STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1968

GWEN TATE

VERSUS

DALE TATE

Judgment Rendered: March 27, 2009.

Appealed from the
Twenty-first Judicial District Court
In and for the Parish of Livingston, Louisiana
Docket Number 88761

Honorable Brenda Bedsole Ricks, Judge Presiding

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Jeffery Oglesby **Sherman Q. Mack** **Albany, LA**	**Counsel for Plaintiff/Appellee,** **Gwen Tate**
Floyd Falcon **Albany, LA**	**Counsel for Defendant/Appellant,** **Dale Tate**

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

DOWNING, J.

This is an appeal from a judgment amending an earlier final judgment of partition pursuant to the plaintiff's Rule to Amend Judgment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Gwen Tate, and defendant, Roger Dale Tate, were divorced in 1990. On April 26, 2000, plaintiff filed a petition for partition of community property, seeking judicial partition of the community liabilities and assets, including defendant's state retirement. By judgment dated July 1, 2002, the trial court partitioned the parties' assets and liabilities and specifically partitioned the community's interest in defendant's state retirement as follows:

> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that **GWEN TATE** is entitled to the Sims calculation of Defendant's retirement, being
>
> One-half (1/2) of a fraction, the numerator of which is the portion of the lump sum refund of accumulated contributions or of the benefit which is attributable to the years of service credit earned or purchased by Roger Dale Tate during the existence of the aforesaid community property regime, to wit, from September 29, 1969, until March 22, 1988, and *the denominator of which is the total lump sum or benefit.*

(Emphasis by italics added). Neither party filed a motion for new trial in regard to the July 1, 2002 judgment of partition, nor was the judgment appealed.

On November 14, 2007, Plaintiff filed a Rule to Amend Judgment, averring that the portion of the July 2, 2002 judgment partitioning the community's interest in defendant's state retirement "was not drafted correctly and must be modified." Thus, plaintiff sought to have the July 1, 2002 judgment amended to reflect a change in the denominator of the

formula from "the total lump sum or benefit," as provided in the original judgment, to "the total number of years of service credit ROGER DALE TATE has with LASERS as of the date of fund [sic] or benefits become payable by LASERS."

Defendant responded by filing a declinatory exception raising the objection of lack of subject matter jurisdiction and a peremptory exception raising the objection of no cause of action. Defendant averred that the amendment sought by plaintiff in her Rule to Amend was substantive. Thus, he asserted that because plaintiff had not filed a motion for new trial or appealed the July 1, 2002 judgment, the trial court was now without jurisdiction to amend the substance of the judgment. Additionally, defendant averred that the Rule to Amend failed to state a cause of action because, even if the facts set forth in the Rule were accepted as true, the requested amendment could not be allowed.

A hearing was conducted on the rule and exceptions, at which time counsel for plaintiff introduced into evidence a letter from the Louisiana State Employees' Retirement System (LASERS), indicating that LASERS could not divide defendant's LASERS benefit with plaintiff because the judgment of partition was drafted incorrectly. At the close of the hearing, the trial court stated that it believed the requested amendment "under [LSA-C.C.P. art.] 1951(1) is just altering the phraseology of the judgment and not the substance." Accordingly, the trial court signed a judgment, dated May 27, 2008, denying defendant's exceptions and amending the July 1, 2002 judgment to provide as follows:

> **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that **GWEN TATE** is entitled to the Sims calculation of Defendant's retirement, being

> One half (1/2) of a fraction, the numerator of which is the portion of the lump sum refund of accumulated contributions or benefit which is attributable to the years of service credit earned or purchased by Roger Dale Tate during the existence of the aforementioned community property regime, to wit, from September 29, 1969, until March 22, 1988, and *the denominator of which is the total number of years of service credit ROGER DALE TATE has with LASERS as of the date of fund [sic] or benefits become payable by LASERS.*

(Emphasis by italics added).

From this judgment, Defendant appeals, contending that the trial court erred in: (1) amending the July 1, 2002 judgment to change its substance; and (2) denying defendant's exceptions.[1]

DISCUSSION

Defendant argues on appeal that the May 27, 2008 amendment was an impermissible substantive amendment that contravenes La. C.C.P. art. 1951.[2] Defendant argues, therefore, that the May 27, 2008 amended judgment is an absolute nullity. We disagree.

Louisiana Revised Statutes 9:2801B governs the amendment of judgments that partition retirement benefits until the order "has been granted 'qualified' status" from the appropriate administrator, as follows:

> **Those provisions of a** domestic relations order or other **judgment which partitions retirement or other deferred work benefits** between former spouses **shall be considered interlocutory until the domestic relations order has been granted "qualified" status from the plan administrator** and/or until the judgment has been approved by the appropriate federal or state authority as being in compliance with applicable laws. **Amendments** to this interlocutory judgment to conform to the provisions of the plan **shall be made with the consent of the parties or following a contradictory hearing by the court**

[1] While defendant lists two assignments of error, his second assignment of error is not individually briefed. Rather, his argument in brief addresses his first assignment of error regarding the propriety of the trial court's amendment of its earlier judgment. Accordingly, we will similarly address the propriety of the trial court's amendment of its earlier judgment.

[2] Louisiana Code of Civil Procedure art. 1951 provides that a final judgment may be amended by the trial court at any time, with or without notice, on its own motion or on the motion of any party: (1) to alter the phraseology of the judgment, but not the substance; or (2) to correct errors of calculation.

> **which granted the interlocutory judgment**. The court issuing the domestic relations order or judgment shall maintain continuing jurisdiction over the subject matter and the parties until final resolution. (Emphasis added.)

This provision was added to La. R.S. 9:2801 by 2001 Acts 493 and governs the judgment before us, which was signed on July 1, 2002.

Here, Plaintiff sought to amend the judgment of partition because LASERS rejected it for non-compliance with its requirements. Since the judgment had not "been granted qualified status from the plan administrator," it remained an interlocutory decree subject to revision. *See* above. Defendant obviously did not agree to the amendment, so the trial court held a hearing, as required by La. R.S. 9:2801B. Accordingly, while not specifically mentioning La. R.S. 9:2801, the trial court followed the required procedure before amending the interlocutory judgment.

Further, the trial court found that the language in both judgments had the same meaning; that the amendment was no more than an alteration of phraseology. Defendant contends in his brief on appeal that the amendment awards plaintiff "a larger percentage," but he offered no evidence to support this allegation. Indeed, as set forth in both the original and amended judgments, plaintiff was awarded her proportionate share of defendant's retirement fund. The trial court's finding in this regard, therefore, is not manifestly erroneous.

Accordingly, on the record before us, we find no merit to Defendant's argument that the amendment to the July 1, 2002 judgment was improper. Thus, we affirm the trial court's May 27, 2008 judgment amending its earlier July 1, 2002 judgment to correct the award to plaintiff of her portion of

defendant's LASERS retirement fund such that LASERS can distribute to plaintiff the interest in the fund awarded to her in the July 1, 2002 judgment.

DECREE

For the above and foregoing reasons, we affirm the May 27, 2008 judgment of the trial court. Costs of this appeal are assessed against defendant, Dale Tate.

AFFIRMED