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CASE NOTES

COMMUNITY PROPERTY—Military Retirement Benefits—Prior to Accrual, Military Retirement Pension Earned During Coverture is Community Property Subject to Division at Time of Divorce

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

Robert Cearley had served nineteen years as an enlisted man in the United States Air Force at the time of his divorce from his wife. He had been married to her for eighteen of his nineteen years of military service. Sergeant Cearley completed the necessary twenty years for retirement on May 7, 1976, although his enlistment extended to August 31, 1976. When the trial court granted the divorce, on June 3, 1975, it ordered that if and when he retired and received his retirement benefits, his wife was to receive a proportional share based on one-half of the number of years they were married over the number of years of active service until retirement.[1] The Austin Court of Civil Appeals reversed, holding that the trial court could not order the division of unaccrued military retirement benefits when the property rights therein had not vested at the time of judgment.[2] The Texas Supreme Court noted jurisdiction under section 2 of article 1728[3] because of a conflict with a decision rendered by the Dallas Court of Civil Appeals.[4] Held—*Reversed.* A property right in an unaccrued or unmatured pension constitutes a contingent interest subject to divestment and, as such, is a community asset available for division along with other property in the allocation of the marital estate of the parties upon divorce.[5]

When dividing community property upon a decree of divorce, the Texas Family Code requires that the estate of the parties be divided "in a manner that the court deems just and right," taking into consideration the rights of the parties and any children of the marriage.[6] The Code further provides

1. Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976).

2. Cearley v. Cearley, 536 S.W.2d 96, 99 (Tex. Civ. App.—Austin), *rev'd,* 544 S.W.2d 661 (Tex. 1976).

3. Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976); *see* TEX. REV. CIV. STAT. ANN. art. 1728, § 2 (1962).

4. Miser v. Miser, 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971, writ dism'd).

5. Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976). The court defined the term "accrued" to mean that "the minimum number of years required for military pension eligibility [have] been served." *Id.* at 664 n.4. "Accured" was distinguished from the term "matured," which denotes that "all the requirements for immediate collection and enjoyment have been met." *Id.* at 664.

6. TEX. FAMILY CODE ANN. § 3.63 (1975).

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a presumption in favor of community property status for any asset of the parties in a divorce proceeding.[7]

In determining whether specific retirement benefits are separate or community property, Texas courts have had to decide the character of the benefits. While defendants have traditionally contended that retirement benefits are in the nature of a gift from employer to employee,[8] most courts have held that the benefits are additional compensation for past services and should be included in the community estate as earnings or wages of the retired spouse.[9] Texas courts have uniformly extended this characterization to military retirement benefits.[10] In recognizing that an *earned* property right in retirement benefits accrues by reason of the spouse's military service, Texas courts have considered the benefits as earnings of that spouse and, therefore, have characterized them as community property.[11]

One problem that has confronted Texas courts partitioning military retirement benefits in divorce proceedings has been the determination of the exact time at which these benefits acquired the character of community property. A device traditionally used for making such determinations with respect to other types of marital property is the "inception of title" doctrine, which states that the character of property depends upon whether the original title was acquired by the spouse before or after marriage.[12] If acquired before marriage, the property is considered separate; if acquired after, it is considered community.[13] Although this doctrine can be easily

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7. *Id.* § 5.02.

8. *See* Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 833 (1923).

9. *Id.* at 404, 247 S.W. at 833; *accord,* Ennis Business Forms, Inc. v. Gehrig, 534 S.W.2d 183, 189 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (retirement and disability retirement plans not gift but contract between company and employees); Fox v. Smith, 531 S.W.2d 654, 656 (Tex. Civ. App.—Waco 1975, no writ) (profit sharing plan not a gratuity).

10. Kirkham v. Kirkham, 335 S.W.2d 393, 394 (Tex. Civ. App.—San Antonio 1960, no writ). Texas courts have consistently upheld the proposition that retirement benefits are an *earned property right. See, e.g.,* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970) (military); Herring v. Blakeley, 385 S.W.2d 843, 846 (Tex. 1965) (private); Davis v. Davis, 495 S.W.2d 607, 611 (Tex. Civ. App.—Dallas 1973, writ dism'd) (military); Webster v. Webster, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ) (military).

11. *See* cases cited note 10 *supra.* Most, if not all, other community property jurisdictions have based their decisions upon the same premise. *See, e.g. In re* Marriage of Freiberg, 127 Cal. Rptr. 792, 795 (Ct. App. 1976) (military); Ramsey v. Ramsey, 535 P.2d 53, 59 (Idaho 1975) (military); Swope v. Mitchell, 324 So. 2d 461, 463-64 (La. Ct. App. 1975) (military); LeClert v. LeClert, 453 P.2d 755, 756 (N.M. 1969) (military); Morris v. Morris, 419 P.2d 129, 130-31 (Wash. 1966) (military). Several common law jurisdictions have been struggling with these concepts, with no discernible trend having yet been established. *Compare* Blitt v. Blitt, 353 A.2d 144, 146 (N.J. Super. Ct. Ch. Div. 1976), *with In re* Marriage of Ellis, 538 P.2d 1347, 1350 (Colo. Ct. App. 1975).

12. Welder v. Lambert, 91 Tex. 510, 525-26, 44 S.W. 281, 286 (1898) (originally setting out the doctrine). *See generally* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY LAW § 64, at 133-34 (2d ed. 1971) [hereinafter cited as DE FUNIAK] (views doctrine as creating a rebuttable presumption in favor of separate property).

13. Welder v. Lambert, 91 Tex. 510, 525-26, 44 S.W. 281, 286 (1898). *See also* McCurdy

applied to realty and contracts,[14] its application to retirement benefits is more difficult. If strictly applied, the determination of the character of retirement benefits would relate back to the day the spouse began military service.[15] Such an application, however, contradicts the basic principle that retirement benefits are an earned property right acquired over the years of service.[16] As a result, Texas courts had to look beyond the "inception of title" doctrine to determine when these benefits actually matured and vested. Only when this determination had been made could the court characterize the pension as separate or community property.[17]

Texas courts adopted a moderate stance regarding vesting requirements, holding that the property rights in a retirement plan vested when the recipient had served for the amount of time necessary to entitle him to the retirement benefits.[18] Actual retirement and receipt of the pension was not required in order for the property rights to vest. Even the possibility that the retirement plan might be forfeited if the necessary time of service was not completed could not defeat the property rights therein.[19]

In *Busby v. Busby*[20] the Texas Supreme Court reaffirmed the principle that an interest in a military retirement plan was an earned property right which, if earned during marriage, constituted community property.[21] The court held that the property rights in the pension in question had vested when the serviceman met the "eligibility requirements" to retire, even though the retirement payments would not be payable until he elected to

v. McCurdy, 372 S.W.2d 381, 383 (Tex. Civ. App.—Waco 1963, writ ref'd) (life insurance policy issued before marriage considered separate property of husband's estate; community estate had right of reimbursement for premiums paid with community funds), *noted in* 18 Sw. L.J. 521 (1964); 42 TEXAS L. REV. 747 (1964).

14. DE FUNIAK, *supra* note 12, § 64, at 131 n.99 (contract rights).

15. This application would become manifestly inequitable if, for example, the service member were to marry shortly after entering the military and the marriage lasted past retirement. By applying the "inception of title" doctrine upon divorce, retirement benefits would be considered separate property and nonmilitary spouses would receive nothing for their years of service to the marital estate.

16. *See* Kirkham v. Kirkham, 335 S.W.2d 393, 394 (Tex. Civ. App.—San Antonio 1960, no writ).

17. Herring v. Blakeley, 385 S.W.2d 843, 846 (Tex. 1965) (deferred compensation plan), *noted in* 19 Sw. L.J. 370 (1965).

18. Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd). The serviceman involved had completed 25 years and 8 months of military service but had not retired at the time of divorce. *Id.* at 661-62.

19. "Only rights in existence may be forfeited." *Id.* at 662; *see* Webster v. Webster, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ). The serviceman in *Webster* had served 24 years in the Air Force at the time of divorce. He became eligible to retire after 20 years. He asserted, however, that he might never retire and thus would never receive his retirement pension. Nevertheless, the court awarded the wife a portion of the pension if, as, and when received by the serviceman husband. *Id.* at 788.

20. 457 S.W.2d 551 (Tex. 1970).

21. *Id.* at 553.

retire.[22] These vested rights were held to be a contingent interest subject to divestment.[23] Consequently, judgments dividing the pension and "providing for the wife's portion if, when, and as the benefits were paid to the husband," would be upheld only if the pension rights had vested.[24] By its decision in *Busby*, the court, over a strong dissent,[25] rejected the notion that property rights in pension plans could not vest until the election to retire had been exercised.[26]

Attempts to extend the holding in *Busby* to include judgments dividing nonvested retirement benefits were struck down by several Texas courts.[27] These courts strictly applied the holding in *Busby* and denied the division of any military retirement benefits where the serviceman-spouse had not served the required twenty years to become eligible for retirement. The view taken in these decisions was that if the eligibility had not been established there could have been no vested property right, and the benefits, therefore, could not be classified as community property.[28]

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22. *Id.* at 553. The husband-serviceman had satisfactorily served the necessary 20 years of service and became *eligible* to voluntarily retire September 14, 1962. The divorce decree was entered on June 25, 1963. The same day the divorce decree was entered, the Air Force ordered the husband's disability retirement for medical reasons to be effective July 19, 1963. *Id.* at 552.

23. *Id.* at 553.

24. *Id.* at 554; *accord,* Webster v. Webster, 442 S.W.2d 786, 788 (Tex. Civ. App.—San Antonio 1969, no writ) (husband had served 24 years); Mora v. Mora, 429 S.W.2d 660, 661 (Tex. Civ. App.—San Antonio 1968, writ dism'd) (husband had served 25 years, 8 months).

25. Busby v. Busby, 457 S.W.2d 551, 555 (Tex. 1970) (dissenting opinion). In Justice Walker's dissent, in which two justices joined, he stated that "the 'right' of a member or former member of the armed forces to retirement benefits that are payable in the future, resting as it does on a statute that is subject to modification or repeal at any time, does not constitute property." *Id.* at 555 (dissenting opinion). It was his belief that the present holding of the court "that 'title' to benefits payable in the future 'vests' or has its inception when the serviceman becomes eligible for retirement can lead to grossly inequitable results." *Id.* at 555 (dissenting opinion).

26. *Id.* at 553; *see* Herring v. Blakeley, 385 S.W.2d 843, 846-47 (Tex. 1965) (private retirement). Community property need not be reducible "to immediate possession before divorce court can take jurisdiction to determine parties rights therein." Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd) (military retirement). Husband had served sufficient time to entitle him to benefits, therefore, the benefits were divisible upon divorce although not yet payable.

27. Bright v. Bright, 531 S.W.2d 440 (Tex. Civ. App.—San Antonio 1975, no writ) (16 years, 4 months), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976); Lumpkins v. Lumpkins, 519 S.W.2d 491, 493 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (19 years), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976); Davis v. Davis, 495 S.W.2d 607, 613-14 (Tex. Civ. App.—Dallas 1973, writ dism'd) (eight and one-half years), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976). *But see* Miser v. Miser, 475 S.W.2d 597, 600-01 (Tex. Civ. App.—Dallas 1971, writ dism'd) (division of nonvested retirement benefits allowed).

28. The following cases were overruled by *Cearley*: 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, 612-13

Texas courts encountered some difficulty in applying the "eligibility requirements" test to both officer and enlisted man. In *Miser v. Miser*[29] the Dallas Court of Civil Appeals upheld a judgment which apportioned the retirement benefits of an Air Force enlisted man who had served only eighteen and one-half of the twenty years required to become eligible for those benefits.[30] Two years later, in *Davis v. Davis,*[31] the same court struck down a judgment awarding the wife of an Air Force officer, who had been in the military eight and one-half years, a portion of his retirement benefits.[32] According to the court in *Davis,* the distinguishing fact in *Miser* was that prior to the divorce, Harry Miser had reenlisted for a term which would result in his serving beyond the necessary twenty years.[33] On the basis that the enlistment contract would carry the serviceman to eligibility, the judgment was upheld.

The position taken by those courts refusing to extend the holding in *Busby* was criticized in a strong dissent by Chief Justice Phillips in *Lumpkins v. Lumpkins.*[34] He defined property as *any interest* regardless of its present or future value, explaining that the possibility of forfeiture did not make these military retirement benefits a mere expectancy but merely subjected them to divestment.[35] He saw no reason for the distinction between officers and enlisted men and reasoned that if the benefits could *partially* vest in an enlisted man whose enlistment extended beyond the required twenty years, the same should be true for an officer.[36] He also

(Tex. Civ. App.—Dallas 1973, writ dism'd).

29. 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971, writ dism'd).

30. *Id.* at 598.

31. 495 S.W.2d 607, 614 (Tex. Civ. App.—Dallas 1973, writ dism'd), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 66 (Tex. 1976).

32. 495 S.W.2d at 614.

33. 495 S.W.2d at 614. In analyzing the vesting requirement of retirement benefits, the court relied on the distinction between an officer and enlisted man. An officer may voluntarily resign his commission or be involuntarily retired if he fails to advance in rank. An enlisted man must complete his contractual obligation and only discharge or death may prevent him from doing so. *Id.* at 614. *See also* Lumpkins v. Lumpkins, 519 S.W.2d 491, 493 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976).

34. 519 S.W.2d 491, 493 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (dissenting opinion), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976). *See also In re* Marriage of Brown, 126 Cal. Rptr. 633 (1976). The California Supreme Court in *Brown* overruled long-established precedent and allowed pension benefits to be apportioned at divorce even though the property rights had not yet vested. The court reasoned that pension benefits are not gratuities, but are a part of the consideration earned by the employee by virtue of his employment contract. The California court concluded, therefore, that nonvested pension rights were not mere expectancies but property rights contingent upon continued employment. *Id.* at 634-37.

35. Lumpkins v. Lumpkins, 519 S.W.2d 491, 494 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (dissenting opinion), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976). *See also* Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd).

36. Lumpkins v. Lumpkins, 519 S.W.2d 491, 495 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (dissenting opinion), *overruled,* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976).

pointed out that the contingencies which would divest the officer of his retirement benefits could as easily apply to the enlisted man.[37] Finally, he suggested, any problems in the potential possession of the benefits could be handled by the method of division—by decreeing a division "when, if, and as received" by the serviceman, rather than making a lump sum award.[38]

Cearley v. Cearley[39] afforded the Texas Supreme Court an opportunity to reexamine the holding in *Busby*. The court revised the *Busby* rule and approved the division of military retirement benefits as a community asset before the property rights therein had vested.[40] The court found such rights constituted a contingent interest in the retirement benefits, subject to divestment if and when the twenty year requirement for eligibility was not met by the serviceman.[41] Restating the well-established rule that a retirement pension is not a gratuity but an earned property right,[42] the court reasoned that a pension is earned not on the day of eligibility or maturity, but rather during each month of service.[43] The court concluded, therefore, that the portion of the military retirement pension earned during coverture is a contingent interest in property of the community, subject to division along with other community assets upon dissolution of the marriage.[44]

In arriving at its decision, the supreme court emphasized that its decision in *Cearley* would avoid unnecessary litigation.[45] The court reasoned that if a trial court could not divide retirement benefits before military-spouses became eligible to retire, it would become necessary for non-military spouses to bring additional suits to obtain their portion of the benefits when they accrue.[46] An effect of the court's holding was to restore equity to the division of pension benefits upon dissolution of the

37. 519 S.W.2d at 495 (dissenting opinion).

38. 519 S.W.2d at 495 (dissenting opinion). *Contra,* Ramsey v. Ramsey, 535 P.2d 53, 60-61 (Idaho 1975). *See generally* McKnight, *Division of Texas Marital Property on Divorce,* 8 ST. MARY'S L.J. 413, 440-41 (1976).

39. 544 S.W.2d 661 (Tex. 1976).

40. *Id.* at 666; *accord, In re* Marriage of Brown, 126 Cal. Rptr. 633, 642 (1976); LeClert v. LeClert, 453 P.2d 755, 756 (N.M. 1969); Wilder v. Wilder, 534 P.2d 1355, 1358 (Wash. 1975).

41. Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976); *see In re* Marriage of Brown, 126 Cal. Rptr. 633, 634-37 (1976). In overruling the rule established in French v. French, 112 P.2d 235 (Cal. 1941), the California Supreme Court held that "pension rights, whether or not vested, represent a property interest; to the extent such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding." *In re* Marriage of Brown, 126 Cal. Rptr. 633, 634-35 (1976).

42. Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 833 (1923).

43. Cearley v. Cearley, 544 S.W.2d 661, 665-66 (Tex. 1976). The Texas courts adopted the view of the California court in *Brown,* which held that "an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract." *In re* Marriage of Brown, 126 Cal. Rptr. 633, 637 (1976).

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

45. *Id.* at 666.

46. *Id.* at 666.

marriage by realizing that as the time of maturity nears, the pension becomes one of the most important assets of the couple's marital estate.[47] In overruling the conflicting portions of *Bright, Lumpkins,* and *Davis*[48] and abolishing the vesting requirement, the court approved the apportionment method of division, effective "if, as, and when" the benefits are received by the retiring spouse[49] and eliminated the previous distinction between an officer and an enlisted man.[50]

In restoring an equitable standard to the nonmilitary spouse's interest in the military retirement benefits, the court's holding in *Cearley* has also created some new problems. By abolishing "vesting" as a prerequisite for the classification of military retirement benefits as community property, the court recognized a long standing interest of the nonmilitary spouse in the pension. The question regarding the time at which the serviceman's rights vest in the retirement benefits can be juxtaposed with an inquiry regarding the time at which the *nonmilitary* spouse's rights vest in the benefits for community property purposes. The question could become quite complicated if the length of the marriage has to be taken into consideration in order to determine whether or not the interest of the nonmilitary spouse had vested.[51] A further complication arises when the serviceman-spouse has been married more than once and the pension must be divided between three or more persons. As the amount of the pension increases with advance in rank,[52] not only the number of years the couple was married, but also *which* years the couple was married may have to be considered by trial courts in their determination of the division of benefits. As is often the case with military personnel, a couple may have moved several times between common law and community property jurisdictions. In such an event, a determination would have to be made whether or not the years spent in different jurisdictions should be considered when finally dividing the retirement benefits.[53]

An issue not addressed by the court in *Cearley,* but which is significant, is that of federal preemption in the classification of military retirement benefits as community property.[54] A two-prong test governs this problem.

47. *Id.* at 666; *see In re* Marriage of Brown, 126 Cal. Rptr. 633 (1976).

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

49. *Id.* at 666.

50. *Id.* at 665 n.5. In effect the court recognized the validity of Chief Justice Phillips reasoning in his dissent in *Lumpkins. See* 544 S.W.2d at 665 n.5.

51. The only logical conclusion which could be drawn would be that the interest vests at marriage, although there has been no determination of this issue by the courts.

52. *See* 10 U.S.C. § 3991 (1970).

53. *See generally* Commissioner v. Wilkerson, 368 F.2d 552 (9th Cir. 1966); Otto v. Otto, 455 P.2d 642 (N.M. 1969); Mitchim v. Mitchim, 509 S.W.2d 720 (Tex. Civ. App.—Austin 1974), *rev'd on other grounds,* 518 S.W.2d 362 (Tex. 1975); Young, *Disposition of Military Retirement Pay Upon Dissolution of the Marriage,* 2 COMM. PROP. J. 239, 250-52 (1975).

54. *See generally* Sage, *Military Retired Pay in Texas: A New Outlook,* 7 ST. MARY'S L.J.

It must first be determined whether the application of state community property law to military retirement benefits conflicts with federal statutory regulation of those benefits, and second, whether the conflicting state law frustrates the purpose of congressional regulation.[55] At least two potential difficulties arise from an application of this test to the *Cearley* case: the first concerns the classification of retirement benefits as a gratuity rather than an earned property right; the second concerns the distinction between a "regular" officer, a "reserve" officer, and an enlisted man and the concurrent classification of the retirement benefits of each.

Most state community property cases dealing with retirement benefits have classified those benefits as earned property rights rather than gratuities.[56] In 1934 the United States Supreme Court ruled, however, that military retirement pensions were gratuities subject to being "redistributed or withdrawn at any time in the discretion of Congress."[57] Indeed, there is evidence also of congressional intent that military retirement benefits be regarded as the personal and separate property of the serviceman.[58] When considering whether Congress should provide annuities to the widows of service members, one reason offered in favor of the proposal was that "historically, military retired pay has been a personal entitlement payable to the retired member himself as long as he lives."[59]

Another difficulty may arise from the Texas Supreme Court's elimination of the distinction between officers and enlisted men in determining when military pension benefits vest. Federal statutes make a clear distinction between "regular" officers, "reserve" officers, and enlisted men. A "regular" commissioned officer retires from active duty but remains in

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28, 36-37 (1975); Comment, *The Unsettled Question of the Military Pension: Separate or Community Property?*, 8 CAL. W.L. REV. 522, 533-34 (1972); Note, *Lump Sum Division of Military Retired Pay*, 12 IDAHO L. REV. 197, 198-206 (1976).

55. *See generally* articles cited note 54 *supra*.

56. *E.g.*, Everson v. Everson, 537 P.2d 624, 629 (Ariz. Ct. App. 1975); *In re* Marriage of Brown, 126 Cal. Rptr. 633, 637 (1976); Ramsey v. Ramsey, 535 P.2d 53, 56 (Idaho 1975); Swope v. Mitchell, 324 So. 2d 461, 462-63 (La. Ct. App. 1975); LeClert v. LeClert, 453 P.2d 755, 756 (N.M. 1969); Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 833 (1923); Morris v. Morris, 419 P.2d 129, 130-31 (Wash. 1966).

57. Lynch v. United States, 292 U.S. 571, 577 (1934). *See also* United States v. Tyler, 105 U.S. 244, 245 (1881); Lemly v. United States, 75 F. Supp. 248, 249 (Ct. Cl. 1948); Busby v. Busby, 457 S.W.2d 551, 555 (Tex. 1970) (dissenting opinion). Two important points that support the categorization of military retirement benefits as gratuities are that the military serviceman does not make any direct contribution to his retirement fund and that should he retire before he becomes eligible for his retirement, he loses *all* of his benefits. The military retirement pension differs from the private pension in that the civilian employee contributes to his pension from what are considered community funds; the military serviceman does not contribute anything. Sage, *Military Retired Pay in Texas: A New Outlook*, 7 ST. MARY'S L.J. 28, 30-31 (1975).

58. S. REP. NO. 1480, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 3294, 3300.

59. *Id.* at 3300.

military service,[60] subject to recall.[61] "Regular" retired officers also remain subject to the Uniform Code of Military Justice[62] and receive "retired pay."[63] "Reserve" commissioned officers and enlisted men *terminate* their relationship with the military upon retirement from active duty and, therefore, are not subject to recall.[64] They are not subject to the Uniform Code of Military Justice and receive "retirement pay."[65] The distinctions between "retired pay" for the "regular" officer, who is being paid for his *present* status as a retired officer,[66] and "retirement pay" for the "reserve" officer and enlisted man, who are being paid for *past* services,[67] may cause a conflict with state community property classifications, such as that of Texas, that treat all retirement benefits alike.

A recent federal statute also sheds light on congressional intent with regard to the status of a serviceman's retirement pension. The Retired Serviceman's Family Protection Plan[68] created an elective annuity plan to provide for the surviving spouse should the service member die. According to the rules for participation in the plan, the service member may elect *not* to participate, but if he does elect to participate, the right left to the nonmilitary spouse is in the annuity and *not* the retired pay.[69] It is further provided that only a widow and not an ex-wife may benefit from the annuity,[70] and that in order to safeguard the participant's future retired pay, the annuity payments withheld from the retired pay cease upon di-

60. 10 U.S.C. § 8075(b)(3) (1970) (Air Force).

61. *Id.* § 3504 (Army); *id.* § 6481 (Navy); *id.* § 8504 (Air Force).

62. *Id.* §§ 801-940. "The following persons are subject to this chapter: . . . [r]etired members of a regular component of the armed forces who are entitled to pay." *Id.* § 802; *see* United States v. Tyler, 105 U.S. 244, 246 (1881).

63. 23 Comp. Gen. 284 (1943).

> 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 those in the Regular Army . . . is not conditioned on their remaining in the service but is more in the nature of a *pension*.

Id. at 286 (emphasis added).

64. *Id.* at 286; *see* 10 U.S.C. § 3914 (1970) (Army enlisted man).

65. 23 Comp. Gen. 284 (1943).

66. *Id.* at 286. The Federal Dual Compensation Act, 5 U.S.C. § 5532(b) (1970), further supports the theory that a "regular" officer's retired pay is present compensation, rather than payment for past services. The Act provides for a forfeiture of a portion of an officer's retired pay if he accepts another federally paid job. *Id.* If retired pay is payment for past services, as in a pension, there could be no reason for its reduction in connection with a position held by the retiree after retirement.

67. Sage, *Military Retired Pay in Texas: A New Outlook*, 7 ST. MARY'S L.J. 28, 29-30 (1975).

68. 10 U.S.C. §§ 1447, 1450 (Supp. V 1975).

69. H.R. REP. No. 951, 90th Cong., 1st Sess. 5 (1967). The rights in retirement pay accrue to the retiree and the decision is ultimately his as to whether or not to leave part of that retirement as an annuity to his survivor. *Id.*

70. 10 U.S.C. §§ 1447, 1450 (Supp. V 1975).