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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of DONNA MARIA MOORE and BOBBY BOWLIN.	B268390 (Los Angeles County Super. Ct. No. GD050856)
DONNA MARIA MOORE, Respondent, v. BOBBY BOWLIN, Appellant.	

APPEAL from judgments of the Superior Court of Los Angeles County, Dianna Gould-Saltman, Judge. Affirmed in part and reversed in part with directions.

Kerney | Baker, Gary W. Kearney for Appellant.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller for Respondent.

Bobby Bowlin appeals from judgments in this marital dissolution proceeding; Donna Moore is the respondent. Bowlin contends: (1) the court's step-down spousal support order is not supported by substantial evidence; (2) the court failed to consider Moore's bonuses in determining spousal support; (3) the court erred in determining the marital community's interest in the family residence; (4) the court erroneously ordered Bowlin to reimburse Moore for post-separation expenses that Bowlin asserts Moore had paid in lieu of support; and (5) the court should have granted Bowlin more attorney fees. We agree with Bowlin that the court erred in determining the community's interest in the residence and by awarding reimbursement of certain expenses, and reject Bowlin's other contentions.

FACTUAL AND PROCEDURAL BACKGROUND

In the Fall of 2000, Bowlin began living with Moore in a house (the residence) that Moore had purchased with her funds earlier that year. In August 2001 they married. At that time, Bowlin was working as an Amtrak waiter, and Moore was working as a sales representative for a medical supplies company.

After they married, Moore and Bowlin decided to have a child together and agreed that Moore would continue working, and Bowlin would be a stay-at-home father. In September 2002, Bowlin quit his job with Amtrak and was thereafter unemployed throughout the marriage. Their only child, Cody, was born in February 2003. According to both parties, "the family enjoyed a solidly middle-class lifestyle."

Bowlin and Moore separated on June 17, 2012, almost 11 years after they married. They continued, however, to live together in the residence with Cody until the conclusion of the dissolution trial in 2015. Pursuant to a stipulation and order

issued in November 2012, Moore paid Bowlin $1,500 per month in uncharacterized support. In addition, Moore paid all living expenses for the family from the date of separation until October 9, 2013, and thereafter paid all family living expenses except half of the utilities and some of Bowlin's personal expenses.

The dissolution trial took place in March and April 2015. The court issued a tentative decision in May 2015 and thereafter received and considered objections from each party. The court issued a statement of decision in July 2015, and entered judgment of dissolution in September 2015.

The court awarded the parties joint legal and physical custody of Cody, with each receiving approximately equal custodial time. Moore was ordered to pay child support to Bowlin in the amount of $1,383 per month plus a percentage of her bonuses and commissions.

Regarding spousal support, the court made findings concerning the factors set forth in Family Code section 4320[1] and issued a step-down support order that periodically reduced Moore's support obligations from $1,800 per month (commencing when Bowlin moved out of the residence) to zero over five and one-half years.[2] The order was designed "to encourage [Bowlin's] concerted

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[1] Unless otherwise specified, statutory references are to the Family Code.

[2] The steps are as follows: (1) Until Bowlin moves out of the family home, there is no spousal support obligation. Bowlin shall move out of the residence within seven days of payment to him of the equalization payment; (2) For six months after Bowlin moves out of the residence, Moore shall pay Bowlin spousal support of $1,800 per month; (3) For 18 months after the expiration of step two, spousal support is reduced to $1,200 per month;

efforts to become self-reliant and discourage delay in seeking available employment."

The court determined that the residence was Moore's separate property, and that the marital community had an interest in the residence valued at $82,515.22. The court awarded the residence to Moore and ordered her to pay to Bowlin an equalization payment to reimburse Bowlin for his one-half share of the community's interest in the residence and in a particular bank account. The amount of this payment was offset by certain items credited to Moore or charged to Bowlin. The offset included $21,218.05 in *Epstein*[3] credits for certain expenses Moore paid after the November 2012 support order.

In October 2015, the court issued a judgment on reserved issues, in which it ordered Moore to pay Bowlin's counsel $25,000, in $500 monthly installments, for Bowlin's attorney fees.

Bowlin timely appealed from the judgment of dissolution and the judgment on reserved issues.

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(4) For 18 months after the expiration of step three, spousal support is reduced to $900 per month; (5) For 18 months after the expiration of step four, spousal support is reduced to $600 per month for 18 months; (6) For six months after the expiration of step five, spousal support is reduced to $300 per month; and (7) Upon the expiration of step six, spousal support shall be reduced to zero.

[3] *In re Marriage of Epstein* (1979) 24 Cal.3d 76.

DISCUSSION

I. The Record on Appeal

We first address an issue concerning the record, which Moore raises in her respondent's brief. After filing his notices of appeal, Bowlin filed a designation of record on appeal in which he elected to use a clerk's transcript pursuant to rule 8.122 of the California Rules of Court. The superior court clerk thereafter certified the clerk's transcript and filed it with this court on June 27, 2016. On September 26, 2016, Bowlin filed his opening brief and an appellant's appendix containing 12 documents consisting of 104 pages. One item in the appendix is a one-page document titled, "Petitioner's Revised Moore Marsden Worksheet" (Revised Worksheet). This document was used as a demonstrative exhibit by Moore's counsel during closing argument; it was not admitted into evidence. The appendix also includes an exhibit that Moore and the court relied upon in determining *Epstein* credits. Moore did not move to strike the appendix or any of its contents.

In her respondent's brief, Moore contends that because Bowlin elected to use a clerk's transcript and did not timely elect to use an appellant's appendix or move to augment the record, the documents in the appellant's appendix are not properly before this court. She asserts that the appellant's appendix and Bowlin's references in his opening brief to documents contained in the appendix should be stricken. She added that her brief will refer "only to the documents properly designated in the clerk's transcript." Moore, however, subsequently requested that the trial court clerk transmit to this court the Revised Worksheet that Bowlin included in his appellant's appendix. Moore attached a copy of the Revised Worksheet to her request, and served this court with

the request. She relied upon the document in her respondent's brief. Apparently because the document was not admitted into evidence and used as a demonstrative exhibit by counsel during closing argument, the superior court clerk did not retain a copy of this document and was unable to provide us with a copy of it.

In his reply brief, Bowlin does not dispute that the filing of the appendix was procedurally improper, but accuses Moore of attempting "to 'sandbag' " him by failing to object to the appendix when it was filed. He contends that if we agree with Moore, we should notify him "so that he may file a motion for augmentation of the record."

Even if Bowlin should not have presented the appellant's appendix to this court for filing for the reason Moore states, the appendix has been filed. Although the appendix may be subject to a motion to strike, Moore has not made such a motion, and the assertion that it should be stricken in her respondent's brief is insufficient to raise the issue for our consideration. (See Cal. Rules of Court, rules 8.40, 8.54; cf. *ReadyLink Healthcare, Inc. v. Jones* (2012) 210 Cal.App.4th 1166, 1174 [court declined to treat request for stay in appellant's brief as a motion for a stay].) In the absence of a motion and an order striking the appendix, it remains part of the appellate record.

II. Step-down Spousal Support Order

Bowlin contends that the evidence does not support the court's step-down spousal support order. We disagree.

In awarding spousal support, the court must consider and weigh the relevant factors set forth in section 4320. (§ 4320; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302.) These factors include: (1) the extent to which the earning capacity of each party is sufficient to maintain the standard of living established

during the marriage; (2) the extent to which the supported party contributed to the supporting party's attainment of an education, training, or career; (3) the ability of the supporting party to pay spousal support; (4) the needs of each party based on their standard of living; (5) the parties' obligations and assets; (6) the duration of the marriage; (7) the ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party; (8) the age and health of the parties; (9) tax consequences; (10) relative hardships; (11) "[t]he goal that the supported party shall be self-supporting within a reasonable period of time"; and (12) "[a]ny other factors the court determines are just and equitable." (§ 4320, subds. (a)-(n).)

Once the court has considered the section 4320 factors, " 'the ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion.' " (*In re Marriage of Left* (2012) 208 Cal.App.4th 1137, 1150.) An abuse of such discretion " 'occurs when, after calm and careful reflection upon the entire matter, it can be fairly said that no judge would reasonably make the same order under the same circumstances.' " (*In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 50 (*Ostler & Smith*).)

A court may make an order that reduces spousal support periodically, a so-called "step-down" order, "to encourage self-support, in anticipation that the supported party will have an increased ability to provide for his or her own support with each step-down." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 6:1070, p. 6-549; see *In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 665 (*Prietsch*) [the effect of the step-down order "is to tell each spouse that the supported spouse has a specified period of time to become

self-supporting, after which the obligation of the supporting spouse will cease"].) Such anticipation, however, " 'must be based upon reasonable inferences to be drawn from the evidence, not mere hopes or speculative expectations.' " (*In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 740.)

By reducing spousal support in anticipation that the supported spouse will find employment, the court creates a risk that "things [will] not work out as contemplated." (*Prietsch*, *supra*, 190 Cal.App.3d at p. 665.) To avoid the possibility of a harsh future that fails to meet the court's expectation, the court may protect the supported spouse by retaining jurisdiction over the case, thereby allowing the supported spouse to return to court and request a change in the support order upon a showing of good cause. (*Id.* at pp. 665-666; *In re Marriage of Beust* (1994) 23 Cal.App.4th 24, 29.) When, as here, the marriage lasted longer than 10 years and there is no order or written agreement terminating spousal support, the court's retention of jurisdiction to modify the terms of spousal support is presumed. (§ 4336, subds. (a) & (b); *In re Marriage of Ostrander* (1997) 53 Cal.App.4th 63, 66.)

Here, there was evidence that Bowlin had a high school education and attended the University of Arizona for one and one-half years. He was planning to take computer classes and possibly return to school to get "a two year degree." In addition to working as an Amtrak waiter for approximately six or seven years before becoming a stay-at-home father, Bowlin had worked as: (1) a "laborer" in "a civil service job with the federal government"; (2) an "operating engineer" who operated heavy equipment such as bulldozers, backhoes, and dump trucks; (3) a technical adviser for the movie industry; (4) a cook; (5) a waiter; and (6) a restaurant host.

At the time of trial, Bowlin was unemployed. He explained that in the two years preceding trial he had prepared a résumé and submitted job applications in person and online. He also joined "Women at Work," an organization that helps men and women obtain skills to join the work force, and he periodically checks a job board.

The court found that Bowlin "had considerable work experience during his adult life prior to marriage," and although "some of his skills, particularly those involving technology, must be updated to make him competitive in the job market, [Bowlin] expressed an expectation that he will be updating those skills." The court observed that "[m]any of the jobs [Bowlin] previously had are still viable jobs for him to undertake presently. The [c]ourt expects that he will take immediate steps to accept full-time employment while upgrading his skills."

Bowlin contends that the court's order is based on speculation about his future employment opportunities because the court "knew nothing about [Bowlin]'s abilities." "For all the [c]ourt knew," he argues, his résumé "was a mess because he suffers from dyslexia or a learning disability which would limit his employability." Bowlin does not assert that he suffers from dyslexia or a learning disability, or that there was evidence thereof. Rather, it appears that Bowlin is arguing that it is possible he has dyslexia or a learning disability, and the court must affirmatively rule out those possibilities before it can infer an ability to obtain employment in the future. He cites no authority for this assertion, and we decline to so hold. The evidence of Bowlin's work history and his testimony regarding his efforts to obtain additional skills was sufficient to support the inference that Bowlin could obtain gainful employment.

If this expectation is not realized, Bowlin can request a change of the spousal support order.

III. Court's Consideration of Moore's Commissions and Bonuses in Determining Spousal Support

Among the factors the court is required to consider in establishing the amount of spousal support is "[t]he ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living." (§ 4320, subd. (c).) Income is statutorily defined to include commissions and bonuses. (§ 4058, subd. (a)(1).)

In its statement of decision, the court stated that Moore's annual base salary in 2015 was $146,000, and her average monthly income was $11,883. Her "net income" has averaged approximately $7,000 per month. In addition to her salary, Moore may receive discretionary performance bonuses. In establishing the amount of *child* support Moore is to pay Bowlin, the court ordered a fixed amount ($1,383 per month), plus 4.3 percent of any bonus or commission she receives. The court did not similarly provide for an increase in spousal support in the event Moore receives any bonus or commission. Bowlin contends that this was error.

Bowlin relies on *Ostler & Smith*, *supra*, 223 Cal.App.3d 33, which upheld a trial court's order requiring the supporting husband to pay a percentage of his future bonuses as spousal support. (*Id.* at p. 50.) The Court of Appeal explained that "trial courts must have broad discretion in weighing and balancing the various factors in each particular marriage before making a suitable support award. . . . Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders." (*Ibid.*) Based on this standard, the court

concluded that the spousal support order in that case was not an abuse of discretion. (*Ibid.*) *Ostler & Smith* did not hold, and Bowlin does not cite to any case that does hold, that a court *must* include a percentage of the supporting spouse's bonuses as spousal support, or that the court abuses its discretion if it does not do so. (See *In re Marriage of Baker* (1992) 3 Cal.App.4th 491, 500.)

Here, the court cited *Ostler & Smith* in providing for a portion of Moore's bonuses and commissions in fashioning the child support order, and Bowlin argued that he should be similarly entitled to a percentage of Moore's bonuses as additional spousal support. He acknowledges that the court addressed this argument at a hearing, after which the court declined to order the additional support. The court was thus aware of its discretionary authority under *Ostler & Smith* and presumably considered the matter. On this record, we cannot conclude that the failure to include future bonuses in the spousal support order constitutes an abuse of its discretion.

IV. Calculation of Community Property Interest in Residence

Bowlin contends that the court made several errors in calculating the community's interest in Moore's residence. We agree in part and will reverse the judgment accordingly.

A. Background Principles

Under the so-called *Moore/Marsden* rule, when one spouse owns real property securing a loan made prior to marriage and, during the marriage, community funds are used to pay down the principal on that loan, the community acquires a pro tanto interest in the property. (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 371-372 (*Moore*); *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 436-440 (*Marsden*).) In cases that do not

involve post-nuptial improvements to the separate property, the "community property percentage share is determined by dividing the amount in which community property payments reduced the principal by the purchase price." (*In re Marriage of Frick* (1986) 181 Cal.App.3d 997, 1008 (*Frick*).) Generally, the percentage is applied to the amount the property has appreciated in value between the date of marriage and the date of the dissolution trial. (*Marsden*, *supra*, 130 Cal.App.3d at pp. 438-439; *In re Marriage of Sherman* (2005) 133 Cal.App.4th 795, 799-800 (*Sherman*).)[4]

In addition to receiving credit for the community's share in the appreciation in value during marriage, the community is credited with any principal payments made from community

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[4] In *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1427 (*Bono*), the Sixth District Court of Appeal expressly departed from the *Moore/Marsden* approach by calculating the pro tanto shares in the property's appreciation through the date of separation, not the date of trial. (*Bono*, *supra*, 103 Cal.App.4th at p. 1426.) In *Sherman*, *supra*, Division Seven of this District declined to follow *Bono* on this point. The *Sherman* court pointed out that *Bono* was not a marital dissolution case, and in dissolution cases the court is statutorily required to " '*value the assets and liabilities as near as practicable to the time of trial*.' " (*Sherman*, *supra*, 133 Cal.App.4th at p. 800, quoting Fam. Code, § 2552, subd. (a).) The date of trial should therefore be used "unless there is some reason which renders this result inequitable." (*Ibid.*) Valuing the property as of the date of trial is particularly appropriate " 'when an asset increases in value from nonpersonal factors such as inflation or market fluctuations.' " (*Id.* at p. 801, quoting *In re Marriage of Priddis* (1982) 132 Cal.App.3d 349, 355.) We agree with *Sherman*, and conclude that the trial date is the proper date for valuing the residence in this case.

property sources. (See *Marsden*, *supra*, 130 Cal.App.3d at pp. 438-439; *Frick*, *supra*, 181 Cal.App.3d at p. 1008.) Upon dissolution, the community's share is divided equally between the spouses. (*In re Marriage of Branco* (1996) 47 Cal.App.4th 1621, 1629 (*Branco*).)

When a separate property loan is refinanced during marriage, the proceeds of the new loan will, for purposes of the *Moore/Marsden* rule, be treated as a payment of the principal of the preexisting loan. (*Branco*, *supra*, 47 Cal.App.4th at p. 1627.) Whether that payment is credited as separate property or community property depends upon the characterization of the loan. (*Ibid.*; see also *Hicks v. Hicks* (1962) 211 Cal.App.2d 144, 153 [loan proceeds "obtained upon the credit of separate property" are separate funds].) Thus, in *Branco*, where the parties refinanced a separate property loan with a new community property loan, the new loan proceeds were treated as a community property payment of the separate property loan, which thereby increased the community's share in the property's appreciation. (*Branco*, *supra*, 47 Cal.App.4th at p. 1629.)

The *Moore/Marsden* formula has generally been discussed in terms of percentages of the property's purchase price. (See, e.g., *Frick*, *supra*, 181 Cal.App.3d at p. 1008; *Branco*, *supra*, 47 Cal.App.4th at p. 1629.) In *Bono*, *supra*, 103 Cal.App.4th 1409, the court extended the *Moore/Marsden* rule to apply to the use of community funds to make capital improvements to the separate property. The *Bono* court stated: " 'The *Moore/Marsden* rule is based upon the principle that where community funds contribute to the owner's equity in separate property, the community obtains a pro tanto quasi-ownership stake in the property. . . . [Citation.] Because contributions to capital improvements also increase

the property's equity value, *Moore's* rationale applies as well to capital improvements made to separate property." (*Id.* at p. 1423.) Therefore, " '[w]here community funds are used to make capital improvements to a spouse's separate real property, the community is entitled to reimbursement or a pro tanto interest under the *Moore/Marsden* rule.' " (*Ibid.*; see also *Sherman*, *supra*, 133 Cal.App.4th at pp. 799-800 [*Moore/Marsden* rule applies to the use of "community funds to make improvements to a residence purchased by one of the parties before marriage [where] those improvements increase the property's equity value"].)

Thus, whereas the traditional statement of the *Moore/Marsden* rule referred to "community property payments [that] reduced the principal balance of the [separate property] loan" (*Moore*, *supra*, 28 Cal.3d at p. 373), the *Bono* court referred more broadly to "the community's contributions to equity"—a phrase that encompasses equity-enhancing improvements to the property as well as reductions of loan principal. (*Bono*, *supra*, 103 Cal.App.4th at p. 1425.) And instead of dividing the community's principal payments by the *purchase price*, the sum of the community's contributions to equity are to be divided by " ' "the total separate and community *investment in the property*." ' " (*Id.* at p. 1427, italics added.) An improvement's contribution to equity thus alters both the numerator and the denominator in the *Moore/Marsden* formula.

The contribution to equity resulting from improvements to the property, however, does not necessarily equal the amount of money spent on the improvements. As one court observed, "improvements do not always enhance the value of an asset; indeed, ill-advised improvements may well diminish the value of property." (*In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962, 972, cited in

Bono, *supra*, 103 Cal.App.4th at p. 1425.) Capital improvements, the *Bono* court stated, are those that "increase the property's equity value." (*Bono*, *supra*, 103 Cal.App.4th at p. 1423.) In applying the *Moore/Marsden* rule, therefore, "care must be taken to include only capital improvements, and then only to the extent that those capital improvements enhance the property's value." (*Id.* at p. 1427; see also *In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1557 [home equity loan that did not contribute to improvement of the property was not considered in *Moore/Marsden* analysis].)

With these principles in mind, we set forth the relevant facts as found by the court.

B. Facts Relevant to the *Moore/Marsden* Analysis

Moore purchased the residence in June 2000 for the price of $220,000. She paid $22,500 down and borrowed $197,500. She held title in her name only. Moore refinanced the loan in August 2001, about one month before her marriage to Bowlin. The new loan was for $203,500, a $6,000 increase over the purchase money loan. The loan was secured by a first deed of trust against the residence.

At the time of the marriage in August 2001, the fair market value of the residence was $236,104.

In June 2003, Moore refinanced the loan secured by the first deed of trust with a new loan in the amount of $202,671. Although both parties signed the deed of trust, Moore was the sole obligor on the note and there was no change in the record title to the residence. The court found that this refinance did not transmute the residence to community property. The court did not make an express finding as to whether the new loan was a community property loan. It noted, however, Bowlin's expert's opinion that it

was a community property loan and, by rejecting the expert's opinion, impliedly found that the loan was a separate property loan.

In 2004, Moore obtained a home equity line of credit (HELOC) in the amount of $110,000, the proceeds of which were used to build a pool and spa, and to remodel and increase the size of the house. Moore secured the loan with a second deed of trust signed by her "as a single woman."

At trial, Bowlin's accounting expert presented alternative estimates of the increase in the residence's value due to the HELOC-financed improvements. The court adopted the estimate of $33,800—the one that Bowlin's expert "like[d] the best." Although Bowlin contends that the court misapplied this value in performing its *Moore/Marsden* analysis (which we discuss below), it does not appear that he is challenging the court's finding as to that amount.

Moore refinanced the HELOC in September 2008. The new loan had a principal balance of about $49,500, reflecting a principal paydown of $60,500 from the 2004 HELOC. Moore secured the loan with a deed of trust signed by her "as a single woman." She refinanced the HELOC again in August 2009. The 2009 loan had a principal balance of $101,000, and was again secured by a deed of trust that Moore signed "as a single woman."

In May 2012, about one month before the parties separated, Moore refinanced the existing first and second loans with a new loan in the principal amount of $188,000. The fair market value of the residence at that time was $483,000. Moore was the sole obligor on the note. As part of the refinancing transaction, the lender required that Bowlin be on title. Accordingly, Moore deeded the residence to her and Bowlin as joint tenants. In August 2012, Bowlin executed a quitclaim deed transferring his interest in the residence to Moore. Based on these 2012 transactions and the

testimony regarding them, the court found that the parties did not intend "to change anything about the ownership of the house," and that the transactions did not transmute the residence to community property. Bowlin does not challenge this finding.

On September 1, 2012, the principal amount of the existing loan was $183,612. At the time of trial, the residence's fair market value was $555,000.

In its statement of decision, the court expressly adopted Moore's Revised Worksheet—the document to which Moore's counsel apparently referred during closing argument. According to this analysis, the appreciation in the value of the residence during marriage was $318,896—the difference between the residence's fair market value at the time of trial ($555,000) and its fair market value on the date of marriage ($236,204). The community's percentage interest in that appreciation was calculated by dividing the amount of loan principal payments made with community funds ($19,887.60) by the purchase price ($220,000). That percentage is approximately 9.04 percent. The community's share of the appreciation during marriage was therefore $28,827.62 (9.04 percent of $318,896). The court then credited the community with the loan principal paid by the community ($19,887.60) and the value of the capital improvements ($33,800). Based on these calculations, the court concluded that the community's interest in the residence is $82,515.22 ($28,827.62, plus $19,887.60, plus $33,800). The court awarded the residence to Moore, and ordered Moore to pay to Bowlin one-half of the community's interest in the residence—$41,251.61.

C. Bowlin's Contentions

Bowlin makes three arguments in challenging the court's *Moore/Marsden* analysis. First, he contends that the loan proceeds in the 2003 refinancing "were community [property] and by paying off [Moore]'s loan, the community contributed $202,671 to the acquisition of the property." The court, he argues, ignored this transaction and "refus[ed] to follow" *Branco*, *supra*, 47 Cal.App.4th 1621. We disagree.

In *Branco*, the husband and wife obtained a loan during marriage and used a portion of the loan proceeds to pay off a debt secured by the wife's separate property. The husband argued that the loan " 'stepped into the shoes' " of the original, separate property loan and should be treated as a community payment toward the acquisition of the property for purposes of the *Moore/Marsden* rule. (*Branco*, *supra*, 47 Cal.App.4th at pp. 1625-1626.) The Court of Appeal agreed, stating that it could "discern no meaningful difference, for purposes of determining whether the community acquires an interest in real property, between the use of community funds to make payments on one spouse's preexisting loan and the use of proceeds from a community property loan to pay off the preexisting separate loan." (*Id.* at p. 1627.)

The applicability of *Branco* depends upon whether the loan that replaces the then-existing loan is a "community property loan." (*Branco*, *supra*, 47 Cal.App.4th at p. 1627.) Here, the court did not make an express finding on this point (and it does not appear from the record that an express finding was requested). The court's analysis and conclusion, however, imply a finding that the 2003 refinance was a separate property loan. (See *In re Marriage of Bonvino* (2015) 241 Cal.App.4th 1411, 1424 [reviewing court will

imply a factual finding necessary to support the judgment if a party fails to raise the omission in the trial court].) The question, therefore, is whether that finding is supported by substantial evidence. (See *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179, 1185 (*Grinius*).)

Although proceeds from a loan obtained during marriage are generally presumed to be community property, this presumption can be rebutted by evidence that the lender intended to rely solely on the spouse's separate property. (*In re Marriage of Bonvino*, *supra*, 241 Cal.App.4th at p. 1423; *Grinius*, *supra*, 166 Cal.App.3d at p. 1187.) Sufficient evidence of the lender's intent to rebut the presumption can be supplied by evidence that the lender relied on one spouse's separate property as security for the loan. (*Ibid*.)

Here, the court found, and Bowlin does not dispute, that Moore was the sole obligor on the 2003 note and that the loan was secured by Moore's separate property. This is sufficient to support the court's implied finding that the 2003 loan was a separate property loan. (See *Grinius*, *supra*, 166 Cal.App.3d at p. 1187; see also *Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 375 [funds borrowed by hypothecation of a spouse's separate property are ordinarily separate property].) *Branco*, therefore, does not apply and the court correctly determined that the 2003 loan was not a community property loan.

Bowlin next contends that although the court recognized that the 2004 HELOC-financed improvements added $33,800 of value to the residence and that the community paid for the improvements, it failed to include that value in determining the

community's pro tanto interest in the residence's appreciation.[5] We agree.

The $33,800 in value added by the improvements potentially affects the *Moore/Marsden* analysis in three ways. First, it increases the total capital investment in the residence by that amount. (See *Bono*, *supra*, 103 Cal.App.4th at pp. 1427-1428 & fn. 2.) Second, the HELOC obtained to finance the improvements is, to the extent that the improvements increased the value of the residence, either a separate property investment or a community property investment in the residence depending on the character of the loan. (See *Grinius*, *supra*, 166 Cal.App.3d at p. 1187.) Third, the payment of principal on the HELOC is credited to either the separate or the community property, depending upon its source.

Here, although the court found that the improvements added $33,800 in value to the residence, the court's *Moore/Marsden* analysis considered only the purchase price in determining the total capital investment in the residence. This was error. The total capital investment is the $220,000 purchase price plus the $33,800 in value added by the improvements; i.e., $253,800. (See *Bono*, *supra*, 103 Cal.App.4th at p. 1423.)

The court found that Moore, not the community, obtained the HELOC. That finding, like the court's implied finding on the 2003 loan, is supported by the evidence that Moore was the sole obligor on the HELOC note and the fact that the HELOC was secured

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[5] In response to Bowlin's argument, Moore asserts that Bowlin failed to provide "a record that demonstrates error" and "does not show the court's analysis or where in the record his alleged facts may be found." She does not address the merits of his argument.

by Moore's separate property. The HELOC was thus a separate property loan and the amount of the loan should be treated as Moore's investment in the residence to the extent it added to the equity in the residence; i.e., $33,800.

Approximately $60,000 of the $110,000 principal on the HELOC was paid down by the time it was refinanced in 2008, and the entire principal balance was repaid in the 2012 refinancing. Although the court did not make any express finding as to the source of the payments used to pay down the HELOC, we can infer the finding that the community paid the balance because the court included the $33,800 amount in the community's share in the residence. Moreover, the payments were presumably paid from Moore's earnings, which were community property up until the date the parties separated. The court did not, however, consider such principal payments in determining the community's percentage share in the residence's appreciation. The court erred in this respect.

In sum, the $33,800 investment in the residence in the form of the 2004 HELOC-financed improvements increased the total investment in the residence and the payment of the principal on the HELOC increased the community's investment in the residence.[6] The court erred by failing to consider these consequences in its *Moore/Marsden* analysis.

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[6] Although the HELOC, as a separate property loan, initially increased Moore's investment in the residence, that investment was reduced to zero by the community's payments of the HELOC principal. (See *Moore*, *supra*, 28 Cal.3d at p. 373 [owner of separate property is credited with full amount of separate property loan "less the amount by which the community property payments reduced the principal balance of the loan"].)

Bowlin next contends that the court improperly relied on the Revised Worksheet. Bowlin characterizes the calculations in the Revised Worksheet as improper expert opinion by a lay witness (i.e., Moore's attorney). We reject that characterization. The Revised Worksheet is in part a summary of the evidence regarding the purchase price, loan amounts, and market valuations of the residence, and in part an aid to counsel's closing argument as to how to apply the *Moore/Marsden* rule to the evidence. It was not admitted into evidence. The court's reliance on it is akin to a court's reliance on an attorney's closing argument or a trial brief. There was no error.

Lastly, Bowlin presents what he describes as the "correct calculation of the pro tanto interest" in the residence. He proceeds to set forth numerous dollar amounts and calculations without meaningful explanations or a single citation to the record. Moreover, it appears to assume that the 2003 refinancing loan was a community loan, a fact that is contrary to the court's implied finding on that point—a finding that, as we explained above, is supported by substantial evidence. We therefore reject Bowlin's calculations.

Our determination of error as to the court's treatment of the 2004 improvements compels us to modify the court's analysis and conclusions as follows. First, the total capital investment in the residence consists of the $220,000 purchase price plus the value of the improvements to the extent they increased the value of the residence—i.e., $33,800—for a total of $253,800.

Next, we determine the community's investment in the residence. Although the numerous refinancing transactions and the HELOC could have complicated this determination, our task is simplified by the fact that all loans were separate property loans

and all payments on the loans after the August 2001 refinancing (which occurred just prior to the marriage) up until the date of separation were made from community property funds. The amount of the community property payments on principal can be derived by first adding $33,800 (the amount by which the HELOC added value to the residence) to the $203,500 principal on the August 2001 loan to arrive at a total principal amount of $237,300, and subtracting from that sum the amount of principal remaining as of the date of separation. In the absence of evidence of the principal amount outstanding as of the June 17, 2012 date of separation, the court reasonably used the amount outstanding as of September 1, 2012—$183,612. The reduction in principal during that time—all of which was accomplished with community property funds—is therefore $53,688 ($237,300 minus $183,612).

The community's percentage share of the appreciation during marriage is the ratio of the community's $53,688 investment in the residence to the $253,800 total investment; i.e., 21.15 percent. The remaining 78.85 percent is Moore's percentage share.

The appreciation in the residence between the date of marriage, when it was valued at $236,104, and the date of trial, when it was valued at $555,000, is $318,896. The community's pro tanto share is 21.15 percent of that amount, or $67,458. Moore's 78.85 percent pro tanto share is $251,438.

The community's interest in the residence is equal to $67,458 (its share of the appreciation during marriage) plus the $53,688 in community funds used to pay loan principal, for a total of $121,146. Bowlin is entitled to one-half that amount, or $60,573. This is $19,315.48 more than the amount the court awarded Bowlin.

V, Reimbursement From Bowlin to Moore for Living Expenses

Under *Epstein*, *supra*, 24 Cal.3d 76, a spouse who uses his or her post-separation earnings or other separate funds to pay preexisting community obligations should ordinarily be reimbursed by the community for such payments. (*Id.* at p. 84.) Such reimbursement should not be made, however, " 'if payment was made under circumstances in which it would have been unreasonable to expect reimbursement, for example, where there was an agreement between the parties the payment would not be reimbursed or where the paying spouse truly intended the payment to constitute a gift or, generally, where the payment was made on account of a debt for the acquisition or preservation of an asset the paying spouse was using and the amount paid was not substantially in excess of the value of the use. [¶] 'Likewise, reimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties.' " (*Id.* at pp. 84-85.) Whether to award *Epstein* credits and in what amount is left to the trial court's discretion based on equitable considerations consistent with an equitable distribution of the community property. (*In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1272.)

At trial, Moore argued that she should be reimbursed for payments she made for Bowlin's expenses or Bowlin's share of community expenses post-separation. These expenses were itemized on exhibit 18A, a spreadsheet Moore's counsel relied upon during closing argument and which Bowlin has included in the appellant's appendix. The court declined to order reimbursement for some items, such as utilities, rental value of the residence, and

property taxes. It did, however, order that Moore receive *Epstein* credits totaling $21,218.05 for payments Moore "made after the date of a support order (11/14/12)." (By calculating the credits as to payments made after the date of the support order, the court presumably determined that Moore's payment of expenses prior thereto were made in lieu of spousal support.) These payments included expenses for satellite and cable television fees, Bowlin's cell phone, car insurance premiums and registration fees, car repairs, tax preparation fees, groceries, home supplies, and pest control services. Bowlin contends that $4,698.84 of the amount the court ordered is for expenses paid before the November 2012 support order, and therefore contrary to the court's order.

Exhibit 18A generally support's Bowlin's contention; the spreadsheet itemizes the categories of expenses by month and includes expenses paid in August 2012 through November 2012—i.e., before the November support order was in effect. Because the court's order expressly provided for reimbursement of payments made *after* the date of the November 2012 support order, the court erred by including the prior amounts. The judgment should therefore be modified to reflect a reduction in the amount of *Epstein* credits by $4,698.84, to $16,582.21.

Bowlin further contends that the order is also erroneous as to the payments made after the November 2012 support order. He contends that the stipulation upon which the support order was based "contemplated that [Bowlin and Moore] would occupy the same residence and [Bowlin] had no obligation for any of the household expenses." "This," he asserts, "is what the parties bargained." As Moore points out, Bowlin did not cite to the record to support these assertions, and Bowlin fails to explain how Moore's post-November 2012 payments are covered by any exception to

Epstein's general rule. Based on the record and the briefs, Bowlin has failed to establish an abuse of discretion.

VI. Attorney Fees

After the dissolution trial, each party requested an award of attorney fees from the other party. The record does not indicate how much each party requested. The court found that Moore had incurred approximately $57,000 in fees, of which $44,347.50 remained unpaid. Bowlin had incurred approximately $94,657 in fees, of which $78,736.37 remained unpaid. Moore had previously paid $20,000 to Bowlin's attorney, some of which was used to pay costs. The court found, after expressly considering the factors set forth in section 4320, that Bowlin "has a need for a contribution toward attorney fees and that [Moore] has the ability to make some contribution toward those fees." The court ordered Moore to pay an additional $25,000 to Bowlin's attorneys at the rate of $500 per month. Bowlin contends that the award was "[i]nsufficient" and an abuse of the court's discretion.

In a marriage dissolution proceeding, the family court "may make an award of attorney's fees and costs . . . where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) In making this determination, "the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." (§ 2032, subd. (b).) The "trial court has wide discretion in fashioning an award of attorney fees in marital proceedings," and we review the award for an abuse of that

discretion. (*In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 662.)

We have not been provided with an adequate record to evaluate this issue. Bowlin states that the issue of attorney fees was "tried by declaration," and the court stated in its ruling that it reviewed declarations in support of each party's request for fees. The declarations, however, are not included in our record. Indeed, the record does not disclose the amount of fees Bowlin had requested or whether the court's award of $25,000 was less than what he had sought. It is the appellant's burden to provide the reviewing court with an adequate record to assess error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141.) When, as here, the appellant fails to satisfy this burden, we resolve the claim against him. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

Bowlin also contends that the court should have required Moore to borrow the amount needed to pay Bowlin's attorneys rather than allow her to pay the amount in monthly installments. He cites to *In re Marriage of Hofer* (2012) 208 Cal.App.4th 454. In that case, a husband who was ordered to pay his wife's attorney fees in a dissolution proceeding challenged the order on the ground that he would "be forced to borrow money" to pay the award. (*Id.* at p. 460.) After concluding that the appeal should be dismissed, the court, under the heading, "Some Dicta," rejected the husband's argument, stating that no "authority prohibits the trial court from making orders that require a party to borrow money under appropriate circumstances." (*Ibid.*) Even if this statement was not dicta, it does not support Bowlin's argument that the court abused its discretion by making an order that does not require a party to borrow money.

DISPOSITION

The judgment is reversed to the extent it states that the community property interest in the residence is $82,515.22, and that Moore is entitled to *Epstein* credits in the amount of $28,201.05. In all other respects the judgment is affirmed. Upon remand, the court shall modify the judgment to reflect that the community property interest in the residence is $121,146, that Bowlin is entitled to reimbursement for one-half that amount ($60,573), and that the amount of Moore's *Epstein* credits is $16,582.21.

Bowlin is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.