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Community Property - Benefits Awarded under the Railroad Retirement Act Are Not Community Property Subject to Division upon Divorce.

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CASE NOTES

COMMUNITY PROPERTY — Benefits Awarded Under the Railroad Retirement Act are not Community Property Subject to Division Upon Divorce.

Hisquierdo v. Hisquierdo,
___U.S.___, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

Jesse H. Hisquierdo, a railroad employee for thirty-three years, obtained a divorce from his wife of seventeen years. At the time of the divorce Hisquierdo was fifty-five years of age and under the Railroad Retirement Act[1] would be entitled to benefits when he reached the age of sixty.[2] In reaching a property settlement the divorce court held that Mrs. Hisquierdo had no community property rights in her husband's retirement benefits. The California Court of Appeals affirmed the property division,[3] but the Supreme Court of California reversed, holding that the benefits were community property since they resulted in part from employment during the marriage.[4] Certiorari was granted by the United States Supreme Court.[5] Held—*Reversed and remanded.* Railroad retirement benefits awarded pursuant to section 231a of Title 45 of the United States Code are not community property subject to division upon divorce.[6]

The community property system originated in Europe and was introduced in America by French and Spanish colonists.[7] This system of marital property prevails in eight jurisdictions in the United States,[8] and is based

1. 45 U.S.C.A. § 231 (West Supp. 1979).

2. *See* 45 U.S.C.A. § 231a(a)(1)(ii) (West Supp. 1979). At the time of the divorce Hisquierdo had over thirty years experience, and therefore was eligible to receive benefits at age sixty. *See* Hisquierdo v. Hisquierdo, ___ U.S. ___, ___, 99 S. Ct. 802, 807, 59 L. Ed. 2d 1, 9 (1979).

3. *See In re* Hisquierdo, 133 Cal. Rptr. 684, 687 (Ct. App. 1976), *rev'd,* 566 P.2d 224, 228, 139 Cal. Rptr. 590, 594 (1977), *rev'd,* ___U.S.___,___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 16 (1979).

4. *See In re* Hisquierdo, 566 P.2d 224, 228, 139 Cal. Rptr. 590, 594 (1977), *rev'd,* ___U.S.___,___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 16 (1979). Finding no conflict between California community property laws and the Railroad Retirement Act, the court reasoned that the federal statute was intended to serve only as a bar to creditor's attempts to garnish an employee's benefits, and not to disrupt the property laws of the State of California. *See id.* at 226, 139 Cal. Rptr. at 592.

5. Hisquierdo v. Hisquierdo, ___U.S.___, 98 S. Ct. 1644, 56 L. Ed. 2d 82 (1978).

6. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 16 (1979).

7. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 91-93 (1975); W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1-3 (1943).

8. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 91 (1975). The eight community

upon principles foreign to common law property concepts.[9] Under the theory of community property, the husband and wife share equally all property acquired by their joint efforts during marriage.[10] In community property states the presumption exists that any property possessed by the spouses at the time of their divorce is community property.[11] Just as community property evolves from the existence of a marriage, dissolution of the marriage destroys it.[12] Upon divorce, each spouse possesses equal rights in one-half of the community assets.[13] Since these rights are substantive property rights a community property settlement merely divides between the spouses that which, by virtue of the marital relationship, he or she already owns.[14]

Under the community property system courts have long wrestled with the problem of whether the pension rights of a spouse are to be regarded as property subject to division upon dissolution of marriage.[15] When considering private pension plans, courts have consistently upheld the propo-

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property states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *Id.* at 91 n.32.

9. *See* Poe v. Seaborn, 282 U.S. 101, 110-12 (1930); R. BALLINGER, COMMUNITY PROPERTY § 1 at 4 (1895). At common law husband and wife were considered to be one, bound together by their marriage. The husband was the "one," however, and had complete control over all marital property. *See* R. BALLINGER, COMMUNITY PROPERTY § 1 at 4-5 (1895).

10. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 92 (1975). Since spouses enjoy equal ownership only in community property, a distinction must be made between community property and separate property. Separate property is that owned before marriage or obtained during marriage by gift, devise, or bequest. All other property is community property. *See id.* at 92. *See generally* TEX. FAM. CODE ANN. § 5.01 (Vernon 1975).

11. *See, e.g.*, CAL. CIV. CODE § 5107 (Deering 1972); IDAHO CODE 32-903 (1963); TEX. FAM. CODE ANN. § 5.02 (Vernon 1975). The presumption that property held by a couple upon their divorce is that of the marital community must be disproved by the party claiming the property to be separate. *See In re* Marriage of Bargary, 140 Cal. Rptr. 779, 781 (Ct. App. 1977); Perkins v. Ray, 365 So. 2d 1189, 1190-91 (La. Ct. App. 1978); Rustad v. Rustad, 377 P.2d 414, 415 (Wash. 1963); CAL. CIV. CODE § 5107 (Deering 1972).

12. *See* Payne v. Commissioner, 141 F.2d 398, 400 (5th Cir. 1944); *In re* Marriage of Brown, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976); C. FOOTE, R. LEVY & F. SANDERS, CASES AND MATERIALS ON FAMILY LAW 759 (1976).

13. *See* Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 239 (5th Cir.), *cert. denied*, 359 U.S. 913 (1958); *In re* Marriage of Brown, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976).

14. *See* General Ins. Co. of America v. Casper, 426 S.W.2d 606, 609-10 (Tex. Civ. App.—Tyler), *writ ref'd n.r.e. per curiam*, 431 S.W.2d 311 (Tex. 1968); Dillard v. Dillard, 341 S.W.2d 668, 670 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.); R. BALLINGER, COMMUNITY PROPERTY § 194 at 252 (1895).

15. *See, e.g.*, Van Loan v. Van Loan, 568 P.2d 1076, 1077 (Ariz. Ct. App.), *vacated*, 569 P.2d 214 (Ariz. 1977); Lumpkins v. Lumpkins, 519 S.W.2d 491, 493 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); De Revere v. De Revere, 491 P.2d 249, 251 (Wash. Ct. App. 1971). *See generally* Note, *Pensions as Property Subject to Equitable Division Upon Divorce in Oklahoma*, 14 TULSA L.J. 168 (1978); Note, *Dividing the Community Property Interests in Non-Vested Pension Rights*, 65 CALIF. L. REV. 275 (1977).

sition that retirement benefits are an earned property based on a contractual relationship between the private employer and the employee.[16] It is argued that since a pension is a form of deferred compensation for services rendered, the employee's right to his pension is based on his employment contract.[17] A contract right is not a mere expectancy but is a chose in action, a form of property.[18] A more troublesome problem develops when a marriage has been dissolved before pension rights have matured.[19] At one time the case law in most community property states held that pension rights had to be mature at the time of the dissolution to entitle the non-employee spouse to an equal share of the benefits.[20] Today even immature pension rights are routinely treated as community property and are divisible upon dissolution of the marriage.[21]

Unlike private retirement benefits systems, annuities payable under the

16. *See, e.g.,* Everson v. Everson, 537 P.2d 624, 629 (Ariz. 1975); T.C. James & Co. v. Montgomery, 332 So. 2d 834, 851-52 (La. 1975); Herring v. Blakely, 385 S.W.2d 843, 846 (Tex. 1965). Federal pensions, on the other hand, have been treated as gratuities rather than contract rights since they are subject to revocation by Congress. *See* Lynch v. United States, 292 U.S. 571, 577 (1934) (dictum) (pensions to former members of military or their dependents are gratuities and create no vested right in the beneficiary); Stouper v. Jones, 284 F.2d 240, 242 (D.C. Cir. 1960) (pensions granted by the government confer no rights that cannot be altered by subsequent legislation); Note, *Dividing the Community Property Interests in Non-Vested Pension Rights,* 65 CALIF. L. REV. 275, 279 (1977) (federal pensions are not enforceable contract rights). Courts in community property states have long been dividing such pensions, however, with very little federal interference. *See* Note, *Dividing the Community Property Interests in Non-Vested Pension Rights,* 65 CALIF. L. REV. 275, 279 (1977).

17. *See* Yeazell v. Copins, 402 P.2d 541, 545 (Ariz. 1965) (pension rights are part of the employment contract and become vested upon acceptance of employment); Van Loan v. Van Loan, 568 P.2d 1076, 1077 (Ariz. Ct. App.) (rights to retirement benefits derived from employment contract and cannot be unilaterally altered), *vacated,* 569 P.2d 214 (Ariz. 1977).

18. *See In re* Marriage of Brown, 544 P.2d 561, 565-66, 126 Cal. Rptr. 633, 637-38 (1976).

19. *See id.* at 563, 126 Cal. Rptr. at 635. Vested pension rights must be distinguished from a matured or unconditional right to immediate payment. An employee's right may vest after a very short term of service, even though it does not mature until he reaches retirement age and elects to retire. *See id.* at 563, 126 Cal. Rptr. at 635. *See generally* Note, *Dividing the Community Property Interest in Non-Vested Pension Rights,* 65 CALIF. L. REV. 275, 277-80 (1977).

20. *See, e.g.,* French v. French, 112 P.2d 235, 236-37 (Cal. 1941); Williamson v. Williamson, 21 Cal. Rptr. 164, 167 (Dist. Ct. 1962); Swope v. Mitchell, 324 So. 2d 461. 463 (La. Ct. App. 1975).

21. *See, e.g., In re* Marriage of Brown, 544 P.2d 561, 569, 126 Cal. Rptr. 633, 641 (1976) (expressly overruling French v. French, 112 P.2d 235, 239 (Cal. 1941) to allow division of non-vested pension benefits); Le Clert v. Le Clert, 453 P.2d 755, 756-57 (N.M. 1969) (wife awarded fractional interest in retirement benefits earned during marriage although rights had not matured at time of divorce); Miser v. Miser, 475 S.W.2d 597, 600-01 (Tex. Civ. App.—Dallas 1971, writ dism'd) (court ordered division of husband's anticipated retirement pay when he had one and one-half years to serve before retirement eligibility). The Texas Supreme Court has referred to the property rights in a non-vested military pension as a contingent interest subject to divestment, and as such is a community asset available for division along with other property of the marital estate. *See* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976).

present Railroad Retirement Act[22] are financed by means of employment taxes.[23] To become eligible, railroad employees must meet the requirements enumerated in section 231a of the Act.[24] The employee's spouse, in order to qualify, must live with the employee, receive regular contributions for support, or be entitled to support under a court order.[25] Benefits for a spouse terminate, however, when the spouse and the employee are absolutely divorced.[26] The Retirement Act contains a strong anti-attachment clause to insure that the annuitant receives the pension,[27] and does not assign or subject the benefits to any tax or legal process.[28]

The United States Supreme Court has often dealt with problems arising from conflicts between a state's community property laws and the laws of the United States.[29] Domestic relations law is generally held to be within

22. *See* 45 U.S.C.A. § 231 (West Supp. 1979). A federal program providing retirement and disability benefits for railroad employees was first enacted in 1934. *See* Railroad Retirement Act, Pub. L. No. 485, 48 Stat. 1283 (1934). The original act was amended in 1935. *See* Railroad Retirement Act of 1935, Pub. L. No. 399, 49 Stat. 967 (1935); H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935). Although major rail companies had established private pension plans, those plans "failed to provide properly for the retirement of employees who should be retired." H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935). Congress recognized that a comprehensive federal plan was needed both to encourage older workers to retire by providing them with the means to "enjoy the closing days of their lives with peace of mind and physical comfort," and to insure more rapid advancement for younger workers. *See* H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935). The original Act was declared unconstitutional and in excess of congressional power under the Interstate Commerce Clause. *See* Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 362 (1935). Two years later, however, Congress enacted very similar legislation which became known as the Railroad Retirement Act of 1937. *See* Railroad Retirement Act of 1937, Pub. L. No. 162, 50 Stat. 307 (1937). The 1937 Act provided annuities only for the workers themselves, and did not include payments to current or former spouses. *See* Railroad Retirement Act of 1937, Pub. L. No. 162, 50 Stat. 307, 309-10 (1937). A 1951 amendment provided an annuity for a qualifying spouse of a retired worker. *See* Railroad Retirement Act of 1951, Pub. L. No. 234, 65 Stat. 683 (1951).

23. *See* 26 U.S.C. § 3231 (1976). These taxes are assessed against both the carrier and the employee and are collected by the Internal Revenue Service pursuant to the Railroad Retirement Tax Act. *See id.* §§ 3201, 3221 (1976).

24. In pertinent part 45 U.S.C.A. § 231a(a) (West Supp. 1979) provides that annuities in the amounts specified under subsection (b) shall be payable to: "(i) railroad employees who have attained the age of sixty-five; (ii) individuals who have attained the age of sixty and have completed thirty years of service . . . ." *Id.*

25. *See id.* § 231a(c)(3)(i).

26. *Id.* § 231d(c)(3)(B).

27. *See id.* § 231m; *Hearings on S. 2393 Before the Senate Comm. on Intrastate Commerce*, 75th Cong., 1st Sess. 29 (1937) (statements of the President of the Brotherhood of Railway Clerks). Section 231m provides that: "Notwithstanding any other law . . . no annuity or supplemental benefit shall be assignable or be subject to any tax or garnishment, attachment, or other legal process whatsoever, nor shall the payment thereof be anticipated." 45 U.S.C.A. § 231m (West Supp. 1979).

28. *See* 45 U.S.C.A. § 231m (West Supp. 1979); H.R. REP. No. 1711, 74th Cong., 1st Sess. 12 (1935); 101 CONG. REC. 11772 (1955) (statements of Sen. John F. Kennedy).

29. *See, e.g.*, Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964) (treasury law overrides

the exclusive control of the states.[30] The power to make rules to establish, protect, and strengthen family life, as well as to regulate the disposition of property, is committed by the Constitution to the states.[31] Federal policies of non-interference in state domestic relations law, however, are not absolute.[32] If state family law comes into conflict with a federal statute, the United States Supreme Court has limited review under the supremacy clause of the Constitution.[33] The Court must determine whether Congress has "positively required by direct enactment" that state law be preempted.[34] A mere conflict in words is not sufficient; state family and property law must do "major damage" to "clear and substantial" federal interests before the supremacy clause will require that the state law be overridden.[35] In *Free v. Bland*[36] and *Wissner v. Wissner*[37] the Supreme Court preempted state community property laws it found injurious to federal interests.[38] In *Free* the Court was presented with a conflict between

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conflicting Washington community property law); Free v. Bland, 369 U.S. 663, 667-68 (1962) (treasury law overrides conflicting Texas community property law); McCune v. Essig, 199 U.S. 382, 389-90 (1905) (federal homestead law preempts conflicting Washington law).

30. *See, e.g.*, United States v. Yazell, 382 U.S. 341, 352-53 (1965); DeSylva v. Ballentine, 351 U.S. 570, 580 (1956); Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383-84 (1930). The Court in *Popovici* held that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States. *See* Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383-84 (1930).

31. *See* Labine v. Vincent, 401 U.S. 532, 538-39 (1971); U.S. CONST. amends. X, XIV, § 1.

32. *See* United States v. Yazell, 382 U.S. 341, 352 (1966) (state family arrangements should be preempted only when they do substantial damage to interests of the federal government); Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 384 (1930) (in the absence of any prohibition in the Constitution or laws of the United States the states may regulate family relations).

33. U.S. CONST. art. VI, cl. 2. In pertinent part this clause states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding." *Id.*; *see, e.g.*, Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 397-98 (1951); Rutledge v. City of Shreveport, 387 F. Supp. 1277, 1279-80 (W.D. La. 1975); Constantian v. Anson County, 93 S.E.2d 163, 168 (N.C. 1956).

34. Wetmore v. Markoe, 196 U.S. 68, 77 (1904); *see, e.g.*, Hjelle v. Brooks, 377 F. Supp. 430, 438 (D. Alaska 1974) (state law invalid when there is a congressional design to preempt entire field), *vacated*, 424 F. Supp. 595 (D. Alaska 1976); Baltimore Shippers & Receivers Ass'n v. Public Util. Comm'n, 268 F. Supp. 836, 844-45 (N.D. Cal. 1967) (federal preemption not inferred unless Congress has mistakenly ordained); Chemical Specialities Mfrs.' Ass'n v. Clark, 482 F.2d 325, 327 (5th Cir. 1973) (Congress may attach express preemption clause to legislation).

35. United States v. Yazell, 382 U.S. 341, 352 (1965); *see, e.g.*, Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178, 1180-89 (5th Cir. 1977); United States v. Marshall, 431 F. Supp. 888, 891 (N.D. Ill. 1977); *In re* Marriage of Musser, 388 N.E.2d 1289, 1292 (Ill. App. Ct. 1979).

36. 369 U.S. 663 (1962).

37. 338 U.S. 655 (1950).

38. *See* Free v. Bland, 369 U.S. 663, 670 (1962); Wissner v. Wissner, 338 U.S. 655, 658-59 (1950).

a treasury regulation creating a right of survivorship in United States savings bonds, and Texas community property laws.[39] In holding that the treasury law must prevail, the Court noted that the federal statute was entirely clear in stating that the survivor will be recognized as the sole and absolute owner of the bond.[40] The Court in *Wissner* held language in the Federal National Life Insurance Act[41] created rights that would be nullified by application of California community property law.[42] Thus, both *Free* and *Wissner* demonstrated that although marital property arrangements are generally within the control of the state, they may not hinder the objectives of federal interests.[43]

In *Hisquierdo v. Hisquierdo*[44] the United States Supreme Court considered whether awarding a divorced spouse an equal share in her husband's retirement benefits pursuant to state community property laws conflicted with the Federal Railroad Retirement Act.[45] Finding a conflict detrimental to federal interests, the Court held that under the supremacy clause of the United States Constitution, California's community property statutes must yield to the federal law.[46] The Court relied on the express language embodied in the Retirement Act,[47] as well as the language concerning federal pensions found in the Social Security Act.[48] In addition, the Court

39. *See* Free v. Bland, 369 U.S. 663, 670 (1962). *Compare* 31 U.S.C. § 757c (a) (1976) (treasury has authority to regulate United States bonds) *and* 31 C.F.R. § 315.61 (1978) (full survivorship rights descend to deceased's co-owner) *with* TEX. CONST. art. XVI, § 15 (any property acquired during marriage other than by gift, devise, or descent shall be deemed community property).

40. *See* Free v. Bland, 369 U.S. 663, 667-68 (1962); 31 U.S.C. § 757c (a) (1976); 31 C.F.R. § 315.61 (1978).

41. *See* 38 U.S.C. § 801(g)(2) (1952) (current version at 38 U.S.C. § 716(f) (1976)).

42. *See* Wissner v. Wissner, 338 U.S. 655, 658-59 (1950). The policy's premiums were paid out of the husband's salary which under California law was community property. The insurance program was created by congressional act, however, and specifically gave the insured the right to change his or her beneficiary at any time. *See id.* at 658-59.

43. Free v. Bland, 369 U.S. 663, 670 (1962); Wissner v. Wissner, 338 U.S. 655, 660-61 (1950); *accord,* Labine v. Vincent, 401 U.S. 532, 538-39 (1971); United States v. Yazell, 382 U.S. 341, 352 (1965); *In re* Marriage of Fithian, 517 P.2d 449, 452, 111 Cal. Rptr. 369, 371, *cert. denied,* 419 U.S. 825 (1974).

44. ___U.S.___, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

45. *See id.* at ___, 99 S. Ct. at 809, 59 L. Ed. 2d at 11-12; 45 U.S.C.A. § 231 (West Supp. 1979).

46. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 16 (1979); U.S. CONST. art. VI, cl. 2.

47. *See* 45 U.S.C.A. §§ 231m (West Supp. 1979) (pensions shall not be subject to garnishment, attachment, or any legal process whatsoever), 231d(c)(3) (entitlement of any non-employee spouse shall end upon absolute divorce from the employee), 231a(c)(3). The majority reasoned that Congress specifically gave the spouse a right in the pension under subsection (a), but also that all rights were intended to end upon dissolution of marriage. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 810, 59 L. Ed. 2d 1, 13 (1979).

48. *See* 42 U.S.C. § 659 (1976). In 1974 Congress amended the Social Security Act to permit garnishment of all federal pensions to satisfy alimony or child support obligations. *See*

found the congressional intent behind enactment of the Retirement Act required that pensions be shielded from community property divisions.[49] The majority further reasoned that to allow California's community property laws to prevail would cause major damage to the clear and substantial interests of the federal government.[50]

A dissenting opinion criticized the majority's finding of a conflict between state and federal laws.[51] It was argued that the pension annuities involved were not benefits or privileges, but were substantive property rights.[52] The dissent pointed out that the principles of a state's marital property law should not be superseded unless substantial interests of the federal government are endangered.[53] Further, the minority found no congressional intent to disturb the substantive property rights enjoyed by the respondent under California's community property laws.[54] The dissent

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id. A few courts construed the amendment to allow garnishment of federal pensions in community property settlements under the guise of alimony. *See* Williams v. Williams, 338 So. 2d 869, 870 (Fla. Dist. Ct. App. 1976); United States v. Stelter, 553 S.W.2d 227, 229 (Tex. Civ. App.—El Paso 1977), *rev'd*, 567 S.W.2d 797 (Tex. 1978). In response, Congress further amended the Social Security Act to define alimony as a periodic payment for the support and maintenance of a former spouse. Specifically excluded from this definition is any "payment or transfer of property . . . in compliance with any community property settlement" or other equitable distribution of property between former spouses. *See* Act of May 23, 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 160 (adding § 462(c)) (to be codified in 42 U.S.C. § 662(c)).

49. Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 810, 59 L. Ed. 2d 1, 13 (1979). *See* H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935). As one of the stated objectives of the Retirement Act is to encourage eligible employees to retire; the majority concluded that any automatic diminution of the pension frustrates that congressional objective. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 810, 59 L. Ed. 2d 1, 13 (1979). By reducing benefits received, divorced workers would be discouraged from retiring. *See id.* at___, 99 S. Ct. at 810, 59 L. Ed. 2d at 13. Since the former spouse would have no community property claim to salary earned after the marital community dissolved, employees would have an incentive to continue working. *Id.* at___, 99 S. Ct. at 810, 59 L. Ed. 2d at 13.

50. *See id.* at___, 99 S. Ct. at 813, 59 L. Ed. 2d at 16; United States v. Yazell, 382 U.S. 341, 352-53 (1965); Francis v. United Technologies Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978); Dalton Motors, Inc. v. Weaver, 446 F. Supp. 711, 712-14 (D.C. Minn. 1978).

51. Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 17 (1979) (Stewart, J., dissenting).

52. *Id.* at___, 99 S. Ct. at 815-16, 59 L. Ed. 2d at 19-20 (Stewart, J., dissenting); *accord, In re* Marriage of Brown, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 637 (1976); De Revere v. De Revere, 491 P.2d 249, 251 (Wash. Ct. App. 1971); *cf. In re* Marriage of Fithian, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (retirement fund integral part of employee's compensation), *cert. denied*, 419 U.S. 825 (1974).

53. Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 815-16, 59 L. Ed. 2d 1, 19-20 (1979) (Stewart, J., dissenting); *accord*, United States v. Yazell, 382 U.S. 341, 352 (1966); Yiatchos v. Yiatchos, 376 U.S. 306, 311 (1964).

54. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 817, 59 L. Ed. 2d 1, 21 (1979) (Stewart, J., dissenting). The dissent did not consider Congress' decision to provide a separate and additional benefit for the spouse of a retired worker (terminating upon absolute divorce) as evidence that this benefit was intended to be the exclusive right a spouse

reasoned the anti-attachment clause in the Retirement Act was merely intended to provide protection against the claims of creditors and that prohibitions against garnishment and attachment referred only to remedies, not to substantive ownership rights.[55] Also criticized was the majority's finding that the anticipation clause in the Retirement Act would be undermined by the Supreme Court of California's decision to remand the case, possibly allowing disposition of property in a manner whereby respondent's loss in pension benefits could be offset by awarding a disproportionate share of community assets.[56] The minority argued that the intent behind this clause was only to prohibit lump sum awards before the pension vests.[57]

The majority in *Hisquierdo* had little choice other than to hold that due to the express language of the Railroad Retirement Act and the legislative intent behind it, federal interests would be circumvented if California community property laws were allowed to prevail.[58] The Court noted that the language of the Act protects a recipient's pension from garnishment, attachment, or any other legal process.[59] An exception to this otherwise blanket protection is embodied in the Social Security Act which allows garnishment and attachment for purposes of child support and alimony.[60]

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might hold in the pension. *See id.* at ___, 99 S. Ct. at 816-17, 59 L. Ed. 2d at 21 (1979) (Stewart, J., dissenting); 45 U.S.C.A. § 231a(c)(3)(i) (West Supp. 1979).

55. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 817-18, 59 L. Ed. 2d 1, 22-23 (Stewart, J., dissenting). The dissent compared the language of the anti-attachment clause with that commonly found in "spendthrift" trusts, which are designed to protect against creditors' attempts to attach a beneficiary's funds. *See id.* at___, 99 S. Ct. at 817, 59 L. Ed. 2d at 21-22 (Stewart, J., dissenting). *Compare* 45 U.S.C.A. § 231m (West Supp. 1979) (no annuity is assignable or subject to tax, garnishment, attachment or other legal process) *with* Caples v. Buell, 243 S.W. 1066, 1066-67 (Tex. Comm'n App. 1922, holding approved) (language from spendthrift trust stating payments to trustee's children shall not be transferred, assigned, or subject to judicial process). *See generally* E. GRISWOLD, SPENDTHRIFT TRUSTS § 16 (1947).

56. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 818-19, 59 L. Ed. 2d 1, 23-24 (1979) (Stewart, J., dissenting). The majority held that such benefits would be anticipated if respondent was awarded the couple's home as an offset against the husband's unvested benefits. *See id.* at___, 99 S. Ct. at 811-12, 59 L. Ed. 2d at 14-15. The Court reasoned that such an award would allow respondent to receive her interest before the date Congress had set for any interest to accrue. *See id.* at___, 99 S. Ct. at 812, 59 L. Ed. 2d at 15; 45 U.S.C.A. § 231m (West Supp. 1979).

57. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 818, 59 L. Ed. 2d 1, 23 (Stewart, J., dissenting).

58. *See id.* at___, 99 S. Ct. at 810-12, 59 L. Ed. 2d at 12-14; 45 U.S.C.A. § 231 (West Supp. 1979); H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935); S. REP. No. 93-1356, 93d Cong., 2d Sess. 42-43 (1974); H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972).

59. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 811, 59 L. Ed. 2d 1, 14 (1979); 45 U.S.C.A. § 231m (West Supp. 1979). Divorce proceedings clearly fit into the definition of a legal process. *Cf.* Seuss v. Schukat, 192 N.E. 668, 671 (Ill. 1934) ("dissolution of marriage effected solely by judicial decree"); Bushnell v. Cooper, 124 N.E. 521, 522 (Ill. 1919) (marriage is a sanction of law).

60. *See* 42 U.S.C. § 659 (1976) (allows garnishment of all federal pensions to satisfy

Community property divisions upon dissolution of marriage, however, have been specifically excluded from the definition of alimony.[61] The minority ignored the literal meaning of the statutes, finding no conflict between the federal language and the California community property law.[62]

Any attempt to divide Railroad Retirement benefits in half upon dissolution of marriage, regardless of need, would frustrate the legislative intent underlying the Act.[63] If California community property laws were allowed to prevail, a divorced employee would be encouraged to work past the age of retirement eligibility, as his or her pension rights accruing after the dissolution could not be divided as community property.[64] In addition, the majority persuasively argues that had Congress wanted to extend retirement benefits to divorced spouses, it could have done so when the Act was revised in 1974.[65]

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alimony and child support decrees).

61. *See* Act of May 23, 1977, PUB. L. No. 95-30, § 501(d), 91 Stat. 160 (adding § 462(c)) (to be codified in 42 U.S.C. § 662(c)).

62. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 818-19, 59 L. Ed. 2d 1, 23 (1979) (Stewart, J., dissenting). *See generally* 45 U.S.C.A. §§ 231d(c)(3), 231m (West Supp. 1979); 42 U.S.C. § 659 (1976); Act of May 23, 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 160 (adding § 462(c)) (to be codified in 42 U.S.C. § 662(c)).

63. *See* H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935); S. REP. No. 93-1356, 93d Cong., 2d Sess. 42-43 (1974) (Act intended to allow eligible employees to retire comfortably and to provide opportunities for younger workers).

64. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 91-93 (1975). Assets divisible upon divorce as community property are only those acquired during the marriage. Those acquired before or after the marriage are considered separate property. *See id.* at 92. *See generally* Free v. Bland, 369 U.S. 663, 664 (1962); *In re* Marriage of Bargary, 140 Cal. Rptr. 779, 781 (Ct. App. 1977); Bell v. Phillips Petroleum Co., 278 S.W.2d 407, 408 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.). Thus although a non-employee spouse would still be entitled to one half of the salary and pension benefits earned by the employee during the marriage, upon divorce, the non-employee's rights end. If railroad pensions were to be treated as community property, a divorced employee could reduce his or her former spouse's fractional share in the benefits with each year of employment after the dissolution of marriage. The end result would be that the stated objectives of the Retirement Act would be frustrated by making it possible for the employee to receive a greater portion of his pension benefits by working past retirement eligibility. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 810, 59 L. Ed. 2d 1, 13 (1979); H.R. REP. No. 1711, 74th Cong., 1st Sess. 10 (1935); *cf.* Le Clert v. Le Clert, 453 P.2d 755, 756 (N.M. 1969) (wife awarded a fraction of husband's retirement pension determined by dividing number of months employed while married by total months employed); Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976) (fraction of military retirement pay earned during coverture subject to proportionate division in divorce proceeding).

65. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 810, 59 L. Ed. 2d 1, 13 (1979); H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 10, 12, 18 (1972). Congress considered amending the Railroad Retirement Act to extend benefits to non-employee spouses after divorce. The proposal failed to receive committee approval, however, largely due to the perilous financial state of the railroad retirement account. *See* H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 12 (1972); 42 U.S.C. § 402(b)(1) (1976) (Social Security amendment has extended benefits to divorced non-employee spouses).

If the dissenting opinion was taken to its logical conclusion, congressional intent would be further frustrated by the minority's approval of the Supreme Court of California's remand allowing the lower court to award respondent a greater share in the community's property to offset any loss in petitioner's unvested pension benefits.[66] Although the Retirement Act prohibits any anticipation of a payment of a pension,[67] little difference exists between an award of property worth one-half of petitioner's unvested pension, and a decree awarding a portion of the pension itself.[68] Further, the minority's literal interpretation of this language seems out of place considering its refusal to accept the express terms of the Railroad Retirement and Social Security Acts as conclusive of legislative intent.[69] Although the dissent's concern with the possible inequities stemming from the exclusion of pension benefits from community property settlements was shared, to some extent, by the majority,[70] the conflict between state and federal interests presented in *Hisquierdo* is clearly the type that the supremacy clause forbids.[71]

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66. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 818-19, 59 L. Ed. 2d 1, 23-24 (1979) (Stewart, J., dissenting); *In re* Hisquierdo, 133 Cal. Rptr. 684, 685-86 (Ct. App. 1976), *rev'd*, 566 P.2d 224, 227, 139 Cal. Rptr. 590, 594 (1977), *rev'd*, ___ U.S. ___, ___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 16 (1979). *See generally* CAL. CIV. CODE ANN. § 4800 (Deering 1972).

67. *See* 45 U.S.C.A. § 231m (West Supp. 1979).

68. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 812, 59 L. Ed. 2d 1, 15 (1979); 45 U.S.C.A. §§ 231m, 231e (West Supp. 1979); *cf.* United States v. Mroch, 88 F.2d 888, 890 (6th Cir. 1937) (government could not set off payments erroneously paid to deceased's daughter against amounts due his widow); 5 U.S.C. § 8346 (1976) (civil service retirement benefits not assignable or subject to garnishment, attachment, or other legal process); 38 U.S.C. § 3101(b) (1976) (veterans' benefits anti-attachment statute).

69. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 17 (1979) (Stewart, J., dissenting). In his dissent Justice Stewart wrote: "There is simply nothing in the Act to suggest that Congress meant to insulate these benefits from the rules of ownership that in California are a normal incident of marriage." *Id.* at___, 99 S. Ct. at 813, 59 L. Ed. 2d at 17 (Stewart, J., dissenting). *See generally* 45 U.S.C.A. § 231m (West Supp. 1979); 42 U.S.C. § 659 (1976); Act of May 23, 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 160 (adding § 462(c)) (to be codified in 42 U.S.C. § 662(c)).

70. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 812-13, 59 L. Ed. 2d 1, 16 (1979). The majority notes with favor legislation that was recently passed allowing garnishment of civil service retirement benefits for community property purposes. *Id.* at___, 99 S. Ct. at 812-13, 59 L. Ed. 2d at 16. *See* Act of Sept. 15, 1978, Pub. L. No. 95-366, 92 Stat. 600 (1978) (to be codified as 5 U.S.C. § 8346).

71. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 813, 59 L. Ed. 2d 1, 16 (1979); U.S. CONST. art. VI, cl. 2; *cf.* Great Western United Corp. v. Kidwell, 439 F. Supp. 420, 435 (N.D. Tex. 1977) (state statute regulating tender offer preempted due to congressional intent to displace state regulation), *aff'd*, 577 F.2d 1256, 1274-75 (5th Cir. 1978). *Compare* Perez v. Campbell, 402 U.S. 637, 656 (1971) (motor vehicle statute rendered invalid for frustrating full effectiveness of federal bankruptcy law, even though vehicle statute was passed with legitimate purpose in mind) *with* Rousseff v. Dean Witter & Co., 453 F. Supp. 774, 780 (N.D. Ind. 1978) (state securities law that supplemented federal law not preempted as the state law did not stand as an obstacle to the objectives of Congress).

Another interesting point not fully developed by the Court is the decision's possible ramifications in cases where there is little or no community property to divide upon dissolution of marriage. Congress clearly intended that state divorce courts have the discretion to order alimony or child support payments for former non-employee spouses, and if necessary, to garnish pension benefits to satisfy the decree.[72] Thus, even though *Hisquierdo* conflicts with community property concepts,[73] its seemingly harsh effects can be somewhat mitigated.[74] Seven of the eight community property states have statutory provisions allowing trial courts to award permanent alimony.[75] Texas makes no allowance for permanent alimony,[76] and under the holding in *Hisquierdo,* a former, non-employee spouse could be faced with grave consequences.[77]

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72. *See* 42 U.S.C. § 659 (1976).

73. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 812-13, 59 L. Ed. 2d 1, 16 (1979).

74. *Compare* IDAHO CODE § 32-706 (1963) (court may compel husband to provide for permanent maintenance of children and support of wife out of his separate property) *with* TEX. FAM. CODE ANN. § 3.59 (Vernon 1975) (allowing only for temporary support pending a final decree).

75. *See* ARIZ. REV. STAT. ANN. § 25-319 (1976); CAL. CIV. CODE ANN. § 4801 (Deering 1972); IDAHO CODE § 32-706 (1963); LA. CIV. CODE ANN. art. 9:302 (West Supp. 1979); NEV. REV. STAT. § 125.150 (1973); N.M. STAT. ANN. §§ 22-7-2, 22-7-6, 22-7-13 (1953); WASH. REV. CODE ANN. § 26.08.110 (1961). *But see* TEX. FAM. CODE ANN. § 3.59 (Vernon 1975).

76. *See* Francis v. Francis, 412 S.W.2d 29, 32-33 (Tex. 1967) (permanent alimony declared against public policy); Cunningham v. Cunningham, 120 Tex. 491, 500, 40 S.W.2d 46, 48 (1931) (Texas courts not authorized under statutes to award permanent alimony); Brunell v. Brunell, 494 S.W.2d 621, 623-24 (Tex. Civ. App.—Dallas 1973, no writ) (statutes and public policy of Texas do not sanction alimony after divorce judgment has been entered). Currently the Texas Family Code contains a provision allowing temporary alimony, but these awards are generally limited to child or spousal support for the period between separation and a final decree. *See, e.g.,* Trevinio v. Trevinio, 555 S.W.2d 792, 800 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Ex parte* Thompson, 510 S.W.2d 165, 167-68 (Tex. Civ. App.—Dallas 1974, no writ); TEX. FAM. CODE ANN. §§ 3.58, 3.59 (Vernon 1975).

77. *See* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802, 812-13, 59 L. Ed. 2d 1, 16 (1979); Eichelberger v. Eichelberger, 582 S.W.2d 395, 402-03 (Tex. 1979). In *Eichelberger* the Texas Supreme Court, confronted with the possible harshness of *Hisquierdo,* overruled an appellate court's treatment of vested railroad retirement benefits as community property upon dissolution of marriage. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 401 (Tex. 1979). The supreme court seemed to recognize the disastrous effects made possible by its decision, but refused to overrule *Francis* and allow an award of permanent alimony. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 402-03 (Tex. 1979) (Mrs. Eichelberger was unemployed and had savings of only one hundred twenty-five dollars at time of divorce, and trial court noted "considerable disparity" in couple's earning power); Francis v. Francis, 412 S.W.2d 29, 32-33 (Tex. 1967) (permanent alimony not permitted in Texas). It might also be noted that the Texas Supreme Court in *Eichelberger* may have gone farther than it needed to in adopting *Hisquierdo.* Although the Supreme Court in *Hisquierdo* made no distinction between vested or non-vested benefits in shielding the railroad pension from community property claims, it could be argued that *Hisquierdo* is binding only in situations where the pension has yet to vest. *Compare* Hisquierdo v. Hisquierdo, ___U.S.___,___, 99 S. Ct. 802,

The possible inequities in Texas may be avoidable, however, due to the curious state of Texas divorce law. Since 1841 the primary statutory provision concerning property settlements has required a "just and right" division of the estate of the parties.[78] Even though a Texas court may not decree an award of permanent alimony, the divorce statute has been interpreted to allow divorce courts wide discretion in dividing the spouses' property.[79] Discretion was first limited, however, by language in the Divorce Act of 1841, which prohibited the divestiture of title to real estate.[80] The failure of the statute to specify whether this limitation applied only to separate realty or to community realty as well has been a great problem for Texas courts.[81]

In its most recent treatment of the issue the Supreme Court of Texas, in *Eggemeyer v. Eggemeyer*,[82] held that the present Family Code could not

807, 59 L. Ed. 2d 1, 9 (1979) (at time of divorce employee's pension would not mature for another five years) *with* Eichelberger v. Eichelberger, 582 S.W.2d 395, 400 (Tex. 1979) (employee had been receiving $419.95 monthly four years prior to divorce). *But see In re* Marriage of Brown, 554 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976) (vested and non-vested pensions treated equally for community property purposes).

78. *See, e.g.*, TEX. FAM. CODE ANN. § 3.63 (Vernon 1975); Tex. Rev. Civ. Stat. art. 4638 (1925); Tex. Rev. Civ. Stat. art. 4634 (1911); Tex. Rev. Civ. Stat. art. 2980 (1895); Tex. Rev. Civ. Stat. art. 2864 (1879); 1841 Tex. Gen. Laws, ch. 13, § 6, at 428, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898). *See generally* 9 ST. MARY'S L.J. 331, 332 (1977).

79. *See, e.g.*, Bell v. Bell, 513 S.W.2d 20, 22 (Tex. 1974) (court awarded all interests in two corporations to husband regardless of whether they were financed with community or separate funds); White v. White, 380 S.W.2d 672, 677-78 (Tex. Civ. App.—Tyler 1964, writ dism'd) (divorce courts have wide discretion in dividing the community's property and decree will not be disturbed on appeal unless there was a clear abuse in discretion); Barry v. Barry, 162 S.W.2d 440, 442 (Tex. Civ. App.—Galveston 1942, no writ) (no abuse in discretion when court awarded wife one thousand dollars from husband's separate property). *See generally* TEX. FAM. CODE ANN. § 3.63 (division of estate in "manner that the court deems just and right").

80. *See* 1841 Tex. Gen. Laws, ch. 13, § 6, at 428, 2 H. GAMMEL, LAW OF TEXAS 484 (1898).

81. *Compare* Maisel v. Maisel, 312 S.W.2d 679, 684 (Tex. Civ. App.—Houston 1958, no writ) (prohibition on divestiture of title to real estate applies to separate and community realty) *and* Donias v. Quintero, 227 S.W.2d 252, 256 (Tex. Civ. App.—El Paso 1949, no writ) (court has no authority to divest spouse of an interest in community realty) *with* Carle v. Carle, 149 Tex. 469, 473, 234 S.W.2d 1002, 1004 (1950) (spouse may be divested of share in community estate) *and* Walker v. Walker, 231 S.W.2d 905, 907 (Tex. Civ. App.—Texarkana 1950, no writ) (the statute applies only to separate realty). The Texas Supreme Court temporarily solved the controversy in *Hailey v. Hailey*, holding Texas divorce prohibited only the divestiture of a spouse's separate real property. *See* Hailey v. Hailey, 160 Tex. 372, 376, 331 S.W.2d 299, 303 (1960).

82. 554 S.W.2d 137 (Tex. 1977). After the court held in *Hailey* that the Family Code's prohibition against divestiture of a spouse's separate property applied to realty only, the controversy was renewed when the legislature omitted the last sentence when codifying the divorce statute. *Compare* Tex. Rev. Civ. Stat. art. 4638 (1925) (nothing herein "shall be construed to compel either party to divest himself of the title to real estate") *with* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975) (prohibition on divestiture of title to real estate omitted).

be construed to allow a divorce court to divest a spouse of his or her separate realty.[83] The court failed, however, to indicate clearly whether divestiture of separate personalty was permissible.[84] *Eggemeyer* did cite with approval a lower court decision which allowed a husband's separate personal assets to be attached to bring about a fair and just division of properties.[85]

There remains open the question of whether *Eggemeyer* construes the Texas Family Code as authorizing divestiture of a spouse's separate personalty upon divorce.[86] The court's approval of *Ramirez v. Ramirez*[87] suggests that such discretion is permissible.[88] Thus, it appears that in Texas, even though permanent alimony is prohibited,[89] divorce courts may be able to circumvent the harsh effects of *Hisquierdo*. In situations where a railroad employee has maintained separate personal property other than the retirement benefits, and where the community's assets are insufficient to provide for his or her spouse upon divorce, a court could conceivably award a portion of that separate personalty.[90] In this manner, inequities resulting

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One court considered the omission to be not an error, but a lifting of the prohibition on divestiture of realty. *See* Wilkerson v. Wilkerson, 515 S.W.2d 52, 56-57 (Tex. Civ. App.—Tyler 1974, no writ). Other courts viewed the omission as an error as to realty, but still allowed divestiture of separate personal property upon divorce. *See* Wisdom v. Wisdom, 575 S.W.2d 124, 125-26 (Tex. Civ. App.—Fort Worth 1978, writ dism'd); Ramirez v. Ramirez, 524 S.W.2d 767, 768-69 (Tex. Civ. App.—Corpus Christi 1975, no writ). *See generally* McKnight, *Dissolution of Marriage*, 5 TEX. TECH L. REV. 320, 337 (1974); 9 ST. MARY'S L.J. 331, 333 (1977).

83. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977). The court cited approvingly, and for practical purposes simply adopted, its interpretation of the Family Code in *Hailey*. *See id.* at 139. The majority took the position that the language regarding the prohibition on divestiture of separate realty was omitted through legislative oversight when article 4638 was codified. *See id.* at 139.

84. *See id.* at 142.

85. *See id.* at 142; Ramirez v. Ramirez, 524 S.W.2d 767, 769-71 (Tex. Civ. App.—Corpus Christi 1975, no writ) (reversing award to wife of husband's separate estate, but holding that substantial portion of husband's separate personalty may be awarded).

86. *See generally* Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 72 (1978); Comment, *Division of Marital Property on Divorce: A Proposal to Revise Section 3.63*, 7 ST. MARY'S L.J. 209, 223-24 (1975); 9 ST. MARY'S L.J. 331, 339-40 (1977).

87. 524 S.W.2d 767 (Tex. Civ. App.—Corpus Christi 1975, no writ).

88. *See* Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 142 (Tex. 1977). Referring to *Ramirez* the court stated: "We agree with that decision." *Id.* at 142. The court also expressly disapproved of language in *Wilkerson*. *See id.* at 142.

89. *See* Francis v. Francis, 412 S.W.2d 29, 32-33 (Tex. 1967); Cunningham v. Cunningham, 120 Tex. 491, 496-502, 40 S.W.2d 46, 48-51 (1931); Brunell v. Brunell, 494 S.W.2d 621, 623-24 (Tex. Civ. App.—Dallas 1973, no writ).

90. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975); *cf.* Burns v. Burns, 541 S.W.2d 280, 282 (Tex. Civ. App.—San Antonio 1976, writ dism'd) (court may divide community and separate property in manner deemed just and right); Bell v. Bell, 540 S.W.2d 432, 440 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (expenditures made by husband from separate

from the classification of railroad retirement benefits as the employee's separate property could be mitigated without actually attaching the pension.[91] In addition, if the employee should allow retirement benefits to become commingled with the community's property before the dissolution of marriage, these commingled annuities could properly be divided upon divorce.[92]

Assuming arguendo that the Texas Supreme Court would allow such a circumvention of the Railroad Retirement Act, there is the question of whether the United States Supreme Court would reverse the holding. To permit state divorce courts to divest an annuitant's separate personalty in an attempt to reach a fair and just property division could be construed as violating the Social Security Act's provision stating that alimony is not to include "equitable distributions of property."[93] In Texas, however, where permanent alimony is prohibited, the Supreme Court would have to realize that reversing a decision that divested a spouse of a portion of his railroad pension benefits because of a lack of sufficient community assets could, in certain cases, result in serious hardships.[94] In essence, the powers of the Texas divorce courts to provide for an equitable distribution of property upon divorce are not unlike the powers other state courts enjoy under their alimony statutes.[95]

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property need not be reimbursed); Trader v. Trader, 531 S.W.2d 189, 190 (Tex. Civ. App.—San Antonio 1975, writ dism'd) (court may award substantial portion of husband's separate property when necessary to effect fair division).

91. *Cf.* Gaulding v. Gaulding, 503 S.W.2d 617, 618 (Tex. Civ. App.—Eastland 1973, no writ) (husband's federal pension separate property, but court awarded wife a substantial portion of his other separate property); Corrigan, *Federal Retirement Benefits in Texas: Division as Property Right Between Former Spouses by Divorce Court*, 41 TEX. B.J. 435, 443 (1978). *But see* Eichelberger v. Eichelberger, 582 S.W.2d 395, 402 (Tex. 1979) (award of employee's separate personalty to spouse would be a transparent attempt to circumvent section 231m). *See generally* Turley, *A Wife's Right to Support Payments in Texas*, 16 S. TEX. L.J. 1 (1974).

92. *See, e.g.*, Krueger v. Williams, 163 Tex. 545, 548, 359 S.W.2d 48, 50 (1962) (where husband purchased shares with separate property and commingled them with community funds, shares deemed community property); Poulter v. Poulter, 565 S.W.2d 107, 110 (Tex. Civ. App.—Tyler 1978, no writ) (husband divested of separate property once commingled); Tarver v. Tarver, 378 S.W.2d 381, 387 (Tex. Civ. App.—Texarkana 1964) (separate assets commingled and no longer traceable deemed community property), *aff'd*, 394 S.W.2d 780 (Tex. 1965).

93. *See* Act of May 23, 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 160 (adding § 462(c)) (to be codified 42 U.S.C. § 662(c)).

94. *See* Hisquierdo v. Hisquierdo, ___U.S.___, ___, 99 S. Ct. 802, 812-13, 59 L. Ed. 2d 1, 16 (1979); *cf.* Eichelberger v. Eichelberger, 582 S.W.2d 395, 402-03 (Tex. 1979) (Texas court noted considerable disparity in couple's earning power but felt bound by *Hisquierdo*).

95. *Compare* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975) (upon divorce, court shall divide property in manner deemed just and right having due regard for rights of parties) *with* NEV. REV. STAT. § 125.150 (1973) (in granting divorce, court may award such alimony as appears just and equitable having regard for merits and condition of parties).