Retirement Equity Inaction: Division of Pension Benefits Upon Divorce in Louisiana

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COMMENTS

RETIREMENT EQUITY INACTION: DIVISION OF PENSION BENEFITS UPON DIVORCE IN LOUISIANA

In 1984 Congress enacted the Retirement Equity Act (REA) to "improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home . . . ." REA amended the Employee Retirement Income Security Act of 1974 (ERISA) which had been enacted to "provide for pension reform." The relevant substantive provisions of REA were preserved under the Tax Reform Act of 1986, subject to clarification and amplification.

The purpose of this paper is to review recent Louisiana court decisions which have addressed the issue of division of pension plan benefits upon divorce. The paper will suggest methods of division and distribution of such benefits that will better protect the interest of the non-employee spouse.

The scope of this paper is limited to the division and distribution of benefits from a tax-qualified, private plan. Insofar as government and military pension plans are both subject to their own complex regulatory schemes, they are more logically the subject of a separate

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4. Since most non-employee spouses currently claiming pension benefits upon divorce are women, this article will use the words "she" and "her" when referring to the non-employee spouse. However, in the future as more women enter the work force and become vested in pension benefits, it will no longer be assumed that the non-employee spouse receiving benefits upon divorce is a woman.
inquiry. This paper will, however, include discussion of some Louisiana cases involving government or military plans to the extent that those decisions have been incorporated into Louisiana's jurisprudentially created "pension doctrine."

Recent Louisiana court decisions indicate that the two supreme court decisions of *T.L. James & Co. v. Montgomery* and *Sims v. Sims* have become enshrined as a pension doctrine. Almost all subsequent decisions have relied upon *T.L. James* to hold that the benefits are community property and upon *Sims* to determine the community interest portion due to the non-employee spouse.

It is important that courts analyze distinctions among pension plans rather than routinely apply the pension doctrine. Such analysis will indicate that benefits in some instances have a determinate value that could easily be distributed to the non-employee spouse upon divorce.

I. PENSION TERMINOLOGY

"Pension plan" is defined by ERISA: ""[T]he terms 'employee pension benefit plan' and 'pension plan' mean any plan ... maintained by an employer ... that ... provides retirement income to employees ...""9

There are several types of private pension plans.10 A defined benefit pension plan provides a participant with definitely determinable benefits upon attaining retirement age. For example, a plan may provide that upon retirement a participant will receive annually an amount equal to the sum of 2% of his annual compensation for his total years of employment. If an employee works for 25 years at a salary of $10,000 per year, he will receive a benefit of $5,000—$200 X 25—per year after retirement.

Employer contributions to a defined benefit pension plan are determined annually based on actuarial assumptions, including pre-retirement interest, post-retirement interest, salary scale, employee turnover, mortality after retirement, future increases in Social Security benefits (with which private plan benefits are often integrated), number of married participants, and administrative expenses.11 Once an employer establishes

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7. 332 So. 2d 834 (La. 1976).
8. 358 So. 2d 919 (La. 1978).
11. Practising Law Institute, supra note 3, at 302-03.
a defined benefit plan he is obligated to fund the plan, which usually requires an annual contribution.\textsuperscript{12}

Alternatively, an employer may define the contribution he will make every year to each participant's "retirement account." Profit sharing plans and money purchase pension plans are examples of the defined contribution pension plan. A profit sharing plan is the simplest type of retirement plan. The employer may, at its election, contribute an amount annually to the profit sharing fund. The amount contributed may be determined either by a set formula or annually by the employer management.\textsuperscript{13} Once the money is within the profit sharing fund, it is allocated to the participants' accounts according to a formula set in the plan document. Such formula is usually based on the proportion of a particular participant's compensation to that of all participants. For example, if an employer contributes $10,000 to a fund and a participant earns $20,000 per year when total participant salaries are $200,000 for that year, then 10% of the fund, $1,000, will be allocated to the participant's account. The allocation formula sometimes is adjusted for such factors as participant age or years of service.

A money purchase plan is considered a pension plan because the employer is obligated to fund it once it is established. It is classified as a defined contribution plan because the employer annually contributes a set amount to the plan. The plan is similar to a profit sharing plan in that the contributions are allocated to discreet, named, participant accounts. A vested participant's interest in the fund is equivalent to his account balance.\textsuperscript{14}

Three distinct pension concepts are often confused: vesting, accrual of benefits, and maturity. Vesting is the process by which a participant's right in his accrued benefit becomes nonforfeitable.\textsuperscript{15}

Accrual of benefits is the process by which benefits earned are credited to a participant's "account."\textsuperscript{16} For a defined contribution plan (a profit sharing or money purchase pension plan) a participant's accrued benefit is equal to his account balance.\textsuperscript{17} The concept of benefit accrual is more complex for a defined benefit plan. The Internal Revenue Code

\textsuperscript{12} I.R.C. § 412 (Supp. 1987).
\textsuperscript{13} Practising Law Institute, Introduction to Qualified Pension and Profit Sharing Plans 110 (1984).
\textsuperscript{14} Id. at 126-28.
\textsuperscript{17} For example, if an employer has a money purchase pension plan with a contribution formula of 10% of compensation and a vesting schedule of 20% per year, after one year of participation, a participant with an annual compensation of $30,000 will have an accrued benefit of $3,000 and vested benefit of $600.
prescribes three acceptable methods by which a participant's benefits can accrue.\textsuperscript{18} The methods do not require that a participant accrue benefits at the same rate from year to year. A plan can be funded on a "frontloaded" basis, which simply means that a participant accrues his whole benefit early in his employment history.\textsuperscript{19} The allowable methods, however, limit the amount of "backloading" of benefit accruals.\textsuperscript{20}

"Benefit maturity" is a jurisprudentially created concept. "The word 'matured' has no recognized meaning within the technical language of private pension plans. It is simply a term adopted by the judiciary to represent the date on which the benefit payments are to commence."\textsuperscript{21}

There are two main categories of benefits that may be payable upon the death of a participant—a death benefit and a survivor annuity. A death benefit refers to the proceeds of an insurance policy which is purchased through the pension plan.\textsuperscript{22} In order for a plan to maintain its tax-qualified status, insurance proceeds provided by the plan's death benefit must be "incidental."\textsuperscript{23} Pension plan death benefits can be used for two purposes. First, some plans are funded through insurance contracts so that upon retirement of the participant, his policy will be converted to cash and used to pay his retirement benefit. Second, a death benefit can be a lagniappe provided in addition to a participant's accrued benefit should he die before retirement.

A survivor annuity is a benefit provided for the remaining life of a beneficiary who is predeceased by the participant. The survivor annuity is automatically provided and is presumed payable to the participant's surviving spouse.\textsuperscript{24} The participant can designate a beneficiary other than his spouse only upon informed, written spousal consent witnessed by a notary public or plan representative.\textsuperscript{25} Survivor annuities are automatically provided in the case of death of a defined benefit or money purchase pension plan participant. They do not usually apply to profit

\textsuperscript{19} Frontloading allows an employer to realize large tax savings for the years during which it is funding a plan on a frontloaded basis.
\textsuperscript{20} Taken to the extreme, an employer might want to backload plan funding to the extent of not having an employee "accrue" his benefit (and the employer would therefore not have to fund it) until the employee's last year of employment. Under this scheme, a 30-year employee earning $50,000 could be fully vested in his benefit, but have no accrued benefit insofar as the employer was planning to fund it all the year before his retirement. In other words, the employee's fully vested benefit would amount to nothing.
\textsuperscript{22} Practising Law Institute, supra note 3, at 122; Canan, supra note 9, at 68-70.
\textsuperscript{23} Practising Law Institute, supra note 3, at 122; Canan, supra note 9, at 68-70.
sharing plans, because a participant's account balance is usually immediately payable to his surviving spouse in the event of death. If other benefit options are available, however, the surviving spouse will automatically receive survivor annuity coverage.

There are two primary methods of dividing pension benefits upon divorce: the "present cash value method" and the "reserved jurisdiction method". The Arizona Supreme Court succinctly contrasted the two methods.

[Under] the 'present cash value method,' . . . the court determines the community interest in the pension, figures the present cash value of that interest, and awards half of that amount to the non-employee spouse in a lump sum, usually in the form of equivalent property; the employee thus receives the entire pension right free of community ties. Under the 'reserved jurisdiction method,' the court determines the formula for division at the time of the decree but delays the actual division until payments are received, retaining jurisdiction to award the appropriate percentage of each pension payment if, as, and when, it is paid out.26

The reserved jurisdiction approach is appropriate where assigning a current value to a benefit would be highly speculative, as where a younger participant is involved in a defined benefit plan. The present cash value method is appropriate where the benefit is presently determinable.

II. Statutory Regime

Preemption

Although ERISA has a broad preemption clause,27 its provisions have not been found to conflict with Louisiana community property principles. Louisiana has consistently recognized pension benefits as a community asset, and the division of this asset upon divorce is not defeated by ERISA.28 In United Ass'n of Journeymen v. Meyers, the federal district court stated that ERISA "does not preempt the laws of

28. "Demands for efficient and expeditious settlement under these plans cannot outweigh or have the effect of nullifying the strongly entrenched and viable community property system existing in this State. . . . [N]othing in the community property system is found which encumbers or deters the operation of the plans before us." T.L. James & Co. v. Montgomery, 332 So. 2d 834, 844 (La. 1976). See also Sims v. Sims, 358 So. 2d 919, 921 (1978).
Louisiana on community property." The court evaluated the legislation and stated that congressional intent "would not be thwarted by allowing a former spouse to assert her community interest in a retirement fund. In fact, the policy of the marital regimes laws is in harmony with the general objectives of the Act."  

REA further supports reliance on state domestic relations law, for Congress specifically stated that ERISA's preemption provisions do not apply to domestic relations orders as defined in the Act. Congress, however, did enact detailed procedures for recognizing a spouse's and an ex-spouses's rights to pension benefits pursuant to a Qualified Domestic Relations Order (QDRO). As a result, states must act in accordance with certain rules mandated by REA, but are free to afford spouses greater protection pursuant to their own laws.

In most cases involving division of pension benefits upon divorce, Louisiana courts allocate community assets and liabilities according to Louisiana Revised Statutes 9:2801. The statute provides a procedure that may be instituted by either spouse for dividing the community property when the spouses cannot agree to a division between themselves. It provides in part:

The court shall divide the community assets and liabilities so that each spouse receives property of an equal net value.

The court shall allocate or assign to the respective spouses all of the community assets and liabilities. In allocating assets and liabilities the court may divide a particular asset or liability equally or unequally or may allocate it in its entirety to one of the spouses.

The statute also provides that the court may appoint experts to aid in valuing the community assets.

Purpose and Key Provisions of REA

In 1984 Congress enacted REA in response to the perception that "the provisions of ERISA are antiquated and need amending to afford better protection to women." Congress noted that seventy-two percent

30. Id. at 711.
of the elderly poor are women and that in 1981 "10.5 percent of women aged 65 and over were receiving private pension benefits . . . averaging $2,427 a year . . . (whereas) 27.7 percent of men in that age group had pensions averaging almost twice as much." In introducing her bill, the author stated,

[This] bill . . . is an attempt to improve the odds that women, be they homemakers or women working outside the home, will enjoy an old age of financial security . . . Women are short-changed by private pension plans because the system does not truly recognize the contribution that women make to the economy or take into account women's unique work patterns, patterns which revolve around child rearing and other family responsibilities . . . She is dependent on her husband and his earnings and at the mercy of death or divorce.

REA specifically benefits the older or divorced woman by requiring that a qualified defined benefit or money purchase plan provide automatic survivor benefits with regard to any vested participant. An automatic survivor benefit must also be provided by a profit sharing plan if the full account balance is not immediately distributed. If a vested participant dies after his annuity starting date, his accrued benefit is automatically payable in the form of a qualified joint and survivor (QJ&S) annuity. If a vested participant dies before his annuity starting date, his accrued benefit is automatically payable to his surviving spouse in the form of a qualified pre-retirement survivor (QPS) annuity. A participant can elect to receive a benefit in a form other than a QJ&S annuity or a QPS annuity, but only upon informed, written spousal consent or the establishment "to the satisfaction of a plan representative that . . . there is no spouse."

The primary mechanism by which REA recognizes the pension rights of an ex-spouse is pursuant to the rules established regarding Qualified Domestic Relations Orders (QDRO's). A QDRO is a domestic relations

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39. Id.
41. 29 U.S.C.A. § 1055(b)(1) (Supp. 1987) defines a "vested participant" as "any participant who has a nonforfeitable right . . . to any portion of such participant's accrued benefit." Therefore, the participant does not have to be fully vested before his spouse's benefit is protected under survivor annuity provisions.
43. See supra note 32.
order "made pursuant to a state domestic relations law (including a community property law)" which "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan" and relates to the provision of "alimony payments, or marital property rights to a spouse, [or] former spouse . . . ."  

REA's QDRO provisions specifically provide for payment of a pension benefit to an ex-spouse (alternate payee) before the participant elects to retire, but "on or after the date on which the participant attains . . . earliest retirement age." Such required payment before the participant would elect to receive retirement benefits himself does not run afoul of REA's proscriptions. Although a QDRO cannot require a plan "to provide any type or form of benefit, or any option, not otherwise provided under the plan . . . [or] to provide increased benefits," a QDRO can require benefits to be paid to an alternate payee at the earliest date on which the participant could retire and receive a benefit. Interestingly, REA does specify that even if the QJ&S annuity is a form of benefit provided by the plan, such form cannot be elected by the ex-spouse, alternate payee. Thus, an ex-spouse cannot opt to receive her benefits in the form of a QJ&S annuity which would pay continued benefits after her death, possibly to her new spouse.

Another key feature of REA's QDRO provisions is the ability to treat a former spouse as a surviving spouse (and a surviving spouse as a non-spouse) for purposes of the QJ&S annuity and the QPS annuity. For example, this crucial provision would allow a judge in a situation where spouses are divorcing at age forty to specify in the QDRO that the ex-wife would be entitled to the participant's death benefit should he die before retiring.

REA also addresses the importance of taxability of retirement plan distributions to an alternate payee. REA specifically provides for an alternate payee to make a tax-free rollover within one year to another eligible retirement plan of certain plan distributions received pursuant to a QDRO.

III. LOUISIANA JURISPRUDENCE

In the 1976 case of T.L. James & Co. v. Montgomery, the Louisiana Supreme Court held that a husband's profit-sharing plan and benefit pension plan proceeds were community property. The plans involved were both qualified, private pension plans within the meaning of I.R.C. 401(a). The case arose as a concursus proceeding when, after the death of the participant, the employer encountered conflicting claims to the benefits from a former spouse, a spouse (in the process of seeking a separation from the deceased participant at the time he committed suicide), a child of the first marriage, and a child of the second marriage.

The court noted that the employer's contribution to the plans was "not a purely gratuitous act, but in the nature of additional remuneration . . . ." In evaluating the plan's ERISA-mandated anti-alienation provisions, the court stated that "plans or devices between employer and employee cannot have the effect of nullifying the wife's rights." The court noted, "[I]t seems apparent that the plans recognize the contribution the wife makes to the employee's contentment, and the design of the plan is to foster and encourage the employee's security." Another important aspect of the T.L. James decision is the court's rejection of an analogy of pension plan death benefits to life insurance proceeds. The court's crucial assumption is that pension plan death benefits are similar to "retirement or profit sharing funds." The court thereby voided Mr. James' beneficiary designation for the pension plan funds to the extent that the designation impinged on the spouse's community property interest. Although the first wife had not requested any portion of the death benefit, the court stated: "Had she asserted any claim, her community ownership rights to share in the funds would be recognized on the basis of the contributions made to the funds during the existence of the first community." Such recognition of a pension plan death benefit as a plan proceed would allow a court to recognize an ex-spouse's interest in the survivor annuity or death benefit.

52. 332 So. 2d 834, 844, 850 (La. 1976).
53. The court stated: "[T]he plans . . . represent compensation from the employer to the employee . . . ." T.L. James, 332 So. 2d at 840. Such characterization results in classification of the pension fund as community property as "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse . . . ." La. Civ. Code art. 2338.
55. T.L. James, 332 So. 2d at 841.
56. Id. at 844.
57. Id.
58. Id. at 846, 852.
59. Id. at 856.
Although the case of *Sims v. Sims* involved a federal employee and therefore a government plan, it is a landmark decision in that the Louisiana Supreme Court posited a formula for dividing pension benefits upon divorce that has been applied in virtually all subsequent cases. The formula assigns a definite value to the portion of the employee’s pension attributable to credited service during the existence of the community.\(^6\)

In *Sims*, the husband had been employed for nineteen years and five months as an air traffic controller at the time of dissolution of the community; the parties had been married for twenty-nine years. The husband subsequently became eligible to retire and receive an immediate benefit upon attaining age fifty (after having completed twenty years of service), two years before the Supreme Court ruled on the case. Although the court states that “the plan is a ‘defined benefit’ plan,”\(^2\) such is not precisely the case. As a government plan, the benefit is defined as a percent of average pay, multiplied by years of service,\(^3\) but unlike ordinary defined benefit plans, the contribution level is also set as a percent of basic pay.\(^4\) This distinction is important because employer contributions made during the existence of a community to such a plan are definitely determinable, unlike those made to a defined benefit plan. Therefore, it would be relatively easy to value the benefit at the time of divorce.

In addition to the enunciation of a formula for apportioning retirement benefits, the court in *Sims* made another far-reaching pronouncement. The court noted that, although eligible to immediately retire and receive a benefit (at the time of trial), the employee had elected to continue his employment. The court thereby concluded:

> [T]he community interest in the retirement plan has no immediate redeemable cash value. Until the employee is separated from the service, dies, retires or becomes disabled, no value can be fixed upon his right to receive an annuity or upon lump-sum payments or other benefits to be paid on his account. Nevertheless . . . the wife is entitled to a declaration at this time of the interest

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\(^{60}\) 358 So. 2d 919 (La. 1978).
\(^{61}\) Id. at 924 n.5.
\(^{62}\) Id. at 924 n.5.
attributable to the community of any such payments, *if and when they become due in the future*. 65

The court continued by noting that it was impossible to exactly determine the amount to which the ex-wife would be entitled. The court stated:

The community’s dissolution before such date does not substitute for the employee’s retirement (or separation or death) as the event which fixes the employer’s liability and which causes payments to become due. When they do become due, however, so as then to have a determinant value, the non-employed spouse is entitled to receive the proportion of them recognized by this judgment . . . . 66

Unfortunately, the court’s effort to protect the interest of the ex-spouse was largely ineffective, as Mr. Sims subsequently died before retiring. 67 The court denied the ex-spouse an interest in Mr. Sims’ survivor annuity, awarding her instead a return of one-half of the employee contributions made to the plan during the existence of the community. Mr. Sims’ spouse of four years (at the date of death) is receiving the survivor annuity. 68

In two recent cases, *Lovell v. Love* 69 and *Michel v. Michel*, 70 the first circuit has apportioned qualified, private pension plan benefits upon divorce by referring to *T.L. James* and *Sims* without reference to REA or the fact that *Sims* involved a federal employee.

*Lovell* involved a participant and his ex-spouse who were married in 1961 and divorced in 1981. The district court entered judgment as to partition of the community of acquets and gains in November, 1984 (after the effective date of REA). One of the primary assets of the community was the fully-vested interest in the husband’s employer’s profit sharing plan. Unfortunately, the court does not indicate the husband’s age, years of company service, or the early or normal retirement ages stated in the plan. However, given the parties’ marriage date (1961)

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65. *Sims*, 358 So. 2d at 923 (emphasis added).
66. Id. at 924.
67. Mr. Sims was fifty-four years old and had accrued twenty-nine years of creditable service at the time of his death. He was thus eligible to retire and receive an immediate benefit. He had not done so, however, so his benefits never became payable within the court’s contemplation of that phrase.
68. Matter of Succession of Sims, 464 So. 2d 991 (La. App. 1st Cir. 1985). *Sims* involved a government plan. Civil Service REA (Pub. L. No. 98-615, 98 Stat. 3195) was passed the same year as REA and contained many parallel provisions. The case addresses the issues of preemption of state law and retroactive application of the act.
69. 490 So. 2d 330 (La. App. 1st Cir.), cert. denied, 495 So. 2d 302 (1986).
70. 484 So. 2d 829 (La. App. 1st Cir. 1986).
and the value of the husband's profit sharing plan (balance of $128,697.35 as of the date of termination of the community), one can assume that Mr. Lovell was a middle-aged, highly compensated employee. Feasibly, at the time of decision he was eligible for early retirement. Nevertheless, the court of appeal cited *T.L. James* and *Sims* to overrule the trial court's assignment of a definite value to the profit sharing plan at the time of dissolution of the community.

Although the court took notice of the Louisiana Revised Statutes 9:2801 directive that the assets be valued as of the time of trial, the court refused to actually value the profit sharing plan benefit since Mr. Lovell was still employed. The court stated: "The value cannot be set with a degree of precision consonant with the requirements imposed upon us as a court of justice . . . . [T]he courts are constrained by *T.L. James & Co.*, and *Sims* not to attempt to set a present value upon the profit sharing plan." In declining to assign a value to Mr. Lovell's vested plan benefit, the court did not consider the particular profit sharing plan characteristics that make it susceptible of accurate valuation.

The funds for participants are held in named accounts. As mentioned above, if a profit sharing plan participant dies before retiring, his beneficiary is paid the account balance (this is true even if the account had previously been non-vested or partially vested—full vesting is automatic upon death). If the participant terminates employment on or after normal retirement age, or if he terminates because of total and permanent disability (regardless of whether he had been previously vested), or if he terminates after achieving full vesting at any time for any reason (regardless of any stated early or normal retirement ages in the plan), the participant will receive his account balance. What the participant does forego is any future contributions that he or his employer might have made to his account by virtue of his continued employment.

In summary, the value of the community portion of Mr. Lovell's profit sharing plan is set upon dissolution of the community. There is no public policy served by requiring the non-employee ex-spouse to wait until the employee retires, dies or separates from service before she can receive her interest, when her interest is presently definitely determinable. Indeed, as discussed below, there is strong public policy to be served by allowing the ex-spouse a current realization of her interest whenever feasible.

The *Michel* case is a second example of the court's rigid adherence to the precedent set by *T.L. James* and *Sims*. In *Michel* the parties had

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72. *Lovell*, 490 So. 2d at 332.
73. See M. Canan & D. Baker, Qualified Retirement Plans § 3.11 (1987).
been married for twenty-five years before the judgment of separation. Mr. Michel had been employed by Jefferson Standard Life Insurance Company (Employer) for the duration of the marriage, but had separated from the service of the Employer prior to January 1, 1984 (REA effective date). As a former employee, Mr. Michel was not entitled to future benefit accruals under the plan. The court did recognize Mrs. Michel's community interest property right in the retirement plan benefits, but again cited the ubiquitous "if and when payable" language of Sims. 

"[Mrs. Michel] shall have a fifty percent (50%) interest in the . . . retirement plan . . . to be paid only if and when such retirement is paid." 74

Unfortunately, the Michel record contains some inaccuracies as to the pension benefits to which the husband is actually entitled. Whereas the court addressed the issue of one retirement plan and separately evaluated the treatment of the contributory and noncontributory portions of the benefit in the one plan, Mr. Michel is actually a participant in two Employer retirement plans, as evidenced by appellee's (Mrs. Michel's) brief. 75

Although the decision is known for the court's innovative evaluation of the community interest in future novel royalties, that same innovative approach was not extended to the pension issues. The court rejected the appellee's attempt to distinguish the case on the basis of the participant's separation from service. It stated that Mr. Michel's only vested interest is the $2,334 attributable to Mr. Michel's contribution. But the court noted that upon reaching age sixty-five, "he will be paid $1,318.99 per month until his death." 76 Since Mr. Michel had separated from service, he must be vested in the "noncontributory" portion of his benefit that was expected to yield $1,318.99 per month upon his attaining normal retirement age. If his benefit were not vested prior to his termination, he would not be entitled to receive it upon retirement. Furthermore, he had been employed since at least 1954, 77 and there are no vesting schedules currently allowed by ERISA whereby a participant could be denied vesting after the lengthy period of Mr. Michel's employment. 78

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74. Michel v. Michel, 484 So. 2d 829, 836 (La. App. 1st Cir. 1986). See also, Henson v. Henson, 499 So. 2d 1024, 1026 (La. App. 3d Cir. 1986) (revised, on appeal, the numerator of the Sims fraction by which the "defendant's interest in the plaintiff's retirement benefits is to be computed, if and when they are paid") (emphasis added).
75. Brief for Appellee at 15, Michel v. Michel, 484 So. 2d 829 (La. App. 1st Cir. 1986) (No. 84-1308).
76. Michel, 484 So. 2d at 836.
77. Id. at 837.
It is important to delineate the concepts of vesting and maturity. Although Mr. Michel was vested in his benefit, it does not mature, i.e. become payable, until his death, his permanent and total disability, or his reaching "retirement age."

Pursuing further Mr. Michel's "retirement age," the court stated: "Michel has no right to any payment unless and until he reaches age 65."

Most private, qualified retirement plans do offer early retirement benefits. Examination of the two plan documents involved reveals that both plans include an early retirement provision upon a participant's attaining sixty years of age. Mr. Michel will be eligible for early retirement in 1990.

The nature of the two plans in which Mr. Michel participates merits further inquiry inasmuch as their different natures affect the "definite determinability" of the provided benefits. One plan is a money purchase pension plan. Since no further employer contributions are being made on Mr. Michel's behalf, his "fund" is definitely determinable. The plan document provides for crediting each participant's account annually with a set formula, variable interest rate, which avoids the risk of plan losses inherent in some defined contribution plans. Furthermore, the benefits are insured by the Pension Benefit Guaranty Corporation.

The other plan in which Mr. Michel participates is a common defined benefit pension plan. Since Mr. Michel has separated from service, his "benefit formula result" (which is normally speculative when trying to project a defined benefit value) is immutably set. The monthly benefit formula in the plan for years of service after 1975 is 1/12 X 2% of annual earnings. Since Mr. Michel is retired, he is accruing no further benefit pursuant to the formula. Therefore, with a definitely determined benefit to fund, his situation becomes analogous to evaluating a benefit to be paid from a money purchase pension plan after termination of service. The "benefit" (for a defined benefit plan) and the "fund" (for a money purchase pension plan) is determined, and the ultimate benefit varies depending only on the other actuarial assumptions, such as mortality and post-retirement interest.

In Michel, the court was apparently unwilling to seize the opportunity to distinguish pension plan benefits according to type of plans and participant situations. Mr. Michel's "fund" in the money purchase pension plan was definitely determinable at the time of divorce. Upon his termination from service, two factors in calculating the defined benefit were set, namely his years of creditable service and his compensation. Furthermore, the court did not consider the possibility of awarding Mrs.

79. Michel, 484 So. 2d at 836.
Michel an interest in the pension plan survivor annuities should Mr. Michel die before retirement.

Three recent Louisiana decisions indicate that some courts are approaching pension division on a more individualized, case-by-case basis. In *King v. King*, the second circuit recognized that the value of the husband’s private defined benefit pension plan was community property. The court, however, did not follow the reserved jurisdiction approach but instead heard expert testimony from both parties’ actuaries. The court rejected the valuation of the husband’s actuary, who had calculated the benefit according to its liquidated value. The court accepted the valuation offered by the wife's actuary, noting that he had calculated the future benefit to be expected from the plan (upon husband’s attaining age sixty in 1997) with knowledge of the *Sims* formula. The court actually assigned a specific amount to the community interest portion of the future expected benefit based on the actuary’s testimony. However, in *King* there was no segregation of the wife’s interest, nor recognition of her right to elect payment of benefits according to her own preferred schedule pursuant to a QDRO; rather, the court granted the wife, “one half (½) of the retirement benefits accrued up to the effective date of the divorce as they are paid.”

The other two cases of interest are both decisions of the Fourth Circuit Court of Appeal. In *Ramstack v. Krieger*, the court divided the community interest in three retirement plans pursuant to Louisiana Revised Statutes 9:2801. Two of the plans in which the husband was a participant were government plans; the third was an account similar to an Individual Retirement Account (IRA).

Predictably, the court cited *Sims* to deny the ex-wife a current interest in the two government plans since the husband had not yet retired. However, the court noted that “the trial court was correct in treating the Kemper [IRA] account as a present asset because, unlike the other two retirement accounts, the money in the . . . account can be withdrawn at any time and therefore is reducible [sic] to possession.” The court was willing to classify the funds as reducible to possession even though defendant would incur an income tax penalty if he withdrew the funds before obtaining a certain age. The court’s willingness to treat retirement plan assets as present assets whenever they may be reduced to possession is helpful for a non-employee spouse who requests a current distribution

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81. 493 So. 2d 679 (La. App. 2d Cir. 1986).
82. Id. at 685 (emphasis added).
83. 470 So. 2d 162 (La. App. 4th Cir. 1985).
84. The court does not disclose the exact nature of the retirement plan.
85. Id. at 166.
86. Id. at 167.
of her interest. As will be more fully discussed below, plan proceeds are often reducible to possession before a participant actually retires.

In *Taylor v. Taylor*, the court recognized the ability to value the future benefit to be expected from a defined benefit pension plan with sufficient precision to enable an immediate partition between the parties. The court granted the wife an interest in a retirement plan that had not been established until after the dissolution of the community, but which included benefit accruals for periods during the existence of the community. The court stated: "We recognize that this right is not presently susceptible of precise monetary valuation. Nonetheless, the parties may value the plan under the [Sims] formula, or they may agree between themselves to assign a value for the purposes of effecting an immediate partition."88

IV. SELECTED DECISIONS OF OTHER STATES

Recent decisions of other jurisdictions indicate that many courts do analyze the type of pension plans involved, together with other relevant factors, and ultimately assign a value to a pension benefit. Other courts have been willing to direct distributions from a defined benefit plan to a non-employee spouse years before the participant could retire. They also have recognized pension plan survivor annuities as plan proceeds, rather than as life insurance proceeds.

In *Harman v. Harman*, the court was faced with conflicting actuarial testimony as to the value of pension benefits. The court stated: "Before using pension rights as a basis for . . . a monetary award, the chancellor must properly value it upon consideration of the various recognized alternative methods raised by the evidence."90 This decision emphasizes the crucial role of the judge in ferreting out relevant pension facts; it is often necessary for the judge to assume such a role when facing complex and often conflicting facts and issues.

The court in *Johnson v. Johnson* noted an important policy reason for assigning a current value to a pension benefit: the interest of the state in finally disposing of the matter rather than supervising the parties until the husband retires. The Arizona Supreme Court considered the

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87. 473 So. 2d 867 (La. App. 4th Cir. 1985).
88. Id. at 872. See also Succession of Tucker, 445 So. 2d 510 (La. App. 3d Cir. 1984) (court awarded ex-spouse a one-half interest in her husband's government retirement plan benefits paid prior to his death where the original partition agreement had not contemplated such benefits, but did not address the ex-spouse's potential interest in his survivor annuity).
90. Id. at 571, 487 A.2d at 698.
community interest in the husband’s vested profit sharing and defined benefit pension plans accumulated during a fifteen year marriage. The court noted that the husband had earned substantial benefits “through his employment with a Tucson law firm.”92 The court thereby acknowledged the practical fact that as a (probable) attorney, the husband likely had a large degree of control over his employer’s plans, i.e., he possibly was or could expect to become a “key employee.”93 Although the husband would not be eligible for early retirement for fifteen years, the court assigned a value to both plans. The court noted that discounts representing pre-retirement mortality and probability of vesting were inapplicable since the participant was already vested. The court chose to make a present award to the wife. The court stated:

In this case the present cash value method is clearly preferable in that the reserved jurisdiction method would require continued court supervision for at least 15 years. Moreover, the Johnsons’ marital estate has sufficient other property available to make a current equitable division of all community property including the wife’s interest in the pension fund.94

The Arizona Supreme Court in Koelsch v. Koelsch95 recognized the inherent unfairness in a situation where the non-employee spouse is at the mercy of an ex-spouse’s retirement decision.

If the employee spouse chooses not to retire, he or she would be liable to reimburse the non-employee spouse for the property interest in the monthly pension benefit that is precluded by the employee spouse’s decision not to retire . . . . [T]he employee spouse cannot unilaterally deprive the non-employee spouse of his or her property.96

Although the Koelsch case involved government pension plan benefits, the principles are relevant to our inquiry. The court acknowledged that the husband could not be forced to retire. To rectify any unfairness, the court calculated a present value for the benefit and stated that the husband could be required to pay the amount in a lump sum to the wife. The court found the lump sum method to be preferable stating: “It provides a clean break between the parties, it provides an unencumbered pension plan to the employee, it relieves the court of any further supervision, and it relieves the retirement agencies of the duty to pay benefits to anyone but the employee.”97

92. Id. at 40, 638 P.2d at 707.
94. Johnson, 131 Ariz. at 42, 638 P.2d at 709.
96. 713 P.2d at 1243.
97. 713 P.2d at 1241.
The court further stated that if there was not sufficient property to satisfy the lump sum obligation, the employee spouse could be ordered to pay the non-employee spouse "a monthly amount equal to his or her share of the benefit which would be received if the employee spouse were to retire." The court concluded that under very limited circumstances and within the trial court's discretion, the payments to the non-employee spouse could be deferred. In such cases the court recommended that the non-employee spouse's interest be protected either by a lien on the participant's separate property or by an insurance policy. The court suggested that in the latter situation, the participant should be required to obtain an insurance policy in an amount sufficient to pay the deferred payments with interest and to name the non-employee spouse as irrevocable beneficiary.

As a retirement plan proceed, the right to receive the portion of the death benefit or survivor annuity attributable to the marriage (that portion earned during the existence of the community) should be judicially awarded to the ex-spouse pursuant to a QDRO upon divorce. In Conn v. Trow the court stated that pension plan death benefits are not insurance but are "simply the property of the employee." The court did not, however, award the ex-wife an interest in the death benefit, because the parties had previously reached a final divorce settlement in which the retirement plan was considered.

V. Recommendations

Judges should comply with REA's provisions when pension benefits are divided pursuant to divorce in order to afford greater protection of the non-employee spouse's property. Judges should eradicate the ubiquitous "if and when payable" language that has formed the cornerstone of the jurisprudentially created "pension doctrine." A properly drafted QDRO will insure that a non-employee spouse, should she survive, ultimately will receive a benefit from her ex-husband's retirement plan, whether such benefit payment is precipitated by his termination from service, his normal or early retirement, or his death.

There are three main aspects involved in judicial protection of an ex-wife's property interest in the community portion of a retirement benefit. First, judges should assign a value to a pension benefit and direct its "immediate transfer" to the non-employee spouse whenever feasible. If Congress did not believe those benefits to have an ascertainable value it would not have included in REA provisions allowing

98. 713 P.2d at 1243.
99. Id.
100. 715 S.W.2d 152, 153 (Tx. Ct. App. 1986).
payment of pension benefits to an alternate payee before the participant retires.\textsuperscript{101}

Judges should continue the practice begun in \textit{Taylor} and \textit{King} of assigning a value to plan benefits at the time of divorce. A vested profit sharing plan benefit, for most practical purposes, has a value equivalent to the participant's account balance. The same is true for a money purchase pension plan that offers a lump-sum distribution option. Assigning a current value to a defined benefit pension plan is relatively straightforward if the employee spouse has terminated service. The calculation should also be reliable in a case involving a younger defined benefit participant in certain occupations. An example is the \textit{Johnson} case, where the court valued the defined benefit of an attorney fifteen years before retirement. It is likely that someone employed in a professional or self-employed capacity will actually work for the employer until retirement, thus, the actuarial factor of employer turnover is more certain. Granted there is some speculation involved in such calculations, but the law is often required to settle dynamic issues. The situation is analogous to a personal injury case where courts are accustomed to evaluating life expectancy and interest rates to arrive at a compensation figure.

After assigning a value to a pension benefit, courts should direct an "immediate transfer" of her interest to the non-employee spouse. An "immediate transfer" could mean one of two things. First, the non-employee spouse can be recognized as an alternate payee pursuant to a QDRO by the pension administrator.\textsuperscript{102} The pension administration firm would then separate the participant's account into one account for the participant and another for the non-employee spouse. The value of such account would be fixed by the court's valuation of the benefit at the time of divorce. The non-employee spouse then has the option of electing her own retirement benefit options. Her options are still predicated, however, on the rights of the participant.

For example, in the \textit{Michel} situation, the pension administration firm recognized the court's decision as a QDRO, and Mrs. Michel as an alternate payee.\textsuperscript{103} When Mr. Michel reaches his early retirement age of sixty, Mrs. Michel can elect to "early retire" herself or she can wait and receive increased benefits when Mr. Michel reaches age sixty-five. She has a choice of payment options.

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\textsuperscript{103} The author acknowledges the kind support of Allen M. Posey, Jr., attorney for appellee, who made available pertinent information on the \textit{Michel} case. Further inquiries should be directed to the author.
An "immediate transfer" could also mean that the court recognizes the non-employee spouse's right to immediately receive the full value of her pension benefit. She would then be free to make a tax-free rollover of the distribution to her own qualified plan, such as an IRA. This type of distribution would be appropriate in situations where a plan allows benefits to be paid in the form of a lump sum distribution. Profit sharing plans almost always provide a lump sum distribution option. Money purchase pension plans usually provide such an option and defined benefit plans sometimes do.\(^{104}\)

There are several policy reasons for effecting an immediate transfer of interest to the non-employee spouse. In the first situation, where she is recognized as an alternate payee by the pension administrator, she is free to make her own retirement decisions based on her particular financial situation. Although the participant may opt to work until or even past normal retirement age, the non-employee spouse may need the money earlier. She can choose to begin receiving her portion of the benefit, actuarially reduced for early payment, when or any time after the participant attains early retirement age. She can also select the benefit payment option most suited to her needs.

Public policy is also served when the non-employee spouse receives a lump sum distribution which she can roll over to her own plan. Such assets are then within her own control in her capacity as manager or administrator of the pension fund. Her assets are thereby protected from certain risks inherent in having her funds retained by the employer's pension plan. First, pension plan assets are sometimes endangered by corporate mergers or takeovers.\(^{105}\) Second, her rights in the plan are predicated upon the employment of the participant. It is conceivable that her interest could be endangered if the participant were denied benefits pursuant to a "bad boy" clause. A "bad boy" clause is a plan provision that requires forfeiture of a participant's benefit in certain situations, such as for violation of a noncompetition clause or if he is convicted of certain felonies.\(^{106}\) If a plan provides for vesting more rapid than that required by ERISA, a plan provision can require forfeiture of such "excess vesting" for certain proscribed behavior. ERISA has curtailed the viability of "bad boy" clauses, but they are still allowed within certain limitations. "The employer's generosity entitles it to subject the 'excess' vested interest to any forfeiture conditions it chooses to impose, including a 'bad boy' clause."\(^{107}\) If the non-employee spouse

\(^{104}\) See generally Canan, supra note 10 at ch. 3, §§ B, D.
\(^{105}\) J. Mamorskey, supra note 10 at ch. 29.
\(^{106}\) S. Kraus and R. Keschner, The Pension Answer Book, 76 (3d ed. 1984); Canan, supra note 10 at ch. 17, § 8.3.
had already received her plan interest as a lump sum distribution, she could not be harmed by the participant's subsequent deprivation of his own interest pursuant to a "bad boy" clause. Third, as manager of her own funds, the non-employee spouse would be better able to tailor her investments to her needs. She could make more conservative investments than those which the plan administrator might make. Depending on her situation, she could invest in short-term or long-term investments.\textsuperscript{108}

Perhaps the most compelling public policy reason for assigning a value to a pension benefit and immediately transferring it by either method to the non-employee spouse is that it disposes of the matter. Under the reserved jurisdiction approach which Louisiana courts now seem to be following, a divorce case involving pension benefits can be effectively "pending" for years longer than if the pension issue had been settled. The reserved jurisdiction approach requires prolonged interaction of acrimonious parties. It also requires continued judicial involvement in a primarily administrative matter. Such factors led the Arizona Supreme Court in \textit{Johnson} to choose the present cash value method, noting that the reserved jurisdiction approach would require court supervision for at least fifteen years until the participant would be eligible for retirement.\textsuperscript{109}

There are two potential types of costs involved in segregating the non-employee spouse's interest. REA provides for charging the "account" of a participant and the non-employee spouse with the costs involved in calculating and segregating the benefit.\textsuperscript{110} The greater potential cost to the plan results if excess benefits have been distributed to the non-employee spouse. Such a situation could occur if one-half of a participant's benefit is distributed to the non-employee spouse and then part of the participant's benefit is forfeited pursuant to a "bad boy" clause. It is important to remember that, except in limited situations, an employer cannot retract money that it has contributed to a retirement plan.\textsuperscript{111} The money which would have gone to erroneously pay the non-employee spouse is no longer money of the employer, but of the pension fund. Although the employer could be required to fund the deficiency, there are often forfeitures within a plan that could be used for that purpose. In essence, courts have the opportunity to allocate the risk of an excess payment to either the pension plan or to the non-

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\item[111.] 29 U.S.C.A. § 1344(d) (Supp. 1987) (provision for reversion of assets to the employer after plan termination and satisfaction of all participant obligations, in limited situations).
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employee spouse. It seems that the pension plan is in a much better position to bear that risk.

In all cases where the non-employee spouse does not receive a lump sum distribution of her pension benefits, courts should take care to safeguard her interest in the event she is predeceased by the participant. As noted earlier, the court in *T.L. James* recognized a pension plan death benefit to be a plan proceed rather than life insurance. As such, courts should provide by QDRO that an ex-wife be entitled to that portion of the husband's survivor annuity or death benefit earned during the community as calculated by application of the *Sims* formula. This approach was contemplated by Congress, as REA specifically provides for recognition of a former spouse as a current spouse for the purposes of the QJ&S and QPS annuities.\(^{112}\)

Such recognition of an ex-wife's interest in the survivor annuity or death benefit is crucial to her ability to plan for her retirement. What will Mrs. Michel do if Mr. Michel dies before attaining retirement age and electing to receive benefits? She will probably find herself in the same situation as Mrs. Sims, receiving the value of one-half of the contributions made to the plans during the community, which is usually worth far less than the survivor annuity or death benefit.

In summary, for reasons of judicial economy, courts should be willing to assign a value to a pension benefit and immediately transfer that interest to the non-employee spouse upon divorce whenever feasible. If benefits are not distributed in a lump sum to the non-employee spouse, courts should provide that the non-employee spouse be entitled to a portion of the plan death benefit or survivor annuity should the participant predecease her. Such recommendations seem clearly compatible with the Congressional intent evidenced by REA. Such recommendations are also compatible with Louisiana Revised Statutes 9:2801, by which the court partitions community property pursuant to a divorce.

Such recommendations will allow the non-employee spouse to rationally and reasonably plan for her future. She will not be at the mercy of an ex-spouse's unilateral retirement decision. She can select the time when her own benefits become payable, regardless of whether the ex-spouse decides to work until or even past normal retirement age. She will also be assured of a continued benefit in the event that her ex-spouse predeceases her.

Elizabeth Alford Beskin

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