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PARTITIONING COMMUNITY PROPERTY

E. LOU CURRY

*If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.*¹

It would seem that since the above statement the law as to valid marriages and divorces has become sufficiently settled to prevent such an utterance today. However, as to dividing the estate of the parties upon divorce, it may still be difficult for an individual to ascertain just what the law is and how to apply it to various facts.

In Texas, the division of the estate of the parties upon divorce is governed by Section 3.63 of the Family Code² which provides:

In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

This act is mandatory,³ and raises a multitude of complex problems, most of which center around the words, "division of the estate." The estate subject to division by the court pronouncing the decree of divorce includes all the property of the parties; community and separate.⁴ The partition is governed by the general rules of equity having due regard to the nature of the property and the relative rights of the parties and the children.⁵ A wide discretion is vested in the trial court⁶ in that it can make any reasonable division of the community or separate personalty that it sees fit.⁷

The trial courts are usually concerned with two types of partition: partition in kind and partition by sale and division of the proceeds. A third type of partition is accomplished by vesting title in one of the spouses and giving a lien to the other for his or her proportionate share. One major reason that partitioning is so important is that the term "estate" as used in the statute includes all the property owned by the parties at the time of the divorce. The trial court must first divide the

¹ *Estin v. Estin*, 334 U.S. 541, 553, 68 S. Ct. 1213, 1220, 92 L. Ed. 1561, 1571 (1948).

² TEX. FAMILY CODE § 3.63 (1970), *repealing* TEX. REV. CIV. STAT. ANN. art. 4638 (1960), which reads substantially the same. All cases cited in the comment refer to art. 4638.

³ *Ex parte* Scott, 123 S.W.2d 306 (Tex. Sup. 1939) *referring to* TEX. REV. CIV. STAT. ANN. art. 4638 (1960).

⁴ *McCart v. McCart*, 275 S.W.2d 155 (Tex. Civ. App.—Fort Worth 1955, no writ).

⁵ *Sibley v. Sibley*, 286 S.W.2d 657 (Tex. Civ. App.—Dallas 1955, writ *dism'd*); *Swisher v. Swisher*, 190 S.W.2d 382 (Tex. Civ. App.—Galveston 1945, no writ).

⁶ *Eaton v. Eaton*, 226 S.W.2d 644 (Tex. Civ. App.—Galveston 1950, no writ); *Earnest v. Earnest*, 223 S.W.2d 681 (Tex. Civ. App.—Amarillo 1949, no writ).

⁷ *Keene v. Keene*, 445 S.W.2d 624 (Tex. Civ. App.—Dallas 1969, writ *dism'd*).

separate realty from the community realty, and then partition the community estate in such a manner as will be just and right.⁸

The statute⁹ has put a duty on the divorce court to partition community property.¹⁰ The word "shall" as used in the article is mandatory and has for its purpose the prevention of multiplicity of suits.¹¹ The courts have stated that no final judgment in a divorce case can be rendered and entered, where no property settlement is properly accomplished.¹²

As to community property of which no disposition is made by the divorce decree, the wife is not precluded from claiming her rights therein, and the divorced parties become joint owners or tenants in common.¹³ The statute¹⁴ applies only to divorce action and does not apply in litigation subsequent to divorce.¹⁵ The power of the court to make an unequal division is limited to the suit for divorce, therefore it may not be exercised in a subsequent suit for the division of undisclosed community property.¹⁶ In a suit brought for the division of community property after divorce, the parties are treated as joint owners as if they had never been married.¹⁷

It can thus be seen that a divorce court has wide discretion in determining what portion of the community estate and the husband's separate estate should be adjudged to the wife. It is also clear that as to a partitioning suit brought after divorce for a division of undivided community property the court does not have discretion and must at that time divide the community property according to the interest of the parties in the property. It also becomes clear that the court must make a determination as to the character of the property it is to divide—is it community or separate property.

COMMUNITY OR SEPARATE PROPERTY

The new Family Code¹⁸ characterizes community property in a negative fashion by defining it as property owned other than separate property. Separate property is defined as:

⁸ 15 BAYLOR L. REV. 237, 240 (1963).

⁹ TEX. REV. CIV. STAT. ANN. art. 4638 (1960), *repealed by* TEX. FAMILY CODE § 3.63 (1970).

¹⁰ Hailey v. Hailey, 331 S.W.2d 299 (Tex. Sup. 1960); *Ex parte* Scott, 123 S.W.2d 306 (Tex. Sup. 1939).

¹¹ Pelham v. Sanders, 290 S.W.2d 684, 688 (Tex. Civ. App.—Texarkana 1956, no writ).

¹² Restelle v. Williford, 364 S.W.2d 444 (Tex. Civ. App.—Beaumont 1963, writ ref'd n.r.e.).

¹³ Cline v. Cline, 323 S.W.2d 276 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

¹⁴ TEX. FAMILY CODE § 3.63 (1970).

¹⁵ Angerstein v. Angerstein, 389 S.W.2d 519 (Tex. Civ. App.—Corpus Christi 1965, no writ).

¹⁶ Wade v. Wade, 295 S.W.2d 939 (Tex. Civ. App.—San Antonio 1956, no writ).

¹⁷ *Id.*, e.g., Henderson v. Henderson, 425 S.W.2d 363 (Tex. Civ. App.—San Antonio 1968, writ *dism'd*).

¹⁸ TEX. FAMILY CODE § 5.01 (1970).

- (1) the property owned or claimed by the spouse before marriage;
- (2) the property acquired by the spouse during marriage by gift, devise, or descent; and
- (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.¹⁹

The code also provides that "property possessed by either spouse during or on dissolution of marriage is presumed to be community property."²⁰ Thus the character of property as separate or community is fixed by operation of law upon certain facts.²¹

WHAT IS "PROPERTY"

The word *property* is a very comprehensive term, having a broad and exceedingly complex meaning.²² *Property* normally includes everything that is the subject of ownership, or has value, including every species of valuable right and interest, *i.e.*, real and personal property, easements, franchises, and incorporeal hereditaments.²³ It becomes increasingly clear that the meaning of the word *property* cannot be fixed. The law generally characterizes property as either real or personal.²⁴ Personal property includes everything except real estate, which is the subject of ownership.²⁵

Using these guidelines, in most cases it is not a difficult determination to establish what is the "estate of the parties"; the estate being composed of the separate and community property. The more difficult determination is: *What is property within the meaning of Section 3.63 of the Family Code and in subsequent litigation for partition?* Having determined that the meaning is unclear and cannot be fixed²⁶ and that it is an extremely comprehensive word, this discussion must be limited to a few problem areas regarding a determination of what is "property" within the meaning of the phrase "estate of the parties." The recent concern of the courts has been in the area of benefits accruing to either spouse as a result of employment or contract, including life insurance plans, annuities, retirement benefits, pensions and the like. An examination of recent cases would show that the "key" to determining if the interest is sufficient to bring this type of "property" within the purview of the divorce court is in the term "vested rights."

¹⁹ *Id.*

²⁰ TEX. FAMILY CODE § 5.02 (1970).

²¹ Kellett v. Trice, 95 Tex. 160, 66 S.W. 51 (1902).

²² 73 C.J.S. PROPERTY § 1 (1951).

²³ *Id.* See also BLACK'S LAW DICTIONARY 1382 (4th ed. 1951).

²⁴ Erwin v. Steele, 228 S.W.2d 882 (Tex. Civ. App.—Dallas 1950, writ ref'd n.r.e.).

²⁵ *Id.*

²⁶ *Id.*

VESTED RIGHTS

A "vested right" has been defined briefly as an immediate, fixed right of possession or future enjoyment.²⁷ The uncertainty of the right to a future enjoyment distinguishes a "vested" from "contingent" interest.²⁸ A contingent interest is not subject to division, while a "vested interest" is a species of "property" subject to division by the divorce court.

A number of cases in recent years have dealt with the problems of "vested rights." An examination of the most significant will shed some light on the attitude of the courts.

It is not necessary that property be reducible to immediate possession before the court can take jurisdiction to determine the parties' rights therein.²⁹ The question of whether or not a profit-sharing plan, a trust agreement and a retirement annuity plan were property, and if so, were community property, was discussed in *Herring v. Blakely*.³⁰ The court based its decision on determining if sufficient interest in the plan had "vested" to make it property and subject to division. The plans in issue contained a formula by which an employee's account became vested up to a certain percentage at the end of each year of continuous employment. The plans were brought into existence during the marriage, all contributions made during marriage, and sufficiently vested during the marriage to be divisible upon divorce. In support of their decision the court said:

There is no requirement in Texas that community property must be reducible to immediate possession before a divorce court can take jurisdiction to determine the parties' rights therein. Community rights may exist in interest that cannot be reduced to possession, such as remainder or reversion rights.³¹

In *Berg v. Berg*³² the court considered the railroad retirement pension of the husband to be "property" and therefore subject to division upon divorce. The husband in this case was retired and drawing the pension at the time of the divorce. The courts have held that contracts to manage insurance companies constituted community property subject to division upon divorce.³³

The court of civil appeals in a very recent case, *Williamson v. Williamson*,³⁴ considered the rights of husband and wife in a retirement plan. The sole question on appeal was whether or not the trial court

²⁷ See *Du Pre v. Du Pre*, 271 S.W.2d 829 (Tex. Civ. App.—Dallas 1954, no writ).

²⁸ *Jones v. Hext*, 67 S.W.2d 441 (Tex. Civ. App.—Amarillo 1933, writ ref'd).

²⁹ *Herring v. Blakely*, 385 S.W.2d 843, 847 (Tex. Sup. 1965).

³⁰ *Id.*

³¹ *Id.* at 847.

³² *Berg v. Berg*, 115 S.W.2d 1171 (Tex. Civ. App.—Fort Worth 1938, writ dismissed).

³³ *Gillis v. Gillis*, 435 S.W.2d 171 (Tex. Civ. App.—Fort Worth 1968, writ dismissed).

³⁴ *Williamson v. Williamson*, 457 S.W.2d 311 (Tex. Civ. App.—Austin 1970, writ filed).

properly awarded an interest in two retirement plans to the wife. In upholding the award the court stated:

[R]etirement benefits and pension plan benefits of the husband are earned property rights belonging to the community estate and are distributable to the wife when the marriage is dissolved, even though payment under the plans may be contingent and are to take place, if at all, in the future.³⁵

However, this broad statement must be restricted to the facts in the case. The plans existed at the time of the marriage; and in this respect the court declared:

[E]xistence or nonexistence of the marriage at the time of incipency of the right by which title finally vests determines whether the property is community or separate.³⁶

The facts in *Williamson* further show that the plans ripened or "vested" when the husband reached the age fifty-five, since age fifty-five was the first time benefits could commence. The husband reached age fifty-five on May 15, 1969, and filed suit for divorce May 26, 1969. The court in referring to the "ripening" of the plans held that since the husband's two retirement plans "matured" during his marriage, the trial court did not abuse its discretion in awarding the wife one-half of the benefits if, as and when they were paid to the husband.

In *Matthews v. Matthews*,³⁷ the court considered a disability insurance policy purchased during marriage, with a disability occurring during marriage and resulting monthly benefits paid. The trial court ordered that the disability income payments which were to accrue in the future to be paid one-half to each party. The court relied on *Herring v. Blakeley*³⁸ in determining that the plan had vested at the time of divorce.

A number of cases in recent years have dealt with military retirement plans. In *Kirkham v. Kirkham*,³⁹ decided in 1960, the husband had completed twenty-two and a half years of military service at the time of the divorce although he had not yet retired. The court in upholding an award of an interest in the future retirement benefits to the wife said:

The retirement pay account is not a gift or gratuity . . . , but is an earned property right which accrues by reason of his years of service in the military service. The earnings of the husband during marriage are community property.⁴⁰

³⁵ *Id.* at 314.

³⁶ *Id.*

³⁷ 414 S.W.2d 703 (Tex. Civ. App.—Austin 1967, no writ).

³⁸ 385 S.W.2d 843 (Tex. Sup. 1965).

³⁹ *Kirkham v. Kirkham*, 335 S.W.2d 393 (Tex. Civ. App.—San Antonio 1960, no writ).

⁴⁰ *Id.* at 394.

In computing the community interest in a military retirement pension to be paid in the future, the court should determine the percentage of the interest of each spouse, *i.e.* when the husband has served twenty-four years and was married for twenty of those years, the community interest of the wife in the future payments is represented as 10/24ths interest.⁴¹

Military retirement benefits were again considered in *Mora v. Mora*.⁴² The husband at the time of the divorce had completed twenty-five years and eight months of military service, the last fourteen years and eight months while married. The court in holding that the divorce court erred in not considering the retirement plan in the division of the community property, specifically ruled that the wife's interest should have been considered. The court pointed out that:

It is true that, at the time of the trial, appellee had not retired from the military service and that he would be entitled to no payments until his actual retirement. . . . [s]ince *he had served . . . for a length of time sufficient to entitle him to retirement benefits*, he has obtained a property right which is vested even though the benefits were not payable at the time the divorce was granted.⁴³ (Emphasis added.)

The court went on to point out that a husband's interest in an armed services retirement plan was an "earned property" right which had accrued by reason of military service, and by statute, the portion thereof earned during marriage constituting community property.

There would seem to be some inconsistency concerning the inception of title rule as discussed in *Williamson*,⁴⁴ and the decisions in both the *Mora*⁴⁵ and *Kirkham*⁴⁶ cases. *Williamson* held that the time of incipiency of right by which title finally vests determines whether property is community or separate. In both *Mora* and *Kirkham* the husband had entered the military service before marriage and in both cases the court held that the part of the retirement accruing during the marriage was community property. The question of whether the retirement fund is community or separate is moot as to a divorce court since their wide discretion allows an equitable division of all the "estate of the parties." Further, if it is determined that a retirement fund is separate property using the incipiency of title rule, the community

⁴¹ *Webster v. Webster*, 442 S.W.2d 786 (Tex. Civ. App.—San Antonio 1969, no writ).

⁴² 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968, writ dismissed).

⁴³ *Id.* at 662.

⁴⁴ 457 S.W.2d 311 (Tex. Civ. App.—Austin 1970, writ filed).

⁴⁵ 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968, writ dismissed).

⁴⁶ 335 S.W.2d 393 (Tex. Civ. App.—San Antonio 1960, no writ).

would be entitled to reimbursement under the "tracing" theory.⁴⁷ In noncontributory pension funds the only way to trace is to determine the number of years the community "contributed" to the pension. The mathematical formula would be the same even if the inception of title rule is disregarded and the fund is considered community property during the years of the marriage.

The supreme court's decision in *Busby v. Busby*⁴⁸ is the most recent concerning military retirement benefits. Here the parties were married in 1946, and divorced in 1963. The husband entered the United States Air Force in September, 1942, and in September, 1962, had completed twenty years of service and thus became eligible for retirement. The divorce decree disposed of certain real and personal property, but no disposition was made of the retirement benefits. On November 1, 1967, the wife filed a suit to recover and have partitioned equally the *disability* retirement benefits of the husband. The husband had not voluntarily retired, but had been ordered retired due to a diabetic condition and thyroid deficiency on the same day the divorce was granted. The court held that the military retirement pay was an earned property right constituting community property, subject to partition equally between the husband and wife. They became tenants in common or joint owners when the benefits were not divided by the trial court in its judgment granting the divorce.

Associate Justice Walker wrote the *Busby* dissent, joined by Associate Justices Greenhill and McGee. The points of the dissent concern the supreme court's ruling in two areas: (1) That title to benefits payable in the future vest when one becomes eligible for the benefits; and (2) *Res judicata* as it applies to division of property.⁴⁹ The dissent indicated that when retirement benefits are payable in the future, and rest on a statute that is subject to modification or repeal, the interest should not be held to constitute property, but that the trial court could properly take retirement benefits into consideration in the exercise of their broad powers in making a just and equitable division of property.

No cases have been found that distinguish "estate of the parties" and community or separate property as defined in the Family Code.⁵⁰ That "something" could be included in the estate of the parties that was not "property" finds no support in past case law. However, holding that property interests "vest" upon becoming eligible for retirement

⁴⁷ See generally McKnight, *Matrimonial Property*, 22 Sw. L.J. 129 (1968), McKnight, *Family Law*, 24 Sw. L. J. 49 (1970), Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 21 BAYLOR L. REV. 137 (1969).

⁴⁸ *Busby v. Busby*, 457 S.W.2d 551 (Tex. Sup. 1970).

⁴⁹ *Id.* at 555.

⁵⁰ TEX. FAMILY CODE § 5.01, § 5.02 (1970).

will, as indicated in the *Busby* dissent, produce inequitable results. To illustrate, it would seem from the holdings in *Busby*, *Mora* and *Kirkham*, that upon completion of twenty years service the retirement rights vest; a serviceman being eligible for a retirement pension upon completion of twenty years service.⁵¹ From these holdings one could surmise that prior to serving twenty years there is no interest in the retirement that the divorce court could consider "property" or that could be divided as part of the "estate of the parties." Therefore, if in the *Busby* case the husband had nineteen years of service and had not been retired for disability, would there be any interest in his future retirement that could be divided upon divorce? It would be mere conjecture at this point to attempt to determine the outcome of a case where a husband and wife are divorced when the husband has nineteen years service, and a year later the wife brings suit for her interest in the retirement fund that "vested" after the divorce. The ex-wife could base her community property interest on the court's prior holdings that retirement programs are an earned property right which accrues by reason of years of service. It seems that in such a case the divorce court would have been precluded from dividing the retirement benefits. As in *Mora* the "if, when, and as received" approach would not be applicable, the fund not having "vested." In all the cases discussed the husband had completed at least twenty years service at the time of the divorce.

To reach equitable results the court should either:

1. Allow the divorce court to partition "if, when, and as received" the future retirement plan regardless of the vesting of such plan.
2. Allow the divorce court to consider potential retirement interest in making an equitable division of the estate of the parties.

The only logical solution is the "if, when, and as received" approach.⁵² However, if this were taken to extremes the court could be faced with the wife of a serviceman with five years service requesting an "if, when, and as received" interest in a retirement plan that would vest fifteen years in the future.

Mr. Hughes in his excellent article⁵³ suggests that perhaps the court should depart from *Herring v. Blakeley* and rest the matter on a possessory interest, or at least an interest proximately anticipated to become possessory.⁵⁴ This interest could be calculated in the following manner:

⁵¹ See Title 10 U.S.C.A. § 8911, § 6321 *et seq.*, § 3991 *et seq.*

⁵² Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEX. L. REV. 860 (1966).

⁵³ *Id.*

⁵⁴ *Id.* at 887.

The court could either order payment of present amounts by the husband from community or separate assets or order the husband to pay such amounts if, as, and when received; the decision regarding which alternative to choose would be based on all the facts and circumstances, including the availability of other assets, the likelihood that an interest would become possessory, and any other relevant considerations.⁵⁵

It must be kept in mind that military retirement is a unique system and such problems should not be met in other forms of pension plans, either contributory or non-contributory. In civilian retirement it is normal for the employee's rights to vest quickly (usually annually) in the fund. The military retirement fund has no contract, no actual fund, and is created by statute.⁵⁶

The *Busby* case raised other interesting problems. As indicated in the dissent, the doctrine of *res judicata* must be considered in partitioning suits brought after divorce.

RES JUDICATA

The general rule is that a judgment is final as to issues actually determined and all other issues which the parties might have litigated in the case. The doctrine of *res judicata* is a rule of convenience and will not be enforced if the failure to have a question determined will have unjust results.⁵⁷ It would seem that suits for partitioning of community property after divorce are both exceptions and limitations on the doctrine of *res judicata*. The court in *Busby* said:

It is well settled that where, as here, a divorce decree fails to provide for a division of community property, the husband and wife become tenants in common or joint owners thereof. (citations omitted) Since this property was not partitioned at the time of the divorce, we hold that the judgment entered in the divorce suit did not preclude the plaintiff from seeking a partition of the undivided community property sought to be partitioned here.⁵⁸

However, the divorce decree is *res judicata* as to all matters therein settled, and insofar as it disposes of property rights of the husband and wife it is an effective adjudication.⁵⁹

⁵⁵ *Id.* at 887.

⁵⁶ Title 10 U.S.C.A. § 8911, § 6321 *et. seq.*, § 3991 *et. seq.*

⁵⁷ *Vann v. Calcasieu Trust and Savings Bank*, 204 S.W. 1062 (Tex. Civ. App.—Galveston 1918, writ ref'd).

⁵⁸ *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. Sup. 1970).

⁵⁹ *Adams v. Adams*, 214 S.W.2d 856 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.).

PARTITIONING AFTER DIVORCE

To determine the success of a partitioning suit brought after a divorce, it is necessary to ask the following questions:

1. Is the property sufficiently vested to be susceptible of division, and was it vested during the marriage?
2. Is the property community property?
3. Is the divorce decree and property settlement therein *res judicata* to the property in question?

If the property in question is "sufficiently vested"; is community property; and *was not* considered by the divorce court; the way is clear for a partitioning suit. Until such a partitioning suit the property is in the status of joint ownership.⁶⁰

To prevent partitioning suits of undivided community property a practical approach would be an agreement between the parties, included in the divorce decree, showing that in consideration of the property awarded to her the wife relinquishes all right and title to any property of the parties.

CONCLUSION

"... [C]ounsel for litigants in a divorce suit should call to the attention of the trial judge all of the assets of the marriage. . . . [T]he trial judges . . . should inquire as to the existence of insurance or retirement programs to the end that the final judgment fully disposes of all property valuables of the community."⁶¹

The term "vesting" as used here means the interest that is sufficient to be subject to a division under the broad equity powers of the divorce court. Since most profit sharing, pension, insurance, and retirement plans have a very early "vesting" and are divisible upon divorce the court should and will look to these assets as part of the estate of the parties. Military retirement benefits present a definite problem to the divorce court in light of the recent holdings that military retirement benefits are not a property interest subject to division until the serviceman has served a sufficient length of time to entitle him to retire. The true test of these holdings will be a case involving a serviceman with less than twenty years service at the time of divorce.

⁶⁰ *E.g.*, *Cline v. Cline*, 323 S.W.2d 276 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

⁶¹ *Busby v. Busby*, 457 S.W.2d 551, 555 (Tex. Sup. 1970).