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MILITARY RETIRED PAY IN TEXAS: A NEW OUTLOOK

JOSEPH F. SAGE*

In a series of recent decisions the Texas courts have solidified the rule that military retirement benefits are community property, subject to judicial division on divorce.¹ The various problems concerning the vesting of rights to the pension² and the determination of proportionate settlements³ have been methodically solved by recent Texas cases. However, an area of federal law and regulation which could change some of these prior holdings has been largely overlooked by the Texas courts.

This area involves the distinction made by the military between retirement from active duty by a regularly commissioned officer and absolute retirement from the service by other members of the military. Generally, it may be stated that officers of the "regular" services⁴ retire from active duty but remain in the military service after retirement, while the retirement of those officers with "reserve" commissions⁵ completely terminates their relationship with the service.⁶ The distinction

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1. See generally *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Freeman v. Freeman*, 497 S.W.2d 97 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); *Davis v. Davis*, 495 S.W.2d 607 (Tex. Civ. App.—Dallas 1973, writ dismissed); *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Civ. App.—El Paso), cert. denied, 409 U.S. 1028 (1972); *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971, writ dismissed); *Marks v. Marks*, 470 S.W.2d 83 (Tex. Civ. App.—Tyler 1971, writ refused n.r.e.); *Webster v. Webster*, 442 S.W.2d 786 (Tex. Civ. App.—San Antonio 1969, no writ); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968, writ dismissed); *Kirkham v. Kirkham*, 335 S.W.2d 393 (Tex. Civ. App.—San Antonio 1960, no writ).

2. *Angott v. Angott*, 462 S.W.2d 73 (Tex. Civ. App.—Waco 1970, no writ); *Williamson v. Williamson*, 457 S.W.2d 311 (Tex. Civ. App.—Austin 1970, no writ); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968, writ dismissed).

3. *Dessommes v. Dessommes*, 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ refused n.r.e.); *Marks v. Marks*, 470 S.W.2d 83 (Tex. Civ. App.—Tyler 1971, writ refused n.r.e.); *Williamson v. Williamson*, 457 S.W.2d 311 (Tex. Civ. App.—Austin 1970, no writ); *Webster v. Webster*, 442 S.W.2d 786 (Tex. Civ. App.—San Antonio 1969, no writ).

4. 10 U.S.C. § 101(33) (1970). "Regular . . . means enlistment, appointment, grade or office in a regular component of the armed force." *Id.*

5. 10 U.S.C. § 101(34) (1970). "Reserve . . . means enlistment, appointment, grade or office held as a Reserve of an armed force." *Id.*

6. A regular retired officer receives "Retired Pay" and a reserve retired officer receives "Retirement Pay." See 23 COMP. GEN. 284, 286 (1943).

between the retirement benefits of regular and reserve officers, correctly termed retired pay and retirement pay, respectively, has not been observed in any Texas case dealing with the community nature of this property. This is unfortunate since it appears that under the Texas Family Code the retired pay of a divorced regular officer is separate property, as it is not property acquired during marriage, but rather compensation received by the officer for services rendered after the termination of the marriage.⁷ It is this distinction between the status of retired regular and reserve officers which should cause the courts in Texas to view each classification differently. The Family Code addresses the status of "Marital Property," setting out the classifications of separate and community property.⁸ But the current wages of the retired regular officer could not properly be classified as either separate or community property after divorce. The classifications of separate and community property have application only to marital property. Upon divorce, new property acquired by the now single spouse cannot be logically placed under the broad classification of marital property. Thus, the current wages of a divorced spouse can never fall under the jurisdiction of a court awarding the divorce. When all existing marital property has been awarded, the court has no further jurisdiction regarding any property subsequently acquired by a former spouse. If it can be conclusively shown that the wages paid to the retired regular officer are current compensation, the Texas courts surely will have to re-examine their approach to this matter.

CLASSIFICATION OF BENEFITS

The United States Supreme Court long ago recognized a "manifest" difference between retiring only from active duty and severing all connections with the military on retirement.⁹ While the distinction between regular and reserve officers' retirement had not yet been recognized, the Court clearly indicated that the two classifications of retirement benefits should not be considered interchangeable.¹⁰ Because of the difference between the status of the retired regular officers and reserve officers¹¹ the Armed Services began to draw distinctions between the compensation paid to each in a series of "Pay Acts."¹² The enact-

7. TEX. FAMILY CODE ANN. § 5.01 (1975).

8. *Id.*

9. *United States v. Tyler*, 105 U.S. 244, 245 (1881).

10. *Id.* at 245.

11. These distinctions will be treated at p. 31 *infra*.

12. Pay Act of March 2, 1903, Pub. L. No. 132, 32 Stat. 927, *as amended*, Pay Act

ment of these provisions culminated with a decision by the Comptroller General in 1943.¹³ In his opinion, the Comptroller stated:

Retired pay . . . is paid to retired officers of the Regular Army as *current* compensation or pay for their continued service as officers after retirement and *only while they remain in the service* whereas the retirement pay . . . for officers . . . other than officers of the Regular Army . . . is not conditioned on their remaining in the service but is more in the nature of a *pension*. . . .¹⁴

This opinion, currently in adoption by the armed services,¹⁵ clearly states what the Texas courts have to this date overlooked. The retired regular officer is being compensated currently for the status he presently holds. Because the compensation he receives is not for past services rendered, it could not possibly be considered community property in Texas.

Two important points, as Texas law effects the benefits, should be made. First, unlike most retirement plans which the Texas courts have held to be community in nature,¹⁶ the military serviceman does not make direct contributions into his retirement fund. The logical conclusion is that if there is no contribution from the community to the retirement fund, and if the benefits are paid as current compensation for status presently held, the funds could only be separate in character when received after divorce.

Second, if the commission of the retired regular officer is terminated, for whatever reason, his entire retired pay also stops, and his status as an officer ends.¹⁷ If the retired pay were a pension in the legal sense of that term, his resignation as a commissioned officer should, at most, reduce the amount of his compensation. The fact that he loses 100

of April 3, 1939, Pub. L. No. 18, 53 Stat. 555, *as amended*, Pay Act of Dec. 2, 1942, 37 U.S.C. § 101 (1970). The Military Pay Readjustment Act of 1942, 37 U.S.C. § 101 (1970), by which the retired pay of regular officers is determined, has no application to the computation of retirement pay of reserve officers because of the differences inherent in the two types of benefits being given. *See Abbott v. United States*, 287 F.2d 573, 576 (Ct. Cl. 1961); *Reynolds v. United States*, 111 F. Supp. 881, 883 (Ct. Cl. 1953); *Berry v. United States*, 107 F. Supp. 849, 856 (Ct. Cl. 1952).

13. 23 COMP. GEN. 284 (1943).

14. *Id.* at 286 (emphasis added).

15. This statement of the status of retirement benefits was incorporated in toto into the current regulation of the United States Air Force. *See AIR FORCE MANUAL 110-3* (1972).

16. *See generally* *Dessommes v. Dessommes*, 461 S.W.2d 525 (Tex. Civ. App.—Waco 1970, no writ); *Bell v. Bell*, 389 S.W.2d 126 (Tex. Civ. App.—Houston 1965, no writ). Both cases deal with employee's retirement trust plans.

17. 23 COMP. GEN. 284 (1943). *See also* *United States v. Tyler*, 105 U.S. 244 (1881).

percent of the benefits on resignation lends great support to the proposition that the compensation is monthly pay based on current services rendered by the retired officer. A reserve officer, on the other hand, is not required to keep his status as a "retired officer" in order to receive his retirement pay.¹⁸ Even after a complete separation from the service, his retirement benefits are continued. Therefore, while the retirement pay of a reserve officer has genuine characteristics of retirement benefits, the retired pay of a regular officer has none of these aspects. In order to justify the contention that a retired regular officer is receiving compensation for current status held, it is imperative that his duties as a retired regular officer be examined.

A RETIRED OFFICER IS STILL AN OFFICER

As early as 1880 the Texas Supreme Court recognized that an officer on the retired list remained a part of the United States Army, and as such was prohibited from holding another public office.¹⁹ The following year the United States Supreme Court settled the issue of the retired officer's status when it held that officers on the retired list remained in the military as officers.²⁰ In *Lemly v. United States*,²¹ the Court of Claims discussed the fact that a retired regular officer remains in the military and effectively dismissed any contention that the benefits which the officer receives are a pension for past services performed.

The court noted that a pension is a sum paid to a person when the services he renders are completely finished, and when the employing body no longer has control over his services.²² Such sums are not subject to forfeiture once accrued and vested. The retired pay that a regular officer receives, however, is not a pension, but a continuation of the active duty pay he received, and is paid to the officer because the government has continuing control over his services.²³ Thus, the court concluded, a "control test" would be the persuasive factor in determining whether or not the benefits received could be considered a true

18. See 10 U.S.C. § 274 (1970) (historical and revision notes); 10 U.S.C. § 1331 (1970).

19. *State v. DeGress*, 53 Tex. 387, 401 (1880).

20. *United States v. Tyler*, 105 U.S. 244, 245 (1881). See also *Lemly v. United States*, 75 F. Supp. 248, 249 (Ct. Cl. 1948); *Franklin v. United States*, 29 Ct. Cl. 6, 10 (1893); *Runkle v. United States*, 19 Ct. Cl. 396, 414 (1884).

21. 75 F. Supp. 248 (Ct. Cl. 1948).

22. *Id.* at 249.

23. *Id.* at 249.

pension.²⁴ The court concluded that military retired pay would not constitute a true pension.²⁵

A conclusive determination that a regular officer on retired status remains in the armed forces and continues to serve his country as a military officer is found in the United States Code.²⁶ It is a simple matter for the officer on retired status to be reinstated in the service because he has never lost his status as a commissioned officer.²⁷ In addition, retired regular officers are generally subject to military regulations, courts-martial, recall to active duty and other restrictions and privileges by reason of their status.

UNIFORM CODE OF MILITARY JUSTICE

When a regular officer retires for length of service, he is placed on a "retired list" maintained by the various branches.²⁸ His inclusion on the retired list makes him subject to the Uniform Code of Military Justice (U.S.M.J.).²⁹ The Supreme Court case of *United States v. Tyler*³⁰ was one of the earliest dealing with the continuing liability of retired officers. The Court compiled a list of the retiree's continuing connections with the military, including the right to wear the uniform, the fact that retired officers are carried in the Army register, and that they may be assigned to certain duties not incident to active service. The Court concluded that retired officers are still in the military service of the United States and are still subject to the U.C.M.J.³¹

In vetoing a bill which would have removed the liability of regular retired officers, President Wilson considered the matter of sufficient import to address the Congress, and gave his reasons for the veto.³² He felt that the armed services needed the experience and wisdom supplied by retired officers. The President reasoned that in order to maintain this reservoir, the same standards and regulations applied to

24. *Id.* at 249.

25. *Id.* at 249.

26. 10 U.S.C. § 8075(b)(3) (1970). This section, applying to the Air Force, states that the Regular Force includes "the retired officers and enlisted members of the Regular Air Force."

27. *Byrd v. United States*, 106 F.2d 821 (10th Cir. 1945). See also *Fulmer v. United States*, 32 Ct. Cl. 112, 119 (1897).

28. 10 U.S.C. § 3966 (1970).

29. 10 U.S.C. §§ 801-940 (1970). "The following persons are subject to this chapter . . . (4) Retired members of a regular component of the armed forces who are entitled to pay." *Id.* § 802.

30. 105 U.S. 244 (1881).

31. *Id.* at 246.

32. 53 CONG. REC. 12844 (1916).

active duty officers should be extended to retired officers. And, as Wilson noted, because the retired officer was still in the military service he should continue to be subject to the liabilities imposed by the U.C.M.J.³³

One of the more celebrated cases involving the continuing liability of a retired officer is that of *Hooper v. United States*.³⁴ Hooper, a regular Navy officer who was retired for years of service, was charged with having committed homosexual acts at a private residence, in no way connected with any military installation. The defendant's guilt was affirmed by the United States Court of Military Appeals.³⁵ As a part of his punishment, Hooper's retired pay was stopped. On appeal to the Court of Claims the defendant challenged the U.C.M.J.'s jurisdiction over the retired officer corps.³⁶ In upholding the jurisdiction of the U.C.M.J., however, that court reiterated the fact that because the retired officer was still a part of the United States Naval forces the military tribunal had jurisdiction in the matter.³⁷ The court found that the retired pay was "a means devised by Congress to assure availability and preparedness in future contingencies."³⁸

Undoubtedly, a major liability of the retired officer is the continuing jurisdiction of military law over his personal life. Such an intrusion logically could not be tolerated without some financial consideration to the retired officer for the inconvenience. Again, reference to the control test of *Lemly* should dictate that this continued liability is not in accordance with the general nature of a genuine pension plan.

RECALL

Another continuing liability on a retired regular officer is the provision for recall to active duty.³⁹ The Army and Air Force provisions allow the President to make the recall at any time, when it is in the national interest.⁴⁰ The Navy provision limits the recall to times of war or national emergency.⁴¹ The only retired reserve officers subject to

33. *Id.*

34. 326 F.2d 982 (Ct. Cl. 1964), *cert. denied*, 377 U.S. 977 (1964).

35. *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

36. This contention was based on 10 U.S.C. § 802 (1970); U.C.M.J. art. 2, § 4 (1970).

37. *Hooper v. United States*, 326 F.2d 982, 986 (Ct. Cl. 1964).

38. *Id.* at 987.

39. 10 U.S.C. § 3504 (1970) (Army); 10 U.S.C. § 8504 (1970) (Air Force); 10 U.S.C. § 6481 (1970) (Navy).

40. 10 U.S.C. § 3504 (1970) (Army); 10 U.S.C. § 8504 (1970) (Air Force).

41. 10 U.S.C. § 6481 (1970). "In time of war or national emergency declared by

recall are those who have been placed on the retired reserve list at their own request.⁴² Placement on such a list is not a requisite to a retired reserve officer's receiving retirement pay.⁴³ However, all regular officers who retire without resigning their commissions are pro forma placed on the retired list and retained in the service.⁴⁴ Only by resigning their commission may retired regular officers be relieved of recall liability. Officers who thus resign their commissions are also subjected to loss of their entire retired pay.⁴⁵

OTHER LIABILITIES

The Federal Dual Compensation Act,⁴⁶ another continuing liability of the retired officer, should be closely examined for its effect on Texas law. The Act provides for a forfeiture of an officer's retired pay if he accepts another federally paid job.⁴⁷ This automatic reduction supports the contention that the retired pay is current compensation since it is measured against other current salaries. If the retired pay were a true pension, there could be no rational basis for its reduction because of employment in another wholly disconnected job. This provision in federal law, argues more strongly than any other for the position that retired pay is current salary earned on a monthly basis. If a Texas court awarded a former wife one-half of her husband's retired pay of \$10,000 per year, the husband, with some shrewd planning could effectively reduce the former wife's share from \$5,000 per year to \$2,000 per year. By taking another federal job which paid \$10,000 per year, his retired pay would be reduced by \$2,000 per year plus one-half of the remaining \$8,000, leaving \$4,000 per year as his retired pay. The husband would pay the wife \$2,000 and keep \$2,000 for himself—in addition to the \$10,000 he would make from his other job. So actually, by forfeiting some of his retired pay to the government, the husband has a net gain of \$7,000 and the wife a net loss of \$3,000, all because both sums under consideration for the Dual Compensation Act are viewed as current wages.

the President, the Secretary of the Navy may order any retired officer of the Regular Navy or the Regular Marine Corps to active duty at sea or on shore." *Id.*

42. 10 U.S.C. § 675 (1970). *See also* 10 U.S.C. § 274 (1970) (composition of the "Retired Reserve"); 10 U.S.C. § 672(a) (1970).

43. 10 U.S.C. § 274 (1970) (revision notes).

44. 23 COMP. GEN. 284, 286 (1943).

45. *Id.* at 286.

46. 5 U.S.C. § 5532(b) (1970).

47. The Act provides for a forfeiture of up to \$2,000 plus one-half of the remainder of retired pay he receives annually if he holds another government job. 5 U.S.C. § 5532(b) (1970).

There are various other federal statutory provisions which govern the conduct and employment of the retired regular officer. He is forever forbidden from selling goods to the service from which he is retired,⁴⁸ and he may never take employment from a foreign government.⁴⁹ Even the constitutional guarantees of the retired officer are somewhat limited. For example, he may not join subversive groups,⁵⁰ and any material that he wishes to publish or any speech he wishes to make about the military must receive prior approval.⁵¹

The effects of these limitations and liabilities are severe. Employing the language of *Lemly*, a pension is not a true pension if the former employer continues to have control over the former employee.⁵² The officer's employment is limited, in both the amount of pay he can receive and in his choice of employers. His rights of association and speech are limited to a substantial degree. It is clear that the retired regular officer is by no means separated from military life.

The military retirement plan differs from most civilian retirement plans in that its members make no contributions to it. In Texas, a contribution to a retirement plan by one of the spouses during marriage renders the benefits community property to the extent that the community has contributed assets to the fund.⁵³ The Texas courts, however, have not considered contribution with regard to military retirement funds.⁵⁴ The fact that no community funds were contributed to the plan weakens the rationale for deeming the funds community.⁵⁵

Additionally, when the retired officer terminates his status as an officer, his *entire* retired pay stops.⁵⁶ He has in effect resigned from a job for which he was receiving a monthly salary. Resignation is one means of terminating the status.⁵⁷ Forced removal from the retired

48. 10 U.S.C. § 6112(a) (1970). See also 37 U.S.C. § 801(c) (1970) (prohibits the retired officer from selling goods to the entire Department of Defense for a 3-year period).

49. U.S. CONST. art. I, § 9, cl. 8.

50. GUIDE FOR RETIRED PERSONNEL OF THE ARMED FORCES § 25 (1970).

51. NAVY REGULATIONS art. 1252 (1948).

52. *Lemley v. United States*, 75 F. Supp. 248, 249 (Ct. Cl. 1948).

53. *Dessommes v. Dessommes*, 461 S.W.2d 525, 526 (Tex. Civ. App.—Waco 1970, no writ); *Bell v. Bell*, 389 S.W.2d 126, 130 (Tex. Civ. App.—Houston 1965, no writ).

54. *But see* *Davis v. Davis*, 495 S.W.2d 607, 611 (Tex. Civ. App.—Dallas 1973, writ *dism'd*).

55. *Crossan v. Crossan*, 94 P.2d 609 (Cal. Ct. App. 1939).

56. *Allen v. United States*, 91 F. Supp. 933, 936 (Ct. Cl. 1950). See also 37 U.S.C. §§ 802, 803 (1970).

57. *Baldauf v. Nitze*, 261 F. Supp. 167, 171 (S.D. Cal. 1966).

list by courts-martial also causes a forfeiture of retired pay.⁵⁸ The court in *Hooper* conclusively stated that since the defendant was dismissed from the Navy for valid reasons, his right to retired pay no longer existed.⁵⁹ It would be an unusual pension plan that would allow forfeiture of the entire amount of accrued benefits for disciplinary reasons such as a felony conviction. Conversely, an employer would not be faulted for terminating the current pay of an employee who has been similarly convicted. An employee would be free to resign his position and would expect his current compensation to end upon his resignation, but a pensioner would think it extraordinary if his resignation from employment had also deprived him of his vested pension benefits.

A NEW OUTLOOK

It is suggested that the Texas courts should consider the California case of *French v. French*.⁶⁰ In *French* the court determined that the fleet reserve pay of an enlisted man was current compensation because

- (1) he remained subject to the U.C.M.J. and other military regulations;
- (2) he was subject to immediate recall to active duty; and
- (3) he was required to attend regular meetings and be on active duty for 2 weeks a year.⁶¹

The court decided that the compensation received was pay for the demands for his services by the military and was therefore current compensation which would continue to be earned after divorce.⁶² Under California laws, which are similar to the Texas Family Code, this salary would become the separate property of the husband as it accrued since it was being earned after the dissolution of the marriage.⁶³

This suggestion is made in the light of other conflicts between the Texas community property laws and the federal statutes. Most notable are conflicts concerning savings bonds,⁶⁴ life insurance,⁶⁵ and railroad retirement benefits.⁶⁶ In all cases, the federal law has taken prece-

58. *Hooper v. United States*, 326 F.2d 982, 988 (Ct. Cl.), *cert. denied*, 377 U.S. 977 (1964).

59. *Id.* at 988.

60. 112 P.2d 235 (Cal. 1941).

61. *Id.* at 236.

62. *Id.* at 236.

63. CAL. CIV. CODE § 5110 (Deering Supp. 1975).

64. *Free v. Bland*, 369 U.S. 663, 670 (1962).

65. *Parsons v. United States*, 460 F.2d 228, 233 (5th Cir. 1972).

66. *Allen v. Allen*, 363 S.W.2d 312, 315 (Tex. Civ. App.—Houston 1962, no writ); *Berg v. Berg*, 115 S.W.2d 1171, 1172 (Tex. Civ. App.—Fort Worth 1938, writ *dism'd*).

dence over attempts by the state to classify the property involved as community property. This is due to the fact that when state property laws conflict with federal regulations, the state law must yield by virtue of the supremacy clause.⁶⁷

It is settled that the retired pay of an officer cannot be assigned for the purpose of a divorce settlement.⁶⁸ The effect of this statute makes such an assignment unenforceable.⁶⁹ It is suggested that a challenge to the division of the retired pay of a regular officer should soon confront Texas courts. Such a challenge should be successful in light of the federal law and regulations which deem such pay current compensation, rather than as a pension for past services rendered by the officer.

67. *Free v. Bland*, 369 U.S. 663, 666 (1962).

68. 37 U.S.C. § 705 (1970); *cf.* *Arnold v. United States*, 331 F. Supp. 42 (S.D. Tex. 1971). *See also* *Asbury Park & Ocean Grove Bank v. Dam*, 199 A. 418, 419 (D.C.N.J. 1938); *Webster v. Webster*, 442 S.W.2d 786, 789 (Tex. Civ. App.—San Antonio 1969, no writ).

69. 44 COMP. GEN. 86, 87 (1964).