

SUPREME COURT OF LOUISIANA

*No. 97-C-1178*

SHERRIE JEAN EDDLEMON BAILEY

Versus

JAMES MARVIN BAILEY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
THIRD CIRCUIT, PARISH OF RAPIDES

LEMMON, Justice\*

This is an action to partition community property. The asset at issue at this stage of the proceeding is a retirement account in the name of James Bailey, an employee of the State of Louisiana and a member of the Louisiana State Employees Retirement System (LASERS). The funds in the account were credited by LASERS over a maximum period of three years as part of a deferred retirement plan in accordance with La. Rev. Stat. 11:447-451, the Deferred Retirement Option Plan (DROP) for eligible members of LASERS which allowed payment of earned retirement benefits into a DROP account based on fictitious retirement while the employee continued to work.

At the beginning of, and during part but not all of, the three-year period that LASERS credited funds into the account, Bailey was married to Sherrie Eddlemon Bailey. The principal issue in this court is whether the spouse of a state employee

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\*Knoll, J., not on panel, recused. Rule IV, Part II, §3.

in LASERS' DROP program is entitled to any portion of the DROP account that is attributable to funds credited by LASERS after the termination of the community.

### Facts

In July 1977, James Bailey married Sherrie Bailey. Mr. Bailey had been a member of LASERS since 1963. In October 1993, Mr. Bailey opted to participate in LASERS' DROP program, and LASERS credited funds monthly into his DROP account, as described hereinafter, for a period of three years. In the meantime, James and Sherrie Bailey divorced, and the community of acquets and gains formerly existing between the parties was terminated retroactive to January 28, 1994.

At the partition trial, the parties stipulated that Mrs. Bailey was entitled, as of the date Mr. Bailey entered the DROP program, to one-half of 53.65 percent of Mr. Bailey's regular retirement benefits under the formula set forth in Sims v. Sims, 358 So. 2d 919 (La. 1978), as the non-employee spouse's share of the pension rights attributable to the employee spouse's employment during the existence of the community.

The trial court rendered a judgment partitioning the community property. As to Mr. Bailey's DROP account, the judgment divided the account into two components: (1) that portion attributable to funds credited by LASERS to the account between the date Mr. Bailey entered the DROP program and January 28, 1994, the date the community was terminated; and (2) that portion attributable to funds credited by LASERS to the account after the termination of the community. The judge classified the first portion as community property and awarded Mrs. Bailey one-half of 53.65 percent of that amount. The judge further classified the second portion as Mr. Bailey's separate property.

In an unpublished opinion, the court of appeal affirmed. The court noted that while an employee's entitlement to optional participation in the DROP program is contingent upon past years of service, the program "contemplates that an employee continue working for three years." Slip opinion p. 4. Hence the court concluded that the trial court correctly characterized the disputed portion of Mr. Bailey's DROP account as "earned" after the termination of the community and therefore his separate property.

The dissenting judge reasoned that since an employee's right to participate in the DROP program is based entirely on past participation in the retirement system, the majority improperly focused on the employee's employment while in the DROP program. For purposes of the DROP program, the dissenting judge observed, the employee became a retiree and was entitled to receive retirement benefits at the time he entered the DROP program, and not when he completed the three years in the program. Thus the DROP account was an asset attributable to the employee's employment before the termination of the community, although a portion of the funds were credited to the account after the termination.

On Mrs. Bailey's application, we granted certiorari primarily to consider the res nova question of whether an employee spouse's DROP account, to the extent attributable to funds credited by LASERS after the termination of the community, constitutes the separate property of the employee spouse, or is apportionable between community property and separate property in accordance with the Sims formula. 97-1178 (La. 6/30/97); 696 So. 2d 996.

## Deferred Retirement Option Plan

The DROP program is described by LASERS in its publication to members as follows:

DROP is an optional method of retiring from the Louisiana State Employees' Retirement System (LASERS). . . . When an employee enters DROP, his status in LASERS changes from active member to retiree, even though he continues working at his regular job. The employee can participate in DROP for up to three years. During his DROP participation, he accumulates money in an individual account based on what he would have received as a monthly retirement benefit. He also continues to earn his regular salary. He can withdraw the money from his DROP account after he ends state employment—either as a lump sum or a series of payments spread out over time.

La. Rev. Stat. 11:447-451 authorize a state employee who is eligible for retirement to participate in the deferred retirement option plan, "[i]n lieu of terminating employment and accepting a retirement allowance." La. Rev. Stat. 11:447A. Under DROP, an eligible state employee may enroll in the plan and is thereafter "considered by the system to be in a retired status" for the period he or she participates in the program. La. Rev. Stat. 11:448A. Although the employee continues to work, payments are credited monthly into the employee's DROP account in the amount of the retirement benefits that the employee was eligible to receive if he or she had retired. La. Rev. Stat. 11:448C. The base amount of the employee's eventual monthly retirement benefits is fixed as of the time he or she enters the DROP program. La. Rev. Stat. 11:448B. The employee does not receive the funds credited into the account until he or she actually retires, La. Rev. Stat. 11:450A, but neither does the employee receive any service credit in the calculation of the eventual monthly retirement benefits for the years that the employee continues to work while in the DROP program. La. Rev. Stat. 11:448B.

As far as LASERS is concerned, the employee is retired and is credited in the DROP account with the amount of retirement benefits that would be due; as far as the

employer is concerned, the employee continues to work and receives the salary for work performed; and as far as the employee is concerned, he or she receives the salary for the work performed and receives credit in the DROP account (which is not available to the employee until sometime in the future) for the retirement benefits that would have been paid had he or she retired, but is ineligible during the DROP period for accruing additional credits toward the calculation of either the base retirement benefits or the possible supplemental benefits earnable upon employment after the DROP period ends.

After the period of participation in the DROP program, the employee, if he or she elects to remain in service, begins accruing additional service credit in the calculation of his or her eventual monthly retirement benefits, but such additional credit is in the nature of a supplemental pension, in addition to the base benefits that were fixed at the time the employee entered the DROP program. La. Rev. Stat. 11:450D.

#### Parties' Position

Neither party disputes that the portion of the DROP account attributable to funds credited by LASERS to the account before the termination of the community is apportionable in accordance with the Sims formula. The parties differ as to the portion of the DROP account attributable to funds credited by LASERS to the account after the termination. Mr. Bailey contends that since the funds were credited by LASERS only if he continued to work, such credits are a form of incentive earnings and are thus his separate property. Mrs. Bailey, on the other hand, contends that the entirety of the DROP account is a retirement benefit attributable to her former husband's employment prior to or during the existence of the community and that she is entitled to her Sims formula percentage of the entirety of the DROP account.

## Community Property Status of DROP Account

The employment and retirement contributions that gave rise to Mr. Bailey's right to have funds credited to the DROP account occurred prior to and during the existence of the community, and not after the termination.<sup>1</sup> It follows then that the right to receive the funds in the DROP account, at least the portion attributable to Mr. Bailey's labor and efforts and retirement contributions during the existence of the community prior to entering the DROP program,<sup>2</sup> constitutes a community asset.

This court addressed the interplay between ordinary retirement plans and community property rights in two seminal cases: T.L. James & Co. v. Montgomery, 332 So.2d 834 (La. 1976), and Sims v. Sims, 358 So. 2d 919 (La. 1978).

In T.L. James, we recognized that deferred compensation earned during the existence of the community accrues to the benefit of both spouses. In Sims, we articulated the following principle:

[A]t the dissolution of the community, the non-employed spouse is entitled to judgment recognizing that spouse's interest in proceeds from a retirement annuity . . . when they become payable with the spouse's interest to be recognized as one-half of any payments to be made, insofar as they are attributable to the other spouse's contributions or employment during the existence of the community.

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<sup>1</sup>The Sims formula stipulated to by the parties properly apportioned the years of the employee spouse's employment and the years of the existence of the community, as of the date that Mr. Bailey entered the DROP program.

<sup>2</sup>The dissenter focuses on the employee spouse's having to commit to complete the DROP program as a requirement for entering the program (although that requirement was not in effect when Mr. Bailey entered the program). The significant requirement for entering DROP is the employee spouse's employment for the period necessary to be eligible for retirement. The minor additional "requirement" of the commitment to complete DROP has little to do with the employment (and retirement contributions) on which the DROP benefits are calculated (and fixed as of the time of entry into DROP, regardless of whether the employee completes DROP). Moreover, there is little unfairness to a new spouse who marries the employee during his or her participation in DROP. During that period, the employee is ineligible to earn retirement credits with LASERS, who considers the employee to be retired, and the new spouse receives the same treatment as the employee spouse.

Id. at 922 (collecting cases). We noted that the community interest in the retirement benefits "stems not only from contributions made by community funds, but also by reason of any right to receive proceeds attributable to such employment during the community (i.e., as an asset `acquire[d] during the marriage,' Civil Code Article 2402)," (now La. Civ. Code art. 2338). Id. at 921. We held that although the benefits would not become due until sometime in the future, the non-employee spouse was entitled, at the time of the dissolution of the community, "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." Id. at 923.

Still further, we enunciated in Sims the following formula for calculating the non-employee spouse's interest (in cases in which the employee spouse has not yet retired):

Portion of pension attributable to creditable  
service during existence of community \_\_\_\_\_ X annuity (or lump sum) X 1/2  
 Pension attributable to total creditable  
 service (yet to be determined)

Application of the Sims formula to a DROP account is complicated by the fact that the employee spouse's base retirement benefits are fixed as of the date of entry into DROP and by the fact that the retirement is a fictitious retirement. The fixing of ordinary retirement benefits is deferred until the employee spouse retires and is then divided according to the formula set forth in Sims. In the DROP situation, the employee spouse's election to enter the DROP program operates, as of the date of that election, to fix the base amount of the employee's eventual monthly retirement benefits,<sup>3</sup> and this amount is credited to the DROP account monthly as retirement

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<sup>3</sup>This amount is also the amount of base monthly benefits the employee is to receive upon actual retirement, subject to supplementation by supplemental retirement benefits earned after participation in DROP.

benefits, although the actual receipt of the funds in that account is deferred until the employee actually retires.

In the case of ordinary retirement benefits, the non-employee spouse's right to share is calculated under the Sims formula as of the date the community terminates, but the exact percentage cannot be fixed until the employee spouse actually retires. In the DROP context, however, the Sims formula must be applied as of the date of the employee spouses's entry into the DROP program, because that is the date the base amount of the eventual monthly retirement benefits is fixed, and the employee spouse earns no further credit toward these retirement benefits while in the DROP program. Significantly, the trial court applied the Sims formula as of the date Mr. Bailey entered DROP, albeit without discussion. Thus the trial court implicitly recognized that Mrs. Bailey's right to share in Mr. Bailey's eventual monthly retirement benefits was fixed as of that date, but then proceeded to treat Mrs. Bailey's right to share in the DROP account as if the funds in that account were attributable to Mr. Bailey's employment after he entered the DROP program. This is where the trial court erred.

If Mr. Bailey had actually retired on the date he entered the DROP program, Mrs. Bailey clearly would have had the right to share, in the stipulated percentage, in the retirement benefits he would have received.<sup>4</sup> The fact that the same amount of monthly retirement benefits was credited to a deferred-receipt account under a fictitious retirement for a specific temporary period should not change that result.

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<sup>4</sup>Our analysis in this case is similar to the situation that would have prevailed if Mr. Bailey had actually retired and accepted other employment for three years with wages equivalent to his state salary. Mrs. Bailey would be entitled to her Sims formula percentage of Mr. Bailey's monthly retirement benefits, but not to any part of any retirement benefits earned by Mr. Bailey in the new employment after the termination of the community.



The amount of the base retirement benefits that Mr. Bailey will receive upon actual retirement was fixed as of the date he entered the DROP program. Mrs. Bailey is entitled to her Sims formula percentage of that fixed amount. When Mr. Bailey reentered LASERS upon completion of the DROP program, he began accruing supplemental retirement credits to be added to his base retirement benefits in the eventual calculation of his total monthly benefits when he retires. Mrs. Bailey, of course, is not entitled to any portion of the supplemental benefits he will receive upon retirement, because these benefits are attributable to Mr. Bailey's employment after the termination of the community. But just as Mrs. Bailey is entitled to her Sims formula percentage of Mr. Bailey's base benefits he will receive upon retirement, she also is entitled to the same percentage of his DROP account, inasmuch as both the base retirement benefits and the funds in the DROP account are attributable to Mr. Bailey's employment and retirement contributions prior to the termination of the community.

The statutory provisions governing the DROP program refer repeatedly to the DROP benefits as "retirement benefits" and fix such benefits as of the date of entry into DROP. Moreover, the statutes expressly provide that if an employee elects to remain in state employment after the DROP period, any future retirement credits earned are in the nature of a supplemental pension. La. Rev. Stat. 11:450D. The latter treatment fully supports our holding that the date of entry into DROP fixes a non-employee spouse's interest in the entirety of the retirement benefits, both the DROP benefits and the regular retirement benefits. Thus we glean no legislative intent to alter a non-employee spouse's right to such retirement benefits by virtue of the employee spouse's opting to participate in the DROP program. We hold that the entirety of Mr. Bailey's DROP account is apportionable between community property and the

employee spouse's separate property, in accordance with the Sims formula -- i.e., 53.65 percent to the community.

Accordingly, that portion of the judgments of the lower courts declaring the funds credited to the DROP account between the date of the termination of the community and the date of the completion of the DROP program to be Mr. Bailey's separate property is set aside. Judgment is rendered declaring these funds to be community property to the extent of 53.65 percent.