

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CW 1994

MELINDA L. LEBLANC

VERSUS

CHRISTOPHER J. LEBLANC

Judge Theriot by wj.

[Signature]

Judgment Rendered: JUL 25 2013

* * * * *

On Appeal from the
17th Judicial District Court,
In and for the Parish of Lafourche,
State of Louisiana
Trial Court No. 110299

The Honorable Jerome J. Barbera, III, Judge Presiding

* * * * *

Rebecca N. Robichaux
Raceland, Louisiana

Attorney for Defendant/Appellant,
Christopher LeBlanc

Robert P. Cuccia
Houma, Louisiana

Attorney for Plaintiff/Appellee,
Melinda LeBlanc

* * * * *

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

CRAIN, J.

Christopher LeBlanc appeals a trial court judgment partitioning the community of acquets and gains formerly existing between himself and his former spouse, Melinda LeBlanc. For the reasons that follow, we convert the appeal to an application for supervisory writs, grant the writ, amend the judgment of the trial court and remand.

FACTS AND PROCEDURAL HISTORY

Christopher and Melinda were married in June 2002. Christopher had been employed by Apache Corporation since August 1991. As an Apache employee, he participated in a 401(k) and retirement plan, as well as other employee benefit plans. Christopher continued working for Apache and participating in those plans throughout the marriage and the proceedings below.

On October 6, 2008, Melinda filed a petition for divorce. A judgment of divorce was rendered on December 21, 2009, which terminated the community of acquets and gains between the parties retroactive to October 6, 2008. The parties entered into a consent judgment regarding custody of their two minor children. They were unable to resolve the division of community property.

The principal dispute between the parties was the division of the community interest in Christopher's Apache 401(k) and retirement plans, and whether any lump sum equalization payment was owed. Christopher contended that the 401(k) and retirement plans should be divided according to the formula set forth in *Sims v. Sims*, 358 So. 2d 919 (La. 1978). Melinda argued that the court should apply the present cash value methodology set forth in *Hare v. Hodgins*, 586 So. 2d 118 (La. 1991), and value the

community property interest in the plans, determine each spouse's portion thereof, and immediately transfer her interest to her.

Trial was held on April 13, 2012, at which the parties testified and submitted documentary evidence. The evidence was held open and thereafter supplemented with the deposition testimony of two Apache representatives who testified regarding the 401(k) and retirement plans. In oral reasons, the trial court explained that it utilized the present cash value methodology advanced by Melinda to divide the community property. The trial court allocated the community assets as follows:

<u>CHRISTOPHER</u>		<u>MELINDA</u>	
\$304,345.55	401(k)	\$304,345.55	401(k)
\$ 25,595.02	Retirement	\$ 25,595.02	Retirement
\$ 11,957.49	Brokerage Account	\$ 11,957.49	Brokerage Account
\$ 14,510.00	Stock Appreciation	\$ 1,500.00	Car
\$ 31,750.00	Burnett Loan	\$ 31,750.00	Burnett Loan
\$ 3,000.00	Truck		
\$ 5,000.00	Furniture		
<u>\$396,158.06</u>	<u>TOTAL</u>	<u>\$375,148.06</u>	<u>TOTAL</u>

The trial court further ordered that Christopher make an equalization payment to Melinda in the amount of \$10,505.00.

Christopher now appeals assigning the following errors:

1. The trial court committed prejudicial legal error by not dividing equally the number of community shares of stock acquired in the Apache 401(k) plan during the marriage and committed prejudicial error by failing to apply the *Sims* – fixed percentage formula when determining the increased value on the separate property of Christopher J. LeBlanc from date of marriage to date of termination rather than using present value on the date of trial.
2. The trial court committed prejudicial legal error by valuing the Stock Appreciation Plan at a speculative value of \$14,510.00 to Christopher J. LeBlanc rather than allocating a 50% interest to each party in its matured benefit value on 12/31/12.
3. The trial court committed prejudicial legal error by valuing the individual brokerage account with a 2011 value of \$23,914.99 and ordering the parties to receive ½ the 2011 value rather than allocating a 50% interest to each party as to the value of the account on the date of termination.

4. The trial court committed prejudicial legal error by placing a \$5,000.00 value on the furniture and allocating it to Christopher J. LeBlanc when the claim was withdrawn during trial by Melinda LeBlanc.

JURISDICTION

Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. *McGehee v. City/Parish of East Baton Rouge*, 00–1058 (La. App. 1 Cir. 9/12/01), 809 So. 2d 258, 260. An appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court. La. Code Civ. Pro. art. 2082. In the absence of a valid final judgment, an appellate court lacks appellate jurisdiction of a matter. *See, Laird v. St. Tammany Parish Safe Harbor*, 02–0045 (La. App. 1 Cir. 12/20/02), 836 So. 2d 364, 366.

The judgment in this case partitions community property and orders execution of a domestic relations order. Louisiana Revised Statute 9:2801 provides that provisions of a judgment partitioning retirement benefits shall be considered interlocutory until the domestic relations order has been granted qualified status from the plan administrator or until the judgment has been approved by the appropriate federal or state authority as being in compliance with applicable laws. After receiving the parties' briefs in response to a rule to show cause why this appeal should not be dismissed as having been taken from an interlocutory judgment, it is apparent that there is no qualified domestic relations order in this case.

Nonetheless, an appellate court has broad discretion to convert an appeal to an application for supervisory review. Because we find it in the interest of judicial economy, we convert this appeal to an application for

supervisory writs. *See, Stelluto v. Stelluto*, 05-0074 (La. 6/29/05), 914 So. 2d 34, 39.

DISCUSSION

Standard of Review

Judicial partition of community property is governed by Louisiana Revised Statute 9:2801, which provides in pertinent part:

A. When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising either from the matrimonial regime, or from the co-ownership of former community property following termination of the matrimonial regime, either spouse, as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter, may institute a proceeding, which shall be conducted in accordance with the following rules:

* * * *

(4) The court shall then partition the community in accordance with the following rules:

(a) The court shall value the assets as of the time of trial on the merits, determine the liabilities, and adjudicate the claims of the parties.

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

(c) 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 court shall consider the nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances that the court deems relevant. As between the spouses, the allocation of a liability to a spouse obligates that spouse to extinguish that liability. The allocation in no way affects the rights of creditors.

(d) In the event that the allocation of assets and liabilities results in an unequal net distribution, the court shall order the payment of an equalizing sum of money, either cash or deferred, secured or unsecured, upon such terms and conditions as the court shall direct. The court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.

Trial courts are accorded broad discretion in partitioning community property and are afforded a great deal of latitude in arriving at an equitable distribution of the assets between spouses. *Benoit v. Benoit*, 11-0376 (La. App. 1 Cir. 3/8/12), 91 So. 3d 1015, 1019, *writ denied*, 12-1265 (La. 9/28/12), 98 So. 3d 838. Factual findings and credibility determinations made in the course of valuing and allocating assets and liabilities in the partition of community property may not be set aside absent manifest error. However, the allocation or assigning of assets and liabilities in the partition of community property is subject to review for abuse of discretion. *Id.*

Valuation of 401(k) Plan

When Christopher began his employment with Apache in 1991, he began participating in the Apache 401(k) plan. According to the plan description, Apache contributes 6% of the employee's pay to the plan each year. A savings feature allows the employee to make additional pre-tax contributions. Apache matches the contribution dollar-for-dollar, up to a maximum match of 8% of the employee's pay. The employee is always 100% vested in his own contributions. Five years after his date of hire, Christopher was considered 100% vested in the employer contributions.

All contributions are invested according to the employee's election among more than twenty options. At the time of trial, Christopher's 401(k) plan was principally invested in Apache stock (approximately 90%), with the remainder invested in bonds. The value of Apache stock fluctuates according to the stock market, while the bond fund is separately valued at a unit price of one dollar. The bond fund receives earnings, dividends, and interest, and thus grows as the interest is reinvested in more units. The

Apache stock also generates dividends, which is automatically invested in additional shares of Apache stock.

An additional feature of the 401(k) plan is that it can be used as collateral for loans. In fact, Christopher received three loans in amounts of \$25,000.00, \$20,000.00, and \$25,000.00, using his 401(k) as collateral. Apache corporate representative Jimmy Vega testified in his deposition that an employee's use of the 401(k) as collateral for a loan affects the number of shares in the plan, in that the number of shares in the plan would be reduced by the loan amount divided by the share price. A loan against the 401(k) would also result in the bond investment portion of the 401(k) being reduced. When the loan is repaid, the amount is reinvested in the funds selected by the employee. Thus, if the employee has directed that his contributions be invested in stock, the repayment proceeds would be used to purchase additional stock at the current market price. Apache statements show that as of October 6, 2008, loans one and two had been repaid and loan three had an outstanding balance of \$21,860.87.

Throughout this proceeding, the parties have disputed whether the 401(k) plan should be apportioned according to the "present value" formula or the *Sims* "fixed percentage" method. The *Sims* fixed percentage method expresses the community interest in an unmatured retirement plan as a fraction with the numerator representing the number of years of creditable service that accrued during the existence of the community and the denominator representing the yet undetermined total years of creditable service. The fraction is then multiplied by one-half to determine the non-employee spouse's share of the retirement benefits, with the employee spouse entitled to the remaining one-half of the community share, as well as the full amount of the fraction representing years of service prior to and after

the existence of the community. *Hannan v. Hannan*, 99-0842 (La. App. 1 Cir. 5/12/00), 761 So. 2d 700, 704, writ denied, 00-1723 (La. 9/29/00), 770 So. 2d 349. The *Sims* fixed percentage method defers benefit distribution to the non-employee spouse until commencement of benefit distribution to the employee spouse. *Blanchard v. Blanchard*, 97-2305 (La. 1/20/99), 731 So. 2d 175, 179.

After rendition of *Sims*, Louisiana Revised Statute 9:2801 was enacted, which affords courts “a great deal of flexibility and clearly implies that the goals of equality require that no one method should be used to the exclusion of other techniques.” *Hare v. Hodgins*, 586 So. 2d 118, 126-27 (La. 1991). Thereafter the Louisiana Supreme Court recognized the propriety of employing, in some cases, the present cash value methodology. See, *Blanchard*, 731 So. 2d at 179. The present cash value methodology requires the court to calculate the present cash value of the community assets, including the pension rights, then awards the non-employee spouse her rightful share in a lump sum or in the form of equivalent property. *Blanchard*, 731 So. 2d at 180. Use of that method results in an immediate transfer to the non-employee spouse of her equivalent share of the community interest in the pension. *Id.*

In this case, it is undisputed that certain contributions were made to the 401(k) prior to and after the marriage, which were invested in stocks and bonds that are Christopher’s separate property. Investments made with contributions during the marriage are community property. This includes investments made using dividends generated during the marriage by separate property. Dividends generated during the marriage were fruits of Christopher’s separate property, and are classified as community property

according to Louisiana Civil Code article 2339.¹ Likewise, dividends paid after the termination of the community and prior to partition on stock acquired during the existence of the community are community property. La. Civ. Code art. 2369.2 (providing that each spouse owns an undivided one-half interest in former community property and its fruits and products); *Becnel v. Becnel*, 10-1011 (La. App. 5 Cir. 5/24/11), 70 So. 3d 20, 25.

The trial court employed the following calculation proposed by Melinda:

\$876,022.24	Market value of 401(k) plan as of April 10, 2012
- \$200,000.00	Minus value as of date of marriage (Christopher's separate property)
- \$ 29,479.40	Minus total contributions by Christopher from October 6, 2008 through March 30, 2012 (Christopher's separate property)
- \$ 18,177.63	Minus total of Apache match from October 6, 2008 through March 30, 2012 (Christopher's separate property)
- \$ 19,674.11	Minus annual retirement contribution from October 6, 2008 through March 30, 2012 (Christopher's separate property)
\$608,691.10	Community property interest in 401(k) plan
\$304,345.55	Each spouse's community property interest in 401(k) plan

The trial court's valuations are reasonably supported by the record, and although we may have employed a different methodology were we sitting as the trial court, we cannot conclude that the trial court's use of this methodology constituted an abuse of its discretion. The calculation takes into account the increase in value of Christopher's separate property, the

¹ The natural and civil fruits of the separate property of a spouse, minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases are community property. La. Civ. Code art. 2339.

community property, including dividends generated by community and separate stock during the community, as well as separate property acquired after the community, and arrives at an equitable division. As Justice Johnson observed in her dissent in *Blanchard, supra*, “[N]o one method of valuation can accomplish justice in every case. Therefore, it is essential that trial courts are allowed flexibility, and are able to take advantage of reasonable alternatives and adjustments in order to accomplish an equal distribution in an equitable manner.”²

We find that the Apache 401(k) plan at issue particularly lends itself to the methodology employed by the trial court. The 401(k) plan description sets forth that amounts payable to an alternate payee pursuant to a qualified domestic relations order “will be paid to the alternate payee in a lump sum as soon as practical.” Thus, Melinda’s share would be distributed to her irrespective of Christopher’s ability to receive his benefits under the plan.

Valuation and Allocation of Stock Appreciation Plan

As additional compensation, Apache offers its employees a Stock Appreciation Plan (SAP). Jayne Percy, Apache’s stock plan administrator, testified in her deposition that the only outstanding SAP grant reflected as one of Christopher’s net benefits was valued at \$14,685.00. However, that value includes the assumption that Apache stock will reach a \$216.00 per share value, by a date set forth in the SAP, and would sustain that price for a requisite time period, prior to the SAP expiration date of December 31, 2012. The market closing price on April 10, 2012, was \$93.50 per share. At

² We note too, that the theory advanced by Christopher would also require application of this principle in that he does not advance a straightforward application of the *Sims* fixed percentage method to the 401(k) plan. Rather, he would have the court mathematically determine the number of shares of stock that are community property, based on Apache statements reflecting cash value and stock market prices, and award each party one-half of the total shares of community stock. He would then have the court apply the *Sims* formula to calculate Melinda’s share of the increased value of his separate shares of stock.

that time, the stock had not met the target price and could not be cashed in. The \$14,685.00 value reflects what one would have if they were 100% vested and could cash it in. Christopher testified that he believed the SAP was worthless because the stocks had not reached the target amount.

The trial court valued the SAP at \$14,685.00 on the date of trial and allocated the entire amount to Christopher in its community property calculation. Christopher argues that this was inequitable as the value was purely speculative. Additionally, he argues that a more equitable and just solution would have been to allocate a 50% interest in the SAP to each party, as the trial court did with other assets. Christopher explains that if the SAP terms were met, each party would receive one half of the share of the stock and their value, but if the SAP terms were not met, there would be no gain or loss for either party.

The deposition testimony of Jayne Percy establishes that the \$14,685.00 value was speculative. We agree that equity demands that each party be allocated a 50% interest in the SAP value, such that each would be entitled to one half of the shares' value if the SAP terms were met before the expiration date of December 31, 2012, and if the SAP expired on that date, neither party would receive or lose any value. This allocation is included in our recalculation of the equalization payment owed by Christopher to Melinda. Since the critical date of December 31, 2012 has now passed, on remand the trial court will be able to determine whether the terms of the SAP were met or the SAP expired, and appropriately implement the community property allocation.

Valuation of the Brokerage Account

The Apache records admitted at trial reflect that Christopher has an individual brokerage account, which on August 19, 2011, had a balance of \$23,914.99. The trial court divided that amount in half, allocating \$11,957.49 to each party. Christopher contends the trial court erred in valuing the brokerage account using the 2011 balance, as opposed to the value of the account on the date the community terminated. Melinda argues that the valuation was correct because she was entitled to one half of the account balance on the date the community terminated plus any appreciation attributable to that interest until the date of the partition trial. Additionally, she points out that there is no evidence of the account's value on the date the community terminated, which information was available only to Christopher.

It is undisputed that community funds were retained in the brokerage account. Considering the sole evidence regarding that amount reflected a value of \$23,914.99, we find no error in the trial court's valuation and division of that asset. *See, Razzaghe-Ashrafi v. Razzaghe-Ashrafi*, 558 So. 2d 1368, 1371 (La. App. 3 Cir. 1990) (finding no error in valuing a community asset as of a date other than the date of trial given delays in the matter and the limited evidence produced).

Furniture and Furnishings

The trial court allocated to Christopher a value of \$5,000.00 for household furniture. Christopher contends this was error because Melinda testified at trial that she was withdrawing her claim for that value. The record reflects that Melinda did testify that she was withdrawing the claim because she and her attorney had determined "it was before we were married." Accordingly, this amount should be deleted from the calculation.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court is amended to reflect the following community property allocations:

<u>CHRISTOPHER</u>		<u>MELINDA</u>	
\$304,345.55	401(k)	\$304,345.55	401(k)
\$ 25,595.02	Retirement	\$ 25,595.02	Retirement
\$ 11,957.49	Brokerage Account	\$ 11,957.49	Brokerage Account
\$ 7,255.00	Stock Appreciation	\$ 7,255.00	Stock Appreciation
\$ 31,750.00	Burnett Loan	\$ 31,750.00	Burnett Loan
\$ 3,000.00	Truck	\$ 1,500.00	Car
\$383,903.06	TOTAL	\$382,403.06	TOTAL

The difference in the amount of community property allocated to the parties is \$1,500.00. The judgment is further amended to reflect that Christopher owes Melinda an equalization payment of \$750.00. This matter is remanded to the trial court for implementation of the partition as set forth herein. Appeal costs are assessed equally to Christopher LeBlanc and Melinda LeBlanc.

**APPEAL CONVERTED TO APPLICATION FOR
SUPERVISORY WRITS; WRIT GRANTED; JUDGMENT
AMENDED; CASE REMANDED.**