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Ex-wife May Bring Garnishment Proceedings to Secure Her Share of Ex-Husband's Military Retirement Pay under the Federal Consent Statute.

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contact is to prevent multiplicity of suits upon remote and possibly groundless claims.[64] Finally, a state has an interest in promoting its inhabitants' business relations. By subjecting nonresident buyers to suit in Texas for such minor contacts as making payments in the forum, the state would be discouraging the sale of its products.[65]

The *U-Anchor* decision places a logical limit upon the exercise of long-arm jurisdiction. In light of the public policy considerations involved, *U-Anchor* will promote interstate business with Texas corporations, and will help insure that Texas residents are protected by their state's long-arm statute and secure in their judgments under it. In respect to fundamental fairness, which is the basis of the minimal contacts test, *U-Anchor* will eliminate the absurd possibility of mail-order customers or other small purchase consumers being dragged into litigation in a distant forum upon insignificant claims. The case points out that "minimum contact" is more than merely *a* contact, and that "traditional notions of fair play and substantial justice" require some "relevant"[66] contact with the benefits and obligations of the forum's laws to invoke long-arm jurisdiction.

Richard E. Sames

COMMUNITY PROPERTY—Garnishment—Ex-wife May Bring Garnishment Proceedings to Secure Her Share of Ex-husband's Military Retirement Pay Under the Federal Consent Statute

United States v. Stelter,
553 S.W.2d 227 (Tex. Civ. App.—El Paso 1977, writ granted).

Plaintiff, Dorothy M. Stelter, brought a garnishment proceeding against

defendant. Jurisdiction in the Texas court was based on the fact that the note sued upon was payable in Texas.

64. In Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 509 (4th Cir. 1956) the court stated,

> It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the state exercising authority. If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed. . . .

65. McQuay, Inc. v. Samuel Scholsberg, Inc., 321 F. Supp. 902, 907 (D. Minn. 1971); Conn v. Whitmore, 342 P.2d 871, 875 (Utah 1959) (what appears advantageous to the state's businesses would be detrimental in the long run).

66. In Zeisler v. Zeisler, 553 S.W.2d 927, 929 (Tex. Civ. App.—Dallas 1977, writ dism'd), a case decided after *U-Anchor,* the court stated that an obligation to perform in the forum would be sufficient contact when coupled with any other relevant contact.

the United States in order to secure a portion of her ex-husband's military retirement pay previously awarded her in a property division during divorce proceedings. Based upon the federal consent statute,[1] the trial court granted summary judgment in favor of Mrs. Stelter. The United States appealed, contending that military retirement pay is current wages for personal services and that the term "alimony" as used in the federal statute does not include the division of military retirement pay by a Texas divorce judgment. Held—*Affirmed.* An ex-wife may bring garnishment proceedings to secure her share of her ex-husband's military retirement pay under the federal consent statute.[2]

Upon a decree of divorce, Texas relies on the partition of the community property to protect the divorcing parties' rights[3] and does not provide for permanent alimony.[4] Texas law defines permanent alimony as a court ordered allowance of periodic payments for support imposing a personal obligation upon the husband after a final decree of divorce.[5] Although Texas has no provision for permanent alimony, temporary alimony may be awarded prior to the final decree of divorce.[6]

In the divorce decree the community property is divided equitably,[7] and, if necessary, income from one spouse's separate property may be awarded to the other spouse.[8] The community property consists of all property

1. 42 U.S.C. § 659 (Supp. V 1975). This provision allows the United States government to be sued for the enforcement of child support and alimony obligations of government employees. *Id.* For the purposes of this case note, § 659 is referred to as the federal consent statute.

2. United States v. Stelter, 553 S.W.2d 227, 228 (Tex. Civ. App.—El Paso 1977, writ granted).

3. Cunningham v. Cunningham, 120 Tex. 491, 496, 40 S.W.2d 46, 48 (1931) (court might provide for wife by division of estate of parties); Fitts v. Fitts, 14 Tex. 443, 444 (1855) (division of community property should be made with due regard to rights of parties); Pape v. Pape, 35 S.W. 479, 480 (Tex. Civ. App. 1896, writ dism'd) (division of community property amply provides for wife); *see* Osborne v. Osborne, 207 S.E.2d 875, 880 (Va. 1974) (Texas community property division protects same right as does alimony in Virginia).

4. Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967); McBean v. McBean, 371 S.W.2d 930, 932 (Tex. Civ. App.—Waco 1963, no writ); McBride v. McBride, 256 S.W.2d 250, 253 (Tex. Civ. App.—Austin 1953, no writ).

5. Francis v. Francis, 412 S.W.2d 29, 32-33 (Tex. 1967); *see* Cunningham v. Cunningham, 120 Tex. 491, 496, 40 S.W.2d 46, 48 (1931).

6. Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1969) (defining temporary alimony); *see, e.g.*, Johnson v. Johnson, 140 S.W.2d 519, 519 (Tex. Civ. App.—Texarkana 1940, no writ) (temporary alimony is conditional); Pape v. Pape, 35 S.W. 479, 480 (Tex. Civ. App. 1896, writ dism'd) (alimony may be pendente lite or permanent and generally does not include child support); TEX. FAM. CODE ANN. § 3.59 (Vernon 1974) (allowing temporary alimony).

7. TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

8. Cooper v. Cooper, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (division may be unequal); McBean v. McBean, 371 S.W.2d 930, 932 (Tex. Civ. App.—Waco 1963, no writ) (award of payments referable to any property either spouse may have owned is valid); *cf.* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 141 (Tex. 1977) (income from separate property may be set aside for support of minor children).

acquired during marriage except that which is acquired by gift, devise or descent[9] and may include unmatured retirement benefits.[10]

After such a division, the failure of the ex-husband to pay the ex-wife her portion of the retirement benefits often has led to contempt of court proceedings.[11] These proceedings, however, have frequently been ineffective because they provide only for imprisonment of the recalcitrant ex-husband and give the ex-wife no right to recover money directly from the retirement fund.[12]

This predicament may have been alleviated somewhat by the passage in 1975 of a federal consent statute[13] allowing the United States to be sued in garnishment proceedings brought to enforce the child support and alimony obligations of its employees. Prior to this act the federal government had enjoyed sovereign immunity from suit,[14] and an ex-wife could collect her portion of retirement pay only from the ex-husband.[15] The consent statute gave the ex-wife an opportunity to secure alimony[16] and arguably her share of retirement pay directly from the federal government.[17]

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9. Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976), *noted in* 9 ST. MARY'S L.J. 135 (1977); TEX. FAM. CODE ANN. § 5.01 (Vernon 1975); *see* McKnight, *Texas Family Code and Commentary*, 5 TEX. TECH L. REV. 281, 346 (1974).

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

11. *See Ex parte* Anderson, 541 S.W.2d 286, 287-88 (Tex. Civ. App.—San Antonio 1976, no writ); *Ex parte* Sutherland, 515 S.W.2d 137, 139 (Tex. Civ. App.—Texarkana 1974, writ dism'd).

12. *Ex parte* Anderson, 541 S.W.2d 286, 287-88 (Tex. Civ. App.—San Antonio 1976, no writ) (failure to pay ex-wife her share of retirement pay directly); *see Ex parte* Yates, 387 S.W.2d 377, 379-380 (Tex. 1965) (failure to make payments to ex-wife to redeem promissory note awarded her by divorce court); *Ex parte* Sutherland, 515 S.W.2d 137, 139 (Tex. Civ. App.—Texarkana 1974, writ dism'd) (failure to pay ex-wife's court awarded share of retainer payments into registry of court).

13. 42 U.S.C. § 659 (Supp. V 1975) provides:

> Notwithstanding any other provision of law . . . moneys (the entitlement to which is based upon remuneration for employment) due from . . . the United States . . . to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Id. In Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162 (S.D. Tex. 1976) the court concluded that the Texas courts must determine whether the consent statute applies to community property decrees. *Id.* at 166.

14. McGrew v. McGrew, 38 F.2d 541, 544 (D.C. Cir. 1930); S. REP. No. 1356, 93d Cong., 2d Sess. 53-54, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8157.

15. *See Ex parte* Anderson, 541 S.W.2d 286, 287-88 (Tex. Civ. App.—San Antonio 1976, no writ); *Ex parte* Sutherland, 515 S.W.2d 137, 140 (Tex. Civ. App.—Texarkana 1974, writ dism'd).

16. S. REP. No. 1356, 93d Cong., 2d Sess. 53-54, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8157.

17. Wilhelm v. United States Dep't. of Air Force, 418 F. Supp. 162, 166 (S.D. Tex. 1976) (state courts must determine whether consent statute applies to community property decrees).

Despite the opportunity afforded by the federal consent statute, its enforcement faces two obstacles in Texas. Texas garnishment law exempts from garnishment current wages for personal services.[18] The term "current wages for personal services," as generally used in exemption statutes, means compensation to be paid periodically.[19] The exemption statutes in Texas have traditionally been given a liberal interpretation in favor of the party seeking protection.[20] A liberal interpretation of the term "current wages for personal services" could include retirement benefits and some courts have held that such benefits are a part of the worker's compensation not subject to garnishment.[21] On the other hand, where the retirement pay is community property which has been divided by a divorce court, direct payment to the ex-wife of her portion of the retirement pay may be ordered by the court against the retirement fund.[22]

The second obstacle in Texas to the application of the federal consent statute is the Texas public policy strongly prohibiting alimony.[23] This policy, if strictly applied to the consent statute, appears to prevent recovery under its provision of garnishment for alimony.[24] Nevertheless, there are

18. TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966), provides in part that "no current wages for personal service shall be subject to garnishment . . . ."

19. Alemite Co. v. Magnolia Petroleum Co., 50 S.W.2d 369, 370 (Tex. Civ. App.—Fort Worth 1932, no writ); J.M. Radford Grocery Co. v. McKean, 41 S.W.2d 639, 640 (Tex. Civ. App.—Fort Worth 1931, no writ).

20. *See, e.g.*, Moore v. Neyland, 180 S.W.2d 658, 660 (Tex. Civ. App.—Texarkana 1944, no writ) (protecting "business homestead"); Illich v. Household Furniture Co., 103 S.W.2d 873, 874 (Tex. Civ. App.—El Paso 1937, writ ref'd) (protecting wife from husband's postnuptial debts); Brasher v. Carnation Co., 92 S.W.2d 573, 575 (Tex. Civ. App.—Austin 1936, writ dism'd) (protecting laborers); J.M. Radford Grocery Co. v. McKean, 41 S.W.2d 639, 640 (Tex. Civ. App.—Fort Worth 1931, no writ) (protecting laborers).

21. Prewitt v. Smith, 528 S.W.2d 893, 896 (Tex. Civ. App.—Austin 1975, no writ) (teacher retirement funds part of member's compensation and not subject to garnishment); *see In re* Marriage of Brown, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 637 (1976) (pension benefits represent form of deferred compensation for services rendered); Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976) (retirement plans regarded as compensation earned); Byrd v. City of Dallas, 118 Tex. 28, 36, 6 S.W.2d 738, 741 (1928) (fireman's retirement funds part of agreed compensation); Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd) (retirement plans mode of employee compensation).

22. *See* Collida v. Collida, 546 S.W.2d 708, 710 (Tex. Civ. App.—Beaumont 1977, writ dism'd) (allowing ex-wife to receive her court awarded share of retirement benefits directly from Fireman's Retirement Fund). *But see* United States v. Smith, 393 F.2d 318, 321 (5th Cir. 1968) (denying assignment of serviceman's pay before it becomes due and payable).

23. Pearce v. Commissioner, 315 U.S. 543, 548 (1942) (interpreting Texas alimony statute); Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967) (defining permanent alimony); McBean v. McBean, 371 S.W.2d 930, 932 (Tex. Civ. App.—Waco 1963, no writ) (permanent alimony is against public policy); McBride v. McBride, 256 S.W.2d 250, 254 (Tex. Civ. App.—Austin 1953, no writ) (award of permanent alimony is against public policy of this state); Pape v. Pape, 35 S.W. 479, 480 (Tex. Civ. App. 1896, writ dism'd) (statutes make no provision for permanent alimony); TEX. FAM. CODE ANN. § 3.59 (Vernon 1975) (providing for temporary alimony).

24. *See* Marin v. Hatfield, 546 F.2d 1230, 1231 (5th Cir. 1977).

two views as to how the term "alimony" in federal statutes should be interpreted with regard to a division of retirement pay by a Texas divorce court.[25] The more restrictive view considers military retirement pay earned during marriage to be a community property right available for division by the divorce court[26] and does not consider it to be alimony.[27] The Fifth Circuit Court of Appeals supported this view by stating that Texas law rejects the contention that military retirement benefits should be treated as alimony payments.[28] It may be argued that application of the federal consent statute to a Texas division of community retirement pay is precluded by this view since Texas does not consider a property division to be alimony[29] and since the statute, while providing for alimony, makes no express provision for community property divisions.[30]

The liberal view gives the term "alimony" as used in federal statutes wider applicability. A Florida Court, for example, decided that for the purposes of United States statutes, a Texas division of military retirement pay amounted to alimony and allowed garnishment of a portion of the retirement benefits.[31] In construing another statute, the Fifth Circuit treated pension benefits awarded by a Texas divorce court as alimony.[32] Other courts have extended the liberal interpretation of the term "alimony" to encompass attorney's fees.[33] Under the liberal view, a division of retirement pay by a Texas divorce court would be alimony under

25. *Compare* Marin v. Hatfield, 546 F.2d 1230, 1231 (5th Cir. 1977) *and Ex parte* Sutherland, 515 S.W.2d 137, 140-41 (Tex. Civ. App.—Texarkana 1974, writ dism'd) *with In re* Nunnally, 506 F.2d 1024, 1026-27 (5th Cir. 1975) *and* Williams v. Williams, 338 So. 2d 869, 870 (Fla. Dist. Ct. App. 1976).

26. *See* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970); *Ex parte* Sutherland, 515 S.W.2d 137, 140-41 (Tex. Civ. App.—Texarkana 1974, writ dism'd); Mora v. Mora, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dism'd).

27. Marks v. Marks, 470 S.W.2d 83, 85 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); *see Ex parte* Sutherland, 515 S.W.2d 137, 140-41 (Tex. Civ. App.—Texarkana 1974, writ dism'd); Andrews v. Andrews, 441 S.W.2d 244, 246 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.) (concerning future payments, but not retirement benefits).

28. Marin v. Hatfield, 546 F.2d 1230, 1231 (5th Cir. 1977).

29. Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970); *Ex parte* Sutherland, 515 S.W.2d 137, 140-41 (Tex. Civ. App.—Texarkana 1974, writ dism'd); Marks v. Marks, 470 S.W.2d 83, 85 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

30. 42 U.S.C. § 659 (Supp. V 1975).

31. Williams v. Williams, 338 So. 2d 869, 870 (Fla. Dist. Ct. App. 1976); *cf.* Osborne v. Osborne, 207 S.E.2d 875, 880 (Va. 1974) (Texas' scheme of economic adjustment upon dissolution of marriage protects same right as does alimony in Virginia). *See generally* Comment, *Substitutes for Alimony—A Review of Methods for Providing Periodic Support Payments Subsequent to Divorce*, 20 BAYLOR L. REV. 314, 324 (1968) (proposing permanent alimony); Comment, *Permanent Alimony—Disguised in Property Settlement Agreements*, 11 S. TEX. L.J. 269, 278 (1969) (proposing permanent alimony).

32. *In re* Nunnally, 506 F.2d 1024, 1026-27 (5th Cir. 1975). In construing the Bankruptcy Act, the court included a division of military retirement pay in Texas under the term alimony.

33. *In re* Birdseye, 548 F.2d 321, 323 (10th Cir. 1977); *In re* Cornish, 529 F.2d 1363, 1365 (7th Cir. 1976); Jones v. Tyson, 518 F.2d 678, 681 (9th Cir. 1975).

the consent statute.

In *United States v. Stelter*[34] a serviceman's ex-wife sought to secure her portion of her former husband's military retirement pay by bringing garnishment proceedings against the United States under the federal consent statute. The court attempted to determine whether these proceedings violated the Texas exemption law prohibiting garnishment of "current wages for personal services."[35] It reasoned that the original divorce decree transformed the ex-wife's portion of the retirement pay into her separate property and her portion thus did not constitute current wages of the ex-husband.[36] Garnishment of her portion of the retirement pay therefore did not violate Texas exemption laws prohibiting garnishment of "current wages for personal services."[37] The court also adopted the liberal interpretation of the term "alimony" as used in the federal consent statute by allowing a division of retirement pay by a Texas divorce court to be encompassed within that term.[38] The liberal interpretation adopted by the *Stelter* court strengthened the Texas trend toward improving the wife's position in divorce settlements,[39] and provided her with a means of suing the federal government to secure her share of the retirement pay.

Notwithstanding the equitable result achieved by giving the ex-wife a means to secure her share of retirement pay, this liberal interpretation seems to differ from prior Texas construction of the term alimony.[40] Before *Stelter* the Texas courts had not considered the federal consent statute but had decided that an order to deliver the wife's share of community retirement pay does not constitute an award of alimony.[41] The *Stelter* court's

34. 553 S.W.2d 227 (Tex. Civ. App.—El Paso 1977, writ granted).

35. *Id.* at 229.

36. *Id.* at 229; *see Ex parte* Sutherland, 515 S.W.2d 137, 141 (Tex. Civ. App.—Texarkana 1974, writ dism'd) (wife's share of Naval Reserve pay divided by divorce court belongs to her, not to her ex-husband).

37. United States v. Stelter, 553 S.W.2d 227, 229 (Tex. Civ. App.—El Paso 1977, writ granted).

38. *Id.* at 229.

39. *See generally* Cearley v. Cearley, 544 S.W.2d 661, 665-66 (Tex. 1976) (community property extended to include unaccrued pension); Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970) (community property extended to include accrued military retirement pay); Collida v. Collida, 546 S.W.2d 708, 710 (Tex. Civ. App.—Beaumont 1977, writ dism'd) (ordering retirement fund to send wife her share of community retirement benefits directly). *But see* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977) (holding wife not entitled to husband's separate property).

40. *See Ex parte* Sutherland, 515 S.W.2d 137, 140-41 (Tex. Civ. App.—Texarkana 1974, writ dism'd); Marks v. Marks, 470 S.W.2d 83, 85 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

41. Marks v. Marks, 470 S.W.2d 83, 85 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) (division of military retirement benefits upon divorce is division of vested property interest and not award of alimony); *see Ex parte* Sutherland, 515 S.W.2d 137, 140-41 (Tex. Civ. App.—Texarkana 1974, writ dism'd) (order to deliver wife's share of retirement payments is not order to pay alimony); Andrews v. Andrews, 441 S.W.2d 244, 246 (Tex. Civ. App.—Fort

interpretation of the term alimony to include a division of community retirement pay seems to conflict with the earlier view.[42]

In May of 1977, legislation was enacted further defining the term "alimony" as used in the consent statute by specifically excluding any payment or transfer of property in a community property settlement.[43] This clarification statute, although allowing Texas residents to sue for temporary alimony, excludes the application of the consent statute to the recovery of a community property division of retirement pay, as was done in *Stelter*.[44] The statute, placing community property settlements beyond the scope of the federal consent statute, deprives a spouse in Texas of the remedy of securing a court awarded portion of retirement pay directly from the United States government. Texas residents are evidently discriminated against by the clarification statute because Texas is the only community property state without permanent alimony and is therefore the only state where the clarification statute denies access to the permanent alimony provision of the consent statute.[45] The clarification statute adopts the conservative view of the term "alimony;" it does not, however, alter the effect of *Stelter* over the period prior to the statute's passage because the *Stelter* trial court's decision preceded the statute's effective date.[46]

While *Stelter* construed the federal consent statute, it did not consider the question of federal preemption. The preemption question arises because the classification given military retirement benefits by Texas seems

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Worth 1969, writ ref'd n.r.e.) (future payments made after divorce as part of community property settlement does not amount to alimony).

42. *See* United States v. Stelter, 553 S.W.2d 227, 229 (Tex. Civ. App.—El Paso 1977, writ granted).

43. 42 U.S.C.S. § 462 (Supp. June, 1977). "The term 'alimony' . . . does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement. . . ." *Id.*

44. 42 U.S.C.S. § 462 (Supp. June, 1977). "The term 'alimony' . . . includes . . . alimony pendente lite. . . ." *Id.*

45. Comment, *Permanent Alimony—Disguised in Property Settlement Agreements*, 11 S. TEX. L.J. 269, 272 (1969); *see* ARIZ. REV. STAT. § 25-319 (1956); CAL. CIV. CODE § 4811 (Deering 1972); IDAHO CODE § 32-706 (1963); LA. CIV. CODE ANN. art. 160 (West Supp. 1977); NEV. REV. STAT. § 125.150 (Supp. 1975); N.M. STAT. ANN. § 22-7-6 (Supp. 1975); WASH. REV. CODE ANN. § 26.09.090 (Supp. 1976). Texas alone among community property states has no permanent alimony, and this places Texas residents at a disadvantage with respect to residents of other community property states because the clarification statute amends the federal consent statute by excluding community property settlements from its terms.

46. 42 U.S.C.S. § 462 (Supp. June 1977). Since the effective date was not given in the statute, it became effective on May 23, 1977, the day it was signed by the President. 2 D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 33.06, at 9 (4th ed. 1973).

But see Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 380-81 (1969) (subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction).

to conflict with the classification given such benefits by some federal cases.[47] Texas treats retirement benefits as earned property rights which become community property during marriage.[48] Some federal cases, however, have treated retirement pensions as gratuities.[49] The clarification statute evidently excludes community property settlements, including divisions of retirement benefits, from the confines of the consent statute.[50] Since military retirement pay is considered a gratuity under federal case law,[51] it appears inconsistent to include it under the 1977 clarification statute as community property. Construction of the clarification statute in accordance with federal cases treating military retirement pay as a gratuity rather than as a property right could lead a federal court to the conclusion that the clarification statute does not exclude military retirement pay from the scope of the consent statute.[52] A further difficulty arises, however, if retirement pay is classified as a gratuity by federal preemption. As a gratuity it apparently would not be available for apportionment because Texas law seems to allow only community property, which does not include a gratuity to a spouse, to be divided upon divorce.[53] Federal preemption

47. *See generally* Comment, *The Unsettled Question of the Military Pension: Separate or Community Property?*, 8 CAL. W.L. REV. 522, 533-34 (1972); 9 ST. MARY'S L.J. 135, 142 (1977).

48. Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976) (includes unaccrued pension benefits as community property); Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970) (includes disability retirement benefits accrued during marriage as community property); *Ex parte* Sutherland, 515 S.W.2d 137, 140 (Tex. Civ. App.—Texarkana 1974, writ dism'd) (includes payments to be received after divorce as community property).

49. Lynch v. United States, 292 U.S. 571, 577 (1934); Frisbie v. United States, 157 U.S. 160, 166 (1895); Lemly v. United States, 75 F. Supp. 248, 249 (Ct. Cl. 1948); 9 ST. MARY'S L.J. 135, 142 (1977).

50. 42 U.S.C.S. § 462 (Supp. June, 1977). "The term 'alimony' . . . does not include . . . any community property settlement, equitable distribution of property, or other division of property between spouses. . . ." *Id.*

51. See cases and material cited note 49 *supra.*

52. *See generally* Comment, *The Unsettled Question of the Military Pension: Separate or Community Property?*, 8 CAL. W.L. REV. 522, 533-34 (1972); 9 ST. MARY'S L.J. 135, 142 (1977).

53. Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977) (the only "estate of the parties" to be divided is the community property); McElreath v. McElreath, 162 Tex. 190, 193, 345 S.W.2d 722, 724 (1961) (wife must look to community property for share of property on divorce); Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 303 (1960) (prohibition against divestiture of title applies to separate property but not to community property). *But see In re* Marriage of Jackson, 506 S.W.2d 261, 266 (Tex. Civ. App.—Amarillo 1974, writ dism'd) (allowing community estate rights of reimbursement from husband's separate estate); Dorfman v. Dorfman, 457 S.W.2d 417, 424 (Tex. Civ. App.—Texarkana 1970, no writ) (judge not restricted to consideration of community assets only in making partition); Earnest v. Earnest, 223 S.W.2d 681, 685 (Tex. Civ. App.—Amarillo 1949, no writ) (court is invested with wide discretion in disposing of all property, separate or community); McKnight, *Texas Family Code and Commentary*, 5 TEX. TECH L. REV. 281, 338 (1974). A gratuity does not become a part of the community estate. *See* Hilley v. Hilley, 342 S.W.2d 565, 567, 569 (Tex. 1961).