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To Divide or Not to Divide the Community Interest in an Unmatured Pension: Present Cash Value Versus Fixed Percentage

Katherine Shaw Spaht*

INTRODUCTION

In the wake of the Louisiana Supreme Court decision in Hare v. Hodgins,1 at least one court of appeal2 has applied one of the modifications made by the Hare case in the valuation3 and division of the “community” interest in a pension plan. Last year in this symposium the author speculated about the dictum in Hare permitting new flexibility to a trial judge in “dividing interests in pension benefits that are not yet matured.”4 The Hare case involved matured pension benefits. However, by repudiating certain language in Sims v. Sims,5 which applied the “fixed percentage” method of “dividing” the “community” interest in unmatured pension benefits, the Louisiana Supreme Court signaled a conscious departure from the Sims decision even in cases where the pension benefits have not yet matured. The court’s subsequent remand in Frazier v. Harper,6 involving a “community” interest in unmatured pension benefits, supports this conclusion. In Frazier; the court, reversed the judgment below and remanded the case to the trial court, instructing

1. 586 So. 2d 118 (La. 1991).
3. One of the two profound issues was the valuation of the community interest in a pension plan by a fixed percentage formula without permitting evidence that post-termination increases in the pension benefits were due to “personal effort or achievement after termination of the community that has little or no relationship with the prior community.” Hare, 586 So. 2d at 128.
5. 358 So. 2d 919 (La. 1978).
6. 600 So. 2d 59 (La. 1992).
the trial judge to "decide the case according to the principles set forth in La. R.S. 9:2801 [community property partition statute] and our decisions in the present case, Hare v. Hodgins, Sims v. Sims, and T.L. James & Co., Inc. v. Montgomery."

An examination of the post-Hare jurisprudence reveals no apparent reluctance by the courts of appeal to apply new methods of division of pension benefits—i.e., the "present cash value" method—where there is some form of immediate transfer to the non-employee spouse. The judiciary should be cautious in its approach to the problem of the disposition of unmatured pension benefits in a community property partition. Abandoning the rigidity in application of the Sims "fixed percentage" method permits the court to seek individual justice (equity for both spouses), but at what cost? Equity in the form of equal justice for both spouses may be extremely difficult, if not impossible, to achieve.

I. SIMS V. SIMS DECISION

The Sims decision was the seminal case in Louisiana establishing the method of valuation and division of the "community" interest in

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7. Id. at 63 (citations omitted).
9. Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165, 1166 (1986): "But as Richard Epstein has pointed out, the aim of perfect, individualized justice often turns out to be an illusion, while the social cost of trying to achieve it, as well as the cost to individual litigants, is high.

In part this tendency [toward substantive justice] is justified by the belief that this fine tuning is necessary in order to eliminate individual acts of injustice that are not caught by the general rules. But that hope is often delusive. Any refinement in legal rules will increase their error in application as well as their costs of administration; at some point the benefits of precision are overwhelmed by their costs. Perfect justice can only be done at an infinite price—which is another way of saying that it cannot be done at all. A willingness to entertain some tradeoff between simplicity and aspiration is not only the counsel of prudence, it is also a precondition for justice in the broad run of cases. Epstein, Settlement and Litigation: Of Vices Individual and Institutional, 30 U. Chi. L. Sch. Rec. 2, 5 (1984) (footnote omitted).
10. It was the seminal case in part because it modified the earlier Louisiana Supreme Court decision in T.L. James & Co., Inc. v. Montgomery, 332 So. 2d 834 (La. 1976). In Sims, the court carefully distinguished between "defined contributions plan," such as that in T. L. James, and "defined benefits plans," such as that in Sims, Sims v. Sims, 358 So. 2d 919, 923 n.5 (La. 1978). See also Dian Tooley Arruebarrena, Applying
a spouse's pension plan. As was typical of many of Justice Albert Tate's opinions, he used the language of the opinion to instruct. First, Justice Tate observed that because of the nature of the interest acquired by the "community," it was not merchantable or subject to "partition by licitation," although admittedly it was subject to voluntary partition. Justice Tate described the nature of the interest acquired by the "community" in the following terms: "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." Later in the opinion, Justice Tate expressed his concern with the speculative nature of any present valuation assigned to the unmatured pension benefits in a footnote: "Deferring the actual valuation until distribution to the annuitant substantially increases the chance that the numerous variables which affect the ultimate pension will then be taken into account." Reading both statements together, it seems obvious that Justice Tate did not mean literally that no value can be fixed upon the non-employee spouse's interest in the other spouse's pension. He observed that the more variables affecting the pension in the form of unfulfilled resolutory conditions, the greater the speculation as to the value and the greater possibility of injustice to the employee spouse.

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Louisiana's Community Property Principles to Pensions, 33 Loy. L. Rev. 241 (1987). The court recognized the feature of "gradual vesting" common in defined benefits plans. Sims, 358 So. 2d at 925 appendix A. See Gerald LeVan, Allocating Deferred Compensation in Louisiana, 38 La. L. Rev. 35, 45 (1977), cited in Sims, 358 So. 2d at 924 n.5. The court also established the accompanying principle that the non-employee spouse is entitled only to a judgment recognizing his or her interest in the other spouse's pension if and when payable. Sims, 358 So. 2d at 923-24.

11. "Due to the nature of the interest acquired by the community, as these decisions likewise recognize, it is not merchantable or susceptible to partition by licitation." Sims, 358 So. 2d at 923 (footnote omitted).

12. "Of course, the parties between themselves can agree upon a valuation for purposes of conventional partition." Id.

13. Id. at 923 (emphasis added) (footnote omitted).

14. Id. at 924 n.7 (emphasis added). In the footnote, Justice Tate cites Vester T. Hughes, Jr., Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future, 44 Tex. L. Rev. 860, 880-81 (1966).

15. La Civ. Code art. 1774 provides:

If the condition is that an event shall not occur within a fixed time, it is considered as fulfilled once that time has elapsed without the event having occurred.

The condition is regarded as fulfilled whenever it is certain that the event will not occur, whether or not a time has been fixed.

16. Professor Gerald LeVan characterizes the conditions attached to the employer's promise to pay pension benefits as resolutory, rather than suspensory as the Louisiana
Justice Tate analogized the judgment declaring the non-employee's interest in the pension plan, if and when the benefits became due in the future, to a "partition or division in kind." Of course, there is no actual partition in kind. The judgment recognizing a non-employee spouse's proportionate interest in a community asset merely fixes for the first time the percentage owned by each spouse in the asset which continues to be co-owned. The former community asset remains under the exclusive control of one of the co-owners by virtue of his relationship with his employer. Typically, Justice Tate recognized the significant difference between a partition in kind of pension benefits and the judgment recognizing the percentages of ownership of the employee and non-employee spouses in the former's pension benefits. In a footnote in the Sims opinion, he imposed upon the employee spouse the duty to exercise his control of the co-owned asset in "good faith."

The Sims case carefully balanced the interest of the employee spouse against that of the non-employee spouse in devising the method of valuation and division of unmatured pension benefits. In the case of the employee spouse, Sims provided that the non-employee spouse's interest in his pension and the value of that interest would be subject

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17. Nevertheless, under the decisions cited, the wife is entitled to a declaration at this time of the interest attributable to the community of any such payments, if and when they become due in the future. . . . When the community is dissolved, the non-employed spouse is entitled to have recognized his or her one-half interest in this community asset, i.e., the right to receive payments from employee benefit plans, to the extent (proportion) that these payments result from the employment or contributions during the community.

18. Id.

19. La. Civ. Code art. 810 now defines a partition in kind as follows:

   The court shall decree partition in kind when the thing held in indivision is susceptible to division into as many lots of nearly equal value as there are shares and the aggregate value of all lots is not significantly lower than the value of the property in the state of indivision.


20. His relationship with his employer may be by contract or by statute (which authorize numerous state and federal pension plans).

21. "At present, the community's retirement-plan interest, as yet inchoate, is in annuities or lump-sum payments to become payable in the future, as determined by the husband's good-faith election of options available to him or by his death, separation from service, or involuntary retirement." Sims, 358 So. 2d at 923 n.4 (emphasis added).
to the same contingencies as the employee's own interest. Against the
terest of the employee, Sims balanced the interest of the non-employee
spouse in protecting her ownership interest in the other spouse's pension
from spiteful, and even negligent, decisions made by the employee. This
balance of interests was artfully achieved and articulated, and served
the profession well.

II. STATE AND FEDERAL STATUTORY CHANGES AFTER SIMS

The Louisiana statutory scheme of partition at the time of Sims
precluded traditional judicial partition of unmatured pension benefits.\(^2\)
The articles regulating partition in kind prevented an allocation of dif-
ferent assets in their entirety to one spouse to accomplish a partition.
Under the Louisiana Civil Code articles, partition in kind could only
be utilized if each item was subject to division in kind (the "item"
theory).\(^3\) By contrast, other jurisdictions recognized the "aggregate"
theory of partition, or division of co-owned assets,\(^4\) which permitted
the judge to consider the property to be divided as the aggregate of
called property and to allocate or assign the assets to accomplish
the division. If the property could not be partitioned in kind, the Civil
Code articles required partition by licitation accomplished by public sale
of the property.\(^5\)

Even though at least one author predicted legislation addressing the
division and valuation of pension benefits after the T. L. James deci-
sion,\(^6\) there was none, probably because of satisfaction with the formula

\(^{22}\) La. Civ. Code art. 1339 (1870) provides: "When the property is indivisible by
its nature . . ., the judge shall order, at the instance of any one of the heirs, on proof
of either of these facts, that it be sold at public auction, after the time of notice and
advertisements prescribed by law, and in the manner hereinafter prescribed." (repealed

La. Civ. Code art. 1340 (1870) provides: "It is said that a thing can not be
conveniently divided, when a diminution of its value, or loss or inconvenience of one of
the owners, would be the consequence of dividing it." (repealed by 1991 La. Acts No.
689, § 1).

arts. 810-811 (1991), which do not represent a change in the law.

See discussion in Katherine Shaw Spaht, Matrimonial Regimes, Developments in the

\(^ {24}\) See Spaht, supra note 23.

\(^ {25}\) La. Civ. Code arts. 1339-40 (1870). For text of the two articles, see supra note
22.

\(^ {26}\) LeVan, supra note 10, at 47:

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
devised in Sims, decided just two years after T.L. James. However, in 1982 the legislature did enact a comprehensive partition statute for former community property adopting the "aggregate" theory of partition. After January 1, 1983, a trial judge had authority to partition former community property by allocating or assigning assets to one spouse or the other and accomplishing an equal division in an equitable manner. For the first time, assignment of the "community" interest in a pension to the employee spouse and community property of equal value to the non-employee spouse was possible, assuming the interest was susceptible of valuation.

Subsequent to enactment of Louisiana's new partition statute, Congress enacted the Retirement Equity Act (REA), amending the Employee Retirement Income Security Act of 1974 (ERISA). The avowed purpose of the REA was to improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses . . . 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. . . .

In a student comment analyzing the impact of the REA upon Louisiana decisions involving division of pension benefits, the author recommended that in the case of tax-qualified private pension plans judges should assign "a value to plan benefits at the time of divorce" and direct an "immediate transfer" of the non-employee spouse's interest to him or her. An "immediate transfer" can be accomplished in two different ways: (1) the court can recognize the non-employee spouse "as an alternate
payee pursuant to a QDRO\textsuperscript{33} by the pension administrator\textsuperscript{34} and the administrator can separate the interest of the non-employee spouse and place it in a separate account subject to the election of benefit options by the non-employee spouse\textsuperscript{35}; or (2) the court can recognize "the non-employee spouse's right to immediately receive the full value of her pension benefit"\textsuperscript{36} permitting the non-employee to make "a tax-free rollover of the distribution to her own qualified plan"\textsuperscript{37} "within her own control . . . as manager . . . of the pension fund."\textsuperscript{38} If the judge should choose the former method of "immediate transfer," the author of the student comment suggests that he can further protect the non-employee spouse from the premature death of the employee spouse\textsuperscript{39} by stipulating in the 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 \textit{Sims} formula."\textsuperscript{40}

Both state and federal statutes enacted after the \textit{Sims} decision permit greater flexibility in dividing the "community" interest in unmatured pension benefits. If there is an \textit{appropriate} case, the trial judge may assign a value to the non-employee spouse's interest and either allocate other community property to satisfy that interest or utilize the REA to sever the non-employee's interest in the pension from that of the employee by one of the two methods of "immediate transfer." Identification of the \textit{appropriate} case after weighing both the interests of the employee

\begin{itemize}
  \item \textsuperscript{33} A Qualified Domestic Relations Order (QDRO) is a domestic relations 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... ." Beskin, \textit{supra} note 8, at 683-84 (footnotes omitted). See 29 U.S.C.A. § 1056(d)(3)(B)(i)(I) and (ii)(I),(II) (West Supp. 1992).
  \item \textsuperscript{34} Beskin, \textit{supra} note 8, at 695. The authority cited for this statement of the author was 29 U.S.C.A. § 1002(16)(A),(B) (West Supp. 1987).
  \item \textsuperscript{35} Beskin, \textit{supra} note 8, at 695. "Her options are still predicated, however, on the rights of the participant."
  \item \textsuperscript{36} \textit{Id.} at 696.
  \item \textsuperscript{37} \textit{Id.}
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{In re Succession of Sims}, 464 So. 2d 991 (La. App. 1st Cir. 1985), the sequel to the original \textit{Sims} decision discussed in the text of this article at \textit{supra} notes 8-19, the husband had died prior to the maturity of pension benefits (the time the benefits became payable). "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." Beskin, \textit{supra} note 8, at 687.
  \item \textsuperscript{40} Beskin, \textit{supra} note 8, at 698. \textit{See also} 29 U.S.C.A. § 1056(d)(3)(F)(i) (West Supp. 1992).}


and non-employee spouse remains elusive. Obviously, the flexibility in partitioning the unmatured pension benefits introduced by the partition statute and the REA focuses on the interest of the non-employee spouse. Nonetheless, there also may be interests of the employee spouse to consider in deciding if present valuation of the non-employee spouse’s interest in unmatured pension benefits [“present cash value” method] is preferable to a judgment declaring the spouse’s respective interests if and when the benefits are payable [“reserved jurisdiction” or “fixed percentage” method].

III. HARE V. HODGINS DECISION

The Louisiana Supreme Court ultimately repudiated the lower courts’ rigid adherence to the formula devised for division of pensions in T. L. James and Sims. The court described the formula of the two decisions as having “become enshrined as a pension doctrine.” Even though the pension benefits in Hare v. Hodgins were fully matured, the rationale, elaborating upon the ambiguities of the Sims decision, supports the application of Hare to unmatured benefits as well. The court described the statement from the Sims case that no value can be fixed upon the right of an employee to receive pension benefits as “unfortunate.”

41. 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. 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. In essence, courts have the opportunity to allocate the risk of an excess payment to either the pension plan or to the non-employee spouse. It seems that the pension plan is in a much better position to bear that risk.”

Beskin, supra note 8, at 697-98 (footnote omitted).

42. Beskin, supra note 8, at 678.

43. 586 So. 2d 118 (La. 1991).

44. See Hargrave, supra note 4, at 667. In a subsection of the article entitled The Dicta, the author opined, “Justice Dennis’ opinion also suggests that greater flexibility is also available to the trial judge when dividing interests in pension benefits that are not yet matured.” See also language quoted from the opinion in Hare in infra note 45.

45. Hare, 586 So. 2d at 126:

If it was intended to signify that the employer could not be required to pay benefits until due under its contractual obligation, the statement was correct but ambiguous. But if it was meant to indicate that a pension right could not be valued for purposes of voluntary [actually the court recognized the possibility of valuing the interest for a voluntary partition] or judicial partition prior to maturity the statement must be acknowledged as error.

(Emphasis added.)
Furthermore, in describing the formulation of the holding in Sims, the Hare court referred to the significance of the language "if and when they become due in the future" as follows: "[W]e did not say that the fixed percentage method is the only technique that may be applied to divide pension benefits." 46

In a subsequent part of the opinion the Louisiana Supreme Court further "clarifies" its decision in Sims by permitting the employee spouse to introduce evidence to modify the "community fraction" by proof that post-divorce increases to pension benefits are due to "high separate earnings in the employee spouse's late employment years." 47 The employee spouse bears the burden of "going forward with evidence and of persuasion. . . ." 48 The ability to fine-tune the "community fraction" afforded to the employee spouse "may be more illusive than real," 49 whereas the decision actually "is much more favorable to the non-covered spouse under the Hare facts. . . . [it] allows that spouse to share in the investment income and inflationary increases in value of such intangible rights." 50

46. Id.

Neither the Civil Code nor La. R.S. 9:2801 contains anything that requires courts to follow the fixed percentage method to the exclusion of others. In fact, La. R.S. 9:2801, which was enacted subsequent to Sims affords the partitioning tribunal a great deal of flexibility and clearly implies that the goals of equality and equity require that no one method should be used to the exclusion of other apportionment techniques. Moreover, our study of legal developments both here and in other jurisdictions convinces us that because of the great variations in pension plans and communal situations no one method can accomplish justice in every case. It is essential, therefore, that courts be able to take advantage of reasonable alternatives and adjustments in order to accomplish an equal distribution in an equitable manner in all situations. . . . Comment, Retirement Equity Inaction: Division of Pension Benefits upon Divorce in Louisiana, 48 La. L. Rev. 675 (1988).

Id. at 126-27 (citations omitted). The student comment cited was also included in the very extensive Appendix of authorities attached to the Hare opinion at 129-31.

47. Id. at 127.

48. Id. at 128.

49. Hargrave, supra note 4, at 666:

The Sims formula remains presumptively correct, and it will often be difficult to muster the proof to show otherwise. At least when large sums are involved, the battles of the hired experts will be costly and time-consuming, and will probably produce no clear results. Often, the burden of proof issue will solve the matter. When lesser amounts of money are involved, the transaction costs and delay of proving that another formula is more equitable will often make the issue too expensive to litigate. Equity at a general, gross level through a general formula is simpler and cheaper. Greater equity through greater fine tuning of a formula is possible, but at substantial costs.

Id. at 666. For a discussion of fine-tuning in an effort to achieve greater equity and its social cost, see Glendon, supra note 9, at 1166.

50. Hargrave, supra note 4, at 666.
The Louisiana Supreme Court suggested a choice of one of two methods of dividing pension benefits upon divorce: (1) the present cash value method "if the pension rights can be valued accurately and if the marital estate includes sufficient equivalent property to satisfy the claim of the non-employee spouse without undue hardship to the employee spouse," and (2) the fixed percentage method "when the calculation of the present value of benefits will be too speculative." Interestingly enough, in *Hare* the court found no abuse of discretion in the trial judge's use of the fixed percentage method in dividing the former husband's *fully matured pension benefits.*

IV. JURISPRUDENCE SINCE *HARE v. HODGINS*

Two cases decided by the courts of appeal concern the proper disposition of matured pension benefits just as in *Hare v. Hodgins.* In *Moore v. Moore,* the district judge had not had the benefit of the Louisiana Supreme Court's decision in *Hare* and had assigned a present value to the wife's interest in the husband's pension based upon the testimony of the husband's expert. The wife argued on appeal that the *Sims* formula for calculating the present value had to be strictly applied, resulting in a difference in value of more than $85,000. The husband argued in response that to apply the *Sims* formula "would result in injustice to him because his salary increased greatly between the time of termination of the community in 1974 and the time of his retirement in 1989." In fact the husband's salary had increased from $22,619.00 to $108,207.00. The husband's expert who had assigned a value to the wife's interest in the pension benefits as of 1974 stated that "it would

51. *Hare*, 586 So. 2d at 125.
52. *Id.*
53. *Id.*

The present partition action was brought in 1988 after the former husband retired and began to draw matured pension benefits.

The trial court in effect classified and divided the pension by using a fixed percentage method, considering itself bound to award the wife one half of a fixed fraction of all past and future retirement payments according to the formula set forth in *Sims v. Sims*. ... We see no abuse of discretion or reversible error in the trial court's use of a fixed percentage approach, although, as we will explain, some adjustment of the formula may be necessary in order to prevent inequity in the present case.

54. 596 So. 2d 252 (La. App. 3d Cir. 1992).
55. *Id.* at 254.
56. "The award to the wife is $15,805.62. The wife appeals.

The wife contends the *Sims* formula must be rigidly applied, resulting in an award to her of $102,281.00." *Id.* at 252-53.
57. *Id.* at 253.
be inequitable to allow Edna [wife] to receive the full benefit of Ottis' [husband's] salary increases after 1974."

After quoting at length from the supreme court's opinion in *Hare*, the court of appeal reversed the trial court judgment and remanded the case "for further proceedings in accordance with law and the views expressed in *Hare v. Hodgins*."

*Moo v. Moore* appears to be an ideal case for applying the principles enunciated in the *Hare* case which permit fine-tuning of the *Sims* formula if the employee spouse can prove that post-termination increases in the value of the pension rights were attributable to increases in his compensation "due purely to his personal effort or skill and unrelated to the prior community earnings."

There is no suggestion in the *Moore* opinion that the trial judge abused his discretion by awarding the wife a lump sum (present cash value method). The fact that the pension benefits were fully matured and were paid to the husband in a lump sum in 1989 explains the failure to focus on the method of division. The litigation was initiated by a petition requesting a supplemental partition of former community property omitted from a voluntary partition in 1974. Thus, the lump sum previously received by the husband in 1989 was the only former community asset remaining to be divided.

In a fourth circuit court of appeal case, *Chiappetta v. Vallot*, the former husband and wife voluntarily partitioned the husband's fully matured pension benefits, allocating forty-eight percent to the wife and fifty-two percent to the husband. The litigation involved the division of the survivor's benefits in the pension plan. The Qualified Domestic Relations Order (QDRO) rendered by the trial court recognized the former wife as an alternate payee and provided that she was entitled to ninety-six percent of the Qualified Survivor Annuity. The death

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58. *Id.* at 254.
59. *Id.* at 256 (citations omitted).
61. The community of acquets and gains was terminated on June 5, 1974, on which date Edna filed a suit for separation, ending in a final divorce on April 15, 1976. At the time of the separation judgment a settlement of community was entered into, on June 21, 1974, which makes no mention of Ottis Moore's retirement program with Amoco.

62. 596 So. 2d 849 (La. App. 4th Cir. 1992).
63. See supra definition in note 33.
64. In reaching this conclusion the trial court reasoned as follows: ... The annuity was computed at the time of the termination of the employment of Thomas by Freeport-McMoran and, at that time, only 4% of the funds were not community in nature. Thus, to allow Thomas' new wife to receive 52% of that annuity while limiting Mary Ann to 48% would be an injustice and would totally ignore Mary Ann's vested and legally recognized community interest in her ex-husband's retirement benefit.

*Chiappetta*, 596 So. 2d at 849.
benefit (survivor's annuity) was fifty percent of the pension. The former husband appealed the QDRO. The court of appeal amended the QDRO to provide that the former wife was entitled to forty-eight percent of the Qualified Survivor Annuity, which was her proportionate interest in the matured benefits.

What makes the Chiappetta case so interesting is the use of the Retirement Equity Act, urged by the author of the student comment mentioned above, to recognize the former spouse in the QDRO not only as alternate payee, one of the two methods of an "immediate transfer," but also as entitled to a proportionate part of the survivor's annuity. The Chiappetta case evidences that recommendations in the student comment have been accepted by at least one court. The two decisions reveal a willingness to utilize different mechanisms for achieving "equity" in the division of pension benefits in Louisiana. However, the two appellate court cases discussed which were rendered subsequent to Hare concern only matured pension benefits, admittedly a much easier scenario in which to apply the principles established in Hare and the recommendations of the student writer.

More recently, the Louisiana Supreme Court demonstrated its intention to apply the principles articulated in Hare to unmatured pension benefits. In Frazier v. Harper, the court reversed the judgment and remanded the case to the trial court with instructions:

to receive evidence as to the contents of the pension plans involved and generally as to the relevant issues, to the end that the court may decide the case according to the principles set forth in La. R.S. 9:2801 and our decisions in the present case, Hare v. Hodgins; Sims v. Sims, and T.L. James & Co. Inc. v. Montgomery.

The issue in Frazier concerned whether the ex-wife had an interest in the former husband's pension plan granted to him after termination of the community as a substitute for a prior plan created during the existence of the community. The prior plan in existence at the termination of the community had no value, it did not vest until retirement, and it was contingent upon factors which had not occurred. However, when

65. Beskin, supra note 8.
66. "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." Beskin, supra note 8, at 698.
67. 600 So. 2d 59 (La. 1992).
68. Id. at 63 (emphasis added).
69. Id. (citations omitted).
the new plan was substituted for the old plan, the employer gave the former husband credit for the years served under the old plan (approximately nine). Although the lower courts had concluded that the wife had no interest in the new pension plan, the supreme court reversed.70

The implications of this decision on the principal issue are discussed elsewhere in this symposium,71 but the language contained in the paragraph on remand is a clear signal that "dicta" in Hare as to its application to unmatured pension benefits was in fact direction. The fifth circuit had already taken the direction in Halverson v. Halverson72 by the time both Frazier and the denial of writs in Halverson appear in the same volume of the Southern Reporter.73

V. Halverson v. Halverson’s Division of Unmatured Pension Benefits

Hare v. Hodgin's was rendered the day before Halverson74 was submitted to the court of appeal for decision. The Halverson court relied extensively upon the language in the Hare opinion to conclude that the trial judge had properly ruled that the ex-wife was entitled to begin receiving her interest in her former husband's pension plan immediately through a carefully structured QDRO. The former husband's pension plan (Delta Pilots' Retirement Plan) had not yet fully "matured," since the husband had not yet retired.75

The former husband argued on appeal that under the Sims decision his ex-wife was not entitled to receive her interest in his pension until the benefits became payable. The ex-wife countered that although the former husband had not yet retired he had "served three consecutive years of his last ten years of employment."76 Thus, the minimum Final Average Earnings (FAE) could "be calculated based on those three years . . . ."77 The calculation of the minimum FAE in turn permitted the calculation of the present value of her interest as if the benefits

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71. Id.
72. 589 So. 2d 1153 (La. App. 5th Cir. 1991), writs denied, 600 So. 2d 655 (1992).
73. Id.
74. Id.
75. At the time of trial, Mr. Halverson was fifty-three years of age; his mandatory retirement date is October 2, 1996, when he will reach age 60. He testified he is still employed by Delta and that he plans to retire at age 60. On the date of trial he had been employed by Delta for 26 years.
76. Id.
77. Id.
were currently payable to her former husband. Not insignificantly, the ex-wife expressed her willingness "to waive her right to prospective higher benefits in order to receive immediate disbursement of the funds due her."  

The trial court had appointed its own expert, a law professor, who examined the provisions of the pension plan and concluded that it was the appropriate case for departure from the mechanical application of the Sims decision. Her reasons included: (1) the ex-wife's proportionate interest in the ultimate benefits was fixed: it could not be diluted further by the former husband's future employment;  

(2) the former husband's minimum actual dollar amount of his pension could be calculated, and the ex-wife was willing to waive her right to future increases to receive the benefits immediately;  

(3) the former husband had reached the earliest possible retirement age;  

(4) under the REA the ex-wife could receive her share of the pension directly from the pension administrator even before the former husband's retirement; and  

(5) the QDRO could be structured to provide that the ex-wife receive a sum no greater than

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78. Id.  
79. "For assistance in understanding the pension plan and in determining how the Sims formula should be applied, the trial court appointed its own expert, Professor Dian Arruebarrena of Loyola School of Law." Id. Professor Arruebarrena was the author of Applying Louisiana's Community Property Principles to Pensions, 33 Loy. L. Rev. 241 (1987).  
80. First, under the Delta Pilots' Retirement Plan as applied to Mr. Halverson, the Sims formula is fixed; the denominator of the formula must be 25, because that is the greatest number of years of service creditable under the Plan. Upon achieving 25 years of service, Mr. Halverson became entitled to 60% of his Final-Average Earnings upon retirement. No matter how many more years he works that percentage figure will not increase, although the actual dollar amount of his pension will increase if his earnings increase. Waiting until he retires will not dilute Mrs. Peck's proportionate share, earned during their 12.055 years of marriage. Halverson, 589 So. 2d at 1155-56.  
81. Second, because Mr. Halverson is 53, not only is he within his last ten years of employment prior to retirement, but also an average earnings figure can be computed for the last three years that would be the minimum for his Final-Average Earnings under the Plan's provisions. (Because his Final-Average Earnings are computed from his highest 36 months of earnings, even if his income decreases between the time of trial and the time he retires his Final-Average Earnings could be calculated based on the three years prior to trial.)  
82. "Fifth, distribution of Mrs. Peck's share at its present value is not unfair to Mrs. Peck if she is willing to waive her right to future increases in order to receive the benefits immediately." Id.  
83. "Third, Mr. Halverson has attained the earliest possible retirement age and thus is entitled to retire." Id.
she would if she were required to wait until her former husband retired. The immediate distribution also solved the problem of the lapse of the ex-wife's interest in her former husband's pension should he die prior to retirement, a dilemma solved in a different way in the Chiappetta case.

The Halverson case is a perfect, and admittedly simple, illustration of the proper balance of former spouses' interests in the division of pension benefits. Virtually all of the contingencies to which the former husband's pension benefits were subject had been accomplished. Furthermore, the ex-wife, the party benefitting by immediate transfer, was willing to forego the advantages of any remaining contingencies, including any diminution in value of the pension to the former husband by virtue of her early drawing of benefits. The immediate transfer in the Halverson case was accomplished without assigning the entire value of the pension to the former husband and the rest of the former community property to the ex-wife. In the case of pension rights, the entire value of the pension ultimately payable to the employee spouse may in fact exceed the value of all other community property, resulting in the employee spouse receiving no other community property from the partition. The transfer in Halverson simply required the pension administrator by QDRO to pay the ex-wife her interest. The division by immediate transfer obviously was fair to the ex-wife who wanted the present value of her interest immediately, not subject to the contingency of the husband's death prior to retirement. In summary, the court observed: "The decision here ... insures fairness to both spouses, in view of Mrs. Peck's willingness to accept a lesser pension than she would receive if she waited until Mr. Halverson retires, and because payment of her share now, in the manner explained by Arruebarrena, will not lessen Mr. Halverson's share."

Returning to Frazier v. Harper in an effort to predict its outcome on remand, a similarity between the facts in Halverson and those in Frazier is that the pension plan of the former husband was also a Delta...
Airlines' plan. Most of the provisions of the plan discussed in the opinion are identical to those in the Halverson case. At least one distinguishing fact is that the former husband in Frazier had not yet completed twenty-five years of service, the maximum allowable as total years of service for purposes of the fraction, although he was qualified for early retirement. Without the benefit of more details concerning the plan, it is not possible to distinguish further the facts in the two cases. The one distinguishing factor already identified may not be sufficient for the lower court to deny division by immediate transfer to the ex-wife of her interest if such transfer is possible under the plan, especially since the former husband is eligible for early retirement. If the ex-wife is willing to forego any increase in ultimate benefits due to the former husband's continued employment, as the ex-wife did in the Halverson case, the argument for division is particularly strong.

VI. PRESENT CASH VALUE VERSUS FIXED PERCENTAGE

To refine further the terms "present cash value" and "fixed percentage," it is essential to define both in the context of the disposition of the community interest in the pension at partition. If "present cash value" is used, there ordinarily will be either immediate transfer by one of the two methods previously described, or assignment (assigning the community interest in the pension to the employee spouse). If "fixed percentage" is used, there will be an allocation of the community interest in the form of a judgment recognizing the percentage, ascertained or to be ascertained, of the non-employee spouse in the co-owned asset (the pension), subject to the contingency of eventual maturity.

91. The new plan provided for a defined benefit of 60% of the employee's "final average compensation" comprised of the average of the highest three consecutive years of pay in the last ten years before retirement. Retirement is mandatory at age 60 and the plan requires twenty-five years of service for full benefits. The second plan provides a credit for years of service under the first plan which was ended in 1972. Using these years of service under the first plan, Malcolm is qualified to retire early under the provisions of the second plan. However, if Malcolm retires early, he would receive a penalty of three percent (3%) reduction per year for each year of service less than twenty-five. In 1996, when Malcolm attains the age of 60, he will receive full benefits under the second pension plan.

Id. at 60-61.

92. "Documentary evidence of neither the new nor the old pension plan was introduced. . . ." Id. at 60.

93. See supra discussion in text at notes 33-40.


95. A percentage may be impossible to fix if the employee has not yet completed his maximum years of creditable service, and as a consequence no figure can be included in the fraction as a denominator.

96. The language of the judgment will include, as in the Sims case, if and when due and payable.
The "fixed percentage" method of disposition is not division of the asset but judicial recognition of the ownership interest of the non-employee spouse and the continuation of the co-ownership relationship between the former spouses as to the pension. Despite pronouncements in at least one recent court of appeal case, the Louisiana Supreme Court in both the Hare and Frazier cases continues to accept "fixed percentage" as a method of disposition of the community interest in a pension plan. It has surely been useful in other cases involving incorporeal, movable property, property which is increasingly important and which often by virtue of its inherent nature is difficult to value. Although the author, just as the fourth circuit in the Stewart case, does not advocate in all cases continued co-ownership as the most desirable disposition, there are some cases where "fixed percentage" may be ex-

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97. Stewart v. Stewart, 585 So. 2d 1250 (La. App. 4th Cir. 1991), writs denied, 590 So. 2d 597 (1992). The issue involved the valuation and assignment or allocation of 200 pieces of art created by the ex-wife listed for sale for three years. Because the value of the work was speculative, the lower court adopted "fixed percentage" disposition: "The net proceeds on the sale shall be divided equally between the parties." Id. at 1253.

On appeal, the fourth circuit reversed and remanded, directing the lower court to appraise the art and allocate to the ex-wife. The court of appeal reasoned as follows: "[W]e believe the intent of R.S. 9:2801 is to require the trial court to make a final apportionment of the assets and liabilities. . . . In other words, the whole of R.S. 9:2801 indicates an intent to require an immediate division of the community. If community property is not divided, this means co-ownership. . . . We do not believe R.S. 9:2801, by providing for allocation of community property, is meant to be one of the exceptions to Art. 807. . . ." Id. at 1253-54 (emphasis added).

One can only speculate as to why the Louisiana Supreme Court would deny writs in the Stewart case after recognizing co-ownership as a possibility for pension benefits in the Hare case.

But see Reeves v. Reeves, 607 So. 2d 626 (La. App. 2d Cir. 1992).

98. See, e.g., Michel v. Michel, 484 So. 2d 829 (La. App. 1st Cir. 1986) (wife's books and manuscripts); Due v. Due, 342 So. 2d 161 (La. 1977) (husband attorney's contingent fee contracts); Reeves, 607 So. 2d 626 (mineral interests).

Interestingly enough, the same disposition will be made of a former spouse's weekly workers compensation payments in which the former community has an interest under La. Civ. Code art. 2344.

One possible distinguishing factor between these cases and the Stewart case is that in the latter the assets are corporeal and from the facts given possibly not subject to one spouse's exclusive control. See quotation from the Stewart case in infra note 99.

99. Stewart, 585 So. 2d at 1254: "There are good practical reasons why the community should be divided with finality . . . . If the former spouses remain co-owners, who decides what price to charge for the art? Or what gallery will display it? Or when to accept an offer? These questions only illustrate that when the trial court requires co-ownership over the objection of one of the spouses, future disputes are not only likely, they are a certainty, and this means future litigation."

tremely useful and the only way to properly protect the legitimate interests of the employee spouse. To avoid potential abuse by the employee spouse who is the manager of the co-owned interests in pension benefits, the trial judge should impose a duty of "good faith" upon the employee spouse in the judgment, a remedy envisioned by Justice Tate in the Sims decision. 101

Unbridled enthusiasm for "present cash value" division of the community interest in unmatured pension benefits is simply not justified. 103 It does represent long needed modifications in the rigidly applied "fixed percentage" method of the Sims decision. Too often the court failed to weigh the interests of the non-employee spouse, including the advantages of immediate payment in the form of a distribution from the pension fund or other community property, 104 or a separate account managed by the non-employee spouse, and, in appropriate cases, freedom from the conditions burdening the employee's interest. The Louisiana Legislature and Congress did act to alleviate the obstacles to serious consideration of "present cash value" and to assure that the interests of the non-employee spouse would be thoroughly considered.

However, the adoption of "present cash value" division of unmatured pension benefits in virtually every case might well ignore equally vital interests of the employee spouse. 105 Such interests include assuring that the employee's ultimate benefits are not affected by the "present cash value" division and that the value or ultimate payment of the pension benefits is as certain as possible. To protect the latter interest of the employee requires that most, if not virtually all, of the contingencies to which payment of the benefits are subject have been fulfilled or resolved. A trial court should proceed cautiously and deliberately in examining the provisions of a particular plan when selecting "present cash value" division or "fixed percentage" by judgment as a disposition of unmatured pension benefits.

101. Compare the obligation of "good faith" to the obligation of a co-owner not to cause damage to the thing held in indivision by his fault. For a thorough discussion of the comparison, see Spaht & Hargrave, supra note 23, at § 7.19 (Supp. 1992).

An example of a former spouse managing co-owned pension benefits is Frazier v. Harper, 600 So. 2d 59 (La. 1992), where the husband agreed to a substitution of one pension plan for another. See discussion in text supra at notes 90-92 and elsewhere in this symposium at Hargrave, supra note 70.


103. It is obvious that the author does not share the enthusiasm of the student who wrote Retirement Equity Inaction: Division of Pension Benefits Upon Divorce in Louisiana, 48 La. L. Rev. 677 (1988). Nonetheless, the article was an excellent piece of work which obviously influenced the judiciary and assisted in educating the author.


105. See, e.g., supra discussion in note 41.