum she found (and the court agreed) was due from appellant to respondent.

D. Trial and Judgment

A court trial was conducted over several days in the summer and fall of 2010. A primary issue under dispute was the characterization of the Oakview properties. Appellant argued that the Oakview properties were his separate property and that respondent had waived the community's *Moore/Marsden* interest in those properties by signing the interspousal transfer deed in 2003. Respondent argued that the parties each owned a 50 percent interest in the Oakview properties pursuant to the original titles and that the subsequent deeds she executed were void because they were obtained through undue influence and breach of fiduciary duties by appellant. Alternatively, respondent argued that the Oakview properties were community property.

³ In the July 15, 2010, cover letter that accompanied her Results Comparison document, Jolicouer advised appellant's trial counsel that the results of her *Moore/Marsden* analysis of the Oakview properties were different than the results in her "draft report that was issued September 2008." Jolicouer explained that, although the draft report gave the community credit for contributions to the acquisition of the Oakview properties, she "erroneously failed to provide for the community to be reimbursed for the amounts it expended for improvements or debt reduction on these properties." Jolicouer advised that the results set forth in her Results Comparison chart included the reimbursement for those amounts as well.

Although Jolicouer testified at trial, she did not offer an opinion regarding the characterization of the Oakview properties. Nor did she squarely address or otherwise explain the assumption in her bottom-line Results Comparison report that respondent was entitled to a *Moore/Marsden* reimbursement in the event that the court were to find that the Oakview properties were appellant's separate property. Furthermore, although several of Jolicouer's reports were admitted into evidence at trial, the schedules that provided support and documentation for many of her assumptions and conclusions were not admitted.

The trial court issued a tentative decision on November 9, 2010, and a statement of decision on December 21, 2010. According to the statement of decision, the characterization of the Oakview properties was a "primary issue in this case driving the other issues." Ultimately, the court found that the Oakview properties "are [appellant's] separate property subject to a *Moore/Marsden* interest in the community."

In reaching this decision, the court rejected respondent's theory that either she owned a 50 percent interest in the Oakview properties or they were community property. The court reasoned that the pre-marital grant deeds signed by respondent wife "create a presumption under Evidence Code § 662 [that] Jerry is the sole owner of the Oakview properties (subject to her *Moore/Marsden* claims). Lisa has the burden of proof to rebut the presumption by clear and convincing evidence. [The court] finds Lisa has failed to meet her burden."

However, the court also rejected the appellant's trial theory that respondent waived the community's *Moore/Marden* interest in the Oakview properties by executing the Interspousal Transfer Deed during the marriage on April 24, 2003. The court reasoned as follows: "Jerry argues this deal waives any *Moore/Marsden* claim through that date. This deed was executed during marriage, and is subject to fiduciary duty issues as discussed in *Marriage of Haines* (1995) 33 CA4th 277 and *Marriage of Delaney* (2003) 111 CA4th 991. If Jerry's position is correct he gained an unfair advantage by the Interspousal Transfer Deed. The unfair advantage creates a presumption of undue influence. Jerry has the burden of proof by a preponderance of the evidence to show that

Lisa freely and voluntarily signed the Interspousal Transfer Deed with full knowledge of all relevant facts and a complete understanding of the effect of the transfer. *Marriage of Haines, supra*, at 297. The presumption of undue influence trumps the presumption of Evidence Code § 662, and Lisa is entitled to a set aside of the Interspousal Transfer Deed. *Marriage of Haines, supra*, at 297-298. Jerry has failed to meet his burden of proof to show that Lisa was aware of her *Moore/Marsden* rights, and knowingly waived those rights.”

The court then adopted (with one minor exception not relevant to this appeal) what it referred to as Jolicouer’s “post separation accounting . . . dated September 10, 2008, as modified July 15, 2010, using the scenario that assumes the Oakview properties are [appellant’s] separate property with a date of separation of May 6, 2007.” Specifically, the court accepted and adopted Jolicouer’s bottom-line conclusion that appellant owes respondent a net payment of \$117,312 to compensate her (primarily) for her share of the *Moore/Marsden* community interest in the two Oakview Way properties. In this regard, the statement of decision states: “Judge Pro Tem Durkin finds this analysis includes and disposes of all claims for reimbursement and credits including the community’s *Moore/Marsden* claims in 727 & [731] Oak View Way and Jerry’s Family Code §2640 claim” in the Woodside property.⁴

A judgment of dissolution and a notice of entry of judgment consistent with the trial court’s statement of decision were filed December 21, 2010. On January 24, 2011, the court filed and served some findings modifying its earlier statement of decision, but also denying appellant’s motion for a new trial. On February 23, 2011, appellant filed a timely notice of appeal.

⁴ In reaching this conclusion, the court rejected what it described as a belated claim by appellant that that the expert had miscalculated “the community’s *Moore/Marsden* interest in the Oakview properties.” However, it is clear from the statement of decision, the Jolicouer accounting, and the parties’ briefs to us, that this alleged miscalculation has nothing to do with the key issue in this case, i.e., whether respondent is entitled to a reimbursement from the community property estate for one-half of the community’s *Moore/Marsden* interest in the Oakview properties.

III. DISCUSSION

A. *Issue Presented and our Standard of Review*

As reflected in our factual summary, several components factored into Jolicouer's bottom-line conclusions. Only one of those components is at issue on this appeal: appellant contends that the trial court committed reversible error by adopting Jolicouer's recommendation to give respondent a reimbursement from the proceeds of the Woodside sale for a one-half share of the community's *Moore/Marsden* interest in the Oakview properties.

In addressing this issue on appeal, the parties agree that the community acquired a *Moore/Marsden* interest in the two Oakview properties. Furthermore, as noted in our factual summary, there has never been a dispute that the Woodside property is a community property asset. Under these settled facts, the question whether the *Moore/Marsden* rule authorizes the reimbursement credited to respondent and awarded by this judgment is one of law which we review de novo. (See *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421.)

B. *Guiding Principles*

In order to resolve disputes regarding the division of marital property, a court must start by characterizing that property as separate or community property. (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 732 (*Rossin*)). "Characterization must take place in order to determine the rights and liabilities of the parties with respect to a particular asset or obligation and is an integral part of the division of property on marital dissolution. [Citation.]" (*Ibid.*) In other words, the trial court's resolution of this threshold inquiry, i.e., the decision whether an asset is community or separate property, dictates what rules apply to determine the parties' rights and liabilities with respect to that asset.⁵

⁵ "Generally speaking, property characterization depends on three factors: (1) the time of acquisition; (2) the 'operation of various presumptions, particularly those concerning the form of title'; and (3) the determination 'whether the spouses have transmuted' the property in question, thereby changing its character. [Citation.] In some

For example, if a court determines that a real property asset is the separate property of one spouse, it may be necessary to apportion an interest in that property to the community if there is evidence that community funds were invested in the property. This inquiry is conducted by applying the *Moore/Marsden* rule. The *Moore/Marsden* rule states that when community funds are used to make mortgage payments on a spouse's separate property, the community acquires " 'a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds.' [Citations.]" (*Moore, supra*, 28 Cal.3d at p. 372.) "Courts have applied this so-called *Moore/Marsden* rule not only where the parties use community funds to pay down a mortgage, but also where they use community funds to make improvements to a residence purchased by one of the parties before marriage and those improvements increase the property's equity value." (*In re Marriage of Sherman* (2005) 133 Cal.App.4th 795, 799-800; see also, *In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1552; *In re Marriage of Branco* (1996) 47 Cal.App.4th 1621, 1626-1627; 11 Witkin, Summary of Cal. Law (10th ed. 2005) Community Property, §§ 118-119, pp. 681-686; Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2011) ¶¶8:326 et seq.)

If, on the other hand, a court classifies a real estate asset as community property, there is no apportionment of interests in that community asset. (Hogoboom & King, Cal. Practice Guide, *supra*, ¶8:288.) Instead, the property division is governed by Family Code section 2550, which states: "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall . . . divide the community estate of the parties equally."⁶

cases, a fourth factor may be involved: whether the parties' actions short of formal transmutation have converted the property's character, as by commingling to the extent that tracing is impossible. [Citation.]" (*Rossin, supra*, 172 Cal.App.4th at p. 732.)

⁶ All further statutory references are to the Family Code unless otherwise indicated.

Although the determination that an asset is community property precludes apportioning a separate property ownership interest in that asset, a spouse may be entitled to a statutory reimbursement for his or her separate property contributions to that community property asset. (§ 2640.⁷) Section 2640 “provides a right to reimbursement upon dissolution for the spouse who contributed separate property to the acquisition of property held in joint title, absent a written waiver of the right to reimbursement.” (*In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 865.) “Though tracing to a separate property source generally cannot defeat title presumptions . . . , it will establish a prima facie statutory right of reimbursement in a marital action dividing the community estate. [Citations.]” (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057.) Furthermore, this statutory reimbursement right is not limited to the original community property to which the separate property contribution was made, but also applies to “any other community property that is subsequently acquired from the proceeds of the initial property, and to which the separate property contribution can be traced.” (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 918 (*Walrath*).

The amount of the section 2640 reimbursement is measured by the value of the separate property contribution at the time it was made. (§ 2640, subd. (b); *Walrath, supra*, 17 Cal.4th at p. 924; *In re Marriage of Neal* (1984) 153 Cal.App.3d 117, 124, fn. 11, disapproved on another ground in *In re Marriage of Fabian* (1986) 41 Cal.3d 440.) When the source of the separate property contribution is itself a real property asset, valuing that contribution might require a *Moore/Marsden* analysis. (Hogoboom & King, Cal. Practice Guide, *supra*, ¶8:457; cf. *In re Marriage of Kahan* (1985) 174 Cal.App.3d

⁷ Section 2640, subdivision (b) states: “In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party’s contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.”

63, 77 (*Kahan*); *In re Marriage of Neal, supra*, 153 Cal.App.3d at p. 124, fn. 11.) For example, if a party converts her separate property home into a community property asset during marriage, her separate property reimbursement right would be calculated by determining the fair market value of the property at the time of the conversion, less outstanding encumbrances and less any community property contributions prior to the conversion. (*Kahan, supra*, 174 Cal.App.3d at p. 77.) In this context, the *Moore/Marsden* rule is used to quantify the value of the spouse's separate property contribution to the subsequently-acquired community asset.

C. *Analysis*

As noted at the outset of our analysis, to resolve this appeal, we focus on a single discrete issue: whether respondent is entitled to a reimbursement from the community estate consisting of the proceeds of the Woodside property for her share of the community's *Moore/Marsden* interest in the Oakview properties.

Applying the rules summarized above to the undisputed facts, we conclude that the additional reimbursement to respondent cannot be sustained. The Woodside property was the only property subject to division by the trial court because the Oakview properties were both sold during the marriage. Since the Woodside property was 100 percent community property, the parties' interests in that asset are dictated by section 2550, not by applying the *Moore/Marsden* apportionment rule.

As reflected above, the *Moore/Marsden* apportionment rule applies to the division of a separate property asset of the marriage to which a specific investment or contribution of community property was made. (*Moore, supra*, 28 Cal.3d at p. 372; *In re Marriage of Sherman, supra*, 133 Cal.App.4th at pp. 799-800; *In re Marriage of Nelson, supra*, 139 Cal.App.4th at p. 1552; *In re Marriage of Branco, supra*, 47 Cal.App.4th at pp. 1626-1627.) However, the *Moore/Marsden* rule does not create a right to reimbursement from a community property asset. (See § 2550.) Indeed, we find no authority which even suggests that it is possible to identify a cognizable community property interest in an asset that already belongs to the community. Furthermore, even if there were some way that a court could apportion a *Moore/Marsden* interest in a community property asset,

that exercise would be futile because the newly-identified interest would be subject to the equal division rule of section 2550.⁸

Section 2640 creates a statutory exception to the equal division rule of section 2550 by establishing a right to reimbursement for the value of a separate property contribution to the acquisition of a community property asset provided that the contribution can be properly traced. Although this statute may support the reimbursement credit awarded to appellant for his separate property contributions to the Woodside community property asset, it does not support Jolicouer's conclusion that respondent was also entitled to a reimbursement from the Woodside property for the community's *Moore/Marsden* interests in the Oakview properties. We simply cannot find any legal basis for sustaining that award.

We understand that there is no dispute on appeal that the community did acquire *Moore/Marsden* interests in the Oakview properties. That fact and the tracing analysis that Jolicouer performed to support it may have been relevant to many of the complex issues she was asked to address. For example, Jolicouer's *Moore/Marsden* analysis may have supported her calculation of the value of appellant's section 2640 reimbursement claim since that claim was based on contributions traceable to the Oakview properties and the community held equity interests in those assets. (Cf. *Kahan, supra*, 174 Cal.App.3d at p. 77.) However, Jolicouer's finding that the community acquired *Moore/Marsden* interests in the Oakview properties does not validate or in any way support the reimbursement credit that Jolicouer gave to respondent in this case because the Oakview properties were sold during the marriage and are not subject to division in this dissolution proceeding.

⁸ Although not directly at issue in this case, we think it is important to note that the Jolicouer reports do not disclose how she accounted for the second half of the *Moore/Marsden* interests in the Oakview properties. What is clear is that Jolicouer's bottom-line conclusions do not permit appellant to recover a *Moore/Marsden* reimbursement from the proceeds of the sale of the Woodside property. Indeed, had Jolicouer given appellant the same credit that he gave respondent, then the two reimbursements would have cancelled each other out.

In short, there appears to be no legal authority supporting the most significant component of the reimbursement credit that Jolicouer gave to respondent in her bottom-line report. Specifically, the *Moore/Marsden* rule, which is the only rule upon which Jolicouer relied, does not justify giving respondent a credit for one-half of the community's \$468,359 in the Oakview properties. Respondent argues otherwise in her appellate brief, but her theory is factually and legally unsound.

Respondent's argument, in a nutshell, is that the community's *Moore/Marsden* interest in one spouse's separate property asset survives after that asset is sold so long as that *Moore/Marsden* interest (1) is not waived and (2) can be traced to another acquisition of the marriage. Unable to support her *Moore/Marsden* tracing rule with relevant authority, respondent relies on the language of section 2640 and the leading case construing that statute, *Walrath, supra*, 17 Cal.4th 907. Respondent reasons that section 2640 and the *Moore/Marsden* rule create essentially analogous rights and, therefore, authority which permits tracing of a separate property interest to subsequently acquired property also permits tracing of a community property interest to subsequently acquired property.

As a factual matter, we find no evidence in this record to support appellant's assumption that Jolicouer "traced" the community's *Moore/Marsden* interest in the Oakview properties to the acquisition or improvement of the Woodside property. Reading the reports together, it appears that Jolicouer simply calculated the *Moore/Marsden* interest in each property and then used those calculations to support the reimbursement credit that she gave respondent in her bottom-line report.

In any event, respondent's *Moore/Marsden* tracing theory fails from the start because she completely skips the essential threshold inquiry in a community property analysis, i.e., determining the character of the property that is potentially subject to division by the trial court. In this case, that property is the Woodside property which is a 100 percent community property asset. As both a conceptual and practical matter, a court cannot apportion a community property interest in a community property asset.

Furthermore, the analogy respondent draws between the *Moore/Marsden* rule and section 2640 is a false one. Section 2640 creates a statutory right to reimbursement at the time of dissolution for a separate property contribution “to the acquisition of property of the community property estate to the extent the party traces the contribution to a separate property source.” (§ 2640, subd. (b).) The *Moore/Marsden* rule, by contrast, apportions substantive property interests in a marital asset between the community and the separate property of one or both spouses. In other words, these rules perform very different functions. For this reason, respondent’s reliance on *Walrath supra*, 17 Cal.4th 907, is simply incorrect.

In *Walrath, supra*, 17 Cal.4th 907, the husband had made a separate property contribution to a community property asset that was sold during the marriage and used to acquire another community property asset that was subject to division as part of the dissolution proceeding. Our Supreme Court held that section 2640 authorizes reimbursement for a separate property contribution from the community property to which the separate property was contributed and also from “any other community property that is subsequently acquired from the proceeds of the initial property, and to which the separate property contribution can be traced.” (*Id.* at p. 918.) This holding was premised on a specific and detailed analysis of the statutory language and history of section 2640. (*Id.* at pp. 918-920.) In reaching its decision, the *Walrath* court did not hold or even suggest that an analogous tracing rule should apply to the community’s *Moore/Marsden* interest in a spouse’s separate property asset. The *Walrath* court never even mentioned the *Moore/Marsden* rule. And that makes perfect sense because, as we have already discussed above, that rule applies in a completely different context and performs a fundamentally different function.

Indeed, in the case of a *Moore/Marsden* interest, there is simply no functional need for a special tracing rule. When a *Moore/Marsden* interest in a separate property asset is traced to a community property acquisition, then, as matter of fact, the community receives ownership credit for its prior community property interest. If, on the other hand, a *Moore/Marsden* interest in a separate property asset is traced to another

separate property asset, then a *Moore/Marsden* analysis of that subsequently acquired asset will result in an apportionment of an interest in that subsequently acquired property to the community without the need for any special tracing rule.

In a supplemental brief, filed at the request of this court, respondent abandons her theory that a *Moore/Marsden* interest is analogous to a section 2640 reimbursement right, and argues instead that, by operation of law, a *Moore/Marsden* interest in a separate property asset becomes two distinct separate property interests at the time that the underlying separate property asset is sold.

Applying this new theory to her situation, respondent formulates the following argument: (1) she paid for part of the Woodside community property residence “with her *Moore/Marsden* interest that she was entitled to receive, but did not receive when the Oakview property was exchanged for the [Woodside] property,” (2) “[h]ad she received her interest when she should have, at the time of the conversion of the Oakview property into the [Woodside] property, that interest would have been her separate property,” but (3) “[i]nstead of receiving her interest, she contributed it to the purchase of [the Woodside property] which then creates the same right of reimbursement that any spouse has pursuant to Family Code section 2640 when community property is acquired with traceable separate property proceeds.”

Preliminarily, we must address some factual problems with respondent’s theory. First, this is a brand new theory; there is no evidence that respondent ever made a claim in the trial court that she was entitled to a section 2640 reimbursement, or that she contributed any of her separate property to the acquisition of the Woodside property or to any other asset of the marriage.

Second, respondent contends that the Oakview property was exchanged for and converted into the Woodside property. By these statements, we assume respondent is referring to 731 Oakview which was used in the “reverse exchange” transaction pursuant to which the parties acquired the Woodside property. However, it is important to note that there were *two* Oakview properties and Jolicouer reimbursed respondent for the

community's interest in both of those properties. Thus, as a matter of fact, respondent's new theory cannot justify the reimbursement award she received.

Third, respondent contends that her share of the *Moore/Marsden* interest in 731 Oakview was used to acquire the Woodside property. However, we find no evidence in this record that Jolicouer traced *any* funds from the proceeds of the sale of 731 Oakview to the acquisition of the Woodside property notwithstanding the fact that both properties were used in the reverse exchange transaction. In this regard, we note that the section 2640 reimbursement that Jolicouer gave to appellant for his separate property contribution to the acquisition of Woodside was *not* traced back to 731 Oakview, but rather to the proceeds of a loan appellant secured against 727 Oakview.

Even if we ignore these factual issues, respondent fails to support any of the legal presumptions implicit in her new theory. For example, respondent asserts that she was entitled to receive her share of the *Moore/Marsden* interest in 731 Oakview when that property was sold. However, she simply ignores the principle that a *Moore/Marsden* interest is by definition a community property interest.

Section 751 establishes that “[t]he respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests.” Neither this statute nor any other law of which we are aware gives either spouse an exclusive, divisible, 50 percent interest in a community property asset during the ongoing marriage. (See Hogoboom & King, Cal. Practice Guide, *supra*, ¶8:15.1 [“The spouses’ ‘equal’ interests within the meaning of § 751 are 50-50 interests in the *whole* of the community property—not ‘exclusive’ interests in only one half of the community property. In other words, neither spouse has a 50% ownership interest in the community estate to the exclusion of the other.”]; *In re McIntyre* (9th Cir 2000) 222 F.3d 655, 658 [applying California law to find that wife’s community property interest in husband’s pension was subject to IRS levy to satisfy husband’s tax liability].)

Respondent also makes the remarkable contention that, as a matter of law, one-half of the community’s *Moore/Marsden* interest in 731 Oakview became her separate property when 731 Oakview was sold. Section 770, subdivision (a) establishes that the

“Separate property of a married person includes all of the following: [¶] (1) All property owned by the person before marriage. [¶] (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. [¶] (3) The rents, issues, and profits of the property described in this section.” Thus, a spouse’s equal interest in a community property interest is not his or her separate property during the marriage.

For all of these reasons, respondent’s theories on appeal do not alter our conclusion that there is no legal basis for awarding respondent one-half of the community’s *Moore/Marsden* interest in the Oakview properties from the proceeds of the sale of the Woodside property. Therefore, the *Moore/Marsden* reimbursement that Jolicouer credited to respondent in the bottom-line report must be stricken and the respective reimbursement rights of these parties must be recalculated.

Appellant requests that this court strike the *Moore/Marsden* credit from Jolicouer’s bottom-line report, recalculate the respective reimbursement rights of the parties and modify the judgment accordingly. At oral argument before this court, respondent’s counsel expressed concern that striking the *Moore/Marsden* credit could potentially affect many other aspects of Jolicouer’s complex analysis and requested that, if this court decides to strike the *Moore/Marsden* credit, the case be remanded to the trial court so that it can make any other necessary adjustments. It does appear that Jolicouer’s bottom-line report addressed numerous complex and potentially interconnected issues. However, as we noted at the outset of our discussion, this appeal challenges only one discrete finding on a purely legal ground. Any other potential problem with the bottom-line report was not appealed and thus cannot be challenged or altered pursuant to a remand order.

Nevertheless, the record before us does not provide the information we need to modify this judgment in the first instance. The judgment itself does not actually award respondent a net credit of \$117,312. Instead, it uses that credit to calculate other obligations of these parties. For example, the court used respondent’s net credit to calculate appellant’s right to a refund of child support. Furthermore, when the judgment was entered, the court reserved jurisdiction over other pending matters and it is simply

not clear whether those matters led to subsequent calculations and adjustments of the reimbursement rights of these parties. Under these circumstances and on this record, we conclude that a remand is necessary.

However, we are very concerned that this case has been pending for more than five years at no small expense to these parties and the court system. Thus, we urge the judge pro tem to work expeditiously to perform these discrete tasks on remand: (1) strike respondent's *Moore/Marsden* credit, (2) recalculate the parties' respective reimbursement rights in the Woodside property *solely* to reflect the fact that respondent has no *Moore/Marsden* credit; and (3) modify the judgment accordingly.

IV. DISPOSITION

The judgment is reversed and this case is remanded to the trial court with directions to recalculate the respective reimbursement rights of the parties in a manner consistent with this decision. Costs on appeal are awarded to appellant

Haerle, J.

We concur:

Kline, P.J.

Richman, J.