

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

04-334

PAIGE B. SULLIVAN

VERSUS

CHARLES P. SULLIVAN

THIBODEAUX, C.J., dissenting.

Louisiana Revised Statutes 9:2801 provides the rules for judicially partitioning community property when the spouses are unable to agree. Louisiana Revised Statutes 9:2801(4)(a) states: “[t]he court *shall value the assets as of the time of trial on the merits*, determine the liabilities, and adjudicate the claim of the parties.” (Emphasis added). Thus, according to the language of La.R.S. 9:2801(4)(a), the court should determine the value of the community assets as of the date of the trial on the merits. The trial court reasoned that because the original trial on the partition of the community property took place on February 14, 1990, and a judgment awarding Ms. Sullivan an interest in any of Mr. Sullivan’s retirement plans, was filed on December 11, 1990, trial on the merits of the DROP account funds occurred in 1990. Therefore, the trial court gave the funds in the DROP account the value it had at the time Mr. Sullivan rolled the funds over to the Merrill Lynch account. I disagree with the trial court’s and majority’s conclusion as to when a trial on the merits partitioning *this* community asset occurred which triggered valuation of the DROP account funds.

In *Edwards v. Edwards*, 35,953, p. 3 (La.App. 2 Cir. 5/8/02), 817 So.2d

414, 416, the court noted:

After termination of the community property regime, the provisions governing co-ownership apply to former community property. La.C.C. art. 2369.1. Any co-owner has a right to demand partition of a thing held in indivision. La.C.C. art. 807.

Further, La.C.C. article 1308 provides:

If, after the partition, a discovery should be made of some property not included in it, the partition must be amended or made over again, either in totality, or of the discovered property alone.

The omission of a thing belonging to the community from a partition is, therefore, grounds for a supplemental partition. La.C.C. arts. 1380 and 1401; *Moreau v. Moreau*, 457 So.2d 1285 (La.App. 3d Cir.1984).

At the original termination of the community in 1990, the option for school board employees to enter into DROP did not exist. After termination of the community, when DROP came into existence, Mr. Sullivan chose to participate. Funds in that account were omitted from the original community property partition by virtue of its nonexistence at that time. However, Ms. Sullivan did not file a supplemental partition of that property. Instead, on September 29, 1999, she filed a rule to determine her interest in Mr. Sullivan's "Teacher Retirement System." On May 4, 2000, the rule was tried and the parties stipulated that Ms. Sullivan's interest in Mr. Sullivan's teacher retirement funds was thirty-one percent. In her pleadings, Ms. Sullivan did not request a partition or valuation of the DROP funds. On July 21, 2000, the trial court rendered a ruling that the DROP funds were not community property. Ultimately, on June 13, 2001, this court determined that the DROP account funds were community property to which Ms. Sullivan was entitled a percentage. *Sullivan v. Sullivan*, 01-6 (La.App. 3 Cir. 6/13/01), 801 So.2d 1093. Writs to the

supreme court were denied. A rule filed on April 30, 2002 requesting that Mr. Sullivan pay Ms. Sullivan her percentage interest in the DROP account was tried on June 30, 2002. Therefore, in accordance with La.R.S. 9:2801(4)(a), the effective date for the determination of the value of the DROP account funds was June 30, 2002.

Further, in *Preis v. Preis*, 94-442 (La.App. 3 Cir. 11/2/94), 649 So.2d 593, *writs denied*, 94-2939, 94-2942 (La. 1/27/95), 649 So.2d 392, the valuation of the husband's stock in a professional law corporation was at issue. Three years after the 1990 termination of the community that existed between the parties, an action for partition of that property was tried in 1993. The value of the stocks had increased from its 1990 value. The husband presented evidence of the stock's value as of 1990, the wife presented evidence of the stock's value as of 1993, two months prior to the partition trial. The trial court valued the stocks as of the time the community was terminated, using the husband's 1990 evidence. The husband in *Preis* contended, as does Ms. Sullivan in the present appeal, that La.R.S. 9:2801 (4)(a) "means that the assets of the community *as they existed at the date of termination of the community* are to be valued at the time of trial of the partition." *Id.* at 594. In *Preis*, this court understood the husband's method of valuing community property as "first giv[ing] value as of the date of termination" and to reevaluate the property to determine how the value has changed "by the passage of time between termination of the community and trial of the partition." *Id.*

The trial court in *Preis* accepted the method of community property asset valuation above as urged by the husband; however, on appeal, this court concluded that the husband's proposed method "ignores the actual value of the asset 'as of the trial on the merits,'" and did not agree with his method. *Id.* See also, *Barr v. Barr*, 613 So.2d 1159 (La.App. 5 Cir. 1993) (trial court valued the parties' IRA accounts

as of the date of the partition trial); *Stewart v. Stewart*, 585 So.2d 1250 (La.App. 4 Cir. 1990), *writs denied*, 590 So.2d 594, 597 (La.1992) (the trial court, faced with valuing the husband's medical practice, used the value closest in time to the date of trial as urged by the wife). We stated in *Razzaghe-Ashrafi v. Razzaghe-Ashrafi*, 558 So.2d 1368, 1371 (La.App. 3 Cir. 1990), quoting *Queenan v. Queenan*, 492 So.2d 902 (La.App. 3 Cir.), *writ denied*, 496 So.2d 1045 (La.1986) that:

The purpose of . . . [9:2801(4)(a)] is to provide an occasion for the court to get a handle on the situation. It does not mean that the court is frozen by any statutory time level or particular valuation at any particular time or for any particular purpose, but simply to place values on the assets for the purpose of accounting, allocation, and adjudication in accordance with the further provisions of R.S. 9:2801(4)(b, c, d and e).

Thus, it appears that the trial court's discretion valuing community assets extends to using a value other than the value as of the date of trial. However, closer inspection of *Razzaghe-Ashrafi* and *Queenan* reveals that the trial courts had limited evidence or no evidence at the partition trial with which to make a valuation. In the present case, there was no doubt about value of the funds that were in the DROP account as of the date of trial. Therefore, the proper time frame for valuing the DROP account funds in the present case is the value of the funds at the time of trial. The trial court and the majority err in using value of the DROP account as it existed in September 15, 1999, the date Mr. Sullivan transferred the funds from the DROP account to the Merrill Lynch account.

Moreover, in my view, the majority's reliance on *Sims v. Sims*, 358 So.2d 919 (La.1978) and *Bailey v. Bailey*, 97-1178 (La. 2/6/98), 708 So.2d 354 is tenuous. Both *Sims* and *Bailey* involved situations where retirement accounts had already been established when the community was terminated. That is not the situation here. DROP was not in existence when the Sullivans' community was partitioned in 1990.

Further, in *Sims*, the funds were in existence but had not yet matured. Again, that is not the situation in this case.

Legal Interest

The September 1999 filing did not seek to establish the value of the DROP account. It only established Ms. Sullivan's entitlement to funds in the teacher's retirement system. In *Reinhardt v. Reinhardt*, 99-723, p. 4 (La. 10/19/99), 748 So.2d 423, 425, the supreme court, quoting from its earlier decision in *Sharbono v. Steve Lang & Son Loggers*, 97-110 (La. 7/1/97), 696 So.2d 1382, reaffirmed the difference between pre-judgment and post-judgment interest:

The world of legal interest may be divided into two hemispheres. Prejudgment interest, which stems from the damages suffered by the victorious party, is meant to fully compensate the injured party for the use of funds to which he is entitled but does not enjoy because the defendant has maintained control over the funds during the pendency of the action. . . . In contrast, postjudgment interest is a prospective award whose purpose is to encourage prompt payment of amounts awarded in the judgment, and to compensate the victorious party for the other party's use of funds to which the victor was entitled under the judgment.

Ms. Sullivan argues that *Reinhardt* is applicable in a case where only "equalizing payments" are involved, which can not be calculated before final judgment is rendered. While Ms. Sullivan is correct, the basis of the court's holding, that interest should be applied post-judgment, is that the winning party was not entitled to the funds until adjudged to be so entitled. "In other words, in cases ex delicto and ex contractu, 'prejudgment interest' is awarded to make an injured party whole by compensating that party for the time-value of money to which that party was entitled from the date set by the legislature, but over which the defendant, in retrospect, had wrongfully continued to exercise dominion and control while the suit was pending." *McLaughlin v. Hill City Oil Company/Jubilee Exxon*, 97-577, p. 18

(La.App. 3 Cir. 10/8/97), 702 So.2d 786, 797, *writ denied*, 97-2797 (La. 2/13/98), 706 So.2d 994. In personal injury or contract cases, damages are ascertainable from the date that a person is injured or a contract breached. However, valuation of community property in a partition trial as well as percentage of the respective parties' interest in that property is not ascertainable until awarded by the court. Thus, interest thereon runs only from the date of judgment. *Sharbono*, 696 So.2d 1382. In this case, that date is November 26, 2003.

For the foregoing reasons, I dissent.