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Whether the employer is private or public, large or small, a manufacturer or a service organization, it is likely that he offers a "fringe benefit" package to his employees. This may include a pension at retirement, hospital, medical or dental insurance, group life insurance, disability income protection, paid vacations, or even sabbatical leave. Whether negotiated by collective bargaining or simply offered by the employer, the rapid growth of fringe benefits reflects concern with comprehensive lifetime financial security, even at the expense of lesser increases in take-home pay.

In one form or another, these fringes are forms of *compensation* to the employee. Louisiana, together with most other jurisdictions, has rejected the argument that they are mere gratuities, even when instituted unilaterally by the employer.[1] Almost all fringes relieve the prudent employee of expenses he would (or should) incur in the interest of his own economic security. The not-so-prudent employee is protected against himself by the intercession of the employer, the union, or both. Moreover, due to economies of size and certain federal tax incentives, a real cost savings may be realized both by employer and employee. And it goes without saying that the deferred compensation phenomenon has spawned a gigantic new industry of its own.[2]

*The problem*. Benefits such as health insurance are earned and disbursed more or less on a current basis. Other benefits such as those payable at death, upon disability, or at retirement, while "earned" currently, are necessarily *deferred* as to disbursement. Births, deaths, separations, divorces and remarriages may occur in the interim. Moreover, some plans provide for delayed vesting of the right to benefits.[3] And the courts

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1. T.L. James & Co. v. Montgomery, 332 So. 2d 834 (La. 1976). Chief Justice Sanders and Justice Marcus dissented.

2. *See* BUREAU OF NATIONAL AFFAIRS, HIGHLIGHTS OF THE NEW PENSION REFORM LAW 5 (1974); Comment, *The Relation of Community Property and Forced Heirship to Employee Retirement Plans*, 51 TUL. L. REV. 645 (1977).

3. A plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) may provide for delayed vesting but minimum vesting requirements are imposed. Full vesting may be delayed for 10 years; or for 15 years if gradual vesting commences after 5 years; or "rule of 45" may apply, requiring benefits to begin

in a number of states are struggling to integrate deferred compensation into traditional property systems.

Several recent Louisiana decisions have attempted to reconcile deferred compensation with community property and forced heirship. Prior to *T.L. James & Co., Inc. v. Montgomery*[4] it was generally assumed that benefits were owned by the employee and disbursed at his direction. Upon retirement, he chose *how* his benefits would be paid (e.g., lump sum, joint and survivor annuity) and *who* would receive them both during his lifetime and after his death, all without reference to the community property system or the demands of forced heirs. To justify this freedom, the Fourth Circuit analogized death benefits to the proceeds of life insurance, thereby freeing them from most claims of forced heirs and community spouses.[5] But the insurance analogy was rejected by the Louisiana Supreme Court in *T.L. James*. In its view, deferred compensation "earned" during the existence of the community accrues to the benefit of *both* spouses. In *T.L. James* the employee designated his older son to receive all death benefits. His surviving spouse claimed that she was entitled to half the death benefit "earned" during the existence of the marriage. His younger son claimed a share as forced heir. The supreme court agreed with both of them.

However, the court did apply the life insurance analogy in one narrow but important area. The employee attempted to direct benefits by executing a designation form *not* in testamentary form. The spouse and younger son claimed the death benefits should be distributed in accordance with the laws of intestacy. Here the court drew the line. With an eye to the adverse death tax consequences if benefits were payable to the succession, it sustained the designation of the eldest son, but subject to an accounting to the surviving spouse and to his half-brother.[6]

vesting at 50% when the sum of age and service reaches 45, but in any event 50% vesting must occur after 10 years' service. 29 U.S.C. § 1053 (Supp. IV 1974).

4. 332 So. 2d 834 (La. 1976).

5. Succession of Mendoza, 288 So. 2d 673 (La. App. 4th Cir. 1973); Succession of Rockvoan, 141 So. 2d 438 (La. App. 4th Cir. 1962).

6. Death benefits from qualified plans are excluded from the gross estate for federal estate tax purposes provided they are payable to a beneficiary *other than* the employee's "executor or estate." I.R.C. § 2039(C). If payable in accordance with the designation form, the exemption would apply. If payable pursuant to the laws of intestacy, the exemption would have been lost. The writer understands that the Internal Revenue Service takes the position that the beneficiary's obligation to account to others has no adverse effect on the exemption. Louisiana inheritance tax laws contain a similar provision. LA. R.S. 47:2404(C) (Supp. 1976).

The *T.L. James* case was complicated by the fact that the employee had been married twice. The company pension and profit-sharing plans had been instituted during the first marriage. Upon divorce, neither was considered in the marital property settlement. His participation in the plan continued during the second marriage. In the court's view death benefits "earned" during the first marriage represented unpartitioned assets of the first community. Further, to the extent they were "earned" during the second community, an accounting was due the surviving spouse. The difficulty lay in determining what was "earned" by which community and in how to account.

*Vesting.* Each plan provided for gradual "vesting" at the rate of 5% per year until at the end of 20 years' participation the employee became "fully-vested." Thus, had he died during the 15th year, his beneficiary would have been entitled only to 75% of his maximum death benefit. Although fully-vested before he died, he was only *partially* vested when divorced from his first wife.

*Classification.* A recurring problem in community property jurisdictions is classifying property purchased both with community and separate earnings. Two basic approaches have been employed. In Louisiana and Texas the separate or community "character" of the property is fixed at the time it is acquired. Hence, the "inception of title" approach. If improved with funds from the other estate or if purchased, in part, with funds of the other estate, the original classification holds, subject to an accounting.[7] Thus a policy on the husband's life purchased prior to marriage is always his separate property, even though most of the premiums are paid with community funds. If the proceeds are payable other than to the surviving spouse, an accounting is required for premiums paid by the community.[8] In other community property states, such as California and Washington, a "proportionate interest" approach is used. Where property is acquired both with separate and community funds, each estate owns an undivided interest in proportion to its contributions.[9] Thus, the

7. LA. CIV. CODE art. 2408. *See* Succession of Le Blanc, 142 La. 27, 76 So. 223 (1917); Succession of Verneville, 120 La. 605, 45 So. 520 (1908).

8. LA. CIV. CODE art. 2408. *See In re* Moseman's Estate, 38 La. Ann. 219 (1881).

9. *See, e.g.*, Forbes v. Forbes, 118 Cal. App. 324, 257 P.2d 721 (1953); McCurdy v. McCurdy, 372 S.W.2d 381 (Tex. Civ. App. 1963); *In re* Coffey's Estate, 195 Wash. 379, 81 P.2d 283 (1938).

insurance policy in our example above would be owned by the husband's separate estate and by the community in proportion to the premiums paid by each.

Given the facts in *T.L. James*, one can readily appreciate the difficulty of applying either approach. What was "earned" during the existence of the first community during which the employee's interest in the plan vested at the rate of 5% per year? What was "earned" by the second community during which the employee became fully-vested? What effect, if any, should be given to gradual vesting? Before attempting an answer, let us look more carefully at the plans involved.

T. L. James and Co. offered its employees two very common plans. One was a "defined-benefit pension plan" under which specific death, disability and retirement benefits were *guaranteed* to the employee. Benefits were determined by a formula tied to salary and years of service. The plan was "funded" by the employer's annual contribution to a trust from which all benefits were paid. The amount of each contribution was determined by actuarial analysis of the employee-participants—their ages, projected retirement dates, estimated benefits, claims experience, etc. No separate account was kept for any specific employee, nor was the actuary or anyone else able to determine what proportion of the employer's contribution in any given year was made for the benefit of any given employee.

The company also offered a "defined-contribution profit sharing plan" whereby a stated portion of company profits were contributed to a trust for the benefit of each employee-participant. A separate account was maintained for each employee which represented the *sole* source from which benefits could be paid at death, disability or retirement. The value of each account fluctuated with market values, gains, income and forfeitures from other accounts. The employer guaranteed *no benefits*. The company's undertaking was limited to the making of the required contributions and to prudent administration of the trust through a bank trustee.

Both plans were "qualified" under federal tax law, permitting the employer to deduct current contributions and permitting the employee to defer income tax until disbursement.[10] Neither plan required or permitted contributions by the employee.

10. I.R.C. §§ 162, 212, 404 (employer deductions); I.R.C. §§ 72, 402 (employee deferrals). *See generally* M. CANAN, QUALIFIED RETIREMENT PLANS 353-90 (1977); Reimer, *Tax Planning for Distributions from Qualified Corporate Retirement Plans*, 1 J. PENSION PLAN. & COMPLIANCE 288 (1977).

*Allocation to the community.* In approaching the allocation problem, the supreme court followed a somewhat erratic course. The traditional "inception of title" approach would have required the court to determine when the employee's interest in each plan was originally acquired. This would have been difficult. His interest might have been "acquired" when he first became eligible to "participate" in the plan, i.e. the year in which contributions were first made on his behalf, although he may have had *no vested interest* until several years thereafter. The court might have determined that he "acquired" his interest in the plan only with the onset of vesting—the time at which he first acquired a non-forfeitable right to benefits. Both of these events occurred during the first community. Thus, had the court chosen "inception of title" approach, both plans would have been classified as unpartitioned assets of the first community. But at its dissolution, neither plan was fully vested. By continued employment during the second community, vesting increased at the rate of 5% per year until he became fully vested in both plans. In a real sense, some of his interest was "earned" during the second community.

Following traditional community property concepts, this increase during the second community would have entitled the surviving spouse to an accounting. But on what basis? Half the amounts contributed by the employer during the second community? Or half the increase in ultimate benefits accruing during the second community? Or accounting by some other approach? Merely to state the problem is to understand, in part, the difficulties facing the court. And in its solution, new ground was plowed.

The court began by recognizing the interest of both communities. But rather than classify the benefits as assets of the first, the court adopted what amounts to a "proportionate interest" approach.

> [T]he value of the *right to share* proportionately in the fund, which is contractually acquired by virtue of each contribution, *falls into the community during which the contribution is made*; for by each contribution, when made, the employee (or his beneficiary or estate) has acquired a *right to share* prorata in the proceeds ultimately payable to the funds.[11]

In measuring the effect of each contribution on ultimate benefits, the court chose to ignore the vesting provisions of the plans. Moreover, it assumed that the amount of contributions made *in any year* to *either plan* could be ascertained:

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11. 332 So. 2d at 851 (emphasis added).

> The value of each contribution paid into the fund shall be a share of the fund of the same proportion that the contribution's amount bears to the total amount of all contributions paid into the fund to the employee's account.[12]

Thus contributions made *before* vesting commenced, after vesting was completed, or in between, were given the same relative weight. Moreover, the court assumed quite erroneously that a *separate* account was maintained for each employee in *both* plans. This was true only of the defined-contribution profit sharing plan. Lastly, it redefined "vesting":

> [T]he *right-to-share* acquired during the community (arising from each contribution made during the marriage) *does not contractually vest until the employee's death, retirement or withdrawal from employment*.[13] (Emphasis added).

*Legal analysis of a plan*. The court was in unfamiliar territory and its opinion reflects this uncertainty. For example, the majority seems to think an employee is *compensated currently* through the medium of contributions to the trust—that employer contributions to the trust immediately become the *employee's* money. Yet it seems to recognize that it is not his, for it speaks of benefits *vesting* only at the time they become *payable*. Perhaps some analysis will help clear the air.

Reduced to simplest terms, both plans were rather complex mechanisms securing *the employer's promise to pay future compensation*. The employee "earned" no more, and "owned" no more than his employer's promise to pay. Enforcement of the company's promise was limited, however, to the assets of the trust—or, in a manner of speaking, the promise was enforceable only in rem.

The company's promise was not bargained for—both plans were adopted unilaterally by the company. As time went on, each employee became entitled to rely on that promise. But the company's promise was not unconditional. Its enforceability was subject to a number of contingencies. It could not be enforced until vesting began, and then only to the extent of the vesting provisions. In civil law terminology, the company's in rem promise was subject to a series of resolutory conditions depending on future and uncertain events.[14] With progressive vesting these resolutory

12. *Id.* at 852.
13. *Id.*
14. LA. CIV. CODE arts. 2021, 2045-47. The court's characterization is "suspensive." This might be persuasive but for the annual contributions which indicate that the employer is bound from the time the employee becomes a participant. The

conditions gradually subside until at the employee's death, disability or retirement, the promise becomes unconditional.

In reality, the trust funds were only *security* for the enforcement of the company promise. Annual contributions were required by each plan in order to secure the deductibility and deferral of federal income tax. And the tax advantages turned upon the *certainty* of payment provided by the trust. Had there been no trust fund and no requirement of current contributions, the company's *promise* would have remained enforceable, though unsecured. Thus the supreme court's approach to allocation of benefits on the basis of the security given rather than the promise earned seems to wag the dog. To allocate by reference to trust assets *never* owned by the employee is to miss the mark.

*Allocation between communities.* The controversy in *T.L. James* involved benefits—the end product of the promises made. Those promises were earned, in part, during each community. Therefore, if benefits represent funded promises, and those promises were earned as a result of specific employment activity, and that activity took place during different matrimonial property regimes, how should traditional community property concepts be applied?

Assume that the first community was dissolved at the end of the seventh year of the 20-year vesting period. At that point the employee had earned a non-forfeitable 35% interest in plan benefits. Community property law credits the spouse with half of this vested interest. If it is a defined-contribution (profit sharing) plan, the spouse should receive 17 1/2% of the value of the account as of the termination of the community and should participate in any gains or losses or income attributable to that interest until disbursement. If it is a defined-benefit (pension) plan, she should be permitted to receive an amount equal to 17 1/2% of the death, disability or retirement benefits, *but only* that portion of the amount promised at the dissolution of the community.

The supreme court's approach to allocating a defined-*contribution* plan seems adequate except that it gives no effect to vesting nor to the value of money over time. If the employee's account is worth more than the total contributions to it, this excess could come from only two sources: earnings and gain on assets or forfeitures from the accounts of other

vesting requirement does not seem to suspend the employer's promise; it only permits discharge from an otherwise binding promise. *See* Due v. Due, 331 So. 2d 858 (La. App. 1st Cir. 1976), *aff'd*, 342 So. 2d 161 (La. 1977).

participants. (Of course, it is possible that the value of the employee's account will be less than the total contributions made because of depressed market conditions or unfortunate investment.) The obligation to determine how these intricate variables have affected *each* plan year during the existence of one or more communities, might well be more than the law should require. However, by giving *no* effect to vesting, the supreme court's approach tends to distort. For example, if the employee marries while 10% vested and divorces while 60% vested, the community has "earned" *only* a 50% interest in ultimate benefits represented by employer contributions made during that period. On the other hand, if the employee remarries, contributions made during the second community will vest at a rate exceeding 60% because of some vesting "earned" during the first community. But no court we know of has required a spouse to account for *earning power* acquired during marriage, and likely none will.

In allocating death benefits, perhaps most of these subtleties could as well be ignored. The problem of how to allocate future retirement benefits is not so simple, especially where a *current* value is required. Assume the community is dissolved by divorce prior to retirement. The amount of contributions made during the community may be known but, of course, the total contributions ultimately made to the plan cannot be ascertained. The supreme court's formula will work only if the non-employee spouse agrees to accept his share of the benefits "if, as and when received,"—allowing time for that share to be ascertained.[15] Should the non-employee spouse desire immediate calculation of his interest, the supreme court's formula will not work.

*Disability benefits*. In cases involving workmen's compensation and personal injury awards, recent Louisiana decisions hold that if the onset of disability occurs *prior* to marriage, disability benefits accrue to the employee's separate estate;[16] if disability occurs *during* marriage, benefits representing lost income during the marriage should fall into the community, but after separation, divorce or the death of the non-employee spouse, *subsequent* benefits accrue to the employee's separate estate.[17] Most plans treat disability compensation as early retirement. But there are

15. The "if, as and when" approach was developed by the Fourth Circuit in *Lynch v. Lawrence*, 293 So. 2d 598 (La. App. 4th Cir.), *writ denied*, 295 So. 2d 809 & 814 (1974).

16. Broussard v. Broussard, 340 So. 2d 1309 (La. 1976).

17. West v. Ortego, 325 So. 2d 242 (La. 1975).

good reasons not to allocate on that basis. Normal retirement ordinarily means that both spouses are no longer in the work force. But the disability retirement of one spouse may well provoke the other to seek employment. Moreover, after separation or divorce the disabled spouse may have no other source of income. For these reasons, I think disability retirement benefits should be treated as substitutes for lost income attributable to the disability and allocated between the spouses in the same manner as workmen's compensation benefits.

*Distributions from defined benefit plans.* Allocation of benefits from defined-benefit plans presents problems which are more complex than the supreme court acknowledged. If the amount contributed each year on behalf of each employee could be ascertained, what would such data tell us? I question its relevance. The purpose of contributions to defined-benefit plans is to cover the actuarial probability that certain benefits will become payable during the plan year to certain predictable members of the group. Predictability will vary with employee mix. As an employee grows older, the probability of his death during a given plan year may increase and thus require a larger contribution to cover that risk. A younger employee paid the same wages and entitled to the same benefits would require a smaller contribution to maintain actuarial soundness. Unusually large claims during a given year might require an unusually large contribution during the following year to maintain actuarial soundness, whereas an unusual number of layoffs might generate forfeitures which would reduce required contributions for the subsequent years. Claims for disability benefits may vary with the hazards of work—thus the contribution for an older office worker may be less than that contributed to defray a potential claim by a younger laborer. Because of these variables related to actuarial experience, but sometimes only remotely related to a given employee's *earnings*, the supreme court's approach is unrealistic; and if such data are unavailable, the court's approach is simply unworkable. This seems to be the case. Several competent actuaries advise that the amount contributed to a defined-benefit plan for a given employee in a given plan year *cannot be calculated*. A different approach seems necessary. Whether the plan defines contributions or defines benefits, separation and divorce frequently require that a current value be assigned to the benefits accumulated by the employee spouse. For instance, the non-employee spouse may wish to release his interest in the plan in exchange for assets of equivalent value. There ought to be a way to calculate a current value—and I suggest there is one.

*Current value—defined contributions.* The value of the employee's account in a defined *contribution* plan is readily ascertainable (with or without giving effect to vesting), depending upon the allocation approach selected. In this instance, the value of the employer's promise *can* be measured by the value of the security—the employee's claim on the assets then in the trust. As indicated earlier, the supreme court's approach which ignores vesting in allocating defined-contribution benefits tends to give the non-employee spouse the benefit of forfeitures and contribution buildup on benefits *not* vested during the first community, thereby reducing the effects of vesting subsequent to dissolution. On the other hand, the employee (or a subsequent community) will have the benefit of vesting which accrued during the first marriage. The effect of the supreme court's approach is a compromise which ignores vesting, and perhaps it should be—at least for defined-contribution plans. But may vesting be equitably ignored in allocating defined-benefit plans?

*Current value—defined benefits.* Suppose the employee is married at a time when he is already 10% vested in a defined-benefit plan. In the year he becomes 60% vested he is divorced. He dies 10 years thereafter and a death benefit of $100,000 becomes payable. Assuming further that had he died the year he was divorced, an employee paid the same, but with more longevity, would have earned a fully-vested death benefit of $60,000. (The increase in death benefit after divorce was due to a combination of raises in salary and longevity combined with general increases in the plan benefit formula.) Since he was only 60% vested, had he died upon divorce only $36,000 would have been payable. Five-sixths of that benefit or $30,000 *vested* during the community and could be deemed so "earned." Thus, arguably the divorced spouse's share of the death benefit is $15,000.

Suppose he had survived until retirement and become entitled to monthly retirement benefits. Let us use the same numbers in this different context. At the date of retirement, the promised monthly benefit had a present actuarial value of $100,000. At the date of divorce, a fully-vested retirement benefit would have had a present actuarial value of $60,000. But since it was only 60% vested, its then present actuarial value was only $36,000. Since 5/6ths of the vesting accrued during the first community, a present value of only $30,000 vested, of which one-half or $15,000 accrued to the non-employee spouse. Accordingly, the spouse should be entitled to $15,000/$100,000 or 15% of each installment if, as and when paid. If *no* effect were given to vesting, she might have been entitled to as much as 30% which, under the circumstances, seems excessive. For the lack of a suitable "trade-off," it seems that vesting should be considered here.

*Contributory plans.* In some instances, both types of plans will permit or require employee contributions. Presumably these contributions are "earned" in the year contributed. Employee contributions to defined-*contribution* plans should cause no difficulty in allocation. Simply add them to the employer's contribution and fold the sum into the calculation. I suggest that employee contributions to the defined-*benefit* plans should be allocated on the basis of *benefits purchased*, rather than amounts contributed and thus folded into the calculations outlined above.

*Self-employed plans.* The "Individual Retirement Account" or IRA permitted by the Employee Retirement Income Act of 1974[18] and the qualified self-employed retirement plans (HR 10) or Keogh plans[19] which do not guarantee benefits, could be allocated on the same basis as a qualified corporate defined-contribution plan. If the Keogh plan does guarantee benefits, then the above defined-benefit approach would seem equally applicable.

*Unfunded plans.* This leaves for discussion the plans for which no annual contribution is made or those to which annual contributions are not sufficiently related to permit the types of calculations discussed above. In this category are many government-sponsored plans and various non-qualified private plans. Most of these do not provide for gradual vesting. For example, there is no vesting in military retirement plans until the serviceman reaches retirement age.[20] The same may be said for most federal, state and municipal plans. To the extent such plans are contributory, the employee who fails to qualify for retirement benefits is entitled only to a refund of his contributions, with or without interest, upon termination of employment. Should a state employee, eligible for retirement upon completing 30 years employment, marry five years after employment and divorce 15 years thereafter, some Louisiana intermediate appellate courts have held that the community has "earned" only those

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18. I.R.C. §§ 408, 409; M. CANAN, *supra* note 10, at 113-32.
19. I.R.C. §§ 401(C), 404. *See* M. CANAN, *supra* note 10, at 133-48.
20. *See* Moon v. Moon, 345 So. 2d 168 (La. App. 3d Cir. 1977); Swope v. Mitchell, 324 So. 2d 461 (La. App. 3d Cir. 1975).

contributions.[21] This seems incorrect since, upon completion of 30 years, those contributions will have ripened into guaranteed benefits. Moreover, most plans would not permit the withdrawal of contributions solely by reason of divorce (or any other reason) and thus as a practical matter would remain as unpartitioned assets of the community until termination of employment, death, disability or eventual retirement. If such contributions can be partitioned in anticipation of these events, and they have a chance of ripening into guaranteed benefits, their division as *contributions* rather than as potential *benefits* seems to short-change the non-employee spouse. Accordingly, I think it appropriate to allocate eventual benefits. And where there is no vesting schedule, it would seem appropriate to presume that they vest equally and annually.

*Forced heirs*. *T.L. James* requires that benefits be subject to the claims of forced heirs. This can occur in a variety of situations. For example, the non-employee spouse may die, thus dissolving the community. Whereas no benefits become payable currently, a value of the deceased spouse's interest in benefits must be ascertained and that sum added to the active mass in order to calculate the legitime. Moreover, if the legitime of forced heirs is not satisfied from other sources, the heirs or legatees of the non-employee spouse are presumably entitled to claim a share of the benefits by an action in reduction. If a non-employee wife dies at age 50, survived by children of the marriage, those children will be entitled to a portion of their mother's community interest in their father's retirement plan since they are her forced heirs. If he has remarried prior to retirement, his monthly benefits must be shared between the new community and the children of the first marriage—at least to the extent they are forced heirs. And if this is the case, *retirement* benefits are being paid to *members of the work force*! We need go no further than *T.L. James* for a concrete example. The employee died leaving two sons entitled as forced heirs to share one-half of his estate. Had he named his second wife as beneficiary, her interest would have been reduced not only by the claim of the first spouse in community *but also* by his son's claim to one-half of the interest of her deceased husband. The total death benefits in that case amounted to some $60,000. Assuming no debts or deductions and no other property, the sons would have divided $15,000 between them (half their father's interest) leaving only $45,000 to be divided between his two wives.

Examples could be multiplied, all of which would support the same practical result: forced heirship simply *does not fit* when applied to

21. *See* Sims v. Sims, 349 So. 2d 974 (La. App. 1st Cir. 1977).

*retirement benefits*. Should the non-employee spouse die and the employee thereafter become disabled prior to retirement, the prospect that the decedent's heirs will thereafter share in *disability* benefits is almost unthinkable. Accordingly, I strongly favor removing *all* deferred compensation benefits from the claims of forced heirs.

*Proposed legislation*. Prompted by the decision on original hearing in *T.L. James*,[22] the Louisiana Law Institute appointed a special committee to study the problems discussed above. Proposed legislation withdrawing all retirement benefits from the operation of forced heirship was adopted almost unanimously by the Council of the Law Institute but its recommendation to the Legislature was deferred. The Council also approved but again deferred for submission to the Legislature valuation and allocation provisions quite similar to those above recommended. The proposed legislation would have rendered the interest of the non-employee spouse *personal* to that spouse and thus not transmissable at death. As to existing plans, a statute of repose would have required a non-employee spouse who wished to transmit vested interests at death to make an express claim to the administrator of the plan within a specified time. It is likely that similar legislation will be proposed in the near future.

*Conclusions*. As long as it lasted, analogizing deferred compensation benefits to life insurance proceeds provided a convenient approach to avoiding all of the foregoing difficulties. But perhaps that analogy was unfair to the surviving spouse. Since the insurance solution has been rejected, Louisiana finds itself aligned with the other community property states, groping for a rational treatment of community interests. This struggle has been heightened by the enigmatic Section 514(b) of ERISA[23] which, according to its terms and to its legislative history would preempt state law in these areas. Although it is arguable that Congress intended to create *federal* property rights in deferred compensation plans subject to ERISA, I doubt that Section 514(b) would be so interpreted if challenged. Indeed, recent Texas cases[24] indicate to the contrary. More than likely, it remains to the community property states to work out the destiny of their citizens in this regard.

22. On original hearing the supreme court held the non-testamentary designation form invalid.

23. U.S.C. § 514(b) (1974).

24. Kerbow v. Kerbow, and Richardson v. Richardson (D.C. N.D. Tex. October 8, 1976), reproduced in Bureau of National Affairs Pension Reporter, New Decisions Nov. 22, 1976.

The solutions are not simple but the problems will not go away. Indeed, they appear to multiply. Those who would attack the problem must realize that as to most of the employees affected, deferred compensation constitutes their single most valuable asset, their *sole* plan for comprehensive financial security and the *only* barrier to the economic ravages of untimely death, total disability or inadequate retirement income.

Now that the problem has been exposed, its solution should not be left to the courts. The situation seems to demand a legislative solution. I recommend the approach outlined above.