SUCCESSION : NUMBER: 553,003-B

OF : FIRST JUDICIAL DISTRICT COURT

SAMMIE JOSEPHINE DEFATTA : CADDO PARISH, LOUISIANA

MILLET

 **REASONS FOR JUDGMENT**

Trial was held May 16, 2013. The parties, the Succession of Sammie Josephine DeFatta Millet, (represented by Executrix Francine Messina Campbell) and Bruce Joseph Millet, Sr. (former husband of the deceased) stipulated to all issues with the exception of the ownership and division issue of Mr. Millet’s 40l(k). The parties agreed to submit post-trial briefs on the applicability of *Boggs v. Boggs*, 520 U.S.833 (1997) to the particular facts of this case. Following a thorough review of the record and based on the analysis and reasons that follow, the Court concludes that Judgment must be rendered in favor of Bruce Millet in accordance with ERISA and *Boggs v. Boggs*.

**FACTS**

Prior to her marriage to Bruce Millet, Sammie Josephine DeFatta (Sammie) was married four previous times; of the first two marriages, two children were born, both of whom were adults at the time of Sammie’s death on May 17, 2011. In 1996, Sammie married Bruce Millet; they separated on July 16, 2010 and instituted divorce proceedings which resulted in a judgment from this court on August 23, 2010 “terminating the community property regime existing between them effective July 16, 2010". Divorce proceedings were pending on the date of Sammie’s death. Sammie left a half-page will dated August 19, 2010 in which she named her sister, Francine Messina Campbell, Executrix and in which she left her entire estate to "Trustee for the Sammie J. DeFatta Millet Trust of 2010". The Court is unaware of the corpus of the trust as well as the identity of any beneficiary or beneficiaries.

Mr. Millet’s plan, Delta Towing Retirement Plan and Trust, identifies itself as a qualified retirement plan commonly referred to as a 40l(k) Plan subject to federal law, specifically the Employee Retirement Income Security Act (ERISA). As stated above, Sammie died before the divorce was final and before any partition of the community was ordered by this court.

**ISSUES AND ALLEGATIONS**

The central issue is whether the 401(k) plan money in the name of Mr. Millet was property belonging to the community of Bruce J. Millet and Sammie DeFatta Millet at the time of her death and thereby inheritable, or whether the 401(k) plan money is the separate property of Mr. Bruce J. Millet due to the doctrine of federal preemption. Sammie Millet’s trust makes the following arguments, which will be addressed in turn:

1. Based on a recent Louisiana Fourth Circuit case, La. R.S. 9:2801 does not apply and the co-ownership rules set forth in Louisiana Civil Code Article 797 apply.

2. Therefore, because La. R.S. 9:2801 does not apply, *Boggs* does not apply.

1. Alternatively, if the Court finds that La. R.S. 9:2801 does apply, then the 401(k)

 should be considered a community asset.

1. Alternatively, La. R.S. 9:2801.1, if the Court finds that *Boggs* requires that the 401(k) be exempt from partition, allows for an allocation of other community property of equal value to the succession’s interest in the 401(k).

**ANALYSIS AND CONCLUSIONS OF LAW**

1. **La. R.S. 9:2801 does apply, because Sammie Millet did not own the 401 (K) in indivision with Bruce Millet.**

Sammie Millet’s trust cites *Jackson v. Jackson,* 201\_CA-1306 (La. App. 4th Cir. 2/27/2013) in support of this argument. In *Jackson*, the court did indeed find that La. R.S. 9:2801 did not apply to a decedent spouse’s estate and his ex-wife, because the controversy arose between the *heirs* of the deceased spouse and the ex-wife, and not between the spouses themselves. The Jackson case is distinguishable from the present case because the property in Jackson was community property owned in indivision between the plaintiff and the heirs of her deceased ex-husband. Here, the 401(k) was not community property owned in indivision because ERISA preempts Louisiana’s community property regime.

**2. Boggs does apply to this case.**

In *Boggs*, the United States Supreme Court[[1]](#footnote-1), reversing the U.S. Fifth Circuit Court of Appeal, held that ERISA preempts state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed qualified plan benefits arising from state community property. The Court stated that the “principal object” of [ERISA] is to protect plan participants and beneficiaries and that the statute “confers beneficiary status on a nonparticipant spouse or dependent only in narrow circumstances,” i.e., under the REA-mandated survivor annuities and QDROs, which “are essential to one of REA’s central purposes, which is to give enhanced protection to the spouse and dependent children in the event of divorce or separation, and in the event of death [of the participant] the surviving spouse.[[2]](#footnote-2)  Interpreting the law by close textual analysis, the Court reasoned that “ERISA’s silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist.”[[3]](#footnote-3)  As the *Boggs* opinion relates to the facts of this case, Sammie Millet’s trust does not have a right to Bruce Millet’s pension plan.

The *Boggs* opinion specifically rejects the outcome that Sammie Millet’s trust is seeking in this case. The Court found that while it is technically possible to comply with both rules (Federal and Louisiana), by paying everything to the beneficiary, then having the beneficiary pay half of the community portion to the heirs of the ex-spouse, this result would frustrate Congress’s purpose behind enacting ERISA - such is the reason Congress allows QDRO’s. A QDRO is a domestic relations order which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a qualified plan (i.e. employer sponsored). Here, there is no evidence of any QDRO being issued to Sammie Millet.

**3. The 401(k) is not a community asset, because ERISA preempts state law.**

**4. La. R.S. 9:2801.1 is not applicable to the 401(k) because it is not a statutory pension plan, it is a private pension plan.**

La. R.S. 9:2801.1 reads as follows:

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.

 Following *Boggs*, the Louisiana Legislature enacted this statute in an effort to balance the Supreme Court’s ruling. The statute does not reclassify the property, but it provides for an off-setting of the community property. In any event, the law is not applicable to this case because the 401(k) at issue is a private pension plan. The law only applies to statutory pension plans.

**CONCLUSION**

 The 401(k) is classified as Mr. Millet’s separate property, because ERISA preempts state law directly on this point. No QDRO was ever issued, which is required to trigger the exception to the general rule of private pension plans remaining the separate property of the participating employee spouse. It is unclear from the exhibits whether Mr. Millet designated any beneficiary besides himself. From the record evidence and applicable law, the Court concludes that the proceeds in the Delta Towing Retirement Plan and Trust belong solely to Bruce Millet.

Counsel shall submit a formal Judgment in accordance with this ruling and La. D. Ct. R. 9.5.

Signed this 7th day of November, 2013, in Shreveport, Caddo Parish, Louisiana.

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 SCOTT J. CRICHTON

 DISTRICT JUDGE

DISTRIBUTION:

David L. White, Counsel for the Succession of Sammie Josephine DeFatta Millet, Francine Messina Campbell, Executrix

J. Ransdell Keene, Counsel for Bruce Millet, Sr.

1. *Boggs v. Boggs*, 520 U.S. 833 (1997) [↑](#footnote-ref-1)
2. *Id*. at 845, citing ERISA §§ 1001(b) and (c), 1103(c)(1), 1004(a)(1), 1108(a)(2), and 1132(a)(1)(B) [↑](#footnote-ref-2)
3. *Id*. at 847 [↑](#footnote-ref-3)