

Johnson v. Wetherspoon: Survivor's Benefits, Whose Money Is It Anyway?

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***Johnson v. Wetherspoon*:¹ Survivor's Benefits, Whose Money Is It Anyway?**

I. THE PROBLEM

Mr. Johnson, a member of the Teachers' Retirement System of Louisiana (TRSL), designated his second wife as the beneficiary of any survivor's benefits due under his statutory retirement plan. In 1984, he died while *still employed*. Thus, the survivor's benefits paid were paid to his second wife as the designated beneficiary. These payments are analogous to disbursements under a life insurance plan. Life insurance claims are ordinarily only payable to the named beneficiary. Nevertheless, ten years after his death, Mr. Johnson's first wife demanded a share of those benefits allegedly attributable to his employment during their marriage. The first court to hear the case, properly construing existing law, granted summary judgment in favor of the second wife. Surprisingly, the Louisiana Supreme Court disagreed and remanded.²

The court held that the survivor's benefits under the state plan were an asset of the first community to the extent attributable to the decedent's employment during the existence of the first community.³ Thus, Mr. Johnson's first wife was entitled to a portion of the survivor's benefits. This paper will explain why the court's holding is contrary to existing law.

II. THE ROOT OF THE PROBLEM

Congress has legislated extensively in the field of private employee pensions. The primary federal acts are: the Employee Retirement Income Security Act of 1974 (ERISA)⁴ and the Retirement Equity Act of 1984 (REA).⁵ However, these two acts only apply to private, and not public, pensions.⁶ Thus, state law is only preempted in the field of private and not public pensions. The TRSL, the plan Mr. Johnson had, is a public pension; ERISA and the REA do not apply in our case. Moreover, in *Frazier v. Harper*, the Louisiana Supreme Court held that state community property laws control how public pension benefits payable to a covered employee are distributed.⁷

Even before *Frazier*, in *Sims v. Sims*, the court may have anticipated the *Johnson* case. There, the court laid the groundwork for the *Johnson* holding.

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1. 694 So. 2d 203 (La. 1997).

2. *Id.*

3. *Id.* at 211.

4. Pub. L. No. 93-406, 88 Stat. 829.

5. Pub L. No. 98-397, 98 Stat. 1426.

6. *See supra* notes 4 and 5.

7. 600 So. 2d 59 (La. 1992); *Sims v. Sims*, 358 So. 2d 919 (La. 1978).

In a very broad assertion the court said that "[a] spouse's right to receive an annuity, lump sum benefit, or other benefits payable by a retirement plan is, to the extent attributable to his employment during the community, therefore an asset of the community."⁸

What is and is not an "other benefit" is not well defined. The question for our purposes turns on whether a survivor's benefit qualifies as an "other benefit." If, as the *Johnson* court held, it is an "other benefit," then the *Sims* holding applies and community property laws govern disbursement.

III. WHAT IS A SURVIVORS BENEFIT?

A survivor's benefit is a benefit paid when the employee dies while still actively employed. Although administered by the pension authority, it differs from a pension because the "pension" ceases to exist when the employee dies and is only payable upon retirement. A joint and survivor's annuity also differs from a survivor's benefit, being merely an election of how the pension will be paid if the employee dies after retiring. The joint and survivor's annuity election extends the pension to the designated survivor after the death of the employee. Thus, both a pension and a joint and survivor's annuity are retirement benefits.

A survivor's benefit is not. To collect a survivor's benefit the employee must not have retired. Accordingly, the survivor's benefit presents a more difficult problem than either ordinary pension benefits or a joint and survivor's annuity. Both a pension and a joint and survivor's annuity fall directly within the scope of "pension" and do not require a precise definition of "other benefit" to determine proper disposition.

IV. THE ANALYSIS

A. An Overly Broad Interpretation of "Other Benefits"

The supreme court has never defined what an "other benefit" is. An overly broad interpretation of "other benefit" would include every benefit payable by a retirement plan to the retiree or his survivor that is not a post-retirement lump sum or annuity. This is most likely the definition that the *Johnson* court was using. Substantial support for this position can be found in existing jurisprudence and legislation.

In *T. L. James & Co. v. Montgomery*,⁹ the supreme court held that retirement benefits are a form of "deferred compensation (additional remuneration) to the employee for his labors during his working lifetime."¹⁰ From this understanding comes the holding in *Johnson*. If all retirement benefits are a

8. 358 So. 2d at 922 (emphasis added).

9. 332 So. 2d 834 (La. 1976).

10. *Id.* at 849.

form of "deferred compensation" and community property, under Louisiana Civil Code article 2338, is defined as "property acquired during the existence of the legal regime through the effort, skill or industry of either spouse; . . ." ¹¹ then all retirement benefits should be community property. Under this interpretation, any payment made pursuant to a retirement plan to a retiree would be a community asset regardless of its "other" status. Thus, even the ex-spouse would be entitled to a proportionate share of the "other benefit." This was the holding in *Johnson*. ¹²

Problematically, this puts Louisiana's survivor's benefits law in direct opposition to federal law and partly with its own. Federal law requires survivor's benefits to be paid to the surviving spouse, if one exists. ¹³ As Federal law covers private pensions, including Louisiana's, Louisiana private pensions pay only the surviving spouse without regard to any pre-existing community. Our own legislature has already recognized the wisdom inherent in the federal law.

Notwithstanding *T.L. James & Co.*, and *Johnson's* broad interpretation of "other benefit," there is a statutory exception for the proceeds of a life insurance policy, even if it is provided as part of the survivor's benefit package. ¹⁴ Louisiana Revised Statutes 22:647 provides that the proceeds of a life insurance policy are to be paid to the named beneficiary without regard to the claims of any legatee, heir or creditor, including a surviving spouse. ¹⁵ Ownership of a life insurance policy is determined to be separate or community property according to the marital status of the purchaser at the time of purchase. ¹⁶ If the policy was purchased by the insured during the existence of the community, with community funds then it is co-owned by the spouses as community property. The ex-spouse, obtains an inchoate right of co-ownership in the policy. ¹⁷ Co-

11. La. Civ. Code art. 2338:

The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

12. *Johnson v. Wetherspoon*, 694 So. 2d 203 (La. 1997).

13. See *supra* notes 4 and 5.

14. See Richard B. Wilkins, Jr., Comment, *Insurance and the Community*, 25 La. L. Rev. 492 (1965).

15. La. R.S. 22:647 (1995) which states:

The lawful beneficiary, assignee, or payee, including the insured's estate, of a life insurance policy . . . shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured . . . and against the heirs and legatees of either such person, and such proceeds and avails shall also be exempt from all liability for any debt of such beneficiary. . . .

16. *Berry v. Metropolitan Life Ins. Co.*, 327 So. 2d 521 (La. App. 1st Cir. 1976).

17. *Sims v. Sims*, 358 So. 2d 919 (La. 1978).

owners of corporeal things have some control over the co-owned property;¹⁸ however, this is not always true for incorporeal things.¹⁹ Ownership of an insurance policy is an incorporeal right, and under the theory of contractual privity the non-contracting spouse has no control over the policy.²⁰

B. *The Theory of Contractual Privity*

The theory of contractual privity provides that contracts have effects only between parties to the contract.²¹ Comment (b) to Louisiana Civil Code article 2346 states that a spouse ". . . may not affect the legal relations and responsibilities of the spouse who incurred the obligation and the other party . . . to that contract, because in principle, contracts produce effects as between the parties only." In *Johnson*, the contract was between the deceased and TRSL. The contract is very similar to an insurance contract; it pays money to a beneficiary upon the death of the contracting party. With the *Johnson* case as the exception, an ex-spouse may not interfere with a contract between an insurance company and its insured.²²

Although the ex-spouse is in some sense a co-owner of the policy, in the insurance context, contractual privity serves to prohibit the exercise of this inchoate right. The contractual protection of the insured extends so far as to allow the changing of the beneficiary without the ex-spouse's consent,²³ the ex-spouse has no right to intervene.

Additionally, there is a further distinction between spousal co-ownership and the right to receive the proceeds of the policy after the death of the insured.²⁴ When the employee names a party as the beneficiary, the surviving ex-spouse will not receive any compensation or reimbursement for community funds used to pay life insurance premiums. Further, the surviving ex-spouse is precluded from asserting a claim against the designated beneficiary for reimbursement.²⁵

Likewise, with regard to the treatment of Individual Retirement Accounts, under the rule of contractual privity the contracting spouse has the exclusive power to alter relations with the third person contracting party, and the other spouse has no management rights in that regard.²⁶ This protects the Trustee from the conflicting claims of spouses who might otherwise assert community property rights. This protection is codified in Louisiana Revised Statutes 11:762,

18. La. Civ. Code art. 809.

19. Katherine S. Spaht and W. Lee Hargrave, *Matrimonial Regimes* § 5.4, at 234, in 16 Louisiana Civil Law Treatise (1997).

20. *Id.*

21. La. Civ. Code art. 1985.

22. See Spaht and Hargrave, *supra* note 19, § 5.4, at 234.

23. *Id.* § 5.4.

24. *Kambur v. Kambur*, 652 So. 2d 99 (La. App. 5th Cir. 1995).

25. See *supra* notes 14 and 15.

26. See W. Lee Hargrave, *Community Property Interests in Individual Retirement Accounts*, 55 La. L. Rev. 509 (1995).

which states that once the trustee pays the beneficiary or estate, the trustee is not liable for any claims on the payment except a claim by the beneficiary or estate.²⁷ Federal Law treats private pensions very similarly.

C. Federal Law Governing Private Pensions

Federal law, specifically ERISA and REA, governs private pensions.²⁸ Congress enacted this legislation to establish national uniformity and to protect retirement benefits.²⁹ ERISA was designed to protect retirement benefits and assure their receipt by employees and their dependents.³⁰ Ten years after Congress enacted ERISA, it enacted REA in response to the “conflicting jurisprudence addressing spousal rights in plans and plan benefits, particularly under community property regimes.”³¹ REA established the Qualified Domestic Relations Order (QDRO) as the only means by which a spouse or ex-spouse can establish a claim on the survivor’s benefits of the employee.³² ERISA and REA mandate that survivor’s benefits are to be paid first to the surviving spouse.³³ Congress, in effect, elected to designate for each and every participant in an ERISA plan precisely who the beneficiary is, the surviving spouse.³⁴

D. Comparison of Survivor’s Benefits Under Federal and State Law

The treatment of survivor’s benefits by federal courts under ERISA and REA is similar to the treatment of the proceeds of a life insurance contract by Louisiana Revised Statutes 22:647. In all cases the payment goes to the designated beneficiary whether the beneficiary is determined by the employee or by statute and cannot be attached by any other party.³⁵ However, Louisiana law and federal law diverge on the issue of distribution of survivor’s benefits.

The Louisiana Supreme Court decided that under Louisiana law, survivor’s benefits do not necessarily go to the designated beneficiary, even when it is the surviving spouse.³⁶ Instead, survivor’s benefits are community property subject to proportionate disbursement between the ex-spouse and the surviving spouse.³⁷ They came to this conclusion despite Louisiana Revised Statutes 11:701 and 11:762, which provide that a spouse is “a person who is legally married to a

27. La. R.S. 11:762 (1993).

28. *Shaw v. Delta Airlines*, 463 U.S. 85, 103 S. Ct. 2890 (1983).

29. *Id.*

30. *Boggs v. Boggs*, 89 F.3d 1169 (5th Cir. 1996), *rev’d on other grounds*, 117 S. Ct. 1754 (1997).

31. *Id.* at 1178.

32. *Id.* at 1179.

33. 29 U.S.C. § 1055 (1994).

34. *See Boggs*, 89 F.3d at 1180.

35. 29 U.S.C. § 1055 (1994) and La. R.S. 22:647 (1995).

36. *Johnson v. Wetherspoon*, 694 So. 2d 203 (La. 1997).

37. *Id.*

member of this system [TRSL] and shall not include a person who is legally separated from a member . . . by a judgment of separation"³⁸ and that survivor's benefits must go to the surviving spouse.³⁹

There is nothing in the statutes directing payment to anyone other than the surviving spouse or surviving minor children. Moreover, the literal wording of the statute seems to preclude payment to a person who is legally separated from a member by a judgment of separation,⁴⁰ which includes ex-spouses. Justice Calogero, in dissent, argued that the ex-spouse was not entitled to receive a statutory payment unless designated as a beneficiary.⁴¹

Although there is similar language in the federal and state law, the federal and state courts have reached different conclusions. Under the federal scheme, the surviving spouse is as a matter of law entitled to the survivor's benefits. Under Louisiana community property law, the surviving spouse must ratably share survivor's benefits with the ex-spouse.

E. The Problem with the Court's Interpretation of the Benefit Calculation

With survivor's benefits, the amount the beneficiary will receive is determined by statute.⁴² There are different formulae for calculating the amount the beneficiary is to receive. The specific formula depends upon whether the beneficiary is a surviving spouse with or without minor children. For example, if there is a surviving spouse with no minor children, the monthly payment is the greater of \$300 or the equivalent of the joint and survivor annuity for regular retirement pension.⁴³

The annuity equivalent is calculated by multiplying the employee's years of service times 2½% times monthly base pay at death.⁴⁴ For an employee with twenty years of service earning \$1000 a month, the result would be $20 \times .025 \times \$1000 = \500 . This is the same formula used to calculate pension benefits except that the percentage changes based upon years of service in a pension calculation. The majority in *Johnson* uses this fact to support their holding that survivor's benefits are the same as pension benefits.⁴⁵ The court argues that since survivor's benefits are calculated in the same manner as pension benefits they should be treated the same—as community property.⁴⁶

38. La. R.S. 11:701(24) (Supp. 1998) (emphasis added).

39. La. R.S. 11:762 (Supp. 1998).

40. *Id.*

41. *Johnson*, 694 So. 2d at 212 (Calogero, J., dissenting).

42. La. R.S. 11:762 (Supp. 1998). *Cf. Eskine v. Eskine*, 518 So. 2d 505 (La. 1988). The Louisiana Supreme Court ordered a public pension to split a pension check between the employee and ex-spouse after the pension had been judicially partitioned.

43. La. R.S. 11:762 (Supp. 1998).

44. *See Sims v. Sims*, 358 So. 2d 919 (La. 1978).

45. *Johnson*, 694 So. 2d at 209.

46. *Id.*

While the legislation does borrow the formula for calculating pension benefits, three policies underlying the survivor's benefits scheme demonstrate noteworthy differences. (1) Survivor's benefits, benefits paid if the employee dies while still working, are suspended upon remarriage of the surviving spouse⁴⁷ while pension benefits, benefits paid after the employee retires, under a joint and survivor's annuity are not. (2) Survivor's benefits take into account whether or not there are surviving minor children to determine if there will be payments; pension benefits do not. (3) There is an additional policy driving the awarding of deferred compensation. That policy is to protect and provide for a surviving spouse and minor children. At the time of the employee spouse's death, they are presumed to be, at least in part, dependent upon the employee's income. The employee was their means of support. This militates in favor of treating survivor's benefits as the property of the survivor and not community property.

F. Problems with Treating Survivor's Benefits as Community Property: Who Pays Whom?

If the survivor's benefit is a community asset, this raises the question of how the ex-spouse should be paid. TRSL may make payments only to the surviving spouse or the designated beneficiary.⁴⁸ The payment or actual refund of contributions may only go to the employee's estate if there is no other beneficiary. Under the *Johnson* facts, there was a surviving spouse who was statutorily entitled to the payment; thus, no payment could directly be made to the ex-spouse. The supreme court resolved this problem by ordering the surviving spouse to pay the ex-spouse a portion of past payments received and of future payments.⁴⁹ The result is that two parties who are likely to be on unfriendly terms must arrange for a transfer of payments, and future courts are enlisted to ensure that the surviving spouse, who would otherwise have no legal relationship with the ex-spouse, transfers those assets.

Treating survivor's benefits as community property also seems to conflict with the policy mentioned above, to take care of the employee's dependents at the death of the employee. By the time the employee dies, the ex-spouse will have had the opportunity to reestablish a means of support. Whereas, the surviving spouse and children presumably have not.

The *Johnson* court noted that the surviving spouse need not split the benefit absent a demand from the ex-spouse.⁵⁰ However, the question remains to whom the demand must be made. If demand must only be made to the surviving spouse, what form of proof of community is the surviving spouse required to accept?

47. La. R.S. 11:762(D)(2) (1993).

48. La. R.S. 11:762 (1993).

49. *Johnson*, 694 So. 2d at 205.

50. *Id.* n.2.

Moreover, the surviving spouse is only entitled to the benefit until death or remarriage. This raises the issue of whether the surviving spouse must pay the ex-spouse even if the surviving spouse is not receiving any payment. If the surviving spouse remarries, she does not receive a survivor's benefit payment. If she is not receiving a payment, there is nothing to share with the ex-spouse. The court has held many times that the payments from a pension are shared only when received.⁵¹ Therefore, according to the court's holding that survivor's benefits are pension benefits, the ex-spouse receives nothing if the surviving spouse is not receiving a payment. Additionally, if the employee had never re-married, or if the surviving spouse dies before the ex-spouse, the ex-spouse receives nothing. Under the court's reasoning, it is in the ex-spouse's best interest for the employee spouse to remarry someone who will live a long time and not remarry.

If the legislature authorizes payments by TRSL directly to the ex-spouse, the retirement plan may pay out more than it is obligated to. For example, the value of a joint and survivor annuity is calculated within one month of the employee's death.⁵² This calculation involves the life expectancies of the employee, which equals zero, and that of the surviving spouse as calculated by actuarial tables. If the payment were to go directly to the ex-spouse, that life expectancy must be included as well. The plan could be made to pay for the duration of both spouses' lives instead of just the surviving spouse. There is certainly the possibility that more than one prior community existed; therefore, it is conceivable that if a direct allowance was provided for, the plan could pay out for the duration of many unintended lifetimes.

As alluded to above, the retirement plan authorities are unlikely to know of the existence of an ex-spouse or the exact amount attributable to that person without a court order or filing for payments. This raises the question of whether the arrival of an ex-spouse requires a recalculation of the payments.

TRSL provides for recalculating benefits and will do so at the request of the employee. The employee is then charged for the service. In our case, the employee is dead and so who should pay the charge; the surviving spouse, the ex-spouse, the plan, or perhaps a waiver can be made.

The court also did not address the issue of whether the ex-spouse may receive payments if she has remarried. If payments were coming directly from TRSL, the answer would be no. TRSL requires that the beneficiary re-qualify for payments yearly. However, the payments to the ex-spouse are made indirectly through the surviving spouse.

Is the court going to require that the ex-spouse certify yearly to the surviving spouse that she is still eligible for the payments? Does this give an ex-spouse the right to challenge a surviving spouse's remarriage on the grounds that it would eliminate her benefit payment, a vested right? These unanswered questions call for legislative answers.

51. *Sims v. Sims*, 358 So. 2d 919, 922-23 (La. 1978).

52. La. R.S. 11:762 (Supp. 1998).

G. Analogy to the Legal Usufruct Created by Louisiana Civil Code Article 890.1

In Louisiana Civil Code article 890.1,⁵³ the Louisiana Legislature created a legal usufruct over recurring payments from a retirement plan. Although the situation contemplated in the article is not exactly the same as survivor's benefits, it provides a strong basis for analogy. The statute provides that if recurring payments are being made, and are community property, upon the death of one spouse the other receives a legal usufruct over any future payments from the same source. In other words the employee spouse, upon the death of the non-employee spouse, gets a usufruct over the non-employee spouse's portion of the payment. This does not give the employee spouse ownership of the payment, but a usufruct subject to an accounting upon termination of the usufruct.

The purpose of this article, as stated in the source article, is "to preserve the community upon the death of one spouse and to grant to the survivor the means for maintaining himself and his family."⁵⁴ This protects the surviving spouse against the claims of forced heirs or other legatees. Under Article 890.1, a spouse who is a co-owner of a pension right is allowed to transfer the naked ownership to that spouse's heirs; however, the surviving spouse receives the payments and the usufruct over them.

As applied to survivor's benefits, the payment of the ex-spouse's community interest would be received by the surviving spouse who would retain the usufruct over those funds, just as, under Article 890.1, where the heir's portion is received by the surviving spouse. In both cases, the non-spouse parties would get the naked ownership of the disbursements; and a usufruct is created in favor of the surviving spouse; furthering the legislature's goal of providing for the surviving spouse.

V. CONCLUSION

The legislature should act to insure that survivor's benefits are owned by the surviving spouse. Although the court ruled that survivor's benefits are "other benefits" of a retirement plan and as such are subject to community property

53. La. Civ. Code art. 890.1 states:

If a recurring payment is being made from a public or private pension plan or retirement plan, an annuity policy or plan, an individual retirement account, a Keough plan, a simplified employee plan, or any other similar retirement plan, to one partner or to both partners of a marriage, and the payment constitutes community property, and one spouse dies, the surviving spouse shall enjoy a legal usufruct over any portion of the continuing recurring payment which was the deceased spouse's share of their community property, provided the source of the benefit is due to payments made by or on behalf of the survivor. . . . The usufruct granted by this Article shall be treated as a legal usufruct and is not an impingement upon the legitime and a naked owner shall not have the right to demand security.

54. State v. Costello, 158 So. 2d 850, 852 (1963).

laws and partition between the surviving spouse and the ex-spouse, this area of the law remains unclear. The majority's argument is that the survivor's benefits were earned during the community by the effort of one spouse and are therefore community property. This ruling, however, will only apply to public pensions in Louisiana, as the federal government has legislated in ERISA and REA that all survivor's benefits paid by private or federal pensions belong to the survivor.⁵⁵ Additionally, the policies of providing for the survivor over all other parties including creditors, heirs and legatees are subverted by the court's ruling.

If survivor's benefits are treated as community property, a problem arises in the distribution of payments to the ex-spouse. Requiring the ex-spouse to file a claim against the surviving spouse is likely to increase the tension that may already exist between the two. It also leads to the absurd result that the ex-spouse can receive the payments, if and only if the surviving spouse is receiving them from the pension plan. Accordingly, if there is no surviving spouse or if the survivor remarries or dies, the ex-spouse receives nothing. By allowing the ex-spouse to recover from the surviving spouse the *Johnson* court has awarded the ex-spouse a windfall. In the interest of simplicity and consistency with federal legislation and policies of the Louisiana Civil Code the legislature should treat survivor's benefits in the same way that they are treated by federal law.

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55. *Boggs v. Boggs*, 89 F.3d 1169 (5th Cir. 1996), *rev'd on other grounds*, 117 S. Ct. 1754 (1997).