Computation of Proportionate Ownership of the Family Residence upon Dissolution of Marriage

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I. INTRODUCTION

In a community property jurisdiction divorce involves not only an end to marriage, but a termination of the community property relationship as well.[1] Upon dissolution of marriage, it is the duty of the court to account for and divide the assets and debts of the community.[2] This requires the court to evaluate and inventory the marital property, as well as to classify each asset as either community property or the separate property of one of the spouses.[3]

One of the most difficult problems facing a court in a marriage dissolution action is determining the proper division of the family residence where separate property funds constituted part of its purchase price.[4] The problem is even more troublesome where the residence was acquired not only with a dual source of funds, but with a combination

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1. A community property system regards marriage as a form of partnership between the spouses — a "conjugal partnership in earnings and gains during the marriage." 1 W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 535 (1943). The end of the marriage thus means the end of this partnership, for the marriage is "only the occasion for the partnership which the spouses have in the earnings and gains during its subsistence." *Id.* The system has been described as:

> that system whereby the property which the husband and wife have is common property, that is, it belongs to both by halves. There are varying forms . . . ranging from the general community . . . in which all the property of the spouses owned by each at the time of the marriage, as well as all that acquired after marriage, becomes a part of the community property; to the community only of acquests and gains during the continuance of the marriage. It is this latter or ganancial system and which came to this country from Spain which prevails in several of our . . . states.

DeFuniak & Vaughn, *Why Community Property is so Misunderstood*, 1 COMMUNITY PROP. J. 97, 97 (1974) [hereinafter cited as DeFuniak & Vaughn].

2. *In re* Marriage of Moore, 28 Cal. 3d 366, 372, 618 P.2d 208, 211, 168 Cal. Rptr. 662, 665 (1980).

3. *See* Vaughn & Margolis, *Community Property and the Death of a Spouse: Income Tax Consequences*, 3 COMMUNITY PROP. J. 19, 24 (1976) [hereinafter Vaughn & Margolis]. Although the article deals chiefly with the problems that would be encountered by a lawyer preparing income tax returns in the year of the death of a spouse, the same principles would guide a court in dividing and classifying assets upon dissolution of marriage.

4. This may be a particularly bitterly contested issue, especially in light of the rising price of real estate in California today. It has been said that:

> [t]he issue of who gets the family house, and how much thereof, on divorce is heating up everywhere in the face of skyrocketing real estate prices. Now more than ever, the principal asset of many marital communities may be the equity in a

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of funds and debt, especially if the debt has not been completely retired at the time of dissolution.

In two unanimous 1980 decisions,[5] the California Supreme Court rejected some traditional notions of dealing with this "classic problem in the sorting-out incident to marital settlement agreement or trial."[6] The supreme court altered (1) the requirements for establishing a separate property interest in the family residence[7] and (2) the formula used to compute its value. The focus of this comment is the current formula used to compute proportionate ownership interests in family residences subject to the California community property system. In particular, this comment will compare the results obtained when the separate property contribution is made during marriage vis-a-vis the results obtained when the contribution is made before marriage.

II.   BACKGROUND — THE CALIFORNIA PRO RATA APPROACH

In a community property system all property owned or acquired by the spouses during marriage must be classified as community or separate property.[8] This classification process is governed by statutory definitions of community and separate property and by certain judicial presumptions. Typically, community property statutes specify the "limited categories of separate property and then negatively provide that everything else acquired during marriage is community in nature."[9] Thus, the California Civil Code provides that all property owned by a spouse before marriage, or acquired during marriage by gift, bequest, devise, or descent is separate property,[10] and that all other property acquired during marriage is community property.[11]

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house; and with the larger numbers carried by inflation, the fight for the house becomes the focal point of more court contests.

  Particularly is this the case in California, where prices have been known to quadruple in a few years . . . .

Editorial, 6 COMMUNITY PROP. J. 381, 382 (1979).

  5. *In re* Marriage of Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980); *In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

  6. Lurvey, *Dividing the Community Residence Where Part of the Contribution Derives from Separate Property*, 7 COMMUNITY PROP. J. 259, 259 (1980).

  7. *See infra* text accompanying notes 85-88.

  8. H. VERRALL & A. SAMMIS, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 188 (2d ed. 1971) [hereinafter cited as VERRALL].

  9. *See* Vaughn & Margolis, *supra* note 3, at 21.

  10. "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property." CAL. CIV. CODE § 5107 (West 1970). Section 5108 contains an identical provision relating to the husband's property.

  11. "Except as provided in [those sections defining separate property], all real property situated in this state and all personal property wherever situated acquired during the mar-

The California courts have interpreted the Civil Code as raising a general presumption that all property acquired during marriage is community, rather than separate, property.[12] This is the basic community property presumption, referred to as the general or pro-community presumption.[13] While all property acquired by the spouses during marriage is presumed to be community property, each spouse remains capable of owning separate property, and separate property owned or acquired by either spouse before marriage remains the separate property of that spouse during marriage.[14] This remains true even if the separate property is exchanged for cash or a different piece of property.[15]

Property acquired with both separate and community funds, however, presents a conceptual problem: what is the proper division of property between the community and the spouse contributing separate funds? In particular, this problem arises in the so-called "continuing transaction case"[16] in which the the property is purchased with a down payment and a long term note or mortgage. Typically, in such cases the down payment and one or more loan payments are made with separate property funds, with some or all of the remaining balance on the loan discharged with community property funds.

Most community property jurisdictions determine ownership of such installment acquisitions at the time of the initiation of the transaction.[17] Ownership is fixed at the time the contract to purchase arises,

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riage by a married person while domiciled in this state . . . is community property." CAL. CIV. CODE § 5110 (West Supp. 1982).

12. *See In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 455, 152 Cal. Rptr. 668, 673 (1979). *See also* VERRALL, *supra* note 8, at 97.

13. W. REPPY, COMMUNITY PROPERTY IN CALIFORNIA 62 (1980) [hereinafter cited as REPPY].

14. *See In re* Marriage of Aufmuth, 89 Cal. App. 3d at 454, 152 Cal. Rptr. at 673; Estate of Caswell, 105 Cal. App. 475, 481 (1930); *see also* DeFuniak & Vaughn, *supra* note 1, at 97.

15. *See* 89 Cal. App. 3d at 454, 152 Cal. Rptr. at 673. This so called "exchange principle" provides that separate property does not lose its separate character merely because it changes its form. Thus, property acquired in exchange for separate property remains separate property — the status of the converted property attaches to the new property. It has been said that· "[i]t is fundamental to the community property system that the nature of funds or other property is not changed by conversion into new property." Vaughn & Margolis, *supra* note 3, at 22.

16. *See* VERRALL, *supra* note 8, at 188; *see also* REPPY, *supra* note 13, at 85. The author notes that the easiest cases in which to determine proportionate interests are those involving assets acquired during marriage with known amounts of community and separate funds "paid over at one time as the complete purchase price of the asset . . . . [W]hen an asset is bought over time on installment payments, things become more complicated."

17. Young, *Community Property Classification of Credit Acquisitions in California: Law Without Logic,* 17 CAL. W.L. REV. 173, 176 (1981) [hereinafter cited as Young]. The author

and the separate or community character of the funds used to initiate the purchase attaches permanently to the property acquired in the transaction. This "inception of right" approach vests title irrevocably at the time the contract is entered into, regardless of the source or amount of any subsequent payments on the loan.[18] Under this approach, property acquired by a spouse in a transaction initiated prior to marriage remains the separate property of that spouse, with the community entitled only to reimbursement for any community funds applied towards the purchase price.[19] Thus, where a spouse initiates the acquisition of an asset with separate property funds, the community acquires no ownership interest in that asset by virtue of making subsequent loan payments with community property funds.

California has rejected the "inception of right" theory in favor of an alternative approach. California case law "gives to the community 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."[20] That is, the California approach to the problem of an installment transaction involving both separate and community property funds is to apportion the property "*pro rata* to the extent that separate and community resources in fact contribute to the acquisition."[21] The asset purchased with dual source of funds is partially reclassified, becoming part community property and part separate property in proportion to the funds used from each source. The pro rata approach has been consistently and repeatedly endorsed by the California courts.[22]

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notes that *all* community property jurisdictions hold to the position that credit transactions must be classified as separate or community at the time of acquisition, but "[w]hether the credit acquisition should *later be reclassified in part* to reflect partial contributions from separate community sources, depends upon whether the court is in an 'apportionment of title' jurisdiction (California) or an 'inception of right' jurisdiction (most other states)." *Id.* at 237 (emphasis in original). For an overview of the law in other jurisdictions, *see id.* at 226-51.

18. *Id.* at 176.

19. *See* VERRALL, *supra* note 8, at 188.

20. Forbes v. Forbes, 118 Cal. App. 2d 324, 325, 257 P.2d 721, 722 (1953); *accord In re* Marriage of Moore, 28 Cal. 3d at 371-72, 618 P.2d at 210, 168 Cal. Rptr. at 664.

21. Young, *supra* note 17, at 176.

22. *See, e.g., In re* Marriage of Moore, 28 Cal. 3d at 371-72, 618 P.2d at 210, 168 Cal. Rptr. at 664; *In re* Marriage of Jafeman, 29 Cal. App. 3d 224, 256-57, 105 Cal. Rptr. 483, 491 (1972); Ortega v. Ortega, 118 Cal. App. 2d 589, 594-95, 258 P.2d 594, 597-98 (1953); Forbes v. Forbes, 118 Cal. App. 2d 324, 325, 257 P.2d 721, 722 (1953); Giacomazzi v. Rowe, 109 Cal. App. 2d 498, 501, 240 P.2d 1020, 1022-23 (1952); Gettman v. Department of Water & Power, 87 Cal. App. 2d 862, 865, 197 P.2d 817, 819 (1948); Estate of Caswell, 105 Cal. App. 475, 482, 288 P.2d 102, 104-05 (1930); Maskuns v. Maskuns, 93 Cal. App. 27, 29-30, 268 P. 1093, 1094 (1928).

The California pro rata approach originated in the landmark case of *Vieux v. Vieux.*[23] In *Vieux* the husband, prior to marriage, contracted to purchase a lot, and made a $280.00 down payment. During marriage, the purchase was completed, using $553.68 of community property funds and $2,200.00 received from the execution of an oil lease on the lot. The court rejected the husband's contention that the lot was his separate property, stating that "so far as outlay on the part of the husband from his separate property was concerned . . . , he actually expended . . . somewhat less than one-tenth of the purchase price; while . . . approximately one-fifth of the purchase price . . . was contributed from funds belonging to the community."[24] Accordingly, the court held that the lot was community property to the extent that the purchase price was contributed by the community and "that the community interest was entitled to share in the title to the property in the same proportion as the amount contributed to the purchase price by the community."[25]

The *Vieux* court obviously regarded apportionment of title as resulting in a more just outcome than would be obtained by using the inception of right theory, and it went to some length to justify its holding:

> For purposes affecting strangers, the acquisition [of real property] through an installment contract . . . may be considered as ownership of such property . . . ; but as between husband and wife, where community funds are used to a considerable extent in the payment of the purchase price, the meaning of the statute relating to the definition of separate and community property of spouses cannot be so limited. The confidential relationship existing between husband and wife forbids such a strict construction to be placed upon the statute as will destroy the probable intent of the husband and wife with reference to the manner in which the ownership of the property is enjoyed. Any other construction in these days of liberal terms with reference to installment purchase price contracts

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23. 80 Cal. App. 222, 251 P. 640 (1926).

24. *Id.* at 225, 251 P. at 641.

25. *Id.* at 229, 251 P. at 643. Although the court stated that the total purchase price of the lot was "in the neighborhood of $3,000.00," a sum which clearly includes the $2,200 received from the oil lease on the property, the court excluded this sum when calculating the separate and community contributions towards the purchase price. *Id.* at 225, 251 P. at 641. The proportionate community interest was thus that proportion that $553.68 bears to $833.86. *Id.* at 229, 251 P. at 643. This would make the community ownership of the lot 66.4%.

for the sale of real property, including the possible provision of "a dollar down and a dollar per week," would permit a husband, or a prospective husband, to buy or to agree to buy any reasonable quantity of lots or lands on the payment by him from his separate funds of a comparatively insignificant sum and thereafter to pay practically the entire purchase price from community funds, and yet successfully maintain that because in its inception the naked right to purchase, carrying with it the right of use and possession, was his separate property, it so remained. It would seem improbable that . . . the intention of the lawmakers was to bring about a result which . . . would be of so disastrous and unjust a consequence.[26]

The court concluded that "justice demands that the rights of the parties should be measured by the direct contributions made by the respective parties to the purchase price of the property."[27] The interest of the community in installment acquisitions partially purchased with community funds is not limited to mere reimbursement, but encompasses proportionate ownership of the property in the ratio of the community contribution towards the purchase price to the separate property contribution towards the purchase price.

Although the *Vieux* court included interest and taxes in its computation of the community contribution towards the purchase price,[28] the California courts have "commonly understood" the rule of pro rata apportionment to exclude payments of interest and taxes.[29] The method traditionally used by the courts to compute proportionate ownership interest was explained in *Bare v. Bare*.[30] In that case, the court of appeal reversed a trial court determination that the family residence was the separate property of the husband. The husband had taken title to the property prior to marriage. Subsequently, $4,000 of community funds were expended during the marriage to reduce the amount of the encumbrance on the house.[31]

The *Bare* court first cited the rule that in such instances there is a pro tanto community property interest "in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds,"[32] and went on to define this interest to

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26. *Id.* at 227-28, 251 P. at 642.·
27. *Id.* at 229, 251 P. at 643.
28. *Id.* at 224, 251 P. at 641.
29. *In re* Marriage of Moore, 28 Cal. 3d at 372, 618 P.2d at 210, 168 Cal. Rptr. at 664.
30. 256 Cal. App. 2d 684, 64 Cal. Rptr. 335 (1967).
31. *Id.* at 689, 64 Cal. Rptr. at 338.
32. *Id.* at 690, 64 Cal. Rptr. at 338.

represent the "ratio of the community investment to the total separate and community investment in the property."[33]   The court apparently assumed that the community contribution was represented by the increase in equity attributable to community funds, and considered the contributions of the parties to consist of equity payments only. This differs from the method of calculating the community and separate contributions used by the *Vieux* court, which included such expenditures as interest and taxes.[34] The *Bare* court then stated that "[i]n the event the fair market value has increased disproportionately to the increase in equity, the wife is entitled to participate in that increment in a similar proportion."[35]

The *Bare* court held that the community property share should not be limited to reimbursement (the equity contributed by community funds) where the asset's overall value has increased greatly beyond the increase in equity. This is, of course, a reiteration of the holding of *Vieux* that it is inequitable to limit the community interest to reimbursement of funds invested in the property. The overall reasoning of the *Bare* court appears to be that where significant capital appreciation has occurred it must be shared; reimbursement would be appropriate only in cases where essentially all of the increased value of the residence was accounted for by an increase in equity.

This concern with sharing of capital appreciation conforms to the *Vieux* court's rejection of the inception of right theory on the ground that justice demands apportionment of title where dual sources of funds have been used in the acquisition of an asset.[36]   Selection of the pro rata theory means that the spouses will share in any increase in value, while the use of the inception of right theory will award the entire increase as separate property to the spouse who initiated the transaction.[37]   Because the inception of right rationale limits the community interest to reimbursement, if "the asset in question (typically realty) has appreciated in value at a rate exceeding ordinary interest rates on invested funds, compensation for community contributions will ordina-

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33. *Id* at 690, 64 Cal. Rptr. at 339.

34. 80 Cal. App. at 224, 251 P. at 641. The *Vieux* court stated it had based its computations upon "the total amount paid by the respective parties." *Id* at 229, 251 P. at 643.

35. 256 Cal. App. 2d at 690, 64 Cal. Rptr. at 339. In this context, the equity in a house is simply that portion of the purchase price which actually has been paid, i.e., purchase price minus outstanding loan balance. It therefore consists of the down payment and the amount of the loan principal that has been repaid.

36. *See supra* notes 26-27 and accompanying text.

37. *See* W. REPPY & W. DeFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 221 (1975).

rily be greater"[38] with the pro rata approach. The pro rata approach of *Vieux* awards to the community the full value of that part of the acquisition paid for with community funds during marriage. To regard that portion of an asset purchased with community funds as community property is certainly consistent with the idea that has been described as the "heart" of the community property system—the presumption that all property acquired during marriage is community property.[39]

III.   THE REVISED PRO RATA APPROACH

A.   *Background:* In re Marriage of Aufmuth

In *In re Marriage of Aufmuth*,[40] the court of appeal affirmed the application of a pro rata division method which differed from the traditional equity contributions formula.[41] The trial court's method of apportionment treated the entire loan amount as money actually contributed toward the purchase price.

In *Aufmuth*, a home was purchased during marriage for $66,500. A $16,500 down payment was supplied from the wife's separate property, with the balance of the price being supplied by a $50,000 deed of trust executed by both husband and wife. All subsequent payments and expenditures connected with the house were made from community property funds.[42] At the time of trial, the property had a fair market value of $125,000, reflecting a capital appreciation of $58,500.

At trial, the wife claimed the home was entirely her separate property, while the husband contended it was entirely community property.[43] The trial court rejected both contentions and found instead that both separate and community interests had been established and that the property should be apportioned.[44] In apportioning the property, the trial court regarded the loan proceeds as community property. The

38. Young, *supra* note 17, at 198.
39. *See* VERRALL, *supra* note 8, at 97. This presumption is codified in CAL. CIV. CODE § 5110 (West Supp. 1982); *see supra* notes 11-13.
40. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).
41. The traditional formula bases ownership interests upon the proportionate equity contributions of the parties, i.e., the down payment and the amount of the loan principal repaid. This formula will be referred to as the equity contributions formula.
42. 89 Cal. App. 3d at 453, 152 Cal. Rptr. at 672.
43. *Id.* at 454, 152 Cal. Rptr. at 673.
44. *Id.* at 456, 152 Cal. Rptr. at 674. This aspect of the *Aufmuth* case was expressly disapproved in *In re* Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 166 Cal. Rptr. 853, 857. The *Lucas* court held that when separate property is used for the down payment on a residence purchased during marriage, the contributing spouse must demonstrate that there was an agreement that the contributing spouse was to maintain a separate property interest in the residence. Absent such an agreement, it would be presumed that the separate

court thus defined the community contribution towards the purchase price as the amount of the loan, rather than as the amount of equity contributed by community funds.

The court of appeal in *Aufmuth* approved this approach, stating that "[t]he trial court was . . . justified in determining that the balance of the purchase price on the home, obtained with a $50,000 loan, was paid from community funds."[45] As justification for this view, the appellate court relied upon the "intent of the lender rule" and the presumption that *all* property acquired during marriage, including loan proceeds, is community property.[46]

In determining the proportionate interests, the *Aufmuth* trial court considered the separate property contribution to be the $16,500 down payment, and the community property contribution to be the $50,000 loan. The trial court then compared each contribution to the total purchase price and applied the resulting fraction to the $58,500 capital appreciation of the house. To compute the respective interests in the house, the share of capital appreciation attributable to each source was added to the amount of equity contributed by each source.[47] Using this formula, the trial court determined the community property interest to

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property funds were a gift to the community. For a brief treatment of the issues and holding of the *Lucas* case in this regard, see Note, 4 CAL. FAM. L. REP. 1406 (1980).

45. 89 Cal. App. 3d at 455, 152 Cal. Rptr. at 674.

46. *Id.* at 455-56, 152 Cal. Rptr. at 673. The "intent of the lender rule," or *Gudelj* rule, states that "[t]he character of property acquired upon credit during marriage is determined according to the intent of the lender to rely upon the separate property of the purchaser or upon a community asset." *Id.* at 455, 152 Cal. Rptr. at 674 (citing Gudelj v. Gudelj, 41 Cal. 2d 202, 210, 259 P.2d 656, 661 (1953)). The *Aufmuth* court apparently relied upon language in *Gudelj*: "There is a rebuttable presumption that property acquired on credit during marriage is community property. . . . But 'funds procured by the hypothecation of separate property of a spouse are separate property of that spouse.' . . . The proceeds of a loan made on the credit of separate property are governed by the same rule." *Id.* at 210, 259 P.2d at 661; *see* 89 Cal. App. 3d at 455, 152 Cal. Rptr. at 674. The *Aufmuth* court therefore concluded that there is a presumption that the proceeds of a loan acquired during marriage are community property unless evidence exists tending to show that the lender extended the loan *"on the faith of existing separate property belonging to the acquiring spouse."* *Id.* at 455-56, 152 Cal. Rptr. at 674 (emphasis in original) (citing Estate of Ellis, 203 Cal. 414, 416, 264 P. 743, 744 (1928); Estate of Abdale, 28 Cal. 2d 587, 592, 170 P.2d 918, 922 (1946); Gudelj v. Gudelj, 41 Cal. 2d at 210, 259 P.2d at 661).

47. On the date of trial, the balance outstanding on the $50,000 loan was $47,000. The equity contribution of the community was therefore $3,000. 89 Cal. App. 3d at 453, 152 Cal. Rptr. at 672. The *Aufmuth* formula consists of four basic computations, as follows:

1. Market value - purchase price = capital appreciation
2. Amount of contribution towards purchase price = percentage of contribution
3. Capital appreciation x percentage of contribution = share of capital appreciation
4. Share of capital appreciation + equity contribution = total share

be $46,986 and the separate property interest to be $31,014.[48]

The wife appealed, contending that the respective interests should have been determined by the ratio of equity contributions from each source to the total of equity contributions from both sources.[49] The court of appeal disagreed, and found instead that the formula used by the trial court was correct. The court of appeal stated that the wife's position was based upon "the erroneous assumption that the proceeds of the real estate loan were [the] wife's separate property."[50]

Clearly, the effect of the *Aufmuth* formula, as contrasted with the traditional equity contributions formula, was to enlarge the community property share. Under *Aufmuth,* the community contribution was considered to be the total amount of the loan, rather than the equity contributed by way of principal reduction; the separate property down payment was compared to the total purchase price rather than to the total of equity contributions. This effect may be dramatically illustrated by comparing the results obtained using the *Aufmuth* formula with those that would have been obtained using the equity contributions formula. Under *Aufmuth,* the separate property share of the $78,000 total realizable equity was $31,014, or 39.76%; using equity contributions, it would have been $66,000, or 84.61%. Under the *Aufmuth* formula, the community property share was $46,986, or 60.24%; using equity contributions it would have been $12,000, or 15.39%.[51]

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48. *Id.* at 457, 152 Cal. Rptr. at 675. The purchase price of the house was $66,500. Its fair market value was stipulated to be $125,000. The capital appreciation was therefore $58,500. There was, then, $78,000 total equity to be divided, i.e., $125,000 minus the outstanding loan balance of $47,000. This is divided into $58,500 appreciation and $19,500 contributed equity. The trial court first determined the percent of the purchase price attributable to separate and community funds. The separate property contribution was the $16,500 down payment; the community contribution was the $50,000 loan. The resulting percentages are therefore 24.81% for the separate property (16,500 divided by 66,500), and 75.19% for the community (50,000 divided by 66,500). The capital appreciation was then divided according to these percentages. The separate property share of the appreciation was therefore $14,514 ($58,500 x 24.81%), and the community property share was $43,986 ($58,500 x 75.19%). To arrive at the final figures the court then added these sums to the respective equity contributions from each source. The final totals were thus $31,014 for the separate property share ($14,514 appreciation added to $16,500 contributed to equity as down payment), and $46,986 for the community property share ($43,986 appreciation added to $3,000 contributed to equity as principal reduction on the loan).

49. *Id.* at 457, 152 Cal. Rptr. at 675. Using this formula, the community property interest would be 15.39% ($12,000) and the separate property interest 84.61% ($66,000). *See infra* note 51.

50. *Id.*

51. "Equity" is used in two senses in this comment. One is to refer to cash contributions to the purchase price which will be recovered when the property is sold, i.e., the equity contributions, which consist of the down payment and principal reduction. Here, "total equity" refers to the net amount realizable upon sale of the property, i.e., the fair market value

B.   In re Marriage of Lucas: *Apportionment of the home acquired during marriage.*

1.   Facts and holding

In 1980, the California Supreme Court, in *In re Marriage of Lucas,*[52] approved the *Aufmuth* formula, terming it "the proper method" of pro rata apportionment.[53]   The facts of *Lucas* were similar to those of *Aufmuth.*   A couple purchased a home during marriage, paying for it with a down payment from the wife's separate property and a loan assumed by the community.   All payments on the loan were made with community property funds.[54]

The trial court held that the wife had established a separate property interest in the home, and apportioned the home using the equity contributions method.   The purchase price of the home was $23,300. This was supplied by a $6,351.57 down payment from the wife's separate funds, and a $16,948.43 loan assumed by the community.   The wife also contributed $2,962 for improvements on the home.   The fair market value at the time of trial was $56,250, with an outstanding loan balance of approximately $14,600.   Community funds were used to pay $2,052.32 of the loan.[55]   The court computed the net realizable equity to be $41,650.50.   This figure was then reduced by $2,962, the amount spent on improvements, leaving $38,688.50 as the total value of the property subject to apportionment.   The respective separate property and community property contributions to equity ($6,351.57 down payment with separate funds and $2,052.32 principal reduction from community funds) were divided by the total equity contributions ($8,403.89).[56]   The trial court therefore awarded the wife a 75.58% interest, or $29,241, as her separate property.   The community property

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minus the outstanding loan balance. Total equity therefore consists of contributed equity plus capital appreciation. Under the equity contributions formula, the community property share would be the percent of total equity contributions made by the community. Total contributed equity would be $19,500 ($16,500 from down payment, $3,000 from principal reduction). The community share would therefore be 15.39% ($3,000 divided by $19,500). Likewise, the separate property share would be 84.61% ($16,500 divided by $19,500). The net realizable equity in the house is then divided according to these percentages. The net equity is $78,000 ($58,500 capital appreciation and $19,500 contributed equity). The respective shares would therefore be: community $12,000 (15.39% x $78,000), separate $66,000 (84.61% x $78,000).

52. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

53. *Id.* at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858.

54. *Id.* at 811, 614 P.2d at 286, 166 Cal. Rptr. at 855.

55. *Id.* at 812, 614 P.2d at 287, 166 Cal. Rptr. at 855.

56. *Id.*

share was determined to be a 24.42% interest, or $9,477.50.[57]

The supreme court found that the trial court had incorrectly decided the issue of whether a separate property interest in the home had been established and remanded the case for reconsideration.[58] The court noted, however, that:

> [I]n the event that on reconsideration the court finds there was . . . a separate property interest in the residence, we discuss briefly the question of the proper method of calculating the community and separate interests. In these inflationary times when residential housing is undergoing enormous and rapid appreciation in value, we believe that the most equitable method of calculating the separate and community interests when the down payment was made with separate funds and the loan was based on a community or joint obligation is that set forth by Justice McGuire in *In re Marriage of Aufmuth*.[59]

The *Lucas* court explained that under the *Aufmuth* formula the community and separate interests would be determined by adding the amount of capital appreciation attributable to each source to the amount of equity contributed from each source.[60]

If this formula is applied to the *Lucas* facts, the separate property share would be $14,526.30 (as compared to $29,241 obtained by the trial court using the equity contributions formula); the community property share would be $23,865.59 (as compared to $9,477.50 obtained by the trial court).[61]

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57. *Id.* The resulting percentages, 75.58% and 24.42%, were multiplied by the net equity in the house to determine the dollar amounts of the separate and community interests: $29,241 and $9,477.50 as stated by the court. *Id.* The correct result is $29,240.78 and $9,447.73 when actually computed using the figures given. The discrepancy apparently arises from slightly different amounts being stated in the findings and in the interlocutory judgment. *Id.* at 812 n.1, 614 P.2d at 287 n.1, 166 Cal. Rptr. at 855 n.1.

58. *Id.* at 815-16, 614 P.2d at 289, 166 Cal. Rptr. at 857; *see supra* note 44.

59. *Id.* at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858.

60. *Id.* at 816-17 n.3, 614 P.2d at 290 n.3, 166 Cal. Rptr. at 858 n.3.

61. These figures were computed as follows: The capital appreciation was determined by calculating the increase in value of the house, and deducting the payments made for improvements. (Fair market value, $56,250, minus purchase price, $23,300 and $2,962 spent on improvements = $29,988). The separate and community percentages of this appreciation were determined by dividing the respective separate and community contributions towards the purchase price by the purchase price. (Separate share: $6,351.57 down payment divided by $23,300 purchase price = 27.26%; community share: $16,948.43 loan divided by $23,300 = 72.74%). The capital appreciation, $29,988, was then allocated according to the percentage obtained, resulting in $8,174.73 as the separate property share, and $21,813.27 as the community property share. The capital appreciation for each share was then added to the equity contributed by separate and community funds to arrive at the final figures: Separate

The entire issue of the proper method of apportionment is disposed of by the *Lucas* court in three sentences,[62] with the formula being explained in a footnote.[63] The court described the basic effect of the formula as "giv[ing] the spouse who made the separate property down payment a separate property interest in the residence in the proportion that the down payment bears to the purchase price; the community acquires that percentage of the residence which the community loan bears to the purchase price."[64]

When the court described the community interest as "that percentage of the residence which the community loan bears to the purchase price," it was referring to a percentage of the capital appreciation and not to a percentage of the total equity.[65] To that percentage, of course, is added a reimbursement of the actual amount of equity contributed.[66] Strictly speaking, therefore, the formula as applied differs from the formula as described. That is, only capital appreciation is apportioned; equity contributions are reimbursed.

2. Analysis

The *Lucas/Aufmuth* formula has been called legally and arithmetically inconsistent[67] because the formula combines and confuses the

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share = $14,526.30 ($8,174.73 capital appreciation + $6,351.57 down payment); Community share = $23,865.59 ($21,813.27 capital appreciation + $2,052.32 principal reduction).

62. 27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858. The major portion of the court's treatment is found *supra* in text accompanying note 59 and *infra* in text accompanying note 64.

63. The court illustrated its explanation of the formula with the following hypothetical:

These principles may be exemplified by considering a house purchased for $100,000, with the wife paying the entire down payment of $20,000 from separate property funds and the community contributing the rest of the purchase price in the amount of a loan for $80,000. There would be a 20 percent separate property interest and an 80 percent community property interest in the house. Assume that the fair market value of the house at the time of trial is $175,000, resulting in a capital appreciation of $75,000, and the mortgage balance at the time of separation was $78,000. The value of the separate property interest would be $35,000, which represents the amount of capital appreciation attributable to the separate funds (20 percent of $75,000) added to the amount of equity paid by separate funds ($20,000). The net value of the community property interest would be $62,000, which represents the amount of capital appreciation attributable to community funds (80 percent of $75,000) added to the amount of equity paid by community funds ($80,000 minus $78,000).

Id. at 816-17 n.3, 614 P.2d at 290 n.3, 166 Cal. Rptr. at 858 n.3.

64. *Id.* at 816, 614 P.2d at 289-90, 166 Cal. Rptr. at 858.

65. *See supra* note 51 for an explanation of total equity.

66. *See supra* note 47.

67. *See* Barnett, *Casenote: Lucas v. Lucas, or Footnotes From Far-Away Forums,* L.A. Daily Journal, Report Section, Dec. 19, 1980 at 15.

concepts of debt and equity investment.[68] According to this view, reimbursement is appropriate where the investment in the enterprise is a loan, or debt investment. Profit sharing is appropriate where the investor is a partner or shareholder in the enterprise, *i.e.,* where there is equity investment. Because California awards the community a percentage interest in the ownership of property purchased with both separate and community funds, logic dictates that once the percentage of ownership is determined, those percentages should be applied to the total value of the residence.[69] Accordingly, the community and the spouse making the separate property down payment should divide the amount realized on the sale of the residence according to the percentage of ownership interests. The amount to be divided is the amount of the sales price remaining after all liabilities (*i.e.* the balance of the loan outstanding) have been paid.[70]

      This is simply an argument that the total equity in the residence should be divided according to the percentages of ownership. This argument fails to recognize that, realistically, if the community has contributed the loan proceeds, it has also "contributed" a liability of almost equal magnitude—the resulting indebtedness. To regard this as a liability of both separate and community interests combined rather than as a community liability alone would be unfair to the separate interest.

      The *Lucas/Aufmuth* formula handles this problem, in effect, by dividing the total sales price of the residence by the respective ownership percentages, and subtracting from the community share the outstanding balance of the loan. It is clear that if both the capital appreciation and the original purchase price are divided according to the percentage of contributions to the purchase price, the total sales price is thereby similarly divided. If the community then pays off the outstanding loan balance, the community share is its percentage of the capital appreciation plus the amount of principal that had been paid on the loan.[71] The formula thus recognizes the outstanding loan amount

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68. *Id* at 15-16. The "most glaring and obvious difference between 'loan' and 'partnership' is that a lending mandates a return of the monies lent plus interest, etc., whereas an investment dictates only that the investor share in profits." *Id* at 17.

69. *Id* at 18.

70. *Id* at 17. Illustration *IA.* The author would divide the $20,000 cash received from the sale for $100,000 of a house purchased with a $20,000 separate property down payment and an $80,000 community loan (no principal paid off) in proportion to the investment percentages: separate property, 20% or $4,000 and community property, 80% or $16,000. Note how the entire loan balance was subtracted not from the community share of the sales price, but from the total amount of the sales price.

71. Assume a house purchased for $100,000 ($20,000 separate property down payment,

as a community debt.[72]

Any imprecision in logic can best be viewed as the result of an attempt by the court to find a formula which permits the spouses to share any increase in the value of their residence while still being fair to the spouse who contributed the down payment. Using the *Lucas/Aufmuth* formula, the "percentage of the residence" determined to be community property will generally be from 70 to 90 percent.[73] To distribute the total equity in the residence according to this percentage would result in giving the community not only most of the profit, but most of the separate property down payment as well.[74] Realizing this, the *Aufmuth* court rejected this position.[75]

The harsh and inequitable consequences that could result from the equity contributions formula can best be illustrated by two examples. First, in the *Aufmuth* situation, the wife, who made a $16,500 down payment from her separate property, would have received only $19,351.80 of the $78,000 total equity.[76] Second, assume that a house is purchased for $100,000 — $20,000 from separate property down pay-

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$80,000 community loan) is sold for $175,000 with $78,000 remaining to be paid on the loan. Dividing the total sales price by the percentage of community interest gives a gross community share of $140,000 ($175,000 x 80%). If from this amount, the $78,000 outstanding on the loan is subtracted, a net community share of $62,000 is obtained. Note that this is the same result that would be obtained by first dividing the $75,000 capital appreciation based on the percent of ownership interest, and then adding the equity contribution ($75,000 x 80% = $60,000; $60,000 + $2,000 principal reduction = $62,000). The hypothetical example is taken from the *Lucas* case, 27 Cal. 3d at 816-17 n.3, 614 P.2d at 290 n.3, 166 Cal. Rptr. 858 n.3; *see supra* note 63 for text of footnote. Although the *Aufmuth* court says that it is "apparent" that the trial court used the latter method, 89 Cal. App. 3d at 457, 152 Cal. Rptr. at 675, the method that it adopted and approved, the results are the same using both approaches. It is clear, in any case, that the *Aufmuth* court treated the outstanding loan balance as a community liability.

72. For an explanation of a contrasting treatment of the loan, *see supra* note 71.

73. This represents the amount of the loan, or that portion of the purchase price not contributed by the down payment. With rising prices, percentage amounts of down payments can be expected to drop. *See, e.g.,* THE MORTGAGE AND REAL ESTATE EXECUTIVES REPORT, Nov. 15, 1980 at 2, reporting a proposal by the Federal Home Loan Bank Board to allow federal savings and loan associations to cut the down payment requirement from 20% to 10%.

74. The *Aufmuth* court noted that the effect of the contention that the *total* equity in the house should be distributed in strict proportion to the amounts of community and separate funds invested "would be to give the community a 75 percent interest in wife's original $16,500 investment, which would deny her its full reimbursement." 89 Cal. App. 3d at 457, 152 Cal. Rptr. at 675.

75. *Id.*

76. The total equity of $78,000 was determined by subtracting the $47,000 loan balance from the fair market value of $125,000. Note that the total equity thus consists of the $58,500 capital appreciation and the $19,500 equity contributed by the parties. The separate property investment was 24.81%. *See supra* note 48. $78,000 × 24.81% = $19,351.80.

ment, $80,000 from a community loan — and the house is then sold for $175,000, with $78,000 remaining to be paid on the loan.[77] Division of the total equity according to the percentage of ownership interests would result in a separate property share of only $19,400, which is *less* than the original investment.

Several aspects of the economy make the 1980's an appropriate time for a change in the pro rata method of apportionment from the equity contributions formula to the *Lucas/Aufmuth* formula. One is simply the enormous increase in the value of real estate.[78] This increase is made even more significant by the fact that the price of homes has risen at a much greater rate than income.[79] It is both equitable and consistent with basic community property principles that where an asset purchased with both separate and community funds has increased greatly in value, the major part of that increase should be shared equally by the spouses.

Another factor which makes the *Lucas/Aufmuth* formula more equitable is rising interest rates.[80] Under the equity contributions formula, the community's interest is determined by reduction of principal on the loan. But rising interest rates make principal reduction an increasingly imperfect measuring stick, because as interest rates rise, the amount of principal repaid during the initial period of the loan term drops. For instance, in the first seven years of a thirty year loan at 7%, the principal pay back is 8.85%; at 12%, it is 3.75%; at 15%, only

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77. This hypothetical situation is the one used by the *Lucas* court to illustrate the *Aufmuth* formula. *See* 27 Cal. 3d at 816-17 n.3, 611 P.2d at 290 n.3, 166 Cal. Rptr. at 858 n.3. *See also supra* note 63.

78. From 1973 to 1979, the median price of a new home increased 107.1% to $67,300. U.S. NEWS & WORLD REPORT, Dec. 10, 1979, at 76. This trend has been even more pronounced in the Western United States: from 1973 to 1978, the nationwide median price of a new home rose from $32,500 to $55,700, while the median figure in the Western United States rose from $32,400 to $61,300. STATISTICAL YEARBOOK, U.S. DEP'T. OF HOUSING AND URBAN DEVELOPMENT (1978). In addition, certain areas of California now have homes with typical pieces well in excess of $100,000, and rates of appreciation among the highest in the United States. *See* MONEY, March, 1980 at 46.

79. From 1970 through 1976, the median price of new homes rose 88.9%, while median family income rose 47%. Downs, *Public Policy and the Rising Cost of Housing,* 8 REAL ESTATE REVIEW 27, 27-28 (1978).

80. Interest rates on home mortgages rose gradually from about 4% in 1950 to 8 to 9% in the late 1970's. Thereafter, there has been a rapid increase, with rates reaching 13% by 1980, and rising to above 15% in early 1981. *See* STATISTICAL ABSTRACT OF THE UNITED STATES (91st ed. 1970), for rates from 1950-1970, (99th ed. 1978), for rates from 1970-1977. Monthly rates for 1980 and 1981 may be found in issues of the FEDERAL HOME LOAN BANK BOARD JOURNAL.

2.13%.[81] Longer loan periods[82] accentuate this effect: the principal reduction on a forty year loan at 12% is only 1.11% after seven years.

In addition, rising interest rates increase monthly payments. Thus,

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81. Figures derived from loan amortization tables obtained using RJ Beta Loan Amortization System, RJ Software Systems, run on a Burroughs B80 computer.

82. *See* MORTGAGE AND REAL ESTATE EXECUTIVES REPORT, Nov. 15, 1980, at 2, reporting on a proposal by the Federal Home Loan Bank Board to permit federal savings and loan associations to make forty year mortgage loans. The effect of rising interest rates and lengthening loan terms is illustrated by the following graph:
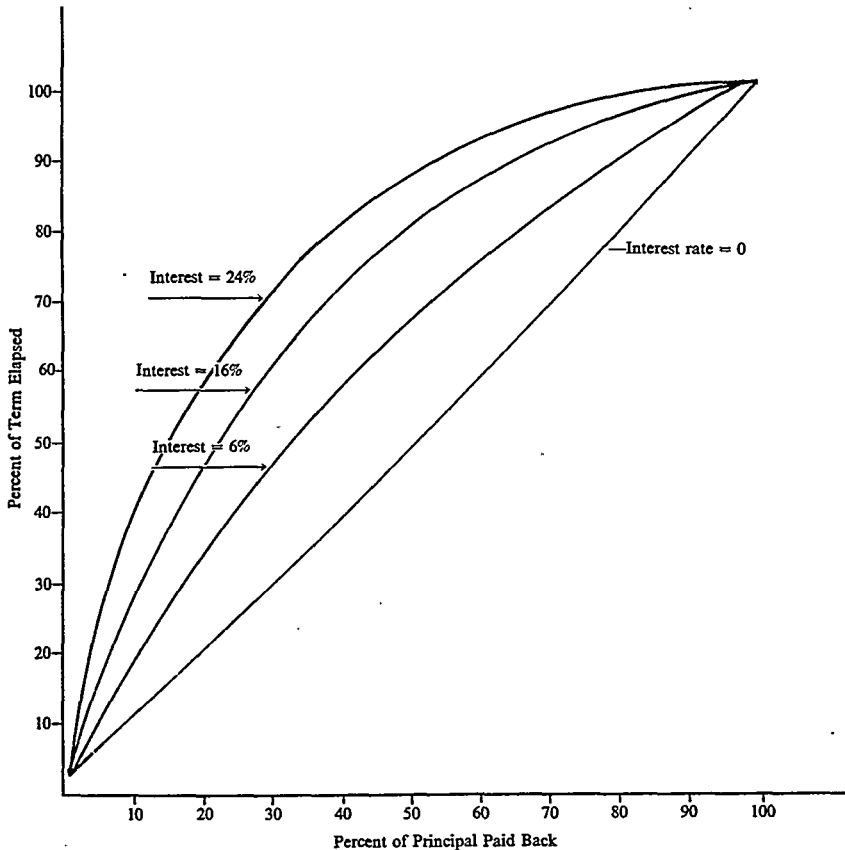
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The graph shows the relationship between interest rate, loan term, and principal payback. If there is no interest, the graph would show a straight line, because the amount of loan repaid would not vary with the amount of the loan term elapsed. As interest rates rise, the curve bows upwards because less principal is repaid in the early years, and more in the later years. This effect becomes extreme with high-interest, long-term loans. *See* R. Beers, *Shorter Mortgage Terms are Better for Home Buyers*, 11 REAL ESTATE REVIEW 93, 94-95 (1981).

installment payments are larger in amount, but principal pay back is less. For example, the initial $1,028.62 payment on a $100,000, thirty year loan at 12% consists of $1,000 interest and $28.62 principal. At 15% the initial $1,264.45 payment is $1,250 interest and $14.45 principal.[83] The second loan costs 35% more than the first, but the principal reduction is about one half as much. The effect of rising interest rates, then, is to make the purchase of a smaller ownership interest more costly. That is, the amount of payments rises, but the amount of principal drops. The effect of changing the community contribution from principal reduction to loan amount is not only to increase greatly the community percentage of investment, but also to avoid determining the community investment by a measure that increases in cost as it decreases in amount.

Of course, principal was always a fairly short measuring stick because so little principal is paid in the first years of a loan. Under the equity contributions method it would be unusual for the community contribution even to equal, much less exceed, the separate property contribution. This is true because the median length of a marriage ending in divorce in California is substantially shorter than the length of time required to pay an amount of principal equal to the down payment.[84]

3. Summary

The impact of the *Lucas* case is twofold. First, the decision adopted principles which increase the difficulty of establishing a separate property interest in a residence purchased with both separate and community funds. The main holding of the *Lucas* case was that in dual-source-of-funds acquisitions of a family residence, where spouses

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83. *See supra* note 81.

84. The median length of a marriage in California has been about seven years throughout the 1970's. *See* STATISTICAL ABSTRACT OF THE UNITED STATES (101st ed. 1980). Assuming down payments of from 10% to 30% of the purchase price, 11% to 43% of the corresponding loan would have to be paid off to equal the dollar amount contributed by the down payment. For 30 year loans, at 7%, this takes from eight years and three months to 20 years and one month; at 12% from 12 years and seven months to 23 years and three months; at 15% from 15 years and nine months to 24 years and five months. The community share would therefore usually fall short of the separate share if those shares were determined by the ratio of equity contributions. In the first seven years of a 7% 30 year loan, 8.85% of the principal is paid; at 12%, 3.34% of the principal is paid; at 15%, 2.13% of the principal is paid. The effect is magnified by longer loan terms: only 1.11% of a 40 year loan at 12% is paid in seven years and .475 of 1% of a 40 year loan at 15%. The following table shows graphically that a 50% payback would rarely be achieved by the community during the course of most California marriages, assuming of course that the community would be paying the earlier, rather than the later, payments.

hold the property as community property by title or by virtue of the statutory presumption created by Civil Code section 5110,[85] the residence will be regarded as entirely community, in the absence of a contrary agreement.[86] This changes the traditional rule that the presumption of community property can be rebutted by tracing the source of funds to separate property.[87] The result of the tracing doctrine was that if it was possible to trace the purchase funds to separate property, the property would retain its character as separate property, even if it had undergone a change in form or identity.[88] Accordingly, the investment represented by the down payment made with traceable separate funds would retain its identity as separate property, although transformed into a proportionate share of the house purchased with the down payment.

Second, the *Lucas* court adopted a formula that will result in a significantly larger community property share when apportionment of a residence purchased during marriage is found to be appropriate. That the *Lucas* court was willing to adopt a formula which bases the community percentage upon the full loan amount, regardless of the outstanding balance, is an indication of the importance the court placed upon employing an apportionment formula which is appropriate for "these inflationary times when residential housing is undergoing

YEARS TO 50% PAYBACK AT 6%	
Term of loan in years	Years to 50% payback
10	5.7
15	9.1
20	12.8
30	21.0
40	29.9

YEARS TO 50% PAYBACK AT 16%	
10	6.8
15	11.2
20	15.9
30	25.7
40	35.6

Adapted from R. Beers, *Shorter Mortgage Terms are Better for Home Buyers,* 11 REAL ESTATE REVIEW 93, 95 (1981).

85. "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 dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife." CAL. CIV. CODE § 5110 (West Supp. 1981).

86. *In re* Marriage of Lucas, 27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858.

87. *See* VERRALL, *supra* note 8, at 99.

88. *In re* Marriage of Jafeman, 29 Cal. App. 3d 244, 255-56, 105 Cal. Rptr. 483, 490 (1973). For an explanation of tracing and the exchange doctrine, *see supra* note 15.

enormous and rapid appreciation in value."[89]

The *Lucas* case should mean that many homes purchased with a separate property down payment and a loan extended to the community will be found to be entirely community in character. It should also mean that when such homes are apportioned, they will be chiefly community in character. The entire thrust of the case, therefore, is strongly pro-community.

C. In re Marriage of Moore: *Apportionment of the Home Where Acquisition Begins Prior to Marriage*

1. Facts and holding

The California Supreme Court again considered the issue of the proper method of apportionment of a family residence purchased with both community and separate funds in *In re Marriage of Moore*.[90] The situation in *Moore* differed from the situation in *Aufmuth* and *Lucas* in that the purchase of the residence was initiated prior to, rather than during, the marriage. In *Moore*, Lydie purchased a house approximately eight months prior to her marriage to David, making a $16,640.57 down payment, and obtaining the rest of the purchase price with a $40,000 loan.[91] Lydie made the first seven payments on the loan. After the marriage of the parties in late 1966, community property funds were used to make all payments until Lydie and David separated in June, 1977.[92] Thereafter, Lydie lived alone in the house, making payments from her separate property which reduced the principal by $581.07. Added to the $245.18 principal from the first seven payments and the down payment, this made her total equity contribution $17,466.82. The community paid $5,986.20 in principal. At the time of trial the house had a fair market value of $160,000,[93] reflecting a capital appreciation of $103,359.43 and a total equity of $126,812.45. The trial court apportioned the house using the equity contributions method, and thereby awarded $94,444.59 as Lydie's separate property share and $32,367.86 as the community property share.[94]

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89. 27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858.

90. 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980).

91. *Id* at 370, 618 P.2d at 209, 168 Cal. Rptr. at 663.

92. *Id*

93. *Id*

94. The supreme court explained the trial court's computations as follows:

The community interest was calculated by multiplying the equity value of the house by the ratio of the community's reduction of principal to the total amount of principal reduction by both community and separate property ($5,986.20 divided by $23,453.02 equals 25.5242 percent). The amount of the community interest was

The wife did not appeal the finding of the trial court that the community had acquired an interest in the house. The supreme court also accepted that determination unquestioningly, commenting briefly, in a footnote, that it was "clear under California law that the interest is properly characterized as a community property interest in the house."[95] The husband appealed, however, contending that the community contribution should have been based upon the full amount of the payments made, including interest, taxes, and insurance, rather than being based solely upon principal.[96] The supreme court rejected this contention, finding that interest, taxes, and insurance were properly excluded from the calculation of ownership interests.[97]

Considering the calculation of interests made by the trial court, the supreme court said that the *Lucas/Aufmuth* formula should have been used. That formula "recognize[s] the economic value of the loan taken to purchase the property."[98] The court noted that "[a]lthough many formulae have been suggested, we are not persuaded that any of them would be an improvement over" the *Lucas/Aufmuth* formula.[99] The supreme court stated that the trial court's use of the equity contributions formula was not appropriate, as it "ignore[d] the role of the loan" and was inconsistent with the principles of *Lucas/Aufmuth*.[100] The court computed the interests under the *Lucas/Aufmuth* formula, determining that the separate share would be $109,901.16, and the community share would be $16,911.29.[101] However, the supreme court

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thus determined to be $32,367.86. Lydie's separate property interest was calculated by multiplying the equity value of the house by the ratio of the separate property reduction of principal to the total amount of principal reduction ($17,466.82 divided by $23,453.02 equals 74.4758 percent). Lydie's separate property interest was thus determined to be $94,444.59.

Id. at 370, 618 P.2d at 209, 168 Cal. Rptr. at 663.

95. *Id.* at 371 n.1, 618 P.2d at 210 n.1, 168 Cal. Rptr. at 664 n.1.

96. *Id.* at 371, 618 P.2d at 210, 168 Cal. Rptr. at 664.

97. *Id.* at 373, 618 P.2d at 211, 168 Cal. Rptr. at 665.

98. *Id.*

99. *Id.*

100. *Id.* at 374, 618 P.2d at 212, 168 Cal. Rptr. at 666.

101. The court explained its computations as follows:

The separate property percentage interest is determined by crediting the separate property with the down payment and the full amount of the loan less the amount by which the community property payments reduced the principal balance of the loan ($16,640.57 plus ($40,000 minus $5,986.20) equals $50,654.37). This sum is divided by the purchase price for the separate property percentage share ($50,654.37 divided by $56,640.57 equals 89.43 percent). The separate property interest would be $109,901.16, which represents the amount of capital appreciation attributable to the separate funds (89.43 percent of $103,359.43) added to the amount of equity paid by separate funds ($17,466.82). The community property percentage interest is found by dividing the amount by which community property payments reduced the principal by the purchase price ($5,986.20 divided by

declined to reverse the trial court's calculation of the interests in the house, because the error was in the husband's favor, and the wife had not appealed the trial court's use of the equity contributions formula.[102]

2. Analysis

It is interesting that the supreme court did not question the finding that a community property interest in the house had been established by virtue of the loan payments made with community property funds. This aspect of *Moore* has been criticized as inconsistent with the holding in *Lucas* that a separate property interest cannot be established merely by demonstrating that separate property funds contributed to the purchase price.[103] Although it has been argued that "[b]ecause the *Moore* case did not involve a contested issue of whether the community has an interest at all, *Moore* may ultimately be held applicable only where there is an agreement or understanding that the community has an interest,"[104] it seems unlikely that the supreme court would adopt a view which presumes that property acquired during marriage (i.e. that portion of the residence purchased with community property funds) is separate rather than community property. The *Lucas* court held that separate property funds spent on a home purchased during marriage will be presumed to be a gift to the community in the absence of a contrary agreement. Accordingly, it is argued, to be consistent with *Lucas,* the *Moore* court should have found a presumption of a gift of community property funds spent after marriage on a home purchased with separate property funds prior to marriage.[105] The bet-

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$56,640.57 equals 10.57 percent). The community property share would be $16,911.29, which represents the amount of capital appreciation attributable to community funds (10.57 percent of $103,359.43) added to the amount of equity paid by community funds ($5,986.20).

Id. at 373-74, 618 P.2d at 211, 168 Cal. Rptr. at 665.

102. *Id.* at 374, 618 P.2d at 212, 168 Cal. Rptr. at 666.

103. The argument is as follows:

[T]he supreme court said in *Lucas* that when a spouse expends his or her separate funds to purchase a community residence, this is presumed to be a gift to the community unless there is an agreement or understanding to the contrary. . . . [W]hy then is it not presumed to be a *gift by the community,* absent an agreement or understanding to the contrary, when community funds are voluntarily spent on the purchase of a separate property residence?

(Emphasis in original). Note, 4 CAL. FAM. L. REP. 1458, 1461 (1980) [hereinafter cited as CFLR]. Another commentator has also suggested that practicing lawyers should "argue that all community contributions reducing principal are presumed to be a gift to the separate residence, absent an agreement to the contrary (following the logic of *Lucas*)." Rosenson, *Divorce California Style,* LOS ANGELES LAW. at 31 (1981) [hereinafter cited as Rosenson].

104. CFLR, *supra* note 103, at 1462.

105. *Id.* at 1461. Note that these arguments reverse the basic community property presumption.

ter view is that consistency between the *Lucas* and *Moore* cases is provided by the basic community property principle that all property acquired during marriage is presumed to be community property.

It is also surprising that the same court that was willing, in *Lucas,* to change the traditional definition of "contributions towards the purchase price" to include loan proceeds, should, in *Moore,* decline to alter that definition further to include interest, taxes, and insurance, by asserting that the pro rata rule "has been commonly understood as excluding payments for interest and taxes."[106] This refusal is even more surprising in light of the fact that the *Vieux* case, generally regarded as the foundation of the California pro rata theory, supports the contention that interest and taxes should be considered in computing ownership interests in jointly purchased property.[107] The *Moore* court, thus, had very persuasive authority available to support a change in the law as innovative as those made by the *Lucas* court, but still refused to make such a change.

It is likely that the major reason the *Moore* court refused to consider interest payments in its pro rata computations is that to do so would be inconsistent with the conceptual framework of *Lucas/Aufmuth.* That framework regards the purchase price as the capital investment.[108] Accordingly, as interest payments do not contribute to this investment, and do not increase the value of the property, they cannot be considered when a court is dividing assets and debts upon dissolution of marriage.[109]

The key to this analysis is that *Lucas/Aufmuth* uses contributions to the purchase price as the basis for apportionment of ownership, and regards the purchase price as consisting of down payment and loan proceeds. Although interest payments may be very large, and principal payments insignificant, there is no way that interest payments can be regarded as part of the "purchase price" as defined by the *Lucas* and

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106. 28 Cal. 3d at 372, 618 P.2d at 210, 168 Cal. Rptr. at 664.

107. The *Moore* court noted that the husband contended that the community property interest should be determined by the full amount of payments made with community funds, including interest, taxes and insurance, and that he relied upon *Vieux* for support. 28 Cal. 3d at 371, 618 P.2d at 210, 168 Cal. Rptr. at 664. The court then acknowledged that the *Vieux* court did indeed include interest and taxes in its calculations. *Id.* The *Vieux* court stated that "so far as community funds might participate in the acquisition or *protection* of vested rights, to that extent proportionally should the property be considered as 'community.'" 80 Cal. App. at 228, 251 P. at 642 (emphasis added). This is a good argument for including all expenses in computing ownership interests.

108. *See In re* Marriage of Lucas, 27 Cal. 3d at 816, 614 P.2d at 289-90, 166 Cal. Rptr. at 858; *In re* Marriage of Aufmuth, 89 Cal. App. 3d at 455, 152 Cal. Rptr. at 673.

109. 28 Cal. 3d at 372, 618 P.2d at 211, 168 Cal. Rptr. at 665.

Aufmuth decisions. It is clear that if loan proceeds are considered to be part of the purchase price, the purchase price must be considered to be that amount received by the seller, and not the amount ultimately spent on the property by the buyer. According to *Lucas/Aufmuth,* the investment is fixed by the amount received by the seller (the purchase or sales price) and is independent of the actual dollar amounts contributed by the purchaser (i.e. the contributions to the purchase price are computed by reference to down payment and loan amount only; interest and taxes are excluded, as is the amount of the outstanding loan balance). This analysis prevailed against the contention that the community property share was unjustly small in view of the large amount of community funds that had actually been spent.

The net effect of applying the *Lucas/Aufmuth* formula, rather than the equity contributions formula, in a *Moore-*type situation is to increase greatly the separate property share.[110] Under the equity contributions method, the separate property contribution is considered to be the down payment plus the amount of the loan actually repaid using separate funds. Applying the *Lucas/Aufmuth* formula, the spouse who initiated the purchase is credited with the down payment, as well as the full amount of the loan, less any principal reduction paid from community funds. In effect, "the loan proceeds must be treated as a separate property contribution."[111] As previously noted, the use of principal reduction to determine ownership interests generally yields a fairly small share. This is true even for the equity contributions method, where principal reduction is compared only to the amount of the down payment, not to the full purchase price.[112]

Ironically, while *Lucas/Aufmuth* freed the community from having its interest in a home purchased during marriage determined by the "short measuring stick" of principal reduction, *Moore* has imposed the use of that determination in the case of a home purchased prior to marriage. In *Moore,* however, not only is principal reduction used, it ·is also compared against a larger amount, the full purchase price, reduced only by the amount of principal actually paid with community funds.

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110. With equity of $126,812.45, under equity contributions the separate share is $94,444.59; under *Lucas/Aufmuth* it is $109,901.16. Under equity contributions the community share is $32,367.86; under *Lucas/Aufmuth* it is $16,911.29. *See supra* notes 94 & 101.

111. CFLR, *supra* note 103, at 1459. The *Moore* court noted that in a pre-marriage acquisition, the down payment is a separate property contribution, and the loan is also a separate property contribution, as it is based on separate assets. "Therefore under the *Lucas/Aufmuth* formula the proceeds of the loan must be treated as a separate property contribution." 28 Cal. 3d at 373, 618 P.2d at 211, 168 Cal. Rptr. at 665.

112. *See supra* notes 82 & 84 and accompanying text.

The application of the formula in a *Moore* situation leads, therefore, to dramatically different results than are obtained in a *Lucas*-type situation.

This can be demonstrated by recomputing the interests in the *Aufmuth* case as if it had involved a prior-to-marriage acquisition, rather than a during-marriage acquisition. The result of such a recomputation is an increase in the separate property share from $31,000 to $72,000 and a drop in the community property share from $47,000 to $5,925.[113] Note that this is an even smaller community property share than the $12,000 that would have been received under the equity contributions method.[114]

In *Moore*, the supreme court stated that the pro rata formula used by the trial court (which was the traditional equity contributions formula) "appears to have been based upon a statement in *In re Marriage of Jafeman* . . . that might be interpreted to mean that the interests are to be determined according to the proportionate equity contributions only, with no credit given for the loan contribution."[115] While this may seem to indicate that the *Lucas/Aufmuth* formula is merely a reinterpretation of a rather recent case, the statement in *Jafeman*,[116] a 1972 court of appeals case, is a reiteration of similar statements made in earlier cases. The *exact* language dates back at least as early as 1967, to *Bare v. Bare.*[117] The *Bare* court traced its treatment of the pro rata issue to a 1953 case, *Forbes v. Forbes*,[118] which relied primarily upon *Vieux*. The *Forbes* court, unlike the *Bare* court, did not refer to "equity" in discussing the contributions of the parties. However, the *Bare* court may merely have made explicit for the first time what had in fact been assumed by previous pro rata apportionment cases.

Although the language in these cases reflects an interesting pro-

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113. Rosenson, *supra* note 103, at 30.

114. *See supra* note 51 and accompanying text.

115. 28 Cal. 3d at 374, 618 P.2d at 211-12, 168 Cal. Rptr. at 665-66.

116. "The community interest is determined by comparing the ratio of the community investment to the total separate and community investment in the property. If the fair market value has increased disproportionately to the increase in equity, the community is entitled to participate in that increase in a similar proportion." *In re* Marriage of Jafeman, 29 Cal. App. 3d 244, 256-57, 105 Cal. Rptr. 483, 491 (1972).

117. The community is entitled to a minimum interest in the property represented by the ratio of the community investment to the total separate and community investment in the property. In the event the fair market value has increased disproportionately to the increase in equity, the wife is entitled to participate in that increment in a similar proportion.
256 Cal. App. 2d 684, 690, 64 Cal. Rptr. 335, 339 (1967).

118. 118 Cal. App. 2d 324, 257 P.2d 721 (1953).

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gression, it is ambiguous; and it is certainly susceptible to the interpretation used by the supreme court in *Moore.* Thus, *Vieux* stated that the community had an interest "in the same proportion as the amount contributed to the purchase price, [or] so far as community funds might participate in the acquisition."[119] *Forbes* described the interest as being "the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds."[120] *Bare* restated *Forbes* and further described that ratio as the "ratio of the community investment to the total separate and community investment in the property."[121] The *Jafeman* court, like the *Bare* court, articulated both "payments on the purchase price" and "investment in the property" ratios.[122] The word "investment," however, may be interpreted in ways that are not synonymous with "purchase price." It may be taken to mean the total amount, including interest, of all expenditures on the property, or it may be taken to mean only the amount of equity contributed.[123]

No court before *Aufmuth* specifically defined "investment in the property." Although the *Jafeman, Bare,* and *Forbes* courts all referred to and utilized formulas under which ownership interests are determined according to proportionate expenditures, those courts did not attempt to define "investment in the property," but in fact considered only funds actually expended by the parties.

The supreme court criticized the equity contributions formula because in considering "expenditures" to include only funds actually expended, it ignores the role of the loan. However, many previous apportionment cases concerned fact situations in which an outstanding loan balance was not involved, either because the purchase price was entirely paid, or because the purchase did not involve a long term note or mortgage.[124] The *Moore* court further stated that the equity contri-

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119. Vieux v. Vieux, 80 Cal. App. at 228-27, 251 P. at 642.

120. Forbes v. Forbes, 118 Cal. App. 2d at 325, 257 P.2d at 722 (citations omitted).

121. Bare v. Bare, 256 Cal. App. 2d at 690, 64 Cal. Rptr. at 338-39.

122. 29 Cal. App. 3d at 256-57, 105 Cal. Rptr. at 491.

123. For an example of a case where the court included the total expenditures of the parties, see Estate of Caswell, 105 Cal. App. 475, 288 P. 102 (1930). There, husband and wife both contributed funds to purchase an interest in a business with a purchase price of $7,500. The parties spent $9,350, including $3,750 which the wife "turned over" to the husband, and which "undoubtedly went into and was used in . . . the said business." *Id.* at 482, 288 P. at 104.

124. *See* Giacomazzi v. Rowe, 109 Cal. App. 2d 498, 240 P.2d 1020 (1952) (total cost of property $2,200, apparently entire amount was paid); Gettman v. Department of Water & Power, 87 Cal. App. 2d 862, 197 P.2d 817 (1948) (life insurance policy divided in proportion to premiums paid from separate and community funds); Maskuns v. Maskuns, 93 Cal. App. 27, 268 P.1093 (1928) ($1,400 paid for property, $700 by each spouse).

butions formula might be the appropriate method to use when the loan has been fully repaid.[125]

Of course, if the loan were fully repaid, the results under both formulas would be the same, because *Lucas/Aufmuth* treats the loan as if fully repaid for purposes of determining the percentage contributions towards the purchase price.[126] That is, for purposes of ownership computation, the party contributing the loan is considered to have contributed the full amount, regardless of how much principal that party actually has paid off. The full loan amount may only be reduced by the amount of principal reduction actually contributed by the other party. The entire loan amount is thus always accounted for under *Lucas/Aufmuth*, with reimbursement of actual equity contributed being used to avoid giving the loan holder an unearned share of the down payment contribution.

In sum, the loan amount is considered to be an asset for purposes of computing ownership shares, but the outstanding balance is a liability against the share of the party contributing the loan. In this respect, the *Lucas/Aufmuth* approach to the ownership of the loan (and thus in a *Moore* situation, to the ownership of the entire property) is more consistent with the inception of right theory than with the pro rata theory.[127] The *Lucas* and *Aufmuth* decisions regarded the ownership of the loan as being determined as of the initiation of the transaction, with title irrevocably vested in the party taking out the loan. Thus, the party subsequently making payments on the loan is credited only with the amount of principal actually paid, while the party who originally procures the loan receives credit for the rest of the loan, regardless of any outstanding balance.

Thus, in *Moore,* although the wife had paid off only $826.25 of the $40,000 loan, and the community had paid $5,986.20, the entire loan was considered to have been contributed by the wife, less *only* the amount of principal paid by the community.[128] In effect, the wife was considered to have contributed $34,013.80 of the $40,000 loan, although her funds had accounted for only $826.25 in principal reduction. The wife was credited with the loan on the strength of having first procured it, and for purposes of apportionment it remained 85% hers,

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125. 28 Cal. 3d at 374, 618 P.2d at 212, 168 Cal. Rptr. at 666.

126. For discussion of the *Lucas/Aufmuth* treatment of the loan, see *supra* notes 71-72 and accompanying text. "*Lucas/Aufmuth* requires that credit must be given for the loan when a loan balance exists." CFLR, *supra* note 103, at 1460.

127. *See supra* notes 16-17 and accompanying text.

128. *In re* Marriage of Moore, 28 Cal. 3d at 373, 618 P.2d at 211, 168 Cal. Rptr. at 665.

despite the $33,187.55 outstanding balance, and despite the fact that she had paid only 2% of the principal while the community had paid 15% of the principal. As a result, the community share of the capital appreciation of the house, most of which was built up during the marriage, and thus during the years when community funds were being used to reduce the indebtedness on the house, was less than 11%.[129]

This type of situation is strikingly similar to the hypothetical situation posed by the *Vieux* court in articulating its reasons for rejecting the inception of right theory:

> Any other construction in these days of liberal terms with reference to installment purchase price contracts for the sale of real property . . . would permit a husband, or a prospective husband, to buy or to agree to buy any reasonable quantity of lots or lands on the payment by him from his separate funds of a comparatively insignificant sum and thereafter to pay practically the entire purchase price from the community funds, and yet successfully maintain that because in its inception the naked right to purchase . . . was his separate property, it so remained.[130]

If the computations of the court in the *Moore* case are recomputed based upon a thirty year, 15% loan, the separate property share would be $116,761.18, as compared to $109,901.16 in the actual case; the community property share would be $5,462.69, as compared to $16,911.29. In the *Lucas* hypothetical situation, if a home purchased with a $20,000 separate property down payment and an $80,000 community loan, with a $78,000 loan balance and a current value of $175,000 is acquired during marriage, the separate property share is $35,000 and the community share is $62,000. If the home is acquired prior to marriage as in *Moore,* however, the separate property share is $93,500 and the community property share is $3,500.[131]

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129. *Id.* at 373-74, 618 P.2d at 211, 168 Cal. Rptr. at 665.

130. Vieux v. Vieux, 80 Cal. App. at 227-28, 251 P. at 642.

131. The computations assume that the wife made the first 7 payments, the community the next 127 payments, and the wife the following 8 payments. (The facts of the *Moore* case state that the wife made the first 7 payments, that community property funds were used to make payments during the marriage, and that the wife paid an additional $581.07 in principal following separation.) 28 Cal. 3d at 370, 618 P.2d at 209, 168 Cal. Rptr. at 663. Loan amortization tables for a 7% loan were used to estimate that the wife's principal payment of $581.07 made after separation is accounted for by 8 additional payments. Using a 15% loan, however, the wife's equity contributions would be $16,937.29 ($16,640 down payment, and $297.29 in principal reduction). The community contribution would be $1,938.80 in principal reduction. The community percentage share of the $56,640.57 purchase price would therefore be 3.42%, and the separate property share would be 96.58%. The wife's contribu-

These results are inconsistent with the rationale of the California pro rata theory that " '[i]n the event the fair market value has increased disproportionately to the increase in equity the [other spouse] is entitled to participate in that increment in a similar proportion.' "[132] The *Vieux* court, in weighing the issue of whether an installment purchase initiated prior to marriage should be deemed to confer full ownership as of its inception, or whether title should be apportioned pro rata according to the sources of funds, "concluded that justice would be better served by interpreting . . . 'ownership' . . . in a manner which permits apportionment of title."[133]

The California pro rata approach recognizes that property purchased partially with community property funds is partially community property, and has been praised as being more just and hence preferable to the inception of right approach.[134] Yet application of the *Lucas/Aufmuth* formula to the premarital acquistion of a house, especially if financed with a high interest loan, results in a very small community share of the capital appreciation. This result is inconsistent with the basic philosophy of pro rata apportionment. In premarital acquisitions of homes purchased with both community and separate funds, therefore, the *Lucas/Aufmuth* formula represents a return to the inception of right theory, because it determines ownership of the loan as of its inception. To the extent that the formula fails to produce significant sharing between the spouses of the capital appreciation of an asset purchased partially with community funds, the formula also represents a rejection of the underlying spirit of the pro rata theory.

IV. CONCLUSION

The *Lucas/Aufmuth* formula could have a significant anti-commu-

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tion would be $16,640.57 down payment, plus total loan amount minus principal reduction made from community funds: $16,650.57 plus $40,000 minus $1,937.80 equals $54,701.77.

Applying these percentages to the $103,359.43 capital appreciation yields the following results: community share of capital appreciation: $3,534.89; separate property share: $99,824.53. Adding the equity contributions from each source ($1,938.80 community property, $16,937.29 separate property) yields the final sums: $5,462.69 community property share and $116,761.18 separate property share. The total amount of the payments made by the community would be over $64,000, based on monthly payments of $505.78. Figures showing the complete computation of interests for the *Lucas* hypo are found in CFLR, *supra* note 103, at 1463.

132. *In re* Marriage of Moore, 28 Cal. 3d at 372, 618 P.2d at 210, 168 Cal. Rptr. at 664 (quoting Bare v. Bare, 256 Cal. App. 2d at 690, 64 Cal. Rptr. at 339).

133. Young, *supra* note 17, at 196.

134. *Id.; see also* Note, 20 S. CAL. L. REV. 281, 283 (1946), in which the author states that "from the standpoint of effecting substantial justice and fairness of result, the apportionment theory is the most desirable."

nity impact. It is likely that the majority of apportionment cases will arise in a *Moore*-type context, in which the community share will be rather small. Two factors lead to this conclusion. The first is the difficulty of establishing a separate property interest in a home purchased partially with separate property funds during marriage.[135] The second is the frequency of remarriages, which increases the likelihood of a spouse purchasing a home prior to marriage.[136] Thus, in a great many cases, when a home is apportioned upon dissolution of marriage, one spouse will receive the vast majority of the proceeds.[137]

The *Moore* court's use of principal payments as a measure of the community interest has been described as "extremely harsh and unfair to the community."[138]   This point was made in the context of the court's refusal to consider interest payments as part of the community contribution. The court's rationale was that interest could not be considered a contribution because it does not increase equity, and the value of real property is represented by the owner's equity.[139] However, the value of real property might more fairly be characterized as being represented by the owner's equity and any increase in value, and a fairer view of the loan as a contribution towards the purchase price might recognize that the loan has a price.[140] That is, the price of a house can be regarded as a "combination of the selling price and the financial terms of purchase or mortgage," which includes the interest

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135. This stems from the main holding of the *Lucas* case, which has been characterized as follows: "The net result is that a residence acquired during marriage and held in joint tenancy will be community property from the first dollar up, regardless of separate property contributions by either spouse, absent an agreement or understanding to the contrary." Rosenson, *supra* note 103, at 29. *See also supra* note 44 and accompanying text.

136. Statistics show that more than one in every four marriages is a remarriage for at least one spouse, and that up to 80% of those who divorce will remarry. Gurak and Dean, *The Re-Marriage Market: Factors Influencing the Selection of Second Husbands,* 3 J. DIVORCE 161, 161 (1979). Another example of the increasing divorce rate in California is the fact that the divorce rate in Orange County is equal to the marriage rate. Tepper, *Estate Planning for Second Marriages,* 120 TRUSTS & ESTATES 16, 16 (1981).

137. This is illustrated by *Moore,* where the wife's total share of the house (her separate property interest plus half the community interest) was $118,356.80, or 93.33%. The husband's share was $8,455.64, or 6.67%. *See supra* note 94 for computations of the separate and community property shares in the *Moore* case. Of course, a loan with a high interest rate would increase this disparity. If the loan in *Moore* had been at 15%, the wife's total share would be $119,492.52, or 97.77%. The husband's share would be $2,731.34, or 2.23%. *See supra* note 131 for computations.

138. Rosenson, *supra* note 103, at 30.

139. *In re* Marriage of Moore, 28 Cal. 3d at 372, 618 P.2d at 211, 168 Cal. Rptr. at 665.

140. To repay a standard 30 year loan of $100,000 at 12%, $360,278.95 must be paid; at 15%, $455,159.12 must be paid. For forty year loans of $100,000, at 12%, $484,079.57 must be paid; at 15%, $601,366.44. *See supra* note 81.

rate, and the term or length of the loan.[141] The total equity in a house is often quite independent of the amount of equity contributed by way of down payment and principal payback; instead it consists almost entirely of capital appreciation.

A fairer basis upon which to apportion such capital appreciation would be to use as the community contribution towards the purchase price that percentage of the loan represented by the percent of payments made with community funds.[142] Such an approach would make the community share independent of interest rates. Alternatively, the community share could be based upon that portion of the loan which has been paid for by the community, i.e., the fraction of the total amount of interest payable over the life of the loan that community payments of interest represent. That approach would take account of the dramatic effect of rising interest rates. Either approach would lead to a more equitable sharing of the capital appreciation than is obtained with the *Lucas/Aufmuth* formula. An alternative formula which would lead to a more equitable division of an asset which is presumptively community property would be more consistent with the reasoning of the *Vieux* court, with the concerns underlying the California pro rata theory, and with the basic philosophy of the community property system.

In sum, the *Lucas* case is extremely pro-community, and should result in significant sharing by divorcing spouses of the value of the family residence. It is ironic indeed that the *Moore* decision, while consistent with *Lucas* in its method of apportionment, will lead to opposite results. The *Lucas/Aufmuth* formula, which appeared to have originated as a pro-community division device, may become, in actual application, a tool used to carve out very small community property shares in residences subject to pro rata apportionment.

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141. J. Webb & R. Curcio, *The Impending Real Estate Crash: Fact or Fiction,* 5 REAL ESTATE ISSUES 7, 9 (1980).

142. Thus, in the *Moore* case, where the community made 127 payments, the community would be credited with having contributed 35.27% of the loan (127 divided by 360), or 24.91% of the purchase price.