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APPORTIONMENT OF COMMUNITY PROPERTY INTERESTS IN PROSPECTIVE MILITARY RETIREMENT BENEFITS UPON DIVORCE

CHARLES H. RENNICK

Prospective military retirement benefits frequently represent the most substantial asset of a serviceman and his spouse.¹ Upon dissolution of the marriage in a community property state, the nonservice spouse is likely to seek division of the benefits.² Under the provisions of the Texas Family Code, all property acquired by either spouse during coverture, except property acquired by gift, devise, descent, or recovery for personal injury, is considered to be property belonging to the marital community and is susceptible to division upon divorce.³ Because of the inchoate nature of prospective retirement benefits, however, a simple method of division is not readily available. A court must first recognize the existence of a community interest in the benefits, and then determine the extent of that interest.⁴ A mathematical formula will usually prove helpful in making

1. Retirement benefits are often referred to as "retired pay" or "retirement pay." The former is sometimes regarded as compensation for a present military status, while the latter is considered compensation in the form of a pension for past services. See Sage, *Military Retired Pay in Texas: A New Outlook*, 7 ST. MARY'S L.J. 28, 30 (1975); cf. 23 Comp. Gen. 284, 286 (1943-44) (referring to disability retirement). For purposes of this comment, the two terms will be used interchangeably in reference to a military pension.

2. The principles to be discussed apply equally, whether the serviceman is a man or a woman. TEX. CONST. art. 1, § 3a; see Mathews v. Mathews, 414 S.W.2d 703, 707 (Tex. Civ. App.—Austin 1967, no writ); cf. *In re Marriage of Jafeman*, 105 Cal. Rptr. 483, 494 (Ct. App. 1973) (pension belonged to employed wife). For purposes of this comment, the military serviceman will generally be referred to as the husband, and the nonserviceman as the wife.

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

4. Under the provisions of the Texas Family Code, a divorce court is afforded wide latitude in dividing community property, the only requirement being that the division be just and right. *Id.* § 3.63 (1975). Whether the court can likewise exercise its discretion and divide the spouses' separate property is a more debatable question. A number of cases have held that the court does have the power to divide separate property. *Hedtke v. Hedtke*, 112 Tex. 404, 409, 248 S.W. 21, 22 (1923); *Cravens v. Cravens*, 533 S.W.2d 372, 375 (Tex. Civ. App.—El Paso 1975, no writ); *Daniels v. Daniels*, 490 S.W.2d 862 (Tex. Civ. App.—Eastland 1973, writ dismissed); *Keene v. Keene*, 445 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1969, writ dismissed). In a well-reasoned analysis, a recent commentator has taken the position that division of separate property, and even discretionary division of community property, violates basic community property principles of equal ownership. Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 222-24 (1975). Because of the disagreement concerning the extent of the divorce court's powers of division, this comment will be concerned with determining the precise property interests of the spouses in military retirement benefits, apart from any discretionary powers of the court. A complete discussion of the problems involved in dividing property in a divorce action may be found in McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413 (1976).

such determination.⁵

The various elements in the formula must be ascertained, and difficulties may arise in deciding upon the amounts of those figures. The court must specify a particular base pay of the serviceman since base pay is a factor the government uses in determining the monthly amount of his retirement benefits.⁶

PROSPECTIVE RETIREMENT BENEFITS AS COMMUNITY PROPERTY

Most courts today generally agree that prospective retirement benefits, although payable at some indeterminate time in the future, are nevertheless an earned property right and not a mere expectancy.⁷ Discussions as to the community nature of the benefits have been less harmonious.⁸ The various branches of the United States Armed Forces have their own requirements for voluntary retirement,⁹ but they all adopt the same basic formula for computing retired pay. The serviceman's monthly retirement check is equal to the product of his base pay at retirement and two and

5. The usual formula is one which determines the community interest by multiplying the amount of the retirement benefits by the proportion that the years of marriage during service bear to total years of service:

$$\text{community interest} = \text{retired pay} \times \frac{\text{married-service years}}{\text{total service years.}}$$

For a more complete discussion of this and other possible formulas, see Recent Development, *Community Property—Deferred Compensation: Disposition of Military Retired Pay Upon Dissolution of Marriage*, 50 WASH. L. REV. 505, 524-25 (1975).

6. The standard military formula computes the serviceman's monthly retirement benefits by multiplying two and one-half percent of his base pay by his total years of service:

$$\text{retired pay} = (2\frac{1}{2}\%) \times (\text{base pay}) \times (\text{years service}).$$

See 10 U.S.C. § 3991 (1970) (Army).

7. *Herring v. Blakely*, 385 S.W.2d 843, 845-46 (Tex. 1965); *Dominey v. Dominey*, 481 S.W.2d 473, 474 (Tex. Civ. App.—El Paso, no writ), cert. denied, 409 U.S. 1028 (1972); accord, *In re Marriage of Brown*, 126 Cal. Rptr. 633, 634-35 (1976); *Ramsey v. Ramsey*, 535 P.2d 53, 57 (Idaho 1975); *Morris v. Morris*, 419 P.2d 129, 130 (Wash. 1966). But see *Allen v. Allen*, 363 S.W.2d 312, 314-15 (Tex. Civ. App.—Houston 1962, no writ).

8. Compare *Schappell v. Schappell*, 544 S.W.2d 807, 809 (Tex. Civ. App.—El Paso 1976, no writ) with *Davis v. Davis*, 495 S.W.2d 607, 613-14 (Tex. Civ. App.—Dallas 1973, writ dismissed, overruled, *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976). See generally *Hughes, Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEXAS L. REV. 860, 869-73 (1966); Comment, *Military Retirement Benefits as Community Property: New Rules from the Supreme Court?*, 24 BAYLOR L. REV. 235, 238-47 (1972); Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347, 356-58 (1973); Note, *Military Retirement Benefits as Community Property*, 25 SW. L.J. 340, 346-49 (1971).

9. Voluntary retirement is distinguished from disability retirement. A disabled serviceman may draw his payments from either a disability retirement plan or a voluntary retirement plan, whichever is higher. With respect to community property principles, the two types of retirement are treated the same in Texas. *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970).

one-half percent of his total number of service years.¹⁰ Servicemen are generally eligible to retire after completion of twenty years of service.¹¹ When divorce occurs after retirement, the marital community has an identifiable interest in the actual payments.¹² A divorce prior to retirement, however, does not have the benefit of an identifiable *res*, and various distinctions concerning vesting of the benefits have been developed in order to determine the precise property in which the community may or may not have an interest.¹³ Some courts have held that the serviceman's property interest arises only when the retirement benefits have vested, vesting being equated to the earliest possibility of retirement.¹⁴ When the vesting requirement is met, the courts then determine the community interest by relating the number of years the marital community existed during military service to the total number of service years.¹⁵ Under this

10. A serviceman retiring after 20 years will receive monthly retirement payments equal to 50% of his base pay at retirement. The percentage is increased with continued service up to a maximum of 75% at 30 years or more. 10 U.S.C. § 1401 (1970 & Supp. V 1975) (warrant officers); *id.* § 3991 (1970) (Army); *id.* §§ 6325-6327, 6330 (1970) (Navy and Marine Corps); *id.* § 8991 (1970) (Air Force).

11. 10 U.S.C. §§ 3911, 3913, 3914 (1970) (Army); *id.* §§ 8911, 8913, 8914 (Air Force). *See also id.* §§ 3917-3919 (army retirement after 30 years); *id.* § 3924 (army retirement after 40 years); *id.* §§ 8917-8919 (air force retirement after 30 years); *id.* § 8924 (air force retirement after 40 years). The United States Navy and Marine Corps have slightly different provisions, requiring an enlisted man to serve 30 years, while an officer may retire at 20 years. *Id.* §§ 6321-6323, 6326-6327, 6330, 6331. For distinctions between the naval enlisted man's retainer pay and retired pay, see *Taggart v. Taggart*, 20 Tex. Sup. Ct. J. 334, 334-35 (May 28, 1977) (wife's portion based on retirement pay rather than on retainer pay).

12. *Dominey v. Dominey*, 481 S.W.2d 473, 474 (Tex. Civ. App.—El Paso, no writ), *cert. denied*, 409 U.S. 1028 (1972); *see Berg v. Berg*, 115 S.W.2d 1171, 1172 (Tex. Civ. App.—Fort Worth 1938, writ *dism'd*). Beyond the scope of this comment is the question whether military retirement benefits can ever be considered community property because of conflicts with federal law. For analyses which would answer the question in the negative, see Sage, *Military Retired Pay in Texas: A New Outlook*, 7 ST. MARY'S L.J. 28, 36-37 (1975); Comment, *Lump Sum Division of Military Retired Pay*, 12 IDAHO L. REV. 197, 198-206 (1976). In a point-by-point refutation, the California Supreme Court rejected the concepts which would deny a community interest. *In re Marriage of Fithian*, 111 Cal. Rptr. 369, 372-75, *cert. denied*, 419 U.S. 825 (1974), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

13. The terms "vested" and "matured" are occasionally confused. "Vested" infers an irrevocable interest. In reference to military retirement benefits, vesting occurs upon completion of 20 years of service. "Matured" means that all requirements for actual enjoyment have been met. In military cases, maturity occurs upon actual retirement. *See Cearley v. Cearley*, 544 S.W.2d 661, 664 & n.4 (Tex. 1976), *noted in* 9 ST. MARY'S L.J. 135 (1977); Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347, 348 & n.4 (1973).

14. *E.g.*, *Bright v. Bright*, 531 S.W.2d 440, 440-41 (Tex. Civ. App.—San Antonio 1975, no writ); *Lumpkins v. Lumpkins*, 519 S.W.2d 491, 493 (Tex. Civ. App.—Austin 1975, writ *ref'd n.r.e.*); *Davis v. Davis*, 495 S.W. 2d 607, 613 (Tex. Civ. App.—Dallas 1973, writ *dism'd*). These cases were expressly disapproved by the Texas Supreme Court in *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976).

15. *Ramsey v. Ramsey*, 535 P.2d 53, 59 (Idaho 1975); *Swope v. Mitchell*, 324 So. 2d 461,

theory of proportionate ownership, the portion of matured benefits which accrued during coverture is community property.¹⁶

The hybrid created by combining a vesting theory with a proportionate ownership theory is not without its difficulties.¹⁷ Strict application of the hybrid theory operates to deprive the community of any interest when dissolution of marriage occurs prior to the twentieth service year since that year marks the inception of the serviceman's interest and the marriage is not in existence at that time.¹⁸ Such an application can produce harsh results for the wife. For example, if a marriage of nineteen years duration terminates just after completion of the twentieth service year, the wife will receive the full fruits of the matured benefits, while if it terminates just before completion of the twentieth service year, she will receive nothing.¹⁹

The courts found means of circumventing the rule and alleviating the hardship in cases where vesting was to follow shortly after divorce, but the

463 (La. Ct. App. 1975); *Webster v. Webster*, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ); *Mora v. Mora*, 429 S.W.2d 660, 662-63 (Tex. Civ. App.—San Antonio 1968, writ *dism'd*).

16. *In re Marriage of Wilson*, 112 Cal. Rptr. 405, 407 (1974) (en banc); *Marshall v. Marshall*, 511 S.W.2d 72, 75 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). Proportionate ownership can be contrasted with another community property theory known as "inception-of-title." This theory requires that the marital community exist at the time that the spouse's property interest first arises. When that interest later matures, it relates back to its inception to give the community a full interest. This is true even though the community may no longer exist at maturity. *Creamer v. Briscoe*, 101 Tex. 490, 493, 109 S.W. 911, 912-13 (1908). In *Williamson v. Williamson*, 457 S.W.2d 311, 314 (Tex. Civ. App.—Austin 1970, no writ) the theory was applied to a private pension. It generally has been avoided, however, in cases of military divorce because it would require that the marriage exist when the husband first entered the service and began earning retirement benefits. See Comment, *Military Retirement Benefits as Community Property: New Rules from the Supreme Court?*, 24 BAYLOR L. REV. 235, 239-40 (1972).

17. Part of the difficulty arises from the Texas Supreme Court's application of the hybrid theory in *Busby v. Busby*, 457 S.W.2d 551, 553 (Tex. 1970). There the court approved the use of both a vesting requirement and a proportionate ownership application: "The right [to retire] having become fixed subject to the sole contingency of the serviceman's election, during the time the marital relationship existed, it was held to be vested as community property, to the extent that it accrued during the time of the marriage . . ." *Id.* at 553. Yet, the court divided the benefits equally, rather than in proportion to the number of years the marriage bore to the career. *Id.* at 551. By so doing, the court entered the realm of inception-of-title in that it appeared to equate vesting with incipiency of the serviceman's interest. Upon finding existence of the marital community at that time, the court accorded it a full interest in the matured benefits, rather than a proportionate interest. *Id.* at 555 (dissenting opinion).

18. *E.g.*, *Bright v. Bright*, 531 S.W.2d 440, 440-41 (Tex. Civ. App.—San Antonio 1975, no writ); *Lumpkins v. Lumpkins*, 519 S.W.2d 491, 493 (Tex. Civ. App.—Austin 1975, writ *ref'd n.r.e.*); *Davis v. Davis*, 495 S.W.2d 607, 613 (Tex. Civ. App.—Dallas 1973, writ *dism'd*). These cases were expressly disapproved by the Texas Supreme Court in *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976).

19. See *Schappell v. Schappell*, 544 S.W.2d 807, 809 (Tex. Civ. App.—El Paso 1976, no writ).

arbitrary distinctions developed were impossible to apply uniformly.²⁰ In the recent case of *Cearley v. Cearley*,²¹ which involved a divorce prior to the twentieth service year, the Texas Supreme Court confronted these distinctions. Reasoning that a military pension is earned each month of a serviceman's career, rather than being earned entirely on one arbitrary date, the court ruled that the portion earned during coverture is a property interest belonging to the marital community.²² Prior to accrual and maturity it is a contingent interest.²³ The *Cearley* decision assures a nonmilitary spouse an interest in the serviceman's retirement benefits regardless of whether or not he is then eligible to retire, the only requirement being that he ultimately does retire.²⁴

THE APPROPRIATE RATE OF BASE PAY

The retirement benefits for most servicemen are calculated according to base pay at retirement.²⁵ When divorce precedes retirement and the wife is awarded an interest in the benefits to the extent they were earned during coverture, it becomes necessary to select some value representing the serviceman's base pay. Few courts have considered the issue of the appropriate rate, and those that have considered it have reached conflicting and often confusing results.²⁶

20. In *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971, writ dismissed) the court of civil appeals found a vested interest in the case of an enlisted man who had served only eighteen and one-half years in the United States Air Force at the time of divorce, but who had contracted by way of reenlistment to serve over 20 years. *Id.* at 600-01. The same court declined to apply the same reasoning to an officer, who was not obligated by contract to serve the full 20 years. *Davis v. Davis*, 495 S.W.2d 607, 614 (Tex. Civ. App.—Dallas 1973, writ dismissed), *overruled*, *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976). The El Paso Court of Civil Appeals, also considering the case of an officer, chose to follow *Miser*. *Schappell v. Schappell*, 544 S.W.2d 807, 808-09 (Tex. Civ. App.—El Paso 1976, no writ).

21. 544 S.W.2d 661 (Tex. 1976). Divorce occurred in the nineteenth service year after 18 years of marriage. *Id.* at 661-62.

22. *Id.* at 665-66; *accord*, *Ramsey v. Ramsey*, 535 P.2d 53, 59 (Idaho 1975); *LeClert v. LeClert*, 453 P.2d 755, 756 (N.M. 1969).

23. *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976). The court accepted the proportionate ownership theory, thereby impliedly rejecting distinctions based upon theories of vesting. *Accord*, *In Re Marriage of Brown*, 126 Cal. Rptr. 633, 642 (1976).

24. *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976).

25. 10 U.S.C. § 3991 (1970) (Army); *id.* §§ 6325-6327, 6330 (Navy and Marine Corps); *id.* § 8991 (Air Force).

26. In the California case of *In re Marriage of Martin*, 123 Cal. Rptr. 634 (Ct. App. 1975), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976), the court calculated the wife's interest according to the husband's base pay at the time of dissolution, payable immediately, even though the serviceman was still on active duty. Rejecting the husband's arguments that the payments should be made only after retirement, the court reasoned that contingencies as to the actual realization of the benefits should not operate to deprive the wife of her interest. 123 Cal. Rptr. at 636. In arriving at its conclusion, the court relied on language to the same effect in *Bensing v. Bensing*, 102 Cal. Rptr. 255 (Ct. App.

The usual situation is one in which the wife has made a claim to a portion of the retirement benefits and the trial court has adopted a formula relating married-service years to total service years, determinable either as of divorce or retirement.²⁷ An alternative to specifying one pay rate is to apportion the benefits on the basis of the various pay rates which the serviceman has enjoyed during marriage.

Base Pay on an Annual Basis—The Theory of Pure Apportionment

Since the government formula for computing retirement benefits contains two variables—time and base pay—the logical extension of the proportionate ownership theory which divides community property on the basis of time is likewise to apportion on the basis of the serviceman's earnings.²⁸ Under this theory, the court would determine the dollar amount that each year of service contributes to the actual monthly retirement payments. The community interest would be the aggregate of these amounts during marriage.²⁹

Although no divorce court considering military retirement benefits has applied the theory, it is the purest form of apportionment. Most cases involving private pensions indirectly adopt the principle, although not expressly considering it. This is because most private pensions, regardless of whether they are contributory or noncontributory, are comprised of an accumulating fund which is based upon the employee's salary.³⁰ A determi-

1972), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976). Yet the *Bensing* court calculated the payments according to base pay at retirement. 102 Cal. Rptr. at 256.

27. The situation is particularly confusing when a court establishes the rate at the time of divorce and another court in a different case relies on the earlier rationale in adopting an equation which contains the rate at retirement. The Texas Supreme Court, without comment on the rate of pay issue, affirmed a judgment which adopted the use of base pay at retirement. *Cearley v. Cearley*, 544 S.W.2d 661, 661-62 (Tex. 1976). The court was concerned primarily with finding any interest at all in the wife and, therefore, relied heavily on the proportionate ownership theories expressed in an earlier case, which happened to favor base pay at divorce. *Mora v. Mora*, 429 S.W.2d 660, 662-63 (Tex. Civ. App.—San Antonio 1968, writ dismissed).

28. Proportionate ownership, at least in terms of years of marriage and years of service, is unmistakably the preferred method of division. *In re Marriage of Brown*, 126 Cal. Rptr. 633, 634-35 (1976); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976); *Mora v. Mora*, 429 S.W.2d 660, 663 (Tex. Civ. App.—San Antonio 1968, writ dismissed).

29. To achieve this result, the government's formula must be applied to each year of military service during coverture, thereby determining the monthly pension on the basis of that year alone. The products of these calculations would then be added together to determine the total monthly pension of the serviceman based upon the total years of marriage. The result is, in effect, a monthly pension payment based upon average annual earnings.

30. Kent, *Pension Funds and Problems Under California Community Property Laws*, 2 STAN. L. REV. 447, 448 (1950). A contributory fund involves contributions from the employee's pay check and is usually supplemented by a contribution from the employer. A noncontributory fund is comprised entirely of payments made into it by the employer on behalf of the employee. *Id.* at 448.

nation of the employee's hypothetical retirement benefits at any given time will be based upon the accumulations in the fund, multiplied by a percentage representing the extent to which the employee's right to the fund has vested.³¹ Thus, a calculation of the monthly amount which would be payable were the employee to retire on the day of divorce is, in reality, a calculation based upon his earnings and contributions up to that point. The dollar value thus being automatically accounted for, the divorce court can then simply apportion the community interest on the basis of time, and the proportionate ownership theory is satisfied.³²

The difference between the private pension and the military pension is that the government formula is not inclusive of varying pay rates. Instead, it simply applies one pay rate to all the years of service, thereby disregarding various base pay rates accorded the serviceman in the past.³³ Any determination of the yearly contributions to the ultimate benefits, although pure in form, would be entirely fictional. The government's formula applies one pay rate to each year of service, the result being that every year is worth precisely the same amount in relation to the ultimate benefits.³⁴ For a divorce court to determine the benefits on the basis of average earnings while the government determines them on the basis of maximum earnings is to favor fiction over reality at the expense of the wife. The husband and wife will each receive an equal share at the hypothetical rate, and the husband will receive an additional windfall in the form of any excess resulting from the government's actual computation at the higher rate. Such a result would violate the very principles of equality inherent in community property doctrines which the theory of proportionate ownership is designed to implement.³⁵ Any manner of apportionment must relate to the requirements of the pension fund in question. While pure apportionment does justice to accumulating pension funds which are based upon yearly earnings and contributions, it has no relation to nonaccumulating funds which are based upon a single pay rate.³⁶ In these latter cases, the

31. Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEXAS L. REV. 860, 861 (1966).

32. In *Dessommes v. Dessommes*, 505 S.W.2d 673, 679-80 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) the husband was required to prove the amount of contributions made during marriage as opposed to the amount made before the marriage or after its termination. This being established, the court could then apportion on the basis of time. *Id.* at 681.

33. See 10 U.S.C. § 3991 (1970) (Army); *id.* §§ 6325-6327, 6330 (Navy and Marine Corps); *id.* § 8991 (Air Force).

34. *Schappell v. Schappell*, 544 S.W.2d 807, 809 (Tex. Civ. App.—El Paso 1976, no writ).

35. See *In re marriage of Brown*, 126 Cal. Rptr. 633, 638-39 (1976); *Cearley v. Cearley*, 544 S.W.2d 661, 665-66 (Tex. 1976).

36. Very large corporations may have sufficient financial resources to be able to use nonaccumulating pensions rather than the usual contributory or noncontributory accumulating fund. In the Texas case of *In re Marriage of Rister*, 512 S.W.2d 72, 73 (Tex. Civ. App.—Amarillo 1974, no writ) the corporation which employed the husband, Southwestern

apportionment should be in terms of time, while value is determined on the basis of a single pay rate. That pay rate may be determined either at the time of divorce or at the time of retirement.

Base Pay at the Time of Divorce—The Rule in Texas

While it would be erroneous to say that Texas courts have developed and followed a particular rule as to the appropriate rate, it can be said that most courts which have considered the issue have applied rates as of the time of divorce.³⁷ Military pensions are generally considered to accrue over a period of time such that the community interest can be ascertained in proportion to the full interest of the serviceman. Some Texas cases which have adopted the apportionment theory have also determined the pay rate as of a particular time during the marriage and the career, that time being the date of divorce.³⁸ The case of *Schappell v. Schappell*³⁹ is the only military divorce case in Texas in which the rate was expressly considered, albeit cursorily. Colonel Schappell's marriage began before his commission in the United States Army and terminated during his eighteenth service year.⁴⁰ The El Paso Court of Civil Appeals, reasoning that retirement benefits should be considered as vested from the day of entry into the service and earned during each day of the career, held that if divorce precedes retirement, the community interest should be determined according to base pay as of divorce.⁴¹

Proportionate ownership with respect to rate of pay is an application of the basic theory that any property accruing to the husband by virtue of

Bell Telephone Company, utilized a pension formula almost identical to the government's military formula. However, the dollar amount which was multiplied by the years of service was not based upon the employee's salary at retirement. Rather, it was based upon the average of his five highest consecutive annual salaries. *Id.* at 73. Adopting the company's formula, the court apportioned on the basis of time, determinable as of divorce. *Id.* at 74. Because of this formula the average earnings of the employee were thus consulted only to the extent of five years rather than the entire career.

37. *See, e.g., Schappell v. Schappell*, 544 S.W.2d 807, 809 (Tex. Civ. App.—El Paso 1976, no writ); *Webster v. Webster*, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ); *Mora v. Mora*, 429 S.W.2d 660, 663 (Tex. Civ. App.—San Antonio 1968), writ *dism'd*). *But see* *Cearley v. Cearley*, 544 S.W.2d 661, 661-62 (Tex. 1976) (affirmation of base pay at retirement without comment).

38. *Mora v. Mora*, 429 S.W.2d 660, 662-63 (Tex. Civ. App.—San Antonio 1968, writ *dism'd*). The court of civil appeals reasoned that an equitable division of the retirement benefits required determination of the serviceman's potential retirement pay were he to retire at the time of divorce, but left the actual decision to the trial court to consider along with the other equities in the case. *Id.* at 663. The same court made a similar decision the following year without discussion of the appropriate rate issue. *Webster v. Webster*, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ).

39. 544 S.W.2d 807 (Tex. Civ. App.—El Paso 1976, no writ).

40. *Id.* at 807-08.

41. *Id.* at 809.

his efforts subsequent to divorce is his separate property.⁴² This theory has found some support in nonmilitary pension cases. Where the private pension is noncontributory and the company's formula for determining the monthly payments is similar to the government's military formula, then the same reasoning as to proportionate ownership can be applied so as to adopt the rate of pay at divorce.⁴³ In cases involving contributory pension funds, it is usually easy to determine the employee's interest at any given time. Although the interest may extend beyond the amount of contributions, it is still ascertainable and the wife's interest can be determined as of the date of divorce.⁴⁴ In extreme cases, the actual fund may be divided, awarding the spouses their respective shares.⁴⁵ Most divisions, though, will leave the fund intact if possible, determining the wife's present interest in the contributions and providing that the interest is payable out of the benefits when received.⁴⁶

In many private pensions the distinction is not between an accumulated fund and a matured fund, but rather between a partially vested fund and a fully vested fund. In cases of partially vested funds, retirement at a given time will render a reduced percentage of benefits whereas a fully vested fund would render fully matured benefits.⁴⁷ In the latter case, the principle of determining the community's interest as of divorce may yield to the equitable considerations of awarding the wife an interest in the matured benefits if and when they are received.⁴⁸ These awards are premised on the

42. See TEX. FAMILY CODE ANN. § 5.01 (1975). See generally Kent, *Pension Funds and Problems Under California Community Property Laws*, 2 STAN. L. REV. 447, 465-66 (1950); Recent Development, *Community Property—Deferred Compensation: Disposition of Military Retired Pay Upon Dissolution of Marriage*, 50 WASH. L. REV. 505, 525 & n.97 (1975).

43. *In re Marriage of Rister*, 512 S.W.2d 72, 74 (Tex. Civ. App.—Amarillo 1974, no writ). But see *Troutenko v. Troutenko*, 503 S.W.2d 686, 687 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (wife's interest determinable as of earliest possibility of retirement, rather than at either divorce or actual retirement).

44. *Herring v. Blakeley*, 385 S.W.2d 843, 848 (Tex. 1965); see *Everson v. Everson*, 537 P.2d 624, 629 (Ariz. Ct. App. 1975); *In re Marriage of Jafeman*, 105 Cal. Rptr. 483, 494-95 (Ct. App. 1972). Because of a concern with vesting distinctions, the court looked to the contributions in order to determine the community interest. *Id.* at 494-95. With the abolition of any vesting distinctions, it is likely that at least California courts will now look to the actual benefits rather than merely the contributions. *In re Marriage of Brown*, 126 Cal. Rptr. 633, 641-42 (1976).

45. *Taylor v. Taylor*, 449 S.W.2d 368, 369-70 (Tex. Civ. App.—El Paso 1969, no writ) (husband required to withdraw from pension plan because of wife's immediate financial needs).

46. *Freeman v. Freeman*, 497 S.W.2d 97, 100 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); see *Dessommes v. Dessommes*, 505 S.W.2d 673, 678-79 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). But see *Everson v. Everson*, 537 P.2d 624, 629 (Ariz. Ct. App. 1975) (value determined at time of divorce and payable at that time).

47. See Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEXAS L. REV. 860, 874 (1966).

48. *Williamson v. Williamson*, 457 S.W.2d 311, 313 (Tex. Civ. App.—Austin 1970, no

theory that the right to matured benefits was earned during marriage and by virtue of community efforts.⁴⁹ To this extent, the rulings in the civilian pension plans resemble more an award of military retirement benefits computed as of retirement than as of divorce and, thus, conflict with the military cases of *Schappell v. Schappell*⁵⁰ and *Mora v. Mora*.⁵¹

Base Pay as of Retirement

The alternative to a formula adopting base pay at divorce is one which uses base pay at retirement. Such a formula, however, has not enjoyed widespread application.⁵² Nevertheless, it may be argued that the community interest as well as that of the wife should be determined according to this latter amount rather than the amount as of divorce. Simply stated, the wife's portion is determined immediately by the divorce court, but no dollar amount is fixed until actual retirement when the monthly payments to the serviceman will be calculated according to his base pay at that time. The wife then receives her specified percentage of the payments.⁵³ As in the cases using base pay at divorce, the wife's percentage is, of course, dependent upon the proportion of years that the marriage bears to the serviceman's career.⁵⁴

Certain of the private pension cases have held that the community interest exists in the matured benefits, not merely the accumulated fund.⁵⁵ The principle's validity relies on the theory that the matured benefits, being a part of the actual consideration earned by virtue of the employee's services to the company, are community in nature to the extent that they were earned during coverture.⁵⁶ Since matured benefits in military pensions, like those in private pensions, are earned by serving a requisite number of years

writ). Since the husband was eligible to retire at the time of divorce, the court determined the wife's proportionate interest as of that time, but made provision for increasing the denominator of the fraction of married years to employed years by one number for each year the husband continued employment. *Id.* at 315. Presumably, the wife's interest would be in the increased value of the fund each year so she would not be penalized due to the natural reduction in her amount which would result from increases in the denominator.

49. *Angott v. Angott*, 462 S.W.2d 73, 74-75 (Tex. Civ. App.—Waco 1970, no writ).

50. 544 S.W.2d 807, 809 (Tex. Civ. App.—El Paso 1976, no writ).

51. 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ *dism'd*). Both *Schappell* and *Mora* advocate use of base pay at divorce.

52. At least two Texas courts have affirmed judgments based upon this formula, without deciding upon its validity. See *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976); *Miser v. Miser*, 475 S.W.2d 597, 600-01 (Tex. Civ. App.—Dallas 1971, writ *dism'd*).

53. *In re Marriage of Freiberg*, 127 Cal. Rptr. 792, 797 (Ct. App. 1976).

54. *Id.* at 797.

55. *Waite v. Waite*, 99 Cal. Rptr. 325, 330 (1972), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976); *Angott v. Angott*, 462 S.W.2d 73, 74-75 (Tex. Civ. App.—Waco 1970, no writ).

56. *Waite v. Waite*, 99 Cal. Rptr. 325, 330 (1972), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

and payable only upon actual retirement, the same reasoning can be applied to find a community interest in the actual benefits received by the serviceman.⁵⁷ That interest is, of course, limited to the number of years the community contributed to the accrual of the benefits.

Although the serviceman might persuasively argue that any pay increases subsequent to dissolution are his separate property,⁵⁸ the argument must necessarily refer only to his actual monthly salary, and not to his retirement benefits. Those benefits are earned by virtue of years of service, some of which are married years. They entitle him, and his wife to the extent of the marriage, to matured benefits computed according to his base pay at retirement, multiplied by a percentage of his total service years.⁵⁹ The federal government makes no distinction as to the serviceman's various rates of pay throughout his career, and instead calculates his monthly retirement payments according to one rate of pay at the end of his career.⁶⁰ The serviceman should not be allowed to make a distinction which the government refuses to make. He receives retirement benefits as compensation for the married years, but based upon a single pay rate determined at the time of retirement. The wife's interest during those married years is necessarily equal to the husband's.⁶¹

If the serviceman suffers a reduction in base pay such that his actual retired pay is less than it would have been had he retired at the time of divorce, it would be patently unjust to require him nevertheless to make payments to his ex-wife according to his base pay at divorce. Manifestly, it is more equitable to the husband for the wife to share the risk of reduced benefits and, likewise, for her to share the possibility of increased benefits.⁶² When the payments do increase, the wife does not invade the hus-

57. See *Bensing v. Bensing*, 102 Cal. Rptr. 255, 256 (Ct. App. 1972), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

58. See TEX. FAMILY CODE ANN. § 5.01 (1975). See generally Recent Development, *Community Property—Deferred Compensation: Disposition of Military Retired Pay Upon Dissolution of Marriage*, 50 WASH. L. REV. 505, 525 & n.97 (1975).

59. *In re Marriage of Freiberg*, 127 Cal. Rptr. 792, 797 (Ct. App. 1976).

60. See 10 U.S.C. § 3991 (1970) (Army); *id.* §§ 6325-6327, 6330 (Navy and Marine Corps); *id.* § 8991 (Air Force).

61. *In re Marriage of Freiberg*, 127 Cal. Rptr. 792, 796 (Ct. App. 1976). The variable which will result in greater amounts for the husband is the number of service years while single. During the married years, the spouses' interests are equal. *Id.* at 796.

62. See *In re Marriage of Brown*, 126 Cal. Rptr. 633, 639 (1976); *In re Marriage of Freiberg*, 127 Cal. Rptr. 792, 797-98 (Ct. App. 1976); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976). If the husband should advance in rank during retirement, the effect should be no different than if he advances after divorce but before retirement. See 10 U.S.C. § 3992 (1970) (advancement in retirement—Army); *id.* § 6151 (advancement in retirement—Navy and Marine Corps); *id.* § 8992 (advancement in retirement—Air Force). If a retired officer elects to continue his employment in the military on a civilian basis, his retirement benefits may be reduced. See 5 U.S.C. § 5532 (1970). In such a case, the wife's portion should likewise be reduced. Her interest is not determined by a specified amount, but rather is in the actual

band's separate property. She simply receives benefits which were earned during marriage and computed by the federal government according to a single standard.

Apart from the actual property interest which the wife may have in the later rate of pay, certain aspects of the computation of the serviceman's retired pay should lead to practical considerations of difficulty—if not fairness—in determining the wife's portion therein. Most cases involve retirement of an active duty serviceman whose retired pay is calculated according to a simple formula comprised of service years and base pay.⁶³ A person who has served a number of years in reserve units is entitled to retire and draw retired pay as well.⁶⁴ His service during the reserve years consists only of minimal duty days, and his retirement benefits are conditioned upon duty days accumulated into service years.⁶⁵ A compilation of the accumulated years at any given time is possible for purposes of determining the proportionate community interest.⁶⁶ Ascertainment of a particular pay rate is more difficult, however, because a reservist does not receive full base pay.⁶⁷ Yet his retirement benefits are calculated according to the base pay rate of the highest grade held satisfactorily at any time during his career.⁶⁸ Since such a determination is possible only upon completion of the career, it is imminently more practical to condition the wife's portion upon the same determination, rather than attempting to calculate her portion at a time when the husband is receiving less than full base pay and the amount of his retirement benefits is a matter of conjecture.

The government also accounts for the probability of cost of living increases by providing for a commensurate increase in the retirement benefits.⁶⁹ Any portion of the benefits payable to the wife should obviously include any such increases as they have no relation to the husband's separate efforts. While provision could be made for such increases even if the wife's interest is determined according to base pay at divorce, such provision would be automatic if base pay at retirement is used, her interest

retirement benefits, which may fluctuate in amount. Should the husband continue employment, the pay he draws is current compensation, not retirement compensation; the ex-wife's interest exists only in the retirement payments. See *In re Marriage of Brown*, 126 Cal. Rptr. 633, 640 (1976). In a California case involving a state pension, however, the court anticipated reduced retirement payments and made alternative provisions of alimony for the wife so that her payments would not decrease. See *Waite v. Waite*, 99 Cal. Rptr. 325, 328 (1972), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

63. See statutes cited note 60 *supra*.

64. 10 U.S.C. § 1331 (1970).

65. *Id.* §§ 1332-1334 (1970 & Supp. V. 1975); see *Freeman v. Freeman*, 497 S.W.2d 97, 100 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

66. 497 S.W.2d at 100.

67. See 37 U.S.C. § 206 (1970) (current pay rates for reserve members).

68. 10 U.S.C. § 1401 (1970 & Supp. V 1975) (formula three).

69. *Id.* § 1401a.

being a direct percentage of the actual payments, and would obviate any oversight of the cost of living contingency.⁷⁰

Regardless of whether a court decides upon base pay at divorce or base pay at retirement, it should make a definite, express choice, lest the formula it develops be so indefinite as to severely complicate application.⁷¹

PROPOSAL

A division of retirement benefits if, as, and when received by the husband, while approximating the respective spouses' interests as closely as possible, may not always be the most equitable method of property division. For the purpose of avoiding continuing enforcement of payment orders, courts are not loathe to award the full pension to the husband when circumstances warrant such an award.⁷² In other cases the retirement benefits may be neglected altogether during the divorce, leaving the parties as tenants in common, and suit will be brought later for partition.⁷³ Although the court in partition proceedings is not clothed with the discretion of a divorce court, it can still make the division along lines of proportionate ownership.⁷⁴ Indeed, it must divide according to the parties' interests.⁷⁵

In the vast majority of divorces, though, the retirement benefits will be

70. In *Payne v. Payne*, 512 P.2d 736, 737-38 (Wash. 1973) (en banc) the court noted the cost of living contingency in the husband's award, but inexplicably set a fixed dollar amount on the wife's portion, with the result of depriving her of any increase to keep pace with the cost of living. See *In re Marriage of Wilson*, 112 Cal. Rptr. 405, 408 (1974) (en banc). The husband, who was retired at the time of divorce, contended that the wife's portion of the benefits should be discounted to their present value. The court disagreed, favoring an award to the wife of an actual percentage of each pension payment. *Id.* at 408.

71. In *Williamson v. Williamson*, 457 S.W.2d 311, 314-15 (Tex. Civ. App.—Austin 1970, no writ) the court determined the wife's portion as of divorce, but developed a "sliding scale" fraction which allowed the husband to continue working and earning benefits without benefiting the community. Since the effect of a sliding scale and a fixed amount was to reduce the wife's portion each year of continued employment, it was unclear whether the court intended the amount to slide yearly also, or remain fixed as of the date of divorce.

72. *Constance v. Constance*, 544 S.W.2d 659, 660 (Tex. 1976) (full pension awarded to husband in view of required child support payments); see *Bensing v. Bensing*, 102 Cal. Rptr. 255, 258 (Ct. App. 1972), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

73. *Clendenin v. Krock*, 527 S.W.2d 471, 473 (Tex. Civ. App.—San Antonio 1975, no writ); see *Fox v. Smith*, 531 S.W.2d 654, 656 (Tex. Civ. App.—Waco 1975, no writ) (parties left as tenants in common when divorce decree fails to dispose of community property). *But see Smith v. Lewis*, 118 Cal. Rptr. 621, 624 (1975) (en banc) (motion to divide subsequent to divorce denied as being untimely), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

74. *Dessommes v. Dessommes*, 505 S.W.2d 673, 681 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (on rehearing). *But see Busby v. Busby*, 457 S.W.2d 551, 551 (Tex. 1970) (equal division).

75. See *Dessommes v. Dessommes*, 505 S.W.2d 673, 678 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

in issue before the court and will represent a major asset of the marriage.⁷⁶ In these cases it is imperative for the divorce court to have available a formula for determining the interests of the spouses. Since the government has provided the formula for calculating the monthly payments to be paid the serviceman, the court's task is to divide the payments fairly.⁷⁷ The most equitable formula for use in the division is one which determines the extent of the community interest according to the number of years that the marital community and the military service coincided, and according to the husband's actual retired pay, as determined by his base pay at retirement. The wife's interest is one-half that of the community.⁷⁸ When the

76. The actuarial value is often very substantial. See *Lumpkins v. Lumpkins*, 519 S.W.2d 491, 492 (Tex. Civ. App.—Austin 1975, no writ) (present value of over \$175,000), *overruled*, *Cearley v Cearley*, 544 S.W.2d 661 (Tex. 1976).

77. An issue which may have a bearing on the formula is that of a change in domicile. Without much analysis, the courts have generally held that only the years during which the couple has maintained its domicile in a community property state should be considered. *Otto v Otto*, 455 P.2d 642, 642-43 (N.M. 1969); *Schappell v. Schappell*, 544 S.W.2d 807, 809 (Tex. Civ. App.—El Paso 1976, no writ); *Gaulding v. Gaulding*, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ). But see *In re Marriage of Karlin*, 101 Cal. Rptr. 240, 244 & n.2 (Ct. App. 1972) (retirement benefits which vested while couple was domiciled in California were considered entirely community property), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976); *Commissioner v. Wilkerson*, 368 F.2d 552, 553 (9th Cir. 1966) (per curiam) (full amount of retirement benefits considered as community property when matured and received in community property state). On the other hand, mere residence changes because of duty assignments are insufficient to establish a change of domicile, and the serviceman must prove any domicile in a common law state such that the benefits are his separate property. *Ramsey v. Ramsey*, 535 P.2d 53, 59-60 (Idaho 1975); *Swope v. Mitchell*, 324 So. 2d 461, 464-65 (La. Ct. App. 1975); see TEX. FAMILY CODE ANN. § 3.22 (1975). When a substantial portion of the benefits is considered separate property of the husband, the wife may be compensated by alimony in most states. See *DeRevere v. DeRevere*, 488 P.2d 763, 765-66 (Wash. Ct. App. 1971). In Texas permanent alimony is not allowed. *Francis v. Francis*, 412 S.W.2d 29, 32-33 (Tex. 1967). The wife must depend on the discretionary powers of division held by the trial court. TEX. FAMILY CODE ANN. § 3.63 (1975). In this respect, it may be well to recall the caveat expressed by the California Supreme Court that "the spouse should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right." *In re Marriage of Brown*, 126 Cal. Rptr. 633, 639 (1976), quoting *In re Marriage of Peterson*, 115 Cal. Rptr. 184, 191 (Ct. App. 1974), *overruled on other grounds*, *In re Marriage of Brown*, 126 Cal. Rptr. 633 (1976).

78. The formula is:

$$\text{community interest (C)} = \frac{\text{married-service years}}{\text{total service years}} \times \text{retired pay.}$$

Inserting the government formula into the equation,

$$C = \frac{\text{married-service years}}{\text{total service years}} \times (2.5\%) \times \left(\frac{\text{service years not exceeding 30}}{\text{exceeding 30}} \right) \times (\text{base pay}).$$

If m = married-service years; t = total service years; s = service years not exceeding 30 (see note 10 *supra*); and b = base pay, then

$$C = \frac{m}{t} \times (2.5\%) \times (s) \times (b), \text{ and}$$

$$C = \frac{m}{t} \times \frac{sb}{40}.$$

husband receives the payments from the government, he holds his ex-wife's share as trustee, and must then pay that portion over to her.⁷⁹

CONCLUSION

It is now almost universally agreed that military retirement benefits represent a property right in which a marital community may have an interest. At least two states, Texas and California, have extended the interest to prospective benefits which have not yet accrued.⁸⁰ Such extension puts to rest arbitrary distinctions involving vesting and gives rise to new problems of division. Of immediate importance, particularly in those situations in which the benefits have not accrued at the time of divorce, is the difficulty of determining the actual dollar amounts the spouses are to receive. The extent of the community interest should be determined as closely as possible, and then translated into a percentage of the actual retirement payments. When this is done, the wife's interest, being one-half that of the community, will remain in a fixed proportion to that of the husband's, irrespective of variances in the dollar amount, and their qualitative interests will be equal.

The wife's interest equals one-half of the community interest. This formula is adapted from a similar formula in an article which favored base pay at divorce. See Recent Development, *Community Property—Deferred Compensation: Disposition of Military Retired Pay Upon Dissolution of Marriage*, 50 WASH. L. REV. 505, 525-26 n.98 (1973). Both formulas incorporate the federal government's formula for determining retirement pay. See 10 U.S.C. § 3991 (1970) (Army); *id.* §§ 6325-6327, 6330 (Navy and Marine Corps); *id.* § 8991 (Air Force).

79. *Clendenin v. Krock*, 527 S.W.2d 471, 474 (Tex. Civ. App.—San Antonio 1975, no writ).

80. *In re Marriage of Brown*, 126 Cal. Rptr. 633, 638 (1976); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976).