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NEWS RELEASE # 79

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **7th day of December, 2007**, are as follows:

BY CALOGERO, C.J.:

2006-C -2191 C/W 2006-C -2204 LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM (LASERS) vs. JANE MCWILLIAMS, JOELLE MCWILLIAMS, AND DIANNE (MCWILLIAMS)SANDERS
(Parish of E. Baton Rouge)
Accordingly, we affirm the portion of the court of appeal judgment finding that Dianne is not entitled to receive any portion of LASERS survivors' benefits in this case. We reverse the portion of the court of appeal judgment ordering LASERS to refund half the accumulated contributions attributable to Dianne's community with Joel. The case is remanded to the district court for release to the qualified survivors, Jane and Joelle, of the funds LASERS has placed into the court registry.
AFFIRMED IN PART, REVERSED IN PART, REMANDED.

CALOGERO, C.J., assigns additional concurring reasons.
KIMBALL, J., assigns additional concurring reasons.
JOHNSON, J., dissents and assigns reasons.
VICTORY, J., dissents in part, concurs in part and assigns reasons.
KNOLL, J., dissents.

12/07/07

SUPREME COURT OF LOUISIANA

No. 2006-C-2191

consolidated with

No. 2006-C-2204

LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM (LASERS)

VERSUS

JANE McWILLIAMS, JOELLE McWILLIAMS, AND DIANNE (McWILLIAMS) SANDERS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

CALOGERO, Chief Justice

Resolution of the difficult issues presented in this community property case requires that this court clarify some of its previous pronouncements concerning a former spouse's interest in a pension plan[1] to which that former spouse made contributions while involved in a community property regime with a plan member.[2] Specifically, we find it necessary to distinguish between the types of pension plans, as well as the various types of benefits paid by those pension plans, in order to develop more specific, efficient, and accurate rules for determining whether a former spouse is entitled to a portion of a specific benefit provided by a specific plan, or perhaps to some other type of recompense for his or her community contributions to the plan. Ultimately, we believe, our decision today will provide guidance to

[1] Purely for the sake of convenience and consistency, we will use the term "pension plan" throughout this opinion to refer to plans, systems, and/or contractual arrangements between employers and employees whereby the employer provides post-employment income to the employees and/or their designees.

[2] These rules are set forth in *T.L. James v. Montgomery*, 308 So. 2d 481 (La. 1975); *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *Hare v. Hodgkins*, 586 So. 2d 118 (La. 1991), and their progeny.

divorcing spouses, practitioners, and lower courts concerning the proper method for protecting community property interests in pension plans.

Specifically, this case involves a concursus proceeding initiated by the Louisiana State Employees Retirement System ("LASERS"), which administers a public pension plan, seeking guidance concerning the proper resolution of a claim by the former spouse of a LASERS' member. When the member died before retirement (and thus before he and/or his former or then-current spouse had received any regular retirement benefits), the claimant sought a portion of LASERS survivors' benefits, which are governed by statute. Whether the claimant is entitled to receive a portion of the statutory survivors' benefits being distributed by LASERS is the issue we must decide.

La. Rev. Stat. 11:471, the general statute that specifies those persons qualified to receive LASERS survivors' benefits, includes only three categories of qualified survivors: (1) surviving minor children, (2) surviving handicapped children, and (3) surviving spouses. Further, the word "spouse" is defined by the controlling statute as "a person who is legally married to a member of this system." La. Rev. Stat. 11:403(26). Thus, former spouses unquestionably are not qualified recipients of LASERS survivors' benefits under the applicable statute. Despite the fact that she clearly is not a qualified recipient under the applicable statute, the claimant here asserts that she is nonetheless entitled to receive a portion of the LASERS survivors' benefits at issue for two reasons. First, the claimant points to this court's previous pronouncements concerning a former spouse's "interest" in a member's pension plan and particularly this court's decision in *Johnson v. Wetherspoon*, in which a majority of the court as it was constituted in 1997 held that a former spouse in community with a member of the Teacher's Retirement System of Louisiana ("TRSLA"), a different public pension plan than the one at issue here, was entitled to receive a portion of

statutory survivors' benefits under that plan. 96-0744 (La. 5/20/97), 694 So. 2d 203.[3] Second, the claimant relies on the language of the partition judgment that memorialized her settlement of the community property issues with the member in this case. That judgment expressly recognized the claimant's interest in the member's LASERS pension plan and provided a formula for calculating that interest "when and if [the member] retires, terminates employment, or dies."

The district court in this case denied the former spouse's claim for a portion of the survivors' benefits. The court of appeal agreed that the former spouse was not entitled to receive survivors' benefits, but nevertheless reversed the district court judgment in part and ordered LASERS to refund a community portion of the relevant accumulated contributions to the estate of the former spouse, who had herself died while the appeal was pending. *La. State Employees' Ret. Sys. v. McWilliams*, 05-0938 (La. App. 1 Cir. 6/9/06), 938 So. 2d 782.

For the reasons set forth below, we agree with both lower courts that the LASERS member's former spouse is not entitled to receive any survivors' benefits. We find that the only persons who may receive LASERS survivors' benefits are those listed in the applicable governing statute, La. Rev. Stat. 11:471–i.e., surviving minor children, surviving handicapped children, and surviving spouses. Contrary to her contentions, neither the "jurisprudence" nor the community property judgment justify the creation of a new category of "survivors" not included in the applicable statutory language. We thus affirm the portion of the court of appeal judgment denying the former spouse's claim against LASERS for survivors' benefits.

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[3] Calogero, C.J., and Watson, J., dissenting. Current court members who did not participate in the *Wetherspoon* decision were Knoll, Traylor, and Weimer, JJ.

However, we find that the court of appeal erred when it ordered LASERS to refund a portion of the accumulated contributions to the estate of the deceased member's former spouse while also paying survivors' benefits to the member's qualified survivors. Thus, we reverse that portion of the court of appeal judgment.

FACTS AND PROCEDURAL HISTORY

Joel McWilliams and Dianne Ard were married on April 26, 1969. On January 10, 1972, during the existence of the community regime between Joel and Dianne, Joel became employed by the State of Louisiana with the Department of Transportation and Development ("DOTD"). The community property regime between Joel and Dianne ended on June 15, 1987, and Joel and Dianne were divorced on October 12, 1987. Their community property was later partitioned by stipulation of the parties and memorialized in a December 15, 1989, judgment issued by Louisiana's 21st Judicial District Court. That judgment recognized Dianne's interest in Joel's U.S. Army Reserve Retirement plan and in Joel's LASERS retirement plan, as to which there was specified the formula for calculating Dianne's interest [consistent with the formula set forth in *Sims v. Sims*, 358 So. 2d 919 (La. 1978)] if Joel were to retire, terminate employment, or die. The same judgment recognized Joel's interest in Dianne's retirement plan with the Diocese of Baton Rouge Retirement System and provided the formula for calculating Joel's interest if Dianne were to retire, terminate employment, or die.[4] On May 15, 1993, Joel married Jane McMahon. On May 24, 2003, while still employed by DOTD, Joel died.

[4] On August 24, 1998, the community property partition judgment was amended "to include the numerator in the *Sims* formula for both parties' interest in each other's respective retirement plan." According to that judgment, the numerator (i.e., "the portion of retirement-pension plan attributable to creditable service during the community") was "from 4/26/69 to 06-15/87 (217 months, 20 days)" for all three retirement plans. However, the parties later stipulated that the "numerator" contained in the amended judgment was incorrect regarding Dianne's interest in Joel's LASERS retirement plan when it recited that it commenced on the date Joel and Dianne married, April 26, 1969, rather than the date Joel began employment with the State DOTD, January 10, 1972.

Following Joel's death, LASERS Applications for Survivors' Benefits were filed by three parties: (1) Joel's second wife, Jane, to whom he had been legally married for more than ten years at the time of his death; (2) Joel's daughter with Dianne, namely Joelle; and (3) Joel's first wife, Dianne, who had also remarried and whose married name by then was "Sanders." As revealed by the LASERS file included in the record of this case, the filing of these applications was followed by extensive discussions regarding Dianne's right to receive survivors' benefits. Citing the fact that a former spouse does not qualify as a "surviving spouse" under La. Rev. Stat. 11:471, Jane argued that Dianne was not entitled to receive any portion of the survivors' benefits. LASERS responded by invoking this concursus proceeding in the 19th Judicial District Court, and by placing the amount claimed by Dianne into the registry of the court.

At the hearing, the parties stipulated:

> LASERS has done calculations and computations of what Dianne Sanders' Interest would be and the total payments. And that would be 24.60 percent. And also they provided us information showing that those payments would convert to $1,144.92 per month.

The parties further stipulated that

> the community contributions during the community years to the plan totaled just under twenty-six thousand dollars, and that is $25,963.62.

The record indicates that LASERS, using these stipulations, placed 24.60 percent of the survivors' benefits (i.e., the amount claimed by Dianne) into the registry of the court, then distributed the remainder of the survivors' benefits (the undisputed percentage) to Jane and Joelle in accordance with the percentages set forth in the

LASERS Member Handbook.[5] Thus, the benefits distributed to both Jane and Joelle were reduced by the 24.60 percent that represented Dianne's claimed entitlement.

After receiving exhibits and stipulations of the parties and hearing arguments of counsel, the district court ruled that the formula set forth by this court in *Sims v. Sims*, 358 So. 2d 919 (La. 1978), applies only to *retirement* benefits, not to *survivors'* benefits under LASERS. Citing La. Rev. Stat. 11:471,[6]

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[5] The LASERS Member Handbook states:

> Survivor benefits cannot exceed 75% of members final average compensation. If there is a benefit for a surviving spouse and qualified surviving children, the surviving spouse receives one-third of the total benefit payable, and the children receive two-thirds of the total benefits. If there is more than one surviving child, the children's portion is divided equally among all children.

[6] La. Rev. Stat. 11:471, relative to "Survivors' benefits" under LASERS, provides:

> A. Surviving minor children. Benefits for the surviving children of members shall be calculated as set forth in this Section. The benefit or benefits shall be based on the average compensation of the member. A benefit shall be payable to surviving unmarried minor children of a member who had at least five years of creditable service, at least two years of which was earned immediately prior to death, and was in state service at the time of death or had twenty years or more of service credit regardless of when earned and whether the deceased member was in the state service at the time of death.
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> B. Surviving handicapped children. (1) The surviving totally physically handicapped or mentally disabled child or children of a deceased member, whether under or over the age of eighteen years, shall be entitled to the same benefits, payable in the same manner, as are provided by this Section for minor children, if the child was totally physically handicapped or mentally disabled at the time of the death of the member and is dependent upon the surviving spouse or other legal guardian.
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> (2) The applicant shall provide adequate proof of handicap or mental disability of such surviving child or children and shall notify the board of any subsequent changes in the child's condition to such an extent that the child is no longer dependent upon the surviving spouse or legal guardian and any changes in the assistance being received from other state agencies. The board may require a certified statement of the child's eligibility status at the end of each calendar year.
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> C. Surviving spouse. A benefit shall be payable to the surviving spouse of a member who had at least ten years of creditable service, at least two years of which was earned immediately prior to death, and was in state service at the time of death or had twenty years or more of service credit regardless of when earned and whether the deceased member was in the state service at the time of death. The surviving spouse must have been married to the deceased member for at least one year prior to the death of the member. The benefit shall be based on the average compensation of the member as set forth in Subsection D of this Section.
>
> D. Benefit. Surviving spouses, minor children, handicapped children, and mentally disabled children who qualify under this Section shall be eligible for benefits as follows:

the district court found that the funds deposited into the registry of the court were survivors' benefits, not retirement benefits, that survivors' benefits payable by LASERS were not subject to a *Sims* formula proration in favor of a former spouse, and that the qualified survivors under LASERS, Jane and Joelle, were entitled to receive all of the survivors' benefits, as determined by law.[7]

Dianne appealed the judgment of the district court, but she died while the appeal was pending, and her estate, represented by her second husband, Richard Sanders, was substituted as a party in these proceedings. The court of appeal agreed with the district court that a former spouse in community, like Dianne, is not entitled to receive LASERS survivors' benefits. *McWilliams*, 05-0938, 938 So. 2d 782. In

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> (1) A minor or handicapped child, or mentally disabled child, when there is no surviving spouse, shall receive the greater of seventy-five percent of the deceased member's average compensation or three hundred dollars.
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> (2) A surviving spouse, with no surviving minor or handicapped child, or mentally disabled child, shall receive the greater of fifty percent of the deceased member's average compensation or two hundred dollars.
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> (3) A surviving spouse who has custody of a minor or handicapped child, or mentally disabled child shall receive the greater of twenty-five percent of the deceased member's average compensation or one hundred dollars, and the surviving minor or handicapped child shall receive the greater of fifty percent of the deceased member's average compensation or two hundred dollars.
>
> (4) A surviving minor or handicapped child or mentally disabled child not in the custody of a surviving spouse shall receive the greater of fifty percent of the deceased member's average compensation or three hundred dollars, and the surviving spouse shall receive the greater of twenty-five percent of the deceased member's average compensation or one hundred dollars.
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> E. Limitations and application. (1) In the event the deceased member is survived by more than one minor child, handicapped child, or mentally disabled child, such children shall share equally in the benefit.
>
> (2) In no event shall the survivors of a member receive benefits which, in total, exceed seventy-five percent of the deceased member's average monthly compensation.
>
> (3) Qualifying survivor's benefits are payable upon application therefor and become effective as of the day following the death of the member.

[7] The 19th Judicial District Court judge further stated in oral reasons for judgment that it (the 19th Judicial District Court) was not the proper court to interpret the 1989 judgment and the 1998 amended judgment of the 21st Judicial District Court.

support of this conclusion, the court of appeal noted that La. Rev. Stat. 11:471 lists three and only three categories of individuals who may qualify for survivors' benefits: (1) surviving minor children, (2) surviving handicapped children, and (3) surviving spouses. *Id.* at 4, 938 So. 2d at 785. The First Circuit Court of Appeal also cited its previous decision in *Bonfanti v. Percy*, which had held that LASERS survivors' benefits are intended to ensure that family members are not left destitute when a member dies, and thus are not intended by the Louisiana Legislature to be given to any individual other than those family members specifically designated by the governing statutes. *Id.* at 5, 938 So. 2d at 785, citing *Bonfanti v. Percy,* 95-1189 (La. App. 1 Cir. 4/6/96), 672 So. 2d 415,

Despite finding that Dianne was not entitled to receive any of the survivors' benefits, the court of appeal sought to fashion an equitable remedy to protect Dianne's community property interest that had been recognized by the 21st Judicial District Court judgment in 1989. In so doing, the court of appeal noted that La. Rev. Stat. 11:475[8] guarantees a return of accumulated contributions, in the form of either monthly benefits or a lump-sum refund. *Id.* Because the statutes governing LASERS guarantee at least the return of an amount equal to the total amount of accumulated contributions, "a former spouse in community is entitled to recoup her share of the accumulated contributions attributable to the community," the court of appeal concluded. *Id.* The court of appeal therefore held that Dianne is entitled to recoup <u>from LASERS</u> fifty percent of the amount stipulated by the parties to be the

[8] La. Rev. Stat. 11:475 provides:

> The retirement system shall pay a lump sum refund equal to the difference between the total monthly survivor benefits paid and the total accumulated contributions of the member, to the beneficiaries or the estate of the beneficiaries if the total monthly benefits are not equal to the accumulated contributions of the member. This refund shall not be paid until all eligible monthly benefits have ceased.

accumulated contributions attributable to the community, which was $25,963.62. *Id.* Thus, the court of appeal found that a lump-sum refund of $12,981.81 was due Dianne's estate. It ordered LASERS to pay that amount to her estate representative and widower, Mr. Sanders. *Id.* We granted writ applications filed by LASERS and Mr. Sanders. *La. State Employees' Ret. Sys. v. McWilliams*, 06-2191, 06-2204 (La. 2/2/07), 948 So. 2d 183.

Our opinion will address in turn each of Dianne's arguments that she is entitled to a portion of the LASERS survivors' benefits.[9] First, we will address whether she is entitled to receive a portion of the survivors' benefits under the Louisiana caselaw relative to a former spouse's right to recognition of an interest in a member's pension plan. Second, we will address whether Dianne is entitled to receive a portion of the LASERS survivors' benefits because of the language of the 1989 community property judgment issued by the 21st Judicial District Court that memorialized Dianne's settlement of her community property issues with Joel. Finally, we will address the propriety of the court of appeal's attempt to fashion a remedy to protect Dianne's community property interest by ordering LASERS to refund to Dianne's estate half of the accumulated contributions attributable to her community property regime with Joel.

Significantly, this case involves a former spouse's claim to a very specific type of benefit–i.e., *statutory* pre-retirement survivors' benefits being paid by a *public* pension plan. As we have indicated, distinguishing between the types of pension plans and the various types of benefits provided by those plans will, we believe, allow us more properly to focus our discussion on the issues in this case. For our purposes,

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[9] Of course, since Dianne died while the appeal was pending, she did not make these arguments in this court directly. However, the brief filed on her behalf by her estate representative, Mr. Sanders, makes essentially the same arguments Dianne raised in the district court and court of appeal. To avoid confusion, the remainder of this opinion continues to refer to Dianne's estate as "Dianne."

the two major categories of pension plans are *public* pension plans and *private* pension plans.[10] Reduced to the simplest level, a public pension plan is one that is administered by a government entity, while a private pension plan is one that is administered by a private business. LASERS is, of course, a public pension plan.

The difference between survivors' benefits and regular retirement benefits have been described as follows:

> A survivor's benefit is a benefit paid when the employee dies while still actively employed. Although administered by the pension authority, it differs from a pension because the "pension" ceases to exist when the employee dies and is only payable upon retirement. A joint and survivor's annuity also differs from a survivor's benefit, being merely an election of how the pension will be paid if the employee dies after retiring. The joint and survivor's annuity election extends the pension to the designated survivor after the death of the employee. **Thus, both a pension and a joint and survivor's annuity are retirement benefits**.
>
> **A survivor's benefit is not.** To collect a survivor's benefit the employee must not have retired. Accordingly, the survivor's benefit presents a more difficult problem than either ordinary pension benefits or a joint and survivor's annuity. Both a pension and a joint and survivor's annuity fall directly within the scope of "pension" . . . .

Juston Michael O'Brien, Note, Johnson v. Wetherspoon: Survivor's Benefits, Whose Money Is It Anyway?, 59 La. L. Rev. 637, 638 (1998-1999) (emphasis added). Specifically, O'Brien was describing the differences between the two types of benefits under TRSLA. LASERS, too, is similar in these respects.

Thus, LASERS provides two different types of benefits under different circumstances:[11] regular *retirement* benefits, and *survivors'* benefits. *Retirement* benefits may be further divided into two groups: maximum retirement benefits, and reduced retirement benefits, followed by an annuity for a person "nominated" by the

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[10] The distinction between public pension plans and private pension plans is significant, as further explained *infra*, because federal law governs private pension plans, but not public pension plans.

[11] LASERS also pays "disability retirement benefits" under the circumstances specified in La. Rev. Stat. 11:461 *et seq.*, but those types of benefits are not pertinent to our discussion here.

member.[12] When a member retires, he or she must be eligible under La. Rev. Stat. 11:441 *et seq.* to receive regular *retirement* benefits. The member, at the time of retirement, may choose to receive the maximum regular *retirement* benefit for the remainder of his life, in which case, his benefits are calculated according to the formula set forth in La. Rev. Stat.11:444. However, if the member wishes to provide benefits for another person (e.g., a current spouse) following his death, he may elect, in lieu of a maximum retirement benefit for his lifetime, one of the options set forth in La. Rev. Stat. 11:446. That statute provides for a reduced benefit for the employee's lifetime, and a lifetime annuity for the person he "nominates" to receive compensation following his death.

Both of the above-described types of payments are regular *retirement benefits*. When the member chooses a reduced retirement benefit followed by an annuity, LASERS uses actuarial methods to calculate both the member's reduced retirement benefit and the annuity for the member's designee. There is also employed for this calculation the ages of the two recipients and their respective life expectancies. Further, a former spouse of a LASERS member may be the person "nominated" to receive the "survivor annuity" following the member's death, especially if the member so agrees in a community property settlement. See *Teachers' Ret. Sys. of La. v. Gonzalez*, 04-0602 (La. App. 5 Cir. 12/14/04), 892 So. 2d 41, for an example of such an agreement. If the employee retires before he dies, **no *survivors'* benefits pursuant to La. Rev. Stat. 11:471 *et seq.* are payable by LASERS to anyone**.

[12] La. Rev. Stat. 11:446(F) refers to at least one of the available options as a "joint and survivor annuity," which is a term used in ERISA and the REA to describe a retirement benefit. La. Rev. Stat. 11:446(F), added in 2004, also requires that the designated beneficiary for a joint and survivor annuity to be the member's current spouse, unless the spouse consents in writing to the contrary. *See also* La. Rev. Stat. 11:447(B)(2).

On the other hand, if the employee dies before he retires, as Joel did in this case, **no *retirement* benefits are payable by LASERS to any person.** Instead, the statutes governing LASERS provide for two options. If the employee has qualified survivors, as defined by La. Rev. Stat. 11:471, those persons are entitled to receive *survivors'* benefits. However, if the employee has no qualified survivors at the time of his or her death, LASERS' responsibility is limited to the return of accumulated contributions, pursuant to La. Rev. Stat. 11:475, 476. Unlike the member's right at retirement to designate a person to receive an annuity after his death, the statutes governing LASERS survivors' benefits do not allow a member to designate anyone to be the recipient of survivors' benefits, be it his spouse, child, or any other person. La. Rev. Stat. 11:471 governs, and specifies who are survivors and what they are entitled to receive.

EFFECT OF PREVIOUS JURISPRUDENCE ON FORMER SPOUSE'S RIGHT TO STATUTORY SURVIVORS' BENEFITS

The jurisprudential principle on which Dianne relies in this case was originally set forth by this court in *Sims* as follows:

> A spouse's right to receive an annuity, lump-sum benefit, or other benefits payable by a retirement plan is, to the extent attributable to his employment during the community, . . . an asset of the community. Further, the community interest is not limited to the refund of community funds paid, usually (as here) greatly less in monetary value than the pension rights acquired as a result of the employment of one spouse of the community.
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> Accordingly, . . . our courts have . . . held that, at the dissolution of the community, the non-employed spouse is entitled to judgment recognizing that spouse's interest in proceeds from a retirement annuity, or profit-sharing plan or contract, if and 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.

358 So. 2d at 922 (emphasis added). *See also T.L. James v. Montgomery*, 308 So. 2d 481 (La. 1975), the forerunner to the *Sims* case. The *Sims* case went on to set forth

the computation formula for determining "the wife's interest in each installment ultimately paid by the government [i.e., the husband's employer] to the husband or his designee." *Id.* at 924. One commentator noted that the rules set forth in *T.L. James* and *Sims* quickly became "enshrined as a pension doctrine," such that "[a]lmost all subsequent decisions . . . relied on *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." Elizabeth Alford Beskin, Comment, Retirement Equity Inaction: Division of Pension Benefits Upon Divorce in Louisiana, 48 La. L. Rev. 677, 678 (1987-1988).

Nevertheless, during the two decades immediately following this court's issuance of its decisions in *T.L. James* and *Sims*, the "pension doctrine" "enshrined" therein was **not** followed in at least one category of cases. When the case involved a claim by a former spouse seeking a portion of *statutory survivors'* benefits, Louisiana courts traditionally found that the *T.L. James/Sims* rule did not apply, as further explained below.

Significantly, the first case to consider whether the jurisprudential rule set forth in *T.L. James* and *Sims* applied to a former spouse's claim to a portion of statutory survivors' benefits was *In re Succession of Sims*, 464 So. 2d 991 (La. App. 1st Cir. 1985), *writ denied*, 467 So.2d 532 (La. 1985). The case is significant for a number of reasons, not the least of which is the fact that it presents the issue of a former spouse's entitlement to statutory survivors' benefits in a case that involved the exact same former spouses that were involved in the *Sims* decision that yielded the formula for dividing retirement benefits. After this court issued the original *Sims* decision, Mr. Sims died before he retired and before he applied for retirement benefits. Mr. Sims' wife at the time of his death received federal statutory survivors' benefits, and the

former spouse sought a portion of those benefits, arguing that she was entitled a portion of the survivors' benefits under this court's decision in *Sims*.

However, the Louisiana First Circuit Court of Appeal denied the former spouse's claim for a portion of the statutory survivors' benefits, stating as follows:

> A survivor's annuity is not paid to the employee-member. By definition the term "survivor annuities" is excluded from the term "retirement benefits". 5 C.F.R. § 831.1702. To sustain plaintiff-appellant's contention that the retirement benefits which were adjudicated by the supreme court in *Sims v. Sims*, *supra*, are "the same" as the survivor annuity provided for by 5 U.S.C.A. § 8341(d), the apportionment of which the object of the case at Bar, **would necessitate our ignoring federal statutes and regulations which distinguish the two benefits.**

Id. at 996 (emphasis added). Thus, in the follow-up case to *Sims*, involving the same couple (Winston and Marcella Sims), the court found that the jurisprudential rule established by the earlier *Sims* case does not operate to entitle a former spouse to a community portion of statutory survivors' benefits in the face of federal statutory language to the contrary. The decision of the Louisiana First Circuit Court of Appeal was based on its finding that the earlier *Sims* decision applied only to retirement benefits, not to survivors' benefits. *Id.*

Following *Succession of Sims*, several Louisiana courts of appeal held that former spouses are not entitled to a portion of statutory survivors' benefits under the rules set forth in *T.L. James* and *Sims*.[13] For example, the court found in *Bendler v. Marshall*, that the only person entitled to a federal statutory survivors' benefit was the designated survivor, the "surviving wife." 513 So. 2d 369, 371 (La. App. 4 Cir. 1987). Likewise, in *Bonfanti*, the court held that LASERS survivors' benefits were

[13] A similar result was reached in *Hebert v. Hughes Tool Co.*, 535 So. 2d 42 (La. App. 3d Cir. 1988), which involved survivors' benefits under a private pension plan. The case is interesting, even though it involved a private plan, because the former spouse had been cohabitating with the member at the time of his death. Nevertheless, because the applicable plan provisions restricted the payment of survivors' benefits to a "qualified spouse," defined as "one who is married to the decedent for at least one (1) year prior to his death," the court found the former spouse was not entitled to receive the benefits. *Id.* at 44.

not community assets for probate purposes, and that therefore a qualified surviving spouse receiving those benefits was not required to account to the community for the benefits. 95-1189, 672 So. 2d 415. In fact, our research revealed no cases decided prior to 1997 in which a Louisiana court found that a former spouse was entitled to receive a portion of *statutory survivors* benefits.[14] Rather, Louisiana courts consistently found that the *T.L. James/Sims* rule did not apply to statutory survivors' benefits because such benefits could be paid only to qualified survivors under the applicable statutes.

However, in 1997, this court reached a different result in *Wetherspoon*, which involved a former spouse's claim to a community portion of statutory survivors' benefits being paid to the member's qualified surviving spouse by TRSLA. 96-0744, 694 So. 2d 203. Similar to the facts of this case, the statute that governs TRSLA survivors' benefits, La. Rev. Stat. 11:762, listed only three categories of qualified survivors: surviving spouse with minor children, surviving minor children alone, or the surviving spouse alone. 96-0744, 694 So. 2d at 209. Nevertheless, this court concluded in *Wetherspoon* that "the legislature did not intend to exempt survivor benefits payable by TRSLA from the claims of a former spouse in community," and ordered the surviving spouse to account to the former spouse for the "community portion" of the survivors' benefits. *Id.*, 694 So. 2d at 211. As we have shown, *Wetherspoon* represented a significant departure from Louisiana's previous jurisprudence on this issue. In this case, Dianne cites *Wetherspoon* in support of her

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[14] In *dicta*, the court in *Ordoyne v. Ordoyne*, stated its belief that "survivor benefits payable by [the member's] retirement plan, to the extent attributable to his employment during the community, are an asset of the community. 94-1766 (La. App. 1 Cir. 4/7/95), p.4, 653 So. 2d 839, 841. However, neither *Ordoyne* nor the cases cited by *Ordoyne* in support of this "belief" directly address the question of a former spouse's right to receive a portion of statutory survivors' benefits. *See Herrington v. Skinner*, 93-1556 (La. App. 3 Cir. 6/1/94), 640 So. 2d 748; *Chiappetta v. Vallot*, 596 So. 2d 849 (La. App. 4 Cir. 1992), *writ denied*, 606 So. 2d 522 (La. 1992). The issue in all three cases was whether a settlement agreement whereby a former spouse disposed of rights to a member's pension plan also disposed of rights to survivors' benefits.

claim that she is entitled to receive a "community portion" of the LASERS survivors' benefits at issue here.

We begin our discussion of this issue by noting that this case presents a classic civilian question relative to the proper weight to be given a previous case involving a similar issue in a situation in which applying and extending the jurisprudence to the facts of the particular case would require that we ignore the express language of a statutory provision that would otherwise unquestionably govern the issue before us. It is, of course, axiomatic that, if the *Wetherspoon* decision did not exist, this would be a simple case. This court would, as Louisiana courts consistently did in the cases prior to *Wetherspoon,* simply resort to classic civilian methodology, which we recently described as follows:

> [C]ivilian methodology and the civil code instruct that the sources of law are legislation and custom, and that legislation is the superior source of law. LSA-C.C. arts. 1, 3. Legislation, which is defined as the solemn expression of legislative will, LSA-C.C. art. 2, is to be interpreted according to the rules set forth in the Civil Code. Chief among those rules is the admonition in LSA- C. C. art. 9 that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."

Willis-Knighton Med. Ctr v. Caddo Shreveport Sales and Use Tax Com'n, 2004-0473, pp. 21-22 (La. 4/1/05), 903 So.2d 1071, 1085. Thus, absent *Wetherspoon*, this court would automatically apply the clear and unambiguous statutory language of La. Rev. Stat. 11:471 to find that Dianne is not entitled to any portion of the LASERS survivors' benefits at issue here. Thus, this case is complicated by the existence of the *Wetherspoon* decision, which found that a former spouse is entitled to a portion of statutory survivors' benefits. 96-0744, 694 So. 2d 203. Rather than simply applying the applicable statutory language and denying Dianne's claim for a portion of the LASERS survivors' benefits, we must first consider the impact of *Wetherspoon* on the issues presented by this case.

Legally and factually, some fairly significant differences exist between this case and *Wetherspoon*. For example, one of the primary stated reasons for the court's decision in *Wetherspoon* is found in this statement: "[T]he similarity in the method used to calculate retirement and survivors' benefits [under the TRSLA governing statutes] supports [the] conclusion that the two types of benefits [under TRSLA] should be treated synonymously when determining the interest in said benefits of a former spouse in community." *Id.*, 694 So. 2d at 207. However, a comparison of the statutes governing retirement benefits and survivors benefits under LASERS reveals that the calculation methods for retirement benefits set forth in the LASERS' governing statutes are quite different from LASERS calculation methods for survivors' benefits.[15] Further, the court expressly noted in *Wetherspoon* that "a survivor benefit payable under [the LASERS statutes] presents different and more complex problems than those at issue in the present case and [we] express no opinion as to how such benefits should be apportioned." *Id.*, fn. 5, 694 So. 2d at 206, fn. 5. Thus, we might here simply do a separate and distinct comparison of the statutes governing the two types of benefits under LASERS to determine whether retirement benefits and survivors' benefits are sufficiently similar that they should be treated synonynomously, an exercise that seems to be contemplated, if not encouraged, by *Wetherspoon*.

However, we find it unnecessary to engage in such an exercise because we have determined here that this court erred in *Wetherspoon* when it held that a former spouse is entitled to a portion of statutory survivors' benefits, despite the fact that former

[15] Pursuant to La. Rev. Stat. 11:444(A), relative to regular retirement benefits, LASERS members are generally entitled to receive "a maximum retirement allowance equal to two and one-half percent of average compensation . . .for every year of creditable service, plus three hundred dollars." However, pursuant to La. Rev. Stat. 11:471(D), survivors' benefits under LASERS, are calculated, not on the basis of the LASERS member's creditable service, but as a straight percentage of the deceased member's average compensation.

spouses are not included in the categories of qualified survivors listed in the applicable statutes governing the public pension plan paying the benefits at issue. Civilian methodology demands that the statutory language, which is the supreme source of law, be applied without resort to jurisprudential interpretation in this area of the law, which is expressly governed by statute. Thus, determination of whether a former spouse is entitled to a portion of statutory survivors' benefits must depend on whether former spouses are among the categories of qualified survivors in the applicable governing statutes. As we have already noted, former spouses are not among the categories of qualified survivors for LASERS survivors' benefits, just as they are not among the categories of qualified survivors for TRSLA benefits.

Our decision to this effect is guided, not only by civilian methodology, but by our consideration of the legal environment in which we are making this decision. In fact, we believe that one of the primary reasons the *Wetherspoon* court erred is because it did not consider the changes in the legal environment that had occurred between 1978, when *Sims* was decided, and 1997, when the *Wetherspoon* decision was issued. Instead, the *Sims* rule was applied in *Wetherspoon* as though it were the only possible avenue for properly protecting a former spouse's community property rights in a member's pension plan. Perhaps the majority in *Wetherspoon* believed that the *Sims* decision set forth the only valid avenue for protecting those rights, but that was not the case then and is especially not the case now, as further explained below.

At the time of the *Sims* decision, Louisiana's statutory scheme for partitioning community property "precluded judicial partition of unmatured pension benefits" because the Civil Code articles that regulated partition in kind "prevented an allocation of different assets in their entirety to one spouse to accomplish a partition." Katherine S. Spaht & Richard D. Moreno, 16 Louisiana Civil Law Treatise, *Matrimonial Regimes* § 7.29 (3d ed. 2007). *See also* Katherine S. Spaht, To Divide or Not to Divide the

Community Interest in an Unmature Pension: Present Cash Value Versus Fixed Percentage, 53 La. L. Rev. 753, 757 (1992-1993). Thus, the court was prevented by the applicable statutory language governing partitions of community property from simply awarding the pension plan to Mr. Sims and giving Mrs. Sims other community property equal in value[16] or perhaps devising another remedy to protect Mrs. Sims' interest.

However, several changes in the law have occurred in the years following this court's decision in *Sims* that have resulted in significant changes in the legal rules governing community property generally, and partition of community interests in pension plans specifically. The first major change was the enactment by the Louisiana Legislature of "a comprehensive partition statute for former community property adopting the 'aggregate' theory of partition." Spaht & Moreno, *supra*, § 7.29; Spaht, To Divide or Not to Divide, *supra* at 753. The changes began in 1981, with the adoption of La. Civ. Code art. 2369.1, which "authorized the judge to partition in kind property of the community 'by the allocation of assets and liabilities of equal net value to each spouse.'" Katherine Shaw Spaht, Matrimonial Regimes, Developments in the Law, 1981-1982, 43 La. L. Rev. 513, 513 (1982-1983). Under the "more flexible 'aggregate theory'" of partition, "different assets of equal value are allotted to each spouse, provided that the property each ultimately receives is of equal net value." *Id.* La. Civ. Code art. 2369.1, however, did not specify how assets were to be allocated between the two spouses. *Id.* at 514. 1982 La. Acts, No. 439, remedied that situation by repealing La. Civ. Code art. 2369.1 and adopting La. Rev. Stat. 9:2801. *Id.* La. Rev. Stat. 9:2801 has since 1982 provided "a detailed procedure for judicial partition of community property, an order of priority, and guidelines to be followed in the allocation of assets and liabilities." *Id.*

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[16] The *Sims* opinion alluded to this fact when it noted: "Due to the nature of the interest acquired by the community, . . . it is not merchantable or susceptible to partition by licitation." 358 So. 2d at 923.

Following the adoption of La. Rev. Stat. 9:2801 and the "aggregate theory" of community property partition, this court issued its decision in *Hare v. Hodgins*, 586 So. 2d 118 (La. 1991), in which the court "repudiated the lower courts' rigid adherence to the formula devised for division of pensions in *T.L. James* and *Sims*." *See* Spaht, Matrimonial Regimes, *supra* at 760. In fact, the court asserted: "We did not say that the fixed percentage method is the only technique that may be applied to divide pension benefits." *Hare*, 586 So. 2d at 126. The *Hare* court further stated:

> 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**.

Id. at 127 (emphasis added).

The second major change in the legal principles governing community property rights in pension plans occurred in 1984, when the United States Congress adopted the Retirement Equity Act ("REA"), amending the Employee Retirement Income Security Act of 1974 ("ERISA"). The passage of the REA accentuated the difference between public pension plans and private pension plans. Traditionally, perhaps the most important difference between a public pension plan and a private pension plan was that public pension plans were (and still are) governed by specific statutory provisions, while private pension plans were essentially creatures of contract between a private employer and its employees. This court's cases have not previously distinguished between the two types of pension plans, perhaps because the fact that the two types of plans are administered by different entities does not, in and of itself, seem to justify the

application of different rules. In fact, Louisiana community property law traditionally governed both categories of plans, as demonstrated by the fact that *T.L. James* involved a private pension plan, while *Sims* involved a public pension plan.

However, following the adoption of REA, the difference between public pension plans and private pension plans became important because REA regulates private pension plans, but does not regulate public pension plans. 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 . . . .

Pub. L. No. 98-397, 98 Stat. 1426 (1985). Further, the United States Supreme Court specifically found in *Boggs v. Boggs*, that the provisions of ERISA and REA preempt Louisiana community property law. 520 U.S. 839 (1997). Thus, at least since 1997, private pension plans are generally not subject to the principles announced by this court in *Sims*.

The third significant change in the legal principles governing community property rights in pension plans came in 2001, when the Louisiana Legislature adopted a new statute that addresses itself specifically to the classification of property distributed by pension plans, such as LASERS. That statute is La. Rev. Stat. 9:2801.1, which provides:

> When federal law or the provisions of a statutory pension or retirement plan, state or federal, preempt or preclude community classification of property that would have been classified as community property under the principles of the Civil Code, the spouse of the person entitled to such property shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property. Nevertheless, if such property consists of a spouse's right to receive social security benefits or the benefits themselves, then the court in its discretion may allocate or assign other community property equal in value to the other spouse.

La. Rev. Stat. 9:2801.1 was originally adopted as 2001 La. Acts, Act 642, and was amended by 2003 La. Acts, Act 1036. It is included in Title VI of the Louisiana Civil Code Ancillaries, entitled "Matrimonial Regimes," in Chapter 1, entitled "Partition of Community Property."

The above statute, in fairly affirmative language, recognizes that "the provisions of a statutory pension or retirement plan, state or federal" can and sometimes do preempt or preclude classification of property distributed by a public pension plan as community property, even if that property would otherwise have been classified as community property under the Civil Code. Arguably, two of the underlying premises of *Wetherspoon* are that Louisiana jurisprudence requires that benefits derived from pension systems be classified as community property, and that the Louisiana Legislature did not intend for any of the statutory provisions governing public pension systems to preclude classification of benefits as community property. However, the legislature recognized in a post-*Wetherspoon* statute, La. Rev. Stat. 9:2801.1, that some of the statutory provisions governing public pension plans are intended to preclude classification of benefits as community property, as is clear from the introductory phrase of the statute–i.e., **"when** . . . the provisions of a [state] statutory pension or retirement plan . . . preclude community classification of property . . . ."

In fact, La. Rev. Stat. 9:2801.1 suggests that determination of whether property distributed by a public pension plan may be classified as community property depends upon examination of applicable federal law and/or federal or state statutory provisions. In so doing, the statute shifts the focus away from any jurisprudential gloss that might arguably entitle a former spouse to a portion of certain benefits, and directs the attention back to the "supreme source of law" in a civilian jurisdiction–i.e., the statutory language. If applicable federal law preempts, or a Louisiana statutory provision precludes, classification of benefits as community property, the property cannot be

classified as community property simply because some jurisprudential principle appears to demand it. And, if the property cannot be classified as community property, the former spouse of a pension plan member is entitled only to allotment or assignment of "ownership of community property equal in value to such property prior to the division of the rest of the community property," and not to receive a portion of the benefits at issue.

Because of these three changes that have occurred since this court's *Sims* decision, a Louisiana court can no longer automatically apply the so-called *Sims* formula to calculate a "fixed percentage" of every benefit payable by a pension plan when faced with the necessity of determining how to protect a former spouse's interest in that plan. For one thing, when the case involves a private pension plan, the court's ability to protect a former spouse's community interest is severely restricted by the provisions of ERISA and REA, which preempt the application of Louisiana community property law to private pension plans. *See Boggs*, 520 U.S. 839. Further, as this court found in *Hare*, "because of the great variations in pension plans and communal situations no one method can accomplish justice in every case," and courts must be allowed "to take advantage of reasonable alternatives and adjustments in order to accomplish an equal distribution in an equitable manner in all situations" when Louisiana's community property principles do apply. 586 So. 2d at 127. In our view, this principle is particularly applicable when the selection of one remedy requires that governing statutory language be ignored, while the selection of a different, but equally valid, remedy honors the statutory language. Finally, the adoption of La. Rev. Stat. 9:2801.1 indicates that Louisiana governing statutes may preclude the classification as community property benefits distributed by Louisiana public pension plans.

Given the fact that this case involves LASERS survivors' benefits governed by specific state statutes, it is La. Rev. Stat. 9:2801.1 that guides our analysis of whether

Dianne is entitled to a community portion of the LASERS survivors' benefits at issue. Under the provisions of that statute, this court must examine the specific statutory language in order to determine whether it precludes classification of the survivors' benefits as community property. In legal contexts, the word "preclude" has been defined to mean "to prohibit or prevent from doing something." *Black's Law Dictionary* 612 (abr. ed. 1983). Thus, if the language of the statutes governing LASERS survivors' benefits prohibit or prevent the classification of these benefits as community property, then the property cannot be classified as community property and Dianne is not entitled to a community portion of property that is not part of her community. Instead, she would be entitled to some other type of property to protect her community interest, i.e. a monetary sum or some other identified community property that accounts for her community interest, in addition to her equal share of the remaining community property.

The relevant statutory provisions governing LASERS survivors' benefits are La. Rev. Stat. 11:471-478. As the court of appeal noted, La. Rev. Stat. 11:471, which is the general article governing survivors' benefits, specifies the categories of persons qualified to receive survivors' benefits as surviving minor children, surviving handicapped children, and surviving spouses. Further, for purposes of the statutes governing LASERS, the word "spouse" is expressly defined as "a person who is legally married to a member of this system." La. Rev. Stat. 11:403(26). Considered together, these provisions clearly restrict the persons to whom LASERS survivors' benefits may be distributed, to surviving minor and handicapped children and a surviving spouse (i.e., a person legally married to a LASERS member at the time of his or her death). Since former spouses are specifically not included in the categories of persons who may receive survivors' benefits, the statutory provisions governing LASERS preclude (i.e., prohibit or prevent) the classification of survivors' benefits under that system as

community property. Thus, pursuant to La. Rev. Stat. 9:2801.1, Dianne, the former spouse of a LASERS member who died before retirement, has no claim to LASERS survivors' benefits, although she may be entitled to property that compensates in some measure for her community investment in the member's LASERS plan.

That the statutory provisions governing survivors' benefits under LASERS preclude the classification of such benefits as community property is further evident from the provisions of La. Rev. Stat. 11:473.[17] "After termination of the community property regime, the provisions governing co-ownership apply to former community property. . . ." La. Civ. Code art. 2369.1. Thus, property that the legislature classifies as community property is subject to the joint control of the former spouses. However, when a LASERS member has no minor children, but has adult children of a prior marriage, La. Rev. Stat. 11:473 provides an option for dividing the survivors benefits, all of which would ordinarily go to the member's surviving spouse, between the member's current spouse and his or her adult children. Because La. Rev. Stat. 11:473 refers to adult children of a "prior marriage," the provision contemplates that a member

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[17] La. Rev. Stat. 11:473 provides, in pertinent part, as follows:

> A. When a married member has major children of both a current marriage and a prior marriage but no minor children of either marriage, the member and nonmember spouse may by written agreement jointly elect to direct the retirement system in writing to divide the benefit established in R.S. 11:471 between the **member's current spouse**, the children of the present marriage, and the children of the prior marriage, in any agreed proportions, provided the proportionate amounts are clearly set forth in the agreement. Either spouse may revoke the agreement by providing the system with a written revocation prior to the death of the member. The agreement shall be automatically revoked by operation of law in the event that the party spouses become divorced.
>
> B. When a married member has major children of a prior marriage and no minor children of the present marriage, that member may unilaterally elect to direct the retirement system in writing to divide the benefit established in R.S. 11:471 between **the member's current spouse** and the children of the prior marriage on a pro rata basis, provided there is no pending joint election made pursuant to Subsection A of this Section. The interest of the current spouse shall be based on the ratio of the length of the current marriage to the total state service of the member.
>
> (Emphasis added.)

may or may not have a former spouse. Nevertheless, the statute excludes the former spouse not only from the categories of persons eligible to receive a portion of the survivors' benefits, but also from the process of determining how such benefits will be divided. Thus, a former spouse has no control over survivors' benefits if the member chooses to divide the benefits as allowed by La. Rev. Stat. 11:473.

In fact, the right of the member's current spouse to control the survivors' benefits is also limited by La. Rev. Stat. 11:473(B), which applies when all of the member's adult children are of a prior marriage. Under La. Rev. Stat. 11:473(A), when the member and the current spouse have adult children in addition to the member's adult children of the prior marriage, the member's current spouse must join the member in directing LASERS to divide the benefits. However, when all of the member's children are from a prior marriage, La. Rev. Stat. 11:473(B) allows the member to unilaterally direct LASERS to divide the benefits between his current spouse and the adult children of the prior marriage on "a pro rata basis."[18] Thus, at least under some circumstances, La. Rev. Stat. 11:473(B) removes control of LASERS survivors' benefits from even the current spouse. If a spouse has no right to control the benefits, the benefits are obviously not intended by the legislature to constitute community property. La. Rev. Stat. 11:473 therefore precludes the classification of LASERS survivors' benefits as community property even of the member's current marriage, in this instance. The fact that LASERS survivors' benefits are not community property triggers the application of La. Rev. Stat. 9:2801.1.

In summary, applying the provisions of La. Rev. Stat. 9:2801.1 to the language of the statutes governing LASERS survivors' benefits leads us to the conclusion that such benefits may not be classified as community property, and that former spouses are therefore not entitled to receive any portion of those benefits. The legislature's

[18] The statute does not explain more particularly the meaning of "a pro rata basis."

decision to preclude classification of LASERS survivors' benefits as community property is consistent with the purpose for which the Louisiana Legislature enacted the provisions governing survivors' benefits distributed by *public* pension plans–i.e., to provide benefits to the surviving widow or dependent widower or children of any deceased member of the Retirement System under certain conditions. The purpose of survivors benefits is to protect those persons who become most financially vulnerable because of the death of a family member on whose salary they relied for basic necessities of life–i.e., the member's surviving spouse and children. The legislature's preclusion of LASERS survivors' benefits from classification as community property (it having established a system that provides survivors' benefits only to surviving spouses, minor children, and handicapped children) is therefore consistent with the purpose for which survivors' benefit statutes were adopted by the legislature.

In further support of our conclusion that LASERS survivors' benefits do not constitute community property, we note that ERISA and REA, federal statutes that do not bear directly on Louisiana' statutory scheme governing survivors' benefits, generally preempts the classification as community property of survivors' benefits under private pension plans, as explained below:

> Federal law, specifically ERISA and REA, governs private pensions. Congress enacted this legislation to establish national uniformity and to protect retirement benefits. ERISA was designed to protect retirement benefits and assure their receipt by employees and their dependents. Ten years after Congress enacted ERISA, it enacted REA in response to the "conflicting jurisprudence addressing spousal rights in plans and plan benefits, particularly under community property regimes." REA established the Qualified Domestic Relations Order (QDRO) as the only means by which a spouse or ex-spouse can establish a claim on the survivor's benefits of the employee. ERISA and REA mandate that survivor's benefits are to be paid first to the surviving spouse. Congress, in effect, elected to designate for each and every participant in an ERISA plan precisely who the beneficiary is, the surviving spouse.[19]

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[19] ERISA and REA do contain a provision that allows pension plan members and their former spouses, through the use of a carefully-constructed "Qualified Domestic Relations Order" ("QDRO"), an agreement that the plan member must choose to enter, to designate an "alternate

O'Brien, *supra* at 641. Given the fact that federal law preempts the classification of survivors' benefits derived from *private* pension systems as community property, it makes sense that state law now precludes the classification of survivors' benefits derived from a *public* pension plan like LASERS, as community property. The result is that henceforth classification of survivors' benefits in Louisiana is no longer contingent on whether those benefits are administered by a public pension plan or a private pension plan, a fact that lends uniformity to distribution of survivors' benefits in this state.

As we have already noted, our decision today is also consistent with the decisions of Louisiana courts pre-*Wetherspoon*, which had consistently held that former spouses are not entitled to receive a portion of *statutory* survivors' benefits when the applicable statutory language did not include former spouses as qualified survivors. Of course, Louisiana court of appeal cases following (and respecting) *Wetherspoon* naturally include a few cases that apply the *Wetherspoon* rule to allow a former spouse to receive a portion of statutory survivors' benefits from public pension plans. Of particular interest in that regard is the decision of the Louisiana Fourth Circuit Court of Appeal in *Vicknair v. Firefighters' Pension and Relief Fund of New Orleans*, 05-0467 (La. 6/15/05), 907 So. 2d 787, *writ denied*, 05-2327 (La. 5/26/06), 929 So. 2d 1233. That case is important because it demonstrates the dangers inherent in the *Wetherspoon* rule, the threat to actuarial soundness of public pension plans. In *Vicknair*, the ex-wife was awarded a portion of survivors' benefits being paid to the member's surviving spouse by the Firefighter's Pension and Relief Fund of New Orleans, as required by

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payee"–i.e., a "spouse, former spouse, child or other dependent of a participant"–to be considered a beneficiary. 29 U.S.C. § 1056(d)(3)(K). That provision applies both to "joint and survivor benefits," which is a *retirement* benefit, and to "preretirement survivors' benefits," which are roughly equivalent to *survivors*' benefits under LASERS. However, the statutes governing LASERS do not contain any type of provision that would allow members to designate someone not falling into the category of a qualified survivor to receive survivors' benefits, even if the member wants to do so.

Wetherspoon. Id. However, the qualified surviving spouse subsequently died, after which no qualified survivors' existed, the consequence being that the pension plan was relieved of any further responsibility for payment of survivors' benefits under the statutes. However, when the pension plan terminated the former spouse's survivors' benefits, she filed a rule for mandamus and contempt, which was denied by the district court. The court of appeal reversed and reinstated the former spouse's benefits, ostensibly for the remaining years of her life. *Id.* Thus, the pension plan was required to continue to make payments to a person not recognized as a qualified survivor, even after the death of the only qualified survivor, a situation that has serious potential for interfering with the actuarial soundness of the pension plan.

For the above and foregoing reasons, we find that Dianne is not entitled to a community portion of the LASERS survivors' benefits at issue here under the jurisprudential principle established by *Sims* and its progeny. Instead, entitlement to statutory survivors' benefits from Louisiana's public pension plans (certainly those with similar provisions that establish survivors' benefits only for surviving spouses, minor children, and handicapped children) is restricted to those categories of persons who are qualified under the express statutory language. To the extent it is inconsistent with this decision, we overrule our decision in *Wetherspoon*, 96-0744, 694 So. 2d 203.

EFFECT OF COMMUNITY PROPERTY JUDGMENT ON FORMER SPOUSE'S RIGHT TO STATUTORY SURVIVORS' BENEFITS

In her second major argument, Dianne claims that she is entitled to receive a portion of the LASERS survivors' benefits pursuant to the language of the December 15, 1989, community property judgment issued by the 21st Judicial District Court that memorialized the settlement of her community property issues with Joel. The lower courts did not give proper effect to this judgment, she claims, when they denied her

claim for LASERS survivors' benefits. That judgment stated, in pertinent part, as follows:

> Dianne McWilliams' interest in Joel McWilliams' Louisiana State Employee Retirement System plan is hereby recognized and shall be calculated as follows **when and if he retires, terminates employment, or dies**:
>
> Portion of retirement/
> Pension attributable
> to creditable service
> during existence of community X 50% X annuity (or lump
> Pension/retirement attributable sum payment)
> to total creditable service
> Dianne McWilliams' portion shall be paid directly to her from the retirement agency.

(Emphasis added.)

On August 24, 1998, the above judgment was amended by the 21st Judicial District Court to specify the numerator for the above formula so that the formula was to read as follows:

> Portion of retirement/pension
> attributable to creditable service
> from 04/26/69[20] - 06/15/87
> (217 months, 20 days) X 50% X annuity (or lump = Dianne
> Pension/retirement attributable sum payment) McWilliams'
> to total creditable service portion

Dianne asserts that, because the community property judgment provides for calculation of her "interest" in the "plan" "when and if [Joel] retires, terminates employment, **or dies,"** the judgment was intended to award Dianne a community portion of the LASERS survivors' benefits at issue here. We disagree.

The language from the community property judgment that Dianne relies on here mimics similar language from this court's decision in *Sims*. In fact, we believe that the

[20] This date is incorrect because it is the date that Joel and Dianne were married, not the date Joel began his employment with the DOTD. The parties stipulated that the correct starting date was May 17, 1972.

judgment, and others like it, probably employed the "retires, terminates employment, or dies" language in an effort to comply with *Sims*. In that case, the court stated:

> [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.

358 So. 2d at 923.

This court has previously noted that the above language in *Sims* was somewhat cryptic and an "unfortunate" expression. In *Hare*, this court quoted the above language from *Sims*, then stated:

> In retrospect, the statement was unfortunate. 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 valuated for purposes of voluntary or judicial partition prior to maturity the statement must be acknowledged as error.

586 So. 2d at 126. Thus, the only "correct" meaning for the reference to "separate from service, dies, retires, or becomes disabled" in *Sims* acknowledged by this court in *Hare*, and consistent with what we determine here, was that it "signif[ies] that the employer could not be required to pay benefits [unless and] until due under its contractual obligation." *Id.*

In context, it seems clear that the intent of the reference to "retires, terminates employment, or dies" in the judgment memorializing Dianne's community property settlement with Joel here, is consistent with the correct meaning of the similar language in *Sims*. That is, the language does not declare that Dianne is to be entitled to survivors' benefits when Joel dies, but instead such language was included in the judgment simply to "signify that the employer could not be required to pay benefits until due under its contractual obligation," or, in this case, until due under the applicable statutory provisions. *Id.* In other words, although the judgment recognized that Dianne had an

"interest" in Joel's LASERS retirement plan, she was not entitled to receive any monies or other assets from LASERS until the occurrence of one of the triggering events that would require LASERS to make payments to Joel or on Joel's behalf. Seen in that light, the phrase is purely temporal, designed to make clear that Dianne is not entitled to receive anything from the pension plan until if and when they became due under the statutory language.

Certainly the language in the community property judgment cannot be interpreted to create rights where none exist. In order to accept Dianne's arguments in this case, this court would have to find that a judgment issued in 1989, at a time when no Louisiana court had ever found that former spouses are entitled to receive a portion of statutory survivors' benefits, was intended to give Dianne a right that did not exist at the time it was issued. We decline to read the judgment in that erroneous manner. All the judgment was intended to convey was Dianne's entitlement to receive a portion of those regular retirement benefits that might eventually be paid to Joel, <u>when and if</u> they were ever paid. Since no court had ever held, at the time the community property judgment was issued in 1989, that former spouses were entitled to a portion of statutory survivors' benefits, the judgment certainly was not intended to convey that Dianne was entitled to a portion of the LASERS survivors' benefits she seeks here.

In reality, the language of the community property judgment on which Dianne bases her entitlement to the LASERS survivors' benefits in this case is vague concerning the rights Dianne received in Joel's LASERS pension plan. Nothing in the judgment defines the parameters of Dianne's "interest" that is recognized in the judgment. The judgment certainly does not expressly provide that Dianne is entitled to receive half of any survivors' benefits when payable to Joel's qualified survivors. The most that could be said is that Dianne was afforded the right to receive a percentage of any *retirement* benefits that Joel might receive, **if and when** LASERS became

obligated to pay such benefits. However, since Joel died prior to retirement in this case, LASERS never became obligated to pay any *retirement* benefits, to Joel or otherwise.

Possibly related to this discussion of the judgment is La. Rev. Stat. 11:291(B), which provides as follows:

> B. Notwithstanding any other provision of law to the contrary, any benefit or a return of employee contributions shall be subject to a court order issued by a court upon or after termination of a community property regime, which order recognizes the community interest of a spouse or former spouse of a member or retiree of the retirement system and provides that a benefit or a return of employee contributions be divided by the retirement system with the spouse or former spouse, but only after a certified copy of such order has been received by the retirement system and has been determined by the retirement system to be in compliance with applicable laws, rules, and regulations governing the retirement system.

There are those who would say that La. Rev. Stat. 11:291(B) sanctifies the judgment and gives it import in this case. However, the above statute cannot be accurately read to give Dianne greater rights than she is entitled to under the law, simply because of the existence of a community property judgment that recognizes her interest in Joel's LASERS <u>pension</u> plan. And, that is true even if the judgment had constituted a clear expression, which it does not, that Joel agreed that Dianne was entitled to receive a portion of the survivors' benefits that the law has created for surviving spouses, minor children, and handicapped children.

Instead, La. Rev. Stat. 11:291(B) was clearly designed to provide protection to Louisiana's public pension plans that pay benefits to former spouses pursuant to community property judgments that recognize their interest in a member's pension plan. Again, what the statute does not do is create a right in favor of a former spouse that does not otherwise exist in law. A former spouse cannot simply point to the provisions of a community property judgment recognizing her interest in a member's pension plan, and thereby avoid any analysis of whether that former spouse is statutorily entitled to receive a portion of the particular benefits actually being paid. In the case of LASERS

survivors' benefits, former spouses are not qualified recipients, and the existence of a community property judgment that generally recognizes that former spouse's "interest" in a LASERS "plan" cannot convert that former spouse into a qualified survivor. Thus, we find no merit in Dianne's arguments based on the 1989 community property judgment.

FORMER SPOUSE'S RIGHT
TO RETURN OF ACCUMULATED CONTRIBUTIONS

The court of appeal correctly found in this case that Dianne is not entitled to receive any portion of the LASERS survivors benefits, but then ordered LASERS to refund 50 percent of the accumulated contributions paid to LASERS during Dianne's community with Joel. In support of its order, the court of appeal cited La. Rev. Stat. 11:475, which provides as follows:

> The retirement system shall pay a lump sum refund equal to the difference between the total monthly survivor benefits paid and the total accumulated contributions of the member, to the beneficiaries or the estate of the beneficiaries if the total monthly benefits are not equal to the accumulated contributions of the member. **This refund shall not be paid until all eligible monthly benefits have ceased.**

(Emphasis added.) The court of appeal reasoned that, because the return of accumulated contributions is guaranteed by the above statute, "a former spouse in community is entitled to recoup her share of the accumulated contributions attributable to the community." *McWilliams*, 05-0938 at 5, 938 So. 2d at 785.

The court of appeal erred when it ordered LASERS to refund to Dianne's estate 50 percent of the accumulated contributions attributable to Dianne's community with Joel. Pursuant to the highlighted portion of La. Rev. Stat. 11:475, LASERS may be required to refund accumulated contributions only when "all eligible monthly benefits have ceased." In this case, LASERS has a continuing obligation to pay monthly benefits, in the form of survivors' benefits to the qualified survivors, Jane and Joelle. Nothing in the statutes governing LASERS allows the refund of accumulated

contributions at the same time LASERS is required to pay survivors' benefits. As LASERS argues, affirmance of the court of appeal judgment in this case has great potential for adversely affecting LASERS' actuarial soundness in violation of the dictates of the Louisiana Constitution that state and statewide retirement systems be maintained in a actuarially-sound fashion. See La. Const. art. X, § 29(E).[21] Thus, we reverse the court of appeal's order that LASERS return half of the accumulated contributions to Dianne's estate in a lump sum refund.

DECREE

Accordingly, we affirm the portion of the court of appeal judgment finding that Dianne is not entitled to receive any portion of the LASERS survivors' benefits in this case. We reverse the portion of the court of appeal judgment ordering LASERS to refund half the accumulated contributions attributable to Dianne's community with Joel. The case is remanded to the district court for release to the qualified survivors, Jane and Joelle, of the funds LASERS has placed into the court registry.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

[21] The importance of actuarial soundness in Louisiana's public pension plans was reaffirmed as recently as the October 20, 2007, election, during which Louisiana voters passed a constitutional amendment that prohibits the legislature from adopting any new benefit provision for members of any "state retirement system," including LASERS, unless it also provides a funding source sufficient to pay the actuarial costs of the new benefit within 10 years of the effective date of the provision.

SUPREME COURT OF LOUISIANA

No. 2006-C-2191

consolidated with

No. 2006-C-2204

LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM (LASERS)

VERSUS

JANE McWILLIAMS, JOELLE McWILLIAMS, AND DIANNE (McWILLIAMS) SANDERS

CALOGERO, Chief Justice, and KIMBALL, Justice. assign additional concurring reasons.

I write separately to address whether Dianne's estate might be entitled to recoup 50 percent of the accumulated contributions from a source other than the public pension plan, such as Joel's estate. There is some precedent for allowing a former spouse to recoup 50 percent of the accumulated contributions attributable to the community from the member spouse's estate, as that was the remedy fashioned by the court of appeal in *In re Succession of Sims*, 464 So. 2d 991 (La. App. 1st Cir. 1985), *writ denied*, 467 So.2d 532 (La. 1985). But, whether the court of appeal's remedy was correct in that case is not before us in the instant case. Furthermore, the member spouses's estate was a party defendant in that case, unlike here where no claim has as yet been asserted against the member spouse's estate.

SUPREME COURT OF LOUISIANA

NO. 2006-C-2191

consolidated with

NO. 2006-C-2204

LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM

VS.

JANE MCWILLIAMS, JOELLE MCWILLIAMS, AND DIANNE (MCWILLIAMS) SANDERS

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

JOHNSON, Justice, dissents and assigns reasons.

I respectfully dissent from the majority's holding denying Dianne McWilliams Sanders her *Sims* portion of the LASERS survivor's benefits.

In my opinion, the majority ignores Louisiana community property law, and erroneously overrules our decision in *Johnson v. Wetherspoon*, 96-0744 (La. 5/20/97) 694 So. 2d 203. I believe that our holding in *Wetherspoon* was correct, and that it should apply to cases involving LASERS survivors' benefits. In *Wetherspoon*, this Court, noting our earlier decisions in *Sims* and *T.L. James* in which we declined to distinguish between retirement and survivor's benefits, specifically declined to treat the payment of retirement and survivor's benefits under TRSLA differently. In so doing, we held that any benefit payable by a retirement plan, to the extent attributable to the community, is an asset of the community.

I believe that this case calls for the same result. I find no compelling reason to

treat survivor's benefits paid under LASERS any differently from survivor's benefits paid under TRSLA. In my opinion, Diane, as a former spouse of a plan participant, has an ownership interest in her former husband's LASERS benefits, and is entitled to the *Sims* portion of the LASERS plan's benefits, regardless of whether the benefits are retirement or survivor's benefits. While I recognize that our opinion in *Wetherspoon* discussed the similarity in the method used to calculate retirement and survivor's benefits under TRSLA, this similarity was only reinforcement for our position that retirement and survivor's benefits would not be treated differently. I do not believe that any dissimilarity in the method used to calculate retirement and survivor's benefits under LASERS mandates a different result than we reached in *Wetherspoon*. Any difference in the calculation of benefits does not change the fact that Diane was married to a plan member, and, thus, was a co-owner of that plan. After the termination of the community, Diane retained an ownership interest in her former husband's LASERS plan. She should be entitled to her *Sims* portion of that plan, regardless of whether it is in the form of survivor's benefits or retirement benefits.

Furthermore, I do not believe the La. R.S. 9:2801.1 changes this result. This statute was originally enacted in 2001 in an attempt to override the effects of the United States Supreme Court decision in *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997). In *Boggs*, the Court held that ERISA pre-empted Louisiana community property law to the extent that it allowed a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits. La. R.S. 9:2801.1 was enacted in an attempt to provide relief to a spouse whose interest in property would be classified as community property under Louisiana law, but is preempted by federal law or other provisions of statutory pension or retirement plans. Because I do not believe that the statutes governing LASERS

prohibit the classification of survivor's benefits as community property, I do not find that La. R.S. 9:2801.1 has an effect in this case. In addition, even if this statute was applicable in this situation, I do not believe it could be applied retroactively to change the designation of the community property that was already partitioned by judgment dated December 15, 1989 (and amended on August 24, 1998), before this statute was enacted.

LASERS' own policies further support a finding that Diane is entitled to her *Sims* portion of the survivor's benefits. The LASERS' Membership Handbook envisions and provides for the division of survivor's benefits between former spouses. The handbook provides that "[w]henever [survivor's] benefits are ***payable to more than one person due to divorce***, or remarriage, ***the benefits will be split*** and issued under each recipient's Social Security number." (Emphasis added).

Moreover, all public plans, including LASERS and TRSLA, are governed by La. R.S. 11:291(B).[1] This statute provides that benefits payable pursuant to public retirement systems are subject to a court order which recognizes the community interest of a former spouse after termination of the community, and also provides that the benefits be divided by the retirement system with the former spouse. There is no distinction in this statute relative to the nature of these benefits - retirement or survivor. In this case, there were two community property judgments recognizing Diane's interest in her former husband's LASERS plan when he retires, terminates employment, ***or dies***. The majority opinion fails to give proper regard to these

[1]La. R.S. 11:291(B): Notwithstanding any other provision of law to the contrary, any benefit or a return of employee contributions shall be subject to a court order issued by a court upon or after termination of a community property regime, which order recognizes the community interest of a spouse or former spouse of a member or retiree of the retirement system and provides that a benefit or a return of employee contributions be divided by the retirement system with the spouse or former spouse, but only after a certified copy of such order has been received by the retirement system and has been determined by the retirement system to be in compliance with applicable laws, rules, and regulations governing the retirement system.

judgments, and improperly limits the effect of La. R.S. 11:291. These two judgments were issued in compliance with La. R.S. 11:291, establishing a community property interest that must be recognized by LASERS.

Procedurally this matter comes before the Court as a concursus proceeding filed by LASERS. LASERS has already deposited the disputed funds into the registry of the Court. By so doing, LASERS has requested that the courts determine the proper beneficiary of these funds. LASERS is able to, and has, calculated the portion that would be due to Diane pursuant to *Sims*. Moreover, the community property judgments provide that Diane's portion "shall be paid directly from the retirement agency." These two judgments were issued in compliance with La. R.S. 11:291, establishing a community property interest that must be recognized by LASERS.

For the above reasons, I respectfully dissent.

12/07/07

SUPREME COURT OF LOUISIANA

No. 06-C-2191

consolidated with

No. 06-C-2204

LOUISIANA STATE EMPLOYEE'S RETIREMENT SYSTEM

versus

JANE MCWILLIAMS, JOELLE MCWILLIAMS, AND DIANNE (MCWILLIAMS) SANDERS

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

VICTORY, J., **dissenting in part and concurring in part**.

"Since colonial days, Louisiana has been a community property state, whose basic policy has always been that the spouses share equally the acquets and gains of either spouse during marriage." Kenneth Rigby, Matrimonial Regimes: Recent Developments, 59 La. L. Rev. 465, 467 (Winter, 1999). "In this respect, Louisiana treats married persons as true 'equal partners' with respect to the monetary rewards of their labors during the marriage." ***Id.*** In overruling ***Johnson v. Wetherspoon***, 06-0744 (La. 5/20/97), 694 So. 2d 203,[1] the majority minimizes the fountainhead statute of community property law, Louisiana Civil Code Article 2338, which defines community property as "property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse." In fact, the majority's opinion weakens the basic premise of numerous other cases decided by this Court in reliance on Article 2338 by holding that property acquired during the existence of the former community through the effort of one spouse is not, in fact, community property.

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[1]***Wetherspoon*** was signed by Justice Johnson, Justice Kimball, myself, and former Justices Marcus and Bleich (Lemmon, J., nop). Chief Justice Calogero and former Justice Watson dissented.

Further, the majority overrules ***Wetherspoon*** in a case where it is completely unnecessary to do so. ***Wetherspoon*** involved an unpartitioned community, where the Teacher's Retirement System of Louisiana ("TRSLA") had been paying survivor benefits to the surviving spouse for ten years before the former spouse filed suit seeking her share of the benefits. The court was then left to decide whether the former spouse was nonetheless entitled to survivor benefits, in spite of the fact that those benefits were never partitioned. To the contrary, this case involves a specific community property judgment between the ex-spouses, partitioning their former community and granting Dianne an interest in benefits under the LASERS plan in the event of the retirement or death of Joel. In reaching its result, the majority opinion fails to give proper weight to the judgment or the statutes applicable to LASERS that require LASERS to pay benefits to an ex-spouse where the ex-spouse has a certified court order recognizing her community interest in benefits payable under the LASERS plan. In addition, as will be seen, the majority's holding results in a severe injustice to Dianne, and makes it very difficult for courts in the future to partition any communities involving public retirement plans.

La. R.S. 11:291,[2] specifically applicable to LASERS and all other state and statewide retirement plans and entitled "Community property interest" provides:

> Notwithstanding any other provision of law to the contrary, any benefit or a return of employee contributions shall be subject to a court order issued by a court upon or after termination of a community property regime, which order recognizes the community interest of a spouse or former spouse of a member or retiree of the retirement system and provides that a benefit or a return of employee contributions be divided by the retirement system with the spouse or former spouse, but

[2]La R.S. 11:291 is found in Title 11 of the Revised Statutes entitled "Consolidated Public Retirement Systems." It is in Title 11 that the LASERS statutes are located. Subtitle I contains the "General and Preliminary Provisions," and Chapter 4 of Subtitle I contains "Provisions Affecting More Than One System." Subpart L of Subtitle I is titled "Applicability of Certain Court Orders." It is here that La. R.S. 11:291, titled "Community property interest," is located. There can be no dispute that this is a general provision applicable to LASERS as well as the other public retirement plans.

> only after a certified copy of such order has been received by the retirement system and has been determined by the retirement system to be in compliance with applicable laws, rules, and regulations governing the retirement system. (Emphasis added.)

As can be seen, La. R.S. 11:291(B) provides that "any benefits" payable by LASERS are subject to a court order recognizing the community property interest of a former spouse. This statute applies "notwithstanding any other provision of law to the contrary." This means that La. R.S. 11:291(B) applies "notwithstanding" La. R.S. 11:471's designation of only the surviving spouse, and the surviving minor and handicapped children as statutory beneficiaries, and defeats the majority's premise that the judgment in this case cannot "create rights where none exist" under La. R.S. 11:471. Slip Op. at 32. Further, La. R.S. 11:291(B) applies broadly to "any benefit" payable by LASERS, not just retirement benefits. La. R.S. 11:291recognizes the common circumstance where a former spouse has a community property judgment recognizing her rights to benefits payable by a retirement plan, whether they be retirement or survivor benefits, and mandates that LASERS pay these benefits directly to her, if the court order is certified and LASERS determines that it is in compliance with certain administrative requirements.[3] Likewise, in the LASERS' Membership Handbook, in the section entitled "**Survivors' benefits**," there is a provision entitled "**Benefits payable to more than one person"** which states: "Whenever benefits are payable to more than one person due to divorce, or remarriage, the benefit will be split and issued under each recipient's Social Security number." This further indicates that survivor benefits can be, and commonly are, split between former and surviving spouses.

Significantly, just as La. R.S. 11:291(B) directs that LASERS must pay benefits to a former spouse when presented with a certified court order meeting certain

[3]Section (D) of that statute provides that the retirement system may "promulgate rules establishing requirements with which a court order must comply." La. R.S. 11:291(D).

administrative requirements, La. R.S. 11:291(E) provides what will happen without such court order:

> E. In those instances in which no certified copy of an injunction, temporary restraining order, or court order for division of a benefit or a return of employee contributions has been received and/or approved as required by this Section, a state or statewide retirement system shall pay the entire amount of any benefit or return of employee contributions to the member, retiree, designated beneficiary, **survivor benefit recipient**, or the estate of a deceased member and payment so made shall constitute a release of all accrued rights of every kind and nature against the retirement system, including but not limited to community property rights of a spouse or former spouse and any rights of an heir or legatee of such spouse or former spouse. (Emphasis added).

A careful reading of this statute makes it clear that La. R.S. 11:291 is applicable to survivor benefit payments to former spouses, as La. R.S. 11:291(E) provides that without a court order from a former spouse, LASERS will pay the entire amount of any benefit to the "survivor benefit recipient," and such payment "shall constitute a release of all accrued rights . . . against the retirement system, including but not limited to community property rights of a spouse or former spouse . . ." La. R.S. 11:291(E). Why would the reference to "survivor benefit recipient" be included if La. R.S. 11:291 did not apply to survivor benefits? Simply stated, without a court order, LASERS will pay the entire benefit to the "survivor benefit recipient," i.e., the surviving spouse or minor or handicapped child. But with a court order, LASERS will divide the survivor benefit and pay the former spouse her portion. Thus, there is simply no room for doubt that La. R.S. 11:291 applies to survivor benefits due former spouses, "[n]ot withstanding any other law to the contrary."

Accordingly, in this case, a very specific community property judgment was entered which, in attempting to divide the assets of the community equally, awarded Dianne an interest in the LASERS plan in accordance with the ***Sims*** formula.[4] On

[4]The judgment partitioned the entire community, awarding Dianne an interest in Joel's military retirement plan, jewelry, and silver. The judgment awarded Joel an interest in Dianne's retirement plan and a vehicle. All movables were to remain in the possession of the possessing

December 15, 1989, a judgment was signed by the 21st Judicial District Court, Parish of Tangipahoa, which stated in pertinent part, as follows:

> Dianne McWilliams' interest in Joel McWilliams' Louisiana State Employee Retirement System plan is hereby recognized and shall be calculated as follows when and if he retires, terminates employment, or dies: (emphasis added)
>
> Portion of retirement/ Pension attributable to credit service during existence of community / Pension/retirement attributable to total creditable service X 50% X annuity (or lump sum payment)
>
> Dianne McWilliams' portion shall be paid directly to her from the retirement agency.

On August 24, 1998, the judgment was amended by the 21st Judicial District Court to specify the numerator for the above formula as follows:

> Dianne McWilliams' interest in Joel McWilliams' Louisiana State Employee Retirement System plan is hereby recognized and shall be calculated as follows when and if he retires, terminates employment, or dies: (emphasis added)
>
> Portion of retirement/ Pension attributable to creditable service from 04/26/69-06/15/87 (217 months, 20 days)[5] / Pension/retirement attributable to total creditable service (undetermined) X 50% X annuity or lump sum payment
>
> Dianne McWilliams' portion shall be paid directly to her from the retirement agency.

The language and intent of the judgments is clear and unambiguous regarding

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party. Further, the judgment ordered that "with the allocation of assets as listed on the consolidated descriptive list, Dianne McWilliams shall pay $2,263.00 to Joel McWilliams as an equalizing payment."

[5]The court based this calculation on the period of creditable service during the community being April 26, 1969 through June 15, 1987. However, this was an error. April 26, 1969 was the date of the parties' marriage; Joel did not begin his State employment until January 10, 1972. The correct period would have been January 10, 1972 through June 15, 1987 and this correction was a stipulation in the concursus proceeding in the 19th Judicial District Court.

the words "retires, terminates employment, or dies." The court and the parties intended to recognize Dianne's interest in the LASERS plan that would be calculated according to a certain formula when he retired or died. It is erroneous to conclude based on this language that they intended that LASERS pay her retirement benefits under the plan if he "retires," but not survivor's benefits if he "dies." La. C.C. art. 2046. Further, the judgment specifically mandates that Dianne be paid directly by LASERS.

In this case, Dianne, Jane and Joelle (Jane's child) each filed a claim for benefits with LASERS. Believing Dianne was entitled to her share of survivor benefits, both by virtue of the community property judgments and the jurisprudence recognizing a former spouse's rights to such assets, LASERS sought to pay Dianne her share of the benefits but ultimately had to invoke a concursus proceeding, depositing the undisputed share of the funds in the registry of the court.[6] It is LASERS' position in this lawsuit that Dianne is entitled to her share of survivor benefits as recognized by the community property judgment by virtue of La. R.S. 11:291(B). In July 25, 2003, correspondence with Joel's attorney before any benefits were paid, LASERS attorney wrote to him as follows:

> . . . in this instance it appears to us that it was the intent of the parties that any survivor's benefits be subject to a community property division. A review of the McWilliams judgment signed August 24, 1998, reveals paragraph "B," which states:
>
> > Dianne McWilliams' interest in Joel McWilliams' Louisiana State Employees' Retirement System plan is hereby recognized and shall be calculated as follows when and if he retires, terminates employment, or ***dies . . .***

[6]Regarding the community property judgments which LASERS asserted entitled Dianne to her share of the benefits, the trial court specifically ruled that it was "not the proper court of interpret or–rather interpret the 21st J.D.C. ruling." The court of appeal, apparently in an effort to protect Dianne's community property interest recognized by the 21st J.D.C. ruling, fashioned an equitable ruling entitling Dianne to recoup from LASERS 50% of the amount stipulated to be the accumulated contributions attributable to the community, i.e, $12,981.81. As correctly found by the majority, the court of appeal erred in doing so.

(emphasis added).

> This language leads LASERS to believe that it was the intent of the parties to divide any payment whatsoever with his former spouse, without regard as to what form the payment might take (it could have been a lump sum) or who the recipient might be. This would include survivor benefits. LASERS, upon request, provides sample court orders for use in dividing benefits. Part of those samples contain a paragraph ("Alternative Clause 3") which, if included, allows the parties to specifically agree to the division of survivor benefits. Although this particular court order did not incorporate the LASERS formulary, it appears to us to contemplate the occasion of payments from LASERS upon the member's death. (Emphasis added.)

Clearly, LASERS statutes, policy, and practice recognizes that survivors' benefits are payable to more than one person when a community property judgment is in effect which recognizes a former spouse's rights to such benefits. As seen from the above correspondence, this practice is so common that LASERS provides "sample court orders" which contain a paragraph allowing the parties to specifically agree to the division of survivor benefits. LASERS is concerned in this and other cases with paying the survivor benefit to the parties to whom it is legally obligated to pay, as long as it is paying the same amount of benefits as it would if there was no former spouse. Under La. R.S. 11:291(B), LASERS' actuarial soundness is not affected because it is simply dividing the benefit payable to the statutory beneficiaries with the former spouse. La. R.S. 11:291(B) never requires it to pay more. LASERS was following the law and its own policy when it recognized Dianne's interest in the survivors' benefits pursuant to the ***Sims*** formula.

In the partition, Dianne was awarded benefits payable by the LASERS plan in the event of Joel's death, which have a value of $27,478.08 based on the stipulated percentage (24.6%). The majority fails to recognize that in granting Dianne this community asset, the partitioning trial court necessarily granted Joel certain other community property in order to achieve an equal division of property. Indeed, Dianne was even ordered to make an equalizing payment of $2,263.00 pursuant to La. R.S.

9:2801(4)(d). So not only is Dianne losing the value of the survivor benefits that were awarded to her in the partition, she now has no practical recourse to recoup the value of the community assets that were awarded to Joel in order to achieve equal division of property, or the equalizing payment she was ordered to pay.

Relying on La. C.C. art. 2338 and 31 years of jurisprudence, courts have routinely been dividing interests in retirement plans, either under the ***Sims*** formula or some other method, all the while believing they were giving the non-employee spouse something of value. However, now a court will find it very difficult to partition an interest in benefits payable by a retirement plan because whether the non-employee spouse will actually be entitled to these benefits depends on whether the employee spouse retires or dies before retirement. How can a court determine which will occur first? This result makes the majority's pronouncement that "our decision today will provide guidance to divorcing spouses, practitioners, and lower courts concerning the proper method for protecting community property interests in pension plans," Slip Op. at 1-2, ring hollow. Even worse, it leaves scores of former spouses, who have either negotiated with their former spouse for an interest in a retirement plan in exchange for other property or have been awarded such property by a court, with property that is now potentially worthless. It is difficult to understand why the majority doesn't simply follow La. R.S. 11:291 and allow LASERS to pay Dianne her portion of the survivor benefits as ordered in the 1989 judgment partitioning this former community, as LASERS has been trying to do all along.

A long line of cases dating back to 1976 has consistently held that, pursuant to La. C.C. art. 2338, a spouse's right to receive an annuity, lump-sum benefit or other benefit payable by a retirement plan is, to the extent attributable to the community, a community asset. ***T.L. James & Co., Inc. v. Montgomery***, 332 So. 2d 834 (La. 1976);

Sims v. Sims, 358 So. 2d 919, 921-922 (La. 1978); ***Hare v. Hogkins***, 586 So. 2d 118 (La. 1991); ***Frazier v. Harper***, 600 So. 2d 59, 62-63 (La. 1992); ***Johnson v. Wetherspoon***, *supra*; ***Bailey v. Bailey***, 97-1118 (La. 2/6/98), 708 So. 2d 354.[7] In ***Sims***, this Court held that the community interest is not limited to a refund of community contributions because the contributions have much less monetary value than the benefits that will eventually be payable as a result of the employment of the spouse. 358 So. 2d at 922. Because the right to receive these benefits is community property, the husband and wife are co-owners of the property, with each spouse owning an undivided one-half interest. La. C.C. arts. 2336, 2369.1, 2369.2

Recognizing this Court's previous decisions that declined to distinguish between retirement and survivor benefits and that held "any benefit payable by a retirement plan, to the extent attributable to the community, is an asset of the community," in 1997, this Court decided ***Wetherspoon***, *supra* (citing ***Sims***, *supra;* ***Frazier***, *supra;* ***Hare***, *supra*). Because survivor benefits are clearly a "benefit payable by a retirement plan," we held that survivor benefits payable under TRSLA were an asset the community, regardless of the fact that TRSLA, like LASERS, lists only the surviving spouse and surviving minor and handicapped children as survivor benefit beneficiaries. ***Id.*** at 211. In ***Wetherspoon***, we expressly rejected the exact argument that was posed in this case, that ". . . because [TRSLA] directs payment of survivor

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[7]Our community property principles of law provide that:

> (1) an employee's contractual pension right is not a gratuity, but a property interest owned by him; (2) to the extent that the right derives from the spouse's employment during the existence of the marriage, it is a community asset subject to division upon dissolution of the marriage; (3) the right to share in a retirement plan is a community asset which, at the dissolution of the community, must be so classified–even though at the time acquired or at the time of dissolution of a community, the right has no marketable or redeemable cash value, and even though the contractual right to receive money or other benefits is due in the future and is contingent upon the happening of an event at an uncertain time.

Frazier, *supra* at 62-63 (citing ***Sims***, *supra* at 921-22 and ***T.L. James***, *supra*).

benefits solely to the surviving spouse, the legislature intended to exclude any and all other claimants." In rejecting this argument, the ***Wetherspoon*** decision states:

> However, the defendant's petition fails to recognize that La. R.S. 11:768, which provides for the payment of retirement benefits, contains language similar to that found in the survivor benefits statute. La. R.S. 11:768 states: "[u]pon service retirement, a member who retires . . . shall receive an allowance. . ."
>
> Thus, were we to subscribe to this reasoning, one would have to agree that the legislature also intended to make "members" a statutorily defined class of persons entitled to retirement benefits, to the exclusion of all other claimants. However, as stated earlier, this interpretation is not tenable in light of this Court's holdings that a former spouse is entitled to her share of the retirement benefits payable to a plan member to the extent those benefits are attributable to time spent and contributions made by the former community.

Id. at 210 (cites omitted). Thus, we "adopt[ed] a construction of TRSLA that harmonizes and reconciles it not only with other statutes dealing with the same subject matter, but also with general community property laws." ***Id.*** Finally, contrary to the majority's claim that in ***Wetherspoon*** we left open the issue of whether survivor benefits under LASERS would be apportioned, Slip Op. at 17, instead we only left open the question of how these survivor benefits would be apportioned. *See* ***Wetherspoon***, *supra* at 206, n. 5.

The majority relies on an article written by a law student in criticizing ***Weatherspoon***. Slip Op. at 10, 28. However, Kenneth Rigby, a well-renowned and experienced community property law practitioner and law professor, describes ***Wetherspoon*** as "a consistent application of the equal benefit sharing policy of Louisiana community property law." Rigby, *supra*, 59 La. L. Rev. at 468. In fact, ***Wetherspoon*** has been the law for over ten years and the Legislature evidently does not think it was decided contrary to their intent, as it has not chosen to legislatively overrule ***Wetherspoon*** by changing the law.

Further, even if one were to interpret La. R.S. 11:471 in the manner attempted

by the majority, La. C.C. art. 2338 is at the very least a competing statute with which La. R.S. 11:471 must be harmonized and reconciled, just as we harmonized art. 2338 with TRSLA in ***Wetherspoon***. This is required under La. C.C. art. 13. Under La. C.C. art. 2338, the benefit payable if the employed spouse dies before he retires is no less due to the effort and skill of the former community that it would be if he retired before he died. Significantly, pursuant to La. R.S. 11:471(c), which provides that survivor benefits are payable where the member had "twenty years or more of service credit regardless of when earned and whether the deceased member was in the state service at the time of death," the right to survivor benefits are clearly attributable to Joel's service while he was married to Dianne. For he had twenty years of service as of May 17, 1992, fifteen of which he was married to Dianne and none of which he was married to his "surviving spouse."[8] The plain fact is that Dianne is the co-owner of the benefits payable by this retirement plan pursuant to La. C.C. art. 2338. The majority also states that, prior to ***Wetherspoon*** "Louisiana courts consistently found

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[8]While the majority claims that the provisions granting survivor benefits under LASERS are different than those under TRSLA, as stated by LASERS in brief they are in fact essentially the same, and they each list only surviving spouses, and minor and handicapped children as the statutory beneficiaries. The statutory schemes for retirement and survivor benefits under both plans provide:

> 1. Retirement benefits are payable upon retirement after a certain number of years of active service. (La. R.S. 11:441 and 11:761).
>
> 2. Survivors' benefits are paid in the event of the death of a member, not retirement. (La. R.S. 11:471 et seq. and 11:762).
>
> 3. Retirement benefits are payable pursuant to a formula based upon average compensation of the employee. (La. R.S. 11:444 and 11:768).
>
> 4. Survivors' benefits are payable pursuant to a formula based upon average compensation of the employee. Both plans define survivors as children and surviving spouses. Neither specifically includes "former spouses." (La. R.S. 11:471 and 11:762).
>
> 5. Each statute has a similar definition of "spouse." (La. R.S. 11:403 and 11:701).
>
> 6. Each statute has the same qualifying provisions for the recovery of survivors' benefits. (La. R.S. 11:471 and 11:762).

that the ***T.L. James/Sims*** rule did not apply to statutory survivors' benefits." Slip Op. at 15. However, this is erroneous. In addition to the fact that both ***T.L. James and Sims***[9] involved the division of benefits in the event of the death of the employee-spouse, our appellate courts consistently held that "any survivor benefits payable to an ex-spouse by the other ex-spouse's retirement plan are an inextricable part of the retirement plan, and are thus also assets of the community." ***Heck v. Heck***, 98-1226 (La. App. 4 Cir. 12/29/98), 728 So. 2d 483, 487 (decided after, but not relying on, ***Wetherspoon)***; ***Ordoyne v. Ordoyne***, 94-1766 (La. App. 1 Cir. 4/7/95), 653 So. 2d 839, *writ denied*, 95-1170 (La. 6/23/95), 656 So. 2d 1018; *see also* ***Herrington v. Skinner***, 93-1556 (La. App. 3 Cir. 6/1/94), 640 So. 2d 748 (holding that the ex-spouse's relinquishment of her rights in her husband's LASERS plan included a relinquishment of her rights to survivor benefits).

In fact, the only cases prior to ***Wetherspoon*** to hold otherwise, besides ***Bonfanti v. Percy***, 95-1189 (La. App. 1 Cir. 4/6/96), 672 So. 2d 415,[10] are based on ERISA, a federal law. ***In re Succession of Sims***, 464 So. 2d 991 (La. App. 1 Cir. 1985), *writ denied*, 467 So. 2d 532 (La. 1985); ***Bendler v. Marshall***, 513 So. 2d 369 (La. App. 4 Cir. 1987). ERISA is applicable to private pensions and generally precludes the payment of a survivor annuity to a former spouse. However, aside from the fact that both ***In re Succession of Sims*** and ***Bendler*** are totally inapplicable to this

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[9]This Court developed the **"*Sims*** formula" to quantify an ex-spouse's interest in a pension plan at the time of dissolution of the community, where benefits would not be payable until a future date subject to certain conditions. ***Sims,*** *supra.* ***Sims*** held that the ***Sims*** formula would apply to calculate her future benefits when "the employee is separated from the service, dies, retires, or becomes disabled . . ." ***Id.*** (Emphasis added.) Similarly, ***T.L. James,*** *supra*, was a concursus proceeding brought by a private profit sharing and retirement plan to resolve a dispute regarding survivor benefits. There, this Court held that the employee spouse could not contractually name a beneficiary to the prejudice of forced heirs or the community ownership of spouses, both present and former, of the wage earner, because rights of "spouses in community acquisitions are fundamental concepts of our legal system." 332 So. 2d at 853.

[10]Prior to ***Wetherspoon***, ***Bonfanti*** stood alone as the only appellate case to hold that survivor benefits under a public pension plan were not community property. Further, ***Bonfanti*** did not even involve a contest over these benefits between spouses.

case, they each recognized that even federal law allows the payment of the survivor annuity to a former spouse where there is a court order granting her this benefit, ***In re Succession of Sims***, *supra* at 998; ***Bendler***, *supra* at 371, n. 1, just as La. R.S. 11:291 allows under Louisiana law.

Further, the majority's implication that La. R.S. 9:2801.1, adopted in 2001, was passed in response to ***Wetherspoon*** and dictates a different result here is also erroneous.[11] La. R.S. 9:2801.1 has been described by commentators as a "dubious attempt to override the effects of federal preemption of state community property rules," Katherine S. Spaht and Richard D. Moreno, La. Civil Law Treatise, Vol. 16, Matrimonial Regimes, § 3.41, p. 232 (3d Ed. 2007), yet the majority uses it to "guide[] [their] analysis" in this case. Slip Op. at 24.

One reason La. R.S. 9:2801.1 does not apply is because it is only applicable when "federal law or the provisions of a statutory pension or retirement plan, state or federal, preempt or preclude community classification of property that would have been classified as community property under the principles of the Civil Code . . ." La. R.S. 9:2802.1 (emphasis added). As a "benefit payable by a retirement plan," survivor benefits are "classified as community property under the principles of the Civil Code," particularly La. C.C. art. 2338; however, the provisions of LASERS do not "preempt or preclude community classification of [this] property." As we explained in ***Wetherspoon,*** the statutory listing of only the surviving spouse, and surviving minor and handicapped children as the beneficiaries does not preclude the classification of survivor benefits as community property under our longstanding community property laws. Further, even if one were to disagree with ***Wetherspoon*** on this issue, and even go as far as to overrule it as the majority does here, the fact that

[11]There is nothing in the legislative history to indicate such intent. In fact, La. R.S. 9:2801.1 was more likely passed in response to ***Boggs v. Boggs***, 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997), applicable to private pension plans.

Dianne presented LASERS with a judgment granting her an interest in the LASERS plan in the event of Joel's death makes this case different from ***Wetherspoon***. Contrary to precluding the classification of this property as community, La. R.S. 11:291(B) actually mandates the classification of this property as community because a certified court order recognizes the community interest of the former spouse in the survivor benefits. Accordingly, because there is no preemption or preclusion, La. R.S. 9:2801.1 does not apply.

Another reason why La. R.S. 9:2801.1 does not apply to this case is that it was not in effect at the time the community property judgment between Dianne and Joel was entered. La. R.S. 9:2801.1 became effective in 2001 and Dianne and Joel's community was partitioned in 1989. In cases where the provisions of a public plan preclude the classification of property as community which would otherwise be classified as community under our community property laws, La. R.S. 9:2801.1 requires that the spouse of the person entitled to such property, i.e., Dianne, shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property between Joel and Dianne. La. R.S. 9:2801.1 is an attempt by the legislature to help the former spouse, not hurt her, by providing that although she will not get a share of certain property that would have been classified as community property under Louisiana's community property laws, when the former community is partitioned, she will get other property of equal value instead, prior to the other ex-spouse getting any property. Thus, because La. R.S. 9:2801.1 was not in effect at the time the former community was partitioned in 1989, obviously Dianne could not have been allocated or assigned ownership of other community prior to the division of the rest of the community property at the time of partition pursuant to this statute.

Finally, the fact that federal law, specifically ERISA and REA, applicable to

federal and private pension plans, generally preclude the classification of the "qualified joint and survivor annuity" as community property, and preempts Louisiana community property law, *see* ***Boggs,*** *supra*, does not justify the majority's result here. Inexplicably, the majority asserts that "[g]iven the fact that federal law preempts the classification of survivors' benefits derived from *private* pension systems as community property, it makes sense that state law now precludes the classification of survivors' benefits derived from a *public* pension plan like LASERS, as community property." Slip Op. at 28. That might be true if Louisiana was not a community property state. Since when do we strive to make our community property laws consistent with non-community property law jurisdictions? As stated by Professors Spaht and Samuels, the ***Boggs*** decision "tore a hole in the fabric of Louisiana's community property system by holding that ERISA preempted the application of Louisiana community property law to a pension covered by ERISA whenever the participant's spouse did not survive until the participant's retirement." Cynthia A. Samuels and Katherine S. Spaht, Fixing What's Broke: Amending ERISA to Allow Community Property to Apply Upon the Death of a Participant's Spouse, Family Law Quarterly, p. 1 (Fall, 2001).

In addition, as mentioned above, even ERISA and REA contain a QDRO exception "by which a spouse or ex-spouse can establish a claim on the survivor's benefits of the employee." As explained by the Supreme Court:

> QDRO's, unlike domestic relations orders in general, are exempt from both the pension plan anti-alienation provision, §1056(d)(3)(A), and ERISA's general pre-emption clause. §1144(b)(7). In creating the QDRO mechanism Congress was careful to provide that the alternate payee, the "spouse, former spouse, child, or other dependent of a participant," is to be considered a plan beneficiary. §§1056(d)(3)(K).

Boggs, *supra*, 520 U.S. at 846-47. Thus, just as ERISA does not preempt the classification of survivor benefits as community property where a QDRO is in place,

LASERS does not preempt the classification of survivor benefits as community property where a certified court order has been presented to LASERS recognizing an ex-spouse's rights to retirement or survivor benefits, just as was done here.[12] The majority's statement that "state law has no provision like REA and ERISA" which allow the ex-spouse to establish a claim to survivor benefits, Slip Op. at 28, n.19, is simply erroneous, as La. R.S. 11:291 provides just that. As a result of the majority's opinion, the former spouse has even less rights that she would have had under a non-community property law jurisdiction, for had this case been governed by federal law, she would have received these benefits pursuant to her court order.

CONCLUSION

Prior to this opinion, if this case involved retirement benefits under the LASERS plan, wouldn't we all agree that the ex-spouse would receive her share of these benefits under La. C.C. art. 2338 and the principles announced in ***Sims*** and ***T.L. James***, in spite of the fact that the statute expressly says that retirement benefits are to be paid to the "member" only? La. R.S. 11:444(A)(1)(a).[13] Yet here, with the statute providing that survivor benefits are payable to surviving minor children, surviving handicapped children, and surviving spouse, the ex-spouse's community property rights are not recognized even though her community had no less to do with the right to entitlement to these benefits than it did with the right to entitlement to retirement benefits. The ex-spouse's interest is in the plan itself and the retirement and survivor benefits each come from the same pot of money, put there through the effort and skill of the former community; to deny her right to benefits under the plan

[12]While the LASERS statute at issue, La. R.S. 11:291(B) does not expressly require a QDRO, it does require a certified court order subject to its own administrative and procedural rules. La. R.S. 11:291(D).

[13]Chief Justice Calogero stated in his dissent in ***Wetherspoon*** that "had retirement benefits, as opposed to survivor's benefits, been at issue in this case, the former spouse would clearly have been entitled to a pro rata share of those benefits to the extent they were attributable to the former community." ***Wetherspoon***, *supra* at 213 (Calogero, C.J., dissenting).

because the husband happened to die before he retired is fundamentally unfair. Can the legislature simply take away community property from a former spouse by enacting a statute that diverts it to a new spouse?

Louisiana is a community property state. Our Civil Code and over 30 years of jurisprudence provide that these benefits are community property and Dianne is a co-owner. While there is something to be said about protecting a surviving spouse, it simply cannot be done with an ex-spouse's property. Many years ago this Court indicated that such a result was not only unfair and intolerable, but in violation of our community property laws. For the above reasons, I respectfully dissent in part.[14]

[14]I concur in the portion of the majority opinion reversing the court of appeal's order that LASERS return half of the accumulated contributions to Dianne's estate in a lump sum refund. *See* footnote 6, *infra.*