SUPREME COURT OF LOUISIANA

No. 97-C-1178

SHERRIE JEAN EDDLEMON BAILEY

Versus

JAMES MARVIN BAILEY

CALOGERO, C.J., assigns additional concurring reasons.

As the majority opinion properly notes, the DROP monthly sums received by Mr. Bailey for the thirty-two months following the termination of the community are the only source of dispute in this case. While in DROP, Mr. Bailey continued working for the state at full salary. The DROP sums had been generated by Mr. Bailey's credited service and retirement contributions, all of which took place during the existence of the community. Admittedly, the DROP benefits at issue were received only because Mr. Bailey elected to remain employed by the state and to continue on in the DROP program after the termination of the community.[1]

Nonetheless, the DROP payments were essentially "early" retirement benefits, and the non-employee spouse, Ms. Bailey in this case, is entitled to her *Sims* formula share. To deny Ms. Bailey her share of the benefits on the premise that the benefits constitute no more than a bonus to the employee spouse for his post-divorce

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[1] At the time Mr. Bailey entered into DROP in October 1993, there was no restriction on his ability to withdraw from DROP. The statute in 1993 merely stated that once an employee decided on a specific time period for participation in the DROP program (at that time not more than two years) that time period could not be extended. In 1993, revised statute 11:447(C) read "An election to participate in the plan may be made only once, for a specified period not to exceed two years. Once specified, the period of participation may not be extended." Therefore, Mr. Bailey was at liberty to withdraw from DROP the day after the divorce. It was only after Act 1110 of 1995 that R.S. 11:447(C) was amended to state in part that "A member participating in the plan may not terminate participation prior to the end of the selected duration without terminating employment."

decisions is not only unfair, but in my view, contrary to the non-employee spouse's legal entitlement.

Mr. Bailey asserts that his post-divorce actions, that is, staying in DROP for the thirty-two months post divorce, his continuing to work for the state, and his foregoing the opportunity to get out of DROP and simultaneously commence earning a second or supplemental independently calculated state pension thirty-two months sooner, represent his "contribution" post-divorce, for which he should be rewarded with at least a greater than *Sims* formula entitlement regarding the thirty-two months of DROP retirement benefits that are in dispute. Although this contention is not entirely without arguable support, in my opinion, it is not of sufficient consequence to change the result reached by the majority, especially since there is a corresponding involuntary sacrifice forced upon Ms. Bailey, the non-employee spouse, when Mr. Bailey entered DROP, as will be noted hereinafter.

The appropriate formula for the fixing of Mr. Bailey's pension amount (here, the monthly DROP amount) includes only thirty years of state service, fourteen of them before the marriage and sixteen of them after the marriage and before divorce. Any change in the *Sims* formula to include the thirty-two months of Mr. Bailey's post divorce, and post-DROP "contribution" (his staying in DROP for thirty-two months and desisting from accelerating the onset of a second supplemental pension with the state), would entail a credit of a different sort and one unrelated to the creditable state service that went into the formula creating the specific DROP monthly benefits.

Furthermore, these pro-employee spouse "equitable considerations" are offset by the disadvantages to which the non-employee spouse is subjected when the employee spouse enters DROP. First, the non-employee spouse, Ms. Bailey, who in the ordinary case must await the employee spouse's termination of state service and

who would be thus, entitled to one-half of 53% of a likely larger pension (the average compensation in the three highest income years preceding final retirement), finds herself, without sharing in the DROP amounts (if Mr. Bailey were to prevail as found in the court of appeal) subjected to the same delay in receipt of her share of the pension, that is until the employee spouse's final retirement, but limited to her share in the pension as fixed at the time the employee spouse went into DROP. This is to say that the non-employee spouse's share, which is fixed when the employee spouse enters DROP and is to be received only after final retirement, is likely less then the non-employee spouse would have received post final retirement on the larger pension the employee would have received at that time but for the employee spouse's entering DROP. In addition to these considerations, surely it is unfair to the non-employee spouse to have the employee spouse calculate the DROP entitlement and alone receive the "early pension" amount, considering that the community years of his state service, which the *Sims* formula would earmark for the non-employee spouse, are central to the DROP calculation.

An additional consideration is that the choice of Mr. Bailey, the employee spouse, to continue working with the state and remain in DROP for the full thirty-six months is just that, his choice, which enures to his benefit and only coincidentally to Ms. Bailey's benefit as well. For these reasons, I would apply the *Sims* formula without variance and award the wife one half of 53% of the disputed thirty-two months of DROP benefits. With these additional concurring reasons, I join in the majority's well-reasoned opinion.