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***207 DIVISION OF RETIREMENT BENEFITS: THE IMPACT OF FEDERAL PREEMPTION ON WOMEN IN TEXAS**

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Introduction

More than one hundred years ago, the U.S. Supreme Court noted ***208** that “[t]he 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.” [\[FN1\]](#) This nineteenth century vision of government proved to be incorrect. Federal laws enacted to protect the retirement benefits of married persons have profoundly and, often, adversely impacted domestic relations laws in community property states such as Texas. Oftentimes, retirement benefits are the most valuable, if not the only, assets accumulated during marriage. By one estimate, the eighty million residents of the nine community property states have more than \$1 trillion in retirement plans. [\[FN2\]](#) Not surprisingly, so many people and so much money gave rise to some divorce-related issues.

In Texas, there were many questions, such as whether unvested retirement plan interests could be divided and how to value plan interests when the employment giving rise to the interest lasted longer than the marriage. Texas state courts addressed and resolved those issues expeditiously. [\[FN3\]](#) However, the federal government stepped into the fray, passing legislation [\[FN4\]](#) that preempted Texas community property laws, which caused unimagined and undoubtedly unintended problems, mostly for the women of Texas. Amendments [\[FN5\]](#) to such federal laws, passed with the intent to ease those problems, only started another cycle of problems. For the most part, those problems fell on the shoulders of women who were penalized for fulfilling the traditional and expected roles of homemaker and career facilitator for their husbands. This article presents an overview of the resolution of the state and federal issues, as well as the problems yet remaining with the division of retirement plan interests in Texas.

***209** I. Overview of Community Property

The concept of community property originated when Germanic tribesmen agreed to give their wives a share of the spoils of war in recognition of the women's contributions. [\[FN6\]](#) These Goths carried this concept with them when they conquered Spain, and the Spanish explorers brought it to the new world. [\[FN7\]](#) Not surprisingly, many states with community property systems had an early Spanish influence.

Justice Stewart summarized well the nature of community property when he stated:

“Community of property between husband and wife is that system whereby the property which the husband and wife have is common property, that is, it belongs to both by halves.”...This definition of the property rights of

a married couple was first recognized in written form in 693 A.D. in Visigothic Spain...and now prevails in eight states of the Union.... Fundamental to the system is the premise that husband and wife are equal partners in marriage.... Each is deemed to make equal contributions to the marital enterprise, and each accordingly shares equally in its assets. [FN8]

The concept of spouses having an equal ownership in property acquired during marriage, regardless of their respective direct contributions to the acquisition, differs dramatically from the concept of marital property at common law. [Section 3.002 of the Texas Family Code](#) defines community property as all property “acquired by either spouse during marriage” that is not separate property. [FN9] A spouse's separate property is that which was “owned or claimed before marriage” or acquired during marriage “by gift, devise, or descent.” [FN10] It also includes any property obtained as a “recovery for personal injuries sustained by the spouse during marriage” other than “recovery for loss of earning capacity.” [FN11] In short, if something is “property” and is not separate property, it necessarily must be community property. [FN12]

*210 II. Division of Community Property Upon Death or Divorce

During marriage, each spouse holds an undivided interest in all property owned by the community estate of the spouses. [FN13] Upon death of one of the spouses, their respective interests are divided equally. [FN14] However, at time of divorce, community property may be divided in any manner which is deemed “just and right.” [FN15] This can be equal, extremely disproportionate, or anything in-between. The court has broad discretion in ordering a division of community property. [FN16] The court may take into account many factors in determining a just and right division of such property, including fault in the breakup of the marriage and the parties' comparative financial circumstances, health, and income-producing abilities. [FN17] In contrast, the court cannot divest a spouse of his or her separate property. [FN18]

III. Retirement Benefits

A. Statutes Applicable to Retirement Benefits

Retirement plan interests accumulated during marriage are community property to be disposed of as part of the just and right division of the community estate at time of divorce. [FN19]

The Employee Retirement Income Security Act (ERISA) of 1974 [FN20] is the controlling federal statute on retirement benefits. It applies generally to all retirement plan interests as well as various other employment-related benefits. In addition, there are other federal statutes dealing with specific types of retirement plan interests, such as military [FN21] or railroad retirement pay, [FN22] which are discussed in later sections of this article.

A 1984 amendment to ERISA permitted the alienation of retirement benefits in limited circumstances. [FN23] It has been important in the evolution *211 of Texas case law. Finally, the Internal Revenue Code establishes the framework for creating retirement plans and the factors that distinguish qualified plans from nonqualified plans. [FN24]

B. Overview of Retirement Benefits

A retirement benefit is an earned property right in the nature of deferred compensation. [FN25] Retirement plans can be either “qualified” or “nonqualified,” depending upon whether they meet certain requirements imposed by the Internal

Revenue Code.

Qualified plans are governed by the limitations and protections of ERISA. [FN26] To be “qualified,” a plan must meet certain minimum requirements for participation, vesting, funding, and nondiscrimination. [FN27] It must be available to all employees who meet those requirements and must be funded in equal percentages of salary. [FN28] For example, if a contribution of fifteen percent of salary is made on behalf of one employee, then a similar percentage of salary contribution must be made on behalf of all other eligible employees. A qualified plan cannot discriminate in favor of highly-compensated employees. [FN29] The advantage of having a plan that meets the Internal Revenue Code requirements of a qualified plan is that contributions made to such a plan, whether by employer or employee, are tax deductible. [FN30] Qualified plan interests can be divided at time of divorce by a “qualified domestic relations order” (QDRO). [FN31] Once signed by the court granting the divorce, the QDRO is then forwarded to the administrator of the plan being divided for a determination as to whether the order meets all the necessary requirements. [FN32] If necessary, a defective order can be corrected or superseded by another order of the original trial court. [FN33] Once approved, the plan administrator will allocate and pay the retirement plan benefits in accordance with the terms of the QDRO. [FN34] Prior to ERISA and the *212 advent of QDROs, the nonemployee-spouse had to rely on the employee-spouse to timely forward to him or her (usually her) the nonemployee-spouse's share of the monthly retirement benefit.

Nonqualified plans are typically designed to coexist with qualified plans, as a way of providing additional retirement benefits to the highly-compensated executives of a company. Such plans circumvent the limitations and requirements of ERISA and the Internal Revenue Code, but they receive less favorable tax treatment. [FN35] Since these plans are not governed by ERISA, the plan administrator is not required to recognize a domestic relations order dividing benefits between the spouses; [FN36] however, in many instances, the administrator will agree to make payments to the nonemployee-spouse after divorce.

There are two general types of qualified plans: defined benefit and defined contribution. Defined benefit plans calculate the amount of the payment to be made to the retired employee by reference to years of service and level of compensation at time of retirement. [FN37] Many such plans offer the employee a variety of payment options, including early retirement, joint and survivor payments, and lump-sum payments. In accordance with ERISA, the employer must contribute to a defined benefit plan at a set rate, starting when an employee becomes a participant in the plan and ending at or before retirement, so that the benefits will gradually accrue. [FN38] In contrast, contributions to a nonqualified defined benefit plan are not mandatory. [FN39] Typically, the payments called for under such a plan are made from anticipated cash flow. As a result, the possibility of a nonqualified plan not being funded is much greater than with a qualified plan. A qualified plan will provide for the accrued benefits to vest incrementally. [FN40] Once a benefit becomes vested, it is not subject to forfeiture if the employee is terminated prior to retirement. [FN41] Unvested benefits of a terminated employee are reallocated among the remaining participants in the plan. [FN42]

Defined contribution plans include profit sharing plans, stock purchase plans, thrift plans, and salary deferral plans, some of which are commonly referred to as 401(k) plans. Under a defined contribution plan, an individual account is maintained to receive the contributions made by the employee, the employer, or both. [FN43] The contributions made *213 by the employer are tax deductible to the employer in the year of payment. [FN44] The contributions made by the employee are not taxed as personal income until the funds are withdrawn from the plan by the employee. [FN45] The employee is always one hundred percent vested in his account, and many such plans include a mechanism for tax-free borrowing from the account by the employee. [FN46]

C. The Texas Issues

1. Divisibility

It is now well-established in Texas jurisprudence that retirement benefits are a property right that, to the extent the right is earned during marriage, is subject to division upon the dissolution of marriage. [FN47] The claim that retirement benefits are gifts to the employee-spouse, and thus indivisible separate property, was rebuffed by the Texas Supreme Court in *Cearley v. Cearley*, [FN48] where the court stated, “Despite an earlier view that retirement and pension plans were gifts bestowed by benevolent employers on retiring employees, they are now regarded as a mode of employee compensation earned during a given period of employment.” [FN49] In another case, a claim, based on the “inception of title” doctrine, that all of a retirement plan interest was separate property because employment began before marriage also failed. [FN50] Moreover, even where a retirement plan commences before the date of marriage, a spouse's right to receive benefits earned during marriage is not separate property. [FN51]

The Texas Supreme Court likewise rejected the claim that retirement benefits are not divisible because there is no immediate right to possession of the benefits. [FN52] Despite the fact that there is no immediate right to possession of retirement benefits by either spouse upon divorce, the court determined that such benefits are contingent earnings of the community subject to division “if, as and when the benefits are received *214 by the retiring spouse.” [FN53]

Even retirement benefits attributable to disability were determined to be divisible community property by the Texas courts. [FN54] Some of these state court rulings are no longer the law, having been quashed by federal court decisions applying the preemption of ERISA, as addressed in a later section of this paper. [FN55] However, a review of Texas cases reveals a strong inclination by the Texas courts to divide between divorcing spouses all post-employment payments relating back to services performed during marriage. In addition, the Texas Supreme Court in 1970, at a time when it was not yet *de rigueur* to consider retirement plan interests in a divorce proceeding, issued a reminder to the state's judiciary in *Busby v. Busby*: [FN56] “Trial judges of this state, sitting in divorce suits, should inquire as to the existence of insurance or retirement programs to the end that the final judgment fully disposes of all property valuables of the community.” [FN57]

2. Calculating the Divisible Amount

Having established that retirement benefits are divisible, it became necessary for the Texas courts to determine the “community portion,” since only rarely does a case on appeal present a couple married during the entirety of the employment of the employee-spouse. More typically, employment begins before marriage or continues after divorce, or both. As a result, a portion of the retirement benefit belongs to the separate estate of the employee-spouse.

The first solution to the problem of determining the community portion was announced in *Taggart v. Taggart*. [FN58] Mr. Taggart accumulated retirement benefits over his working life of thirty years, and he was married to Mrs. Taggart for twenty of those years. [FN59] The court determined that two-thirds of the retirement benefit paid to Mr. Taggart was community property. [FN60] Thus was born the so-called “*Taggart* *215 formula” for determining the amount to be paid the nonemployee-spouse: It is a fraction wherein the numerator is the number of months married while employed as a participant in the plan, and the denominator is the number of total months employed as a participant in the plan, which is then multiplied by the amount of the monthly payment received at retirement and multiplied by the percentage of community property awarded to the nonemployee-spouse. [FN61] This formula appeared in virtually every divorce decree dividing retirement benefits that was granted in the six-year interval between the issuance of the *Taggart* opinion and the advent of *Berry v. Berry*, [FN62] discussed below. In application, assuming a twenty-year marriage, a thirty-year employment, a \$1000 monthly pension, and a fifty-fifty division of the community component, the result is as follows: $240/360 \times \$1000 \times .5 = \333.33 , which, in this example, is the nonemployee-spouse's share of the retirement be-

nefit. The objective of the courts is to avoid divesting the employee-spouse of any separate property component of the retirement benefit. [FN63]

Since the *Taggart* formula considers only the amount of time employed, without taking into account many other factors that affect the value of retirement benefits, inequitable results occurred. Typically, an employee's income is highest during the last years before retirement. Therefore, the *Taggart* formula operates unfairly to the employee-spouse who continues working after divorce and receives promotions and pay increases. Similarly, the calculation is unfair to a nonemployee-spouse if the employee-spouse has a few years of low income early-service prior to marriage. The problem with the *Taggart* formula is that it divides retirement benefits as of date of receipt by the employee-spouse, rather than valuing them as of date of divorce. [FN64]

The inequities of the *Taggart* formula were addressed and resolved in *Berry v. Berry*. [FN65] The Texas Supreme Court held, "When the value of [[[retirement] benefits is in issue,...the benefits are to be apportioned to the spouses based upon the value of the community's interest at the time of divorce." [FN66] This decision corrected the inequity in the application of the *Taggart* formula. Under *Berry*, the share for the nonemployee-spouse is calculated based on the value of the benefit at time of divorce, rather than at time of retirement. [FN67]

In *May v. May*, [FN68] the Corpus Christi Court of Appeals compared the *216 application of *Berry* and *Taggart*. The court concluded that where a spouse is already retired at time of divorce, the *Taggart* formula is proper, [FN69] but where a spouse continues working after divorce, the *Berry* formula applies, [FN70] thereby harmonizing the two different holdings.

Unquestionably, the employee-spouse divorced after *Berry* is better off than the employee-spouse divorced under *Taggart*, assuming continued employment with promotions and pay increases. Texas courts have often held, however, that *Berry* does not apply retroactively to decrees of divorce that were final prior to its pronouncement. [FN71] An apportionment of retirement benefits in a divorce decree, even if improper, is not subject to collateral attack and will be enforced. [FN72]

Texas courts have consistently held that the *Berry* formula does not apply to the division of retirement benefits accumulated in defined contribution plans. [FN73] The reason is that the "trial court can easily determine the value of a defined contribution plan at any time before retirement simply by looking at the employee spouse's account." [FN74] The proper calculation of the community's interest in a defined contribution plan is to simply subtract the value of the plan on the date of marriage from the value of the plan on the date of divorce. [FN75]

In *Bloomer v. Bloomer*, [FN76] the First Court of Appeals in Houston held that neither the *Berry* nor *Taggart* formula applies to valuing military reserve retirement pay because the amount of the benefit is based upon the total number of points the retiree accumulated by performing reserve duty. [FN77] The points are not evenly accrued based upon the mere passage of time, but are strictly determined by the amount of activity. [FN78] Thus, even though the military reservist may have been a member of the reserves for a longer period during marriage than before or after marriage, the majority of the benefits points could have been acquired *217 while single. The court ruled that the community portion of such retirement benefits is calculated as the number of points accumulated during marriage divided by the total number of points accumulated. [FN79] In *Rankin v. Bateman*, [FN80] the court held that the valuation of the community's interest in military retirement pay is based on the retirement pay that corresponds to the rank actually held by the service-member on the date of divorce. [FN81]

Some post-divorce increases in retirement benefits properly belong to the nonemployee-spouse, such as cost-of-living adjustments associated with the nonemployee-spouse's interest in the benefits. [FN82] These increases are not attribut-

able to the post-divorce time, toil, and effort of the employee-spouse. Even so, there has been some inconsistency in rulings on this point. [FN83]

Since the enactment of ERISA, as amended by the Retirement Equity Act (REA), and the implementation of QDROs, [FN84] valuation is less often an issue than it used to be. In many cases, at time of divorce, the value of an employee's interest in a defined benefit is actuarially calculated by the plan administrator, and the parties' respective interests are apportioned and segregated. Increases are applied to each segregated portion in accordance with the agreements of the parties or the ruling of the trial court, as expressed in the terms of the order. In due course, the benefits, including any increases, are paid directly to each of the former spouses by the plan administrator.

D. Early ERISA and Its Application to Texas

Under ERISA, as originally enacted in 1974, anti-alienation, anti-assignment was the rule. [FN85] Moreover, by its own terms, ERISA *218 preempted all state laws relating to any covered employee benefit plan. [FN86] Therefore, prior to the passage of REA in 1984, the division of the community property portion of qualified retirement plan interests was prohibited by federal law. [FN87] Nevertheless, Texas courts were dividing retirement benefits upon divorce and getting away with it. [FN88] The rationale was that an implied exception to ERISA's anti-alienation provisions existed with respect to the division of the community property on divorce. [FN89]

In 1984, REA was passed, codifying this implied exception. [FN90] The Act amended ERISA to permit the division of retirement benefits by state courts as part of the division of community property in a divorce. [FN91] Before that happened, however, Texas citizens were hurled into a storm of litigation concerning railroad and military retirement benefits.

E. The Collision Between Anti-Alienation and Community Property: Hisquierdo

The federal government kept pushing toward a direct collision between community property principles and anti-alienation principles. Except when the U.S. Supreme Court ruled directly that a specific retirement benefit was not divisible under community property law, state courts continued with business as usual on the implied exception theory. [FN92] In 1978, the first collision occurred. The Supreme Court ruled in *Hisquierdo v. Hisquierdo* [FN93] that retirement benefits paid under the Railroad Retirement Act of 1974 were not divisible under community property laws. [FN94] The Court held that the express language of the Act provided that a spouse's entitlement to a share of the retirement benefits ended when a couple divorced. [FN95] The Court determined that any scheme *219 requiring Mr. Hisquierdo to pay a portion of his retirement benefits to his ex-wife, as and when he received them, would injure the objective of the federal program. [FN96] In the Court's view, Congress intended the retirement benefit for Mr. Hisquierdo only. [FN97] The Court also forestalled any attempt to offset this glaring inequity. It prohibited giving the nonemployee-spouse some other community property as compensation for the expected retirement benefits. [FN98] According to the Court, this would be an impermissible anticipation of benefits. [FN99]

The Court's enunciated rationale for application of federal supremacy seemed strained:

It is for Congress to decide how these finite funds are to be allocated. The statutory balance is delicate. Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire. Any automatic diminution of that amount frustrates the congressional objective. By reducing benefits received, it discourages the divorced employee from retiring. And it provides the employee with an incentive to keep

working, because the former spouse has no community property claim to salary earned after the marital community is dissolved. [FN100]

After noting the increasing importance of retirement benefits in American life and the increasing frequency of divorce, the Court expressed concern about the onerous impact of its decision on former spouses who have no other expected pension benefits. [FN101] By way of justification, the Court indicated that former spouses of railroad retirees could garnish the retirement benefit for collection of spousal support. [FN102] This must have been cold comfort to the former spouses of Texas, where spousal support was nonexistent.

In the wake of *Hisquierdo*, there was no gap remaining through which Texas courts could squeeze to find a way to divide railroad retirement benefits. Accordingly, the Texas Supreme Court did what it had to do in *Eichelberger v. Eichelberger*. [FN103] It held that railroad retirement benefits are not divisible upon divorce and that no offsetting asset can be awarded to the nonemployee-spouse. [FN104] The manifest unfairness of this does irreparable violence to the concept of community *220 property. Women bore the full brunt of this violence. There is no rational explanation for denying the wife of a railroad worker a share in retirement benefits, while wives of all other workers are given their fair share.

At least Texas courts could and did refuse to give retroactive effect to *Hisquierdo*. In *Ex parte Lucher*, [FN105] the husband's railroad retirement benefits were divided in a divorce predating *Hisquierdo*. [FN106] Mr. Lucher, contending that his divorce decree was void as to the division of the retirement interest, stopped paying a portion of the benefits to his former wife. [FN107] The court rejected Mr. Lucher's contention that *Hisquierdo* should be applied retroactively:

There is nothing in the holding in *Hisquierdo* that suggests that the United States Supreme Court intended to invalidate, or otherwise render unenforceable, a prior valid state court judgment. Nor does case law support the retroactive application of the *Hisquierdo* ruling. Indeed, Texas law is to the contrary. [FN108]

This was a scene that would be played out over and over again in Texas as former spouses were bounced around by forces outside the state and outside their control. For those players, timing was everything; identical facts yielded opposite results, depending on the moment.

Amazingly, *Hisquierdo* is still in effect.

F. The Progression: *McCarty* and the Uniformed Services Former Spouses' Protection Act (USFSPA)

On June 26, 1981, the U.S. Supreme Court decided *McCarty v. McCarty*. [FN109] A 6-3 majority held that military retirement pay was not divisible under state community property laws. [FN110] Writing for the majority, Justice Blackmun (also the author of *Hisquierdo*) determined that the application of community property principles to military retirement pay threatened "grave harm to clear and substantial federal interests." [FN111] Once again, the Court ruled that the benefit was intended by Congress for the servicemember only. [FN112] Alienation might impair the existence of a youthful military, since division of retired pay would *221 discourage retirement, the Court reasoned. [FN113] Once again, the Court "recognize[d] that the plight of an ex-spouse of a retired servicemember is often a serious one," but one that could be remedied by garnishment for purposes of support. [FN114]

Given *Hisquierdo*, *McCarty* should have been expected. Instead, it was viewed as a shocking overreach by the federal government. Quick action was demanded from Congress. Congress responded. On September 9, 1982, the Uniformed Services Former Spouses' Protection Act (USFSPA) was enacted, and it became effective on February 1, 1983. [FN115] It reversed the effect of *McCarty* and authorized courts to divide military retirement pay at time of divorce in accordance with the laws of the jurisdiction, to the extent of payments beginning after June 25, 1981. [FN116] In *Cameron v.*

Cameron, [FN117] the Texas Supreme Court approved a division of military retirement benefits. [FN118]

Though short-lived, *McCarty* resulted in a seemingly endless backwash of litigation in Texas. The decision in *McCarty* was applied to Texas in *Trahan v. Trahan*, [FN119] where the court held that military retirement benefits were not subject to division upon dissolution of marriage pursuant to Texas community property laws. [FN120] *Trahan* was pending before the Texas Supreme Court at the time the decision in *McCarty* was handed down by the U.S. Supreme Court. Texas courts did, however, hold that *McCarty* would not be applied retroactively to reopen divorce cases finalized prior to *McCarty*. [FN121] An exception was *Ex parte Buckhanan*, [FN122] where the court ruled that a pre-*McCarty* decree dividing military retirement pay was void by reason of retroactive application of *McCarty*. [FN123] The next year, the same court ruled that *McCarty* would not be applied retroactively. [FN124] Divorcing Texans and their lawyers were reeling from wave after wave of inconsistent decisions.

After the 1983 promulgation of the USFSPA, the Texas Supreme Court approved partition as the means to divide military retirement *222 benefits in divorce cases that had been finalized during the interval between *McCarty* and the effective date of the USFSPA, provided the benefits had not been expressly awarded to the servicemember in the divorce decree. [FN125]

The proviso that partition was available only if the benefits had not been expressly awarded in the original decree launched a new spate of litigation to determine whether benefits had been adjudicated in the prior order. [FN126] In contrast to these cases, in *Allison v. Allison*, [FN127] it was held that the divorce decree had made an express award of all military retirement benefits to Mr. Allison, foreclosing any right of Mrs. Allison to sue for partition of the benefits. [FN128] The parties had been divorced in 1981, [FN129] after *McCarty* and before the USFSPA. There was no consistency in the decisions imposed upon hapless litigants. Whether military retirement pay was divided was determined not only by the vagaries of the trial court, but also by the timing of the divorce and the boilerplate language included in the divorce decree.

As a result of the USFSPA, the business of dividing military retirement pay among spouses divorced after *McCarty* was booming. So much so that in *Steel v. United States*, [FN130] the federal court was asked to and did decide that the USFSPA did not extend subject matter jurisdiction over division of military retirement pay to the federal courts. It held that the act merely authorized courts already having jurisdiction over the division of marital property to treat military retirement benefits in accordance with applicable state law. [FN131]

Unwilling or unable to leave well enough alone, in 1990 Congress amended the USFSPA to limit the jurisdiction of a court to partition military retirement pay when the divorce decree was signed before June 25, 1981, if the decree did not treat, or reserve jurisdiction to treat, the issue of the military retirement pay. [FN132] In sum, partition relief would be available to post-*McCarty* divorcees, but not to persons who divorced prior to *McCarty* if the divorce decree had neglected to divide military *223 retired pay. [FN133] Furthermore, this amendment was expressly given retroactive application to judgments issued before the date of its passage:

The amendment...shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act. In the case of a judgment issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act. [FN134]

This created a special class of persons divorced prior to *McCarty* by a decree that did not divide the military retirement pay, but whose interest in the pay was partitioned by a subsequent order signed after June 25, 1981. All the retired servicemember had to do was make the payments due for the first two years following enactment of the amendment, then

assert that the partition order was void pursuant to this amendment, which was, after all, expressly made retroactive. Here was a new reason for litigation in Texas. Among the first to step in was Jack Trahan, already a veteran of military retirement pay litigation. [FN135] In *Trahan v. Trahan*, [FN136] the Austin Court of Appeals decided that a partition order signed after 1981 where the parties were divorced prior to 1981 was res judicata as to the parties' rights to the military retirement pay, despite the retroactive language of the amendment. [FN137] Soon thereafter, the Amarillo Court of Appeals followed suit, holding that since the partition order had been finalized before the amendment to the USFSPA, the doctrine of res judicata would apply. [FN138]

In stark contrast is the saga of the Buys. [FN139] They were divorced in 1970, but made no effort, or so they thought, to divide the interest in Mr. Buys' military retirement pay until Mrs. Buys filed suit to do so in 1990. [FN140] The San Antonio Court of Appeals held that Mrs. Buys' suit for partition was barred by the 1990 USFSPA amendment. [FN141] In 1994, the Texas Supreme Court granted Mrs. Buys' writ application. In its opinion, *Buys v. Buys*, [FN142] the Texas Supreme Court ruled that the 1970 *224 divorce decree had, in fact, adjudicated the retirement pay issue, awarding it to Mrs. Buys via a residuary clause, which stated:

All of the other properties, financial assets and belongings of the parties hereto, whether separate or community, not specifically set aside to the defendant [Norbert Buys] under Paragraph I, above shall be and is hereby specifically set apart, assigned, given, granted and conveyed to plaintiff [[Alene Buys] as the separate property of the plaintiff herein and the defendant herein expressly releases, assigns, gives, grants and conveys to the plaintiff herein all the defendant's right title and interest in and to the property hereby set apart to Plaintiff that he now has or may have, free of and waiving any and all claims at law or in equity that he has or may have, in whole or in part to such property. [FN143]

Thus, Mrs. Buys' action was not a prohibited partition suit, but an action for enforcement of her existing property right. It appeared the Texas Supreme Court might not bow to federal preemption on this issue, stating, "we do not consider and express no opinion on whether the 1990 amendment preempts a community property state court's ability to partition 'tenancy in common' military retirement benefits earned during marriage but not awarded in the final divorce decree." [FN144]

G. The Persisting Problem: Disability Benefits

Originally, the Texas Supreme Court held that military disability retirement benefits accrued during marriage constituted community property subject to division. [FN145] The rationale is that when disability payments arise by a contract right vested during marriage, the disability benefits are characterized as community property, even though paid after divorce. [FN146] The same rule applies even where disability payments to a spouse are the proceeds of a disability insurance policy purchased during marriage with community funds. [FN147] The theory is that the right to *225 disability compensation is not a right to payment for damages suffered by injury, but an earned and vested property right acquired during marriage. [FN148] As such, it is community property subject to division upon divorce.

However, with respect to Veteran's Administration disability benefits, Texas has imposed a federal preemption upon itself on the way to holding that such benefits are not subject to division at divorce. This line of cases holds that Title 38 of the United States Code preempts state community property law dividing such benefits. [FN149] The statute states:

Payments of benefits due or to become due under any law administered by the [Veterans' Administration] shall not be assignable except to the extent specifically authorized by law, and such payments made to or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after re-

ceipt by the beneficiary. [FN150]

The Texas Supreme Court noted that preemption of the state community property law was necessary because of the strong prohibition against attachment and anticipation of the benefits. [FN151]

In 1989, the U.S. Supreme Court, in *Mansell v. Mansell*, [FN152] ruled that the USFSPA did not grant state courts the power to divide Veteran's Administration disability benefits since the amendment specifically excepted disability benefits from the definition of disposable pay. [FN153] For once, the Supreme Court's action did not send Texas jurisprudence reeling because Texas had already imposed a different federal preemption upon itself. The Texas Supreme Court did decide, in *Berry v. Berry*, [FN154] that *Mansell* would not be applied retroactively to subject to collateral attack divorce decrees or partition orders, finalized prior to *Mansell*, disposing of Veteran's Administration disability benefits. [FN155]

There is, however, a serious problem emanating out of all this. A *226 former servicemember who is disabled may, at any time and at his or her sole option, elect to forego regular military retirement pay in exchange for disability benefits from the Veteran's Administration. [FN156] Since Veteran's Administration disability benefits are not even considered property for purposes of divorce, [FN157] they certainly are not divisible if taken in lieu of retirement pay. By the voluntary act of waiving regular military retirement for the Veteran's Administration disability benefits, the disabled servicemember can effectively modify a divorce property agreement with respect to allocation of the monthly income attributable to prior military service. [FN158] The *Burson* court determined that a servicemember has that right by federal law. [FN159]

Texas appellate courts now consistently hold that trial courts do not have the authority to divide military retirement pay waived for Veteran's Administration disability benefits. [FN160] However reasonable that may superficially appear, the result can be far from fair to the nonemployee-spouse when the option to exchange retired pay for disability pay is taken after divorce. The trial court will have already divided the community estate based on the existing retired pay option. After the fact, the disabled servicemember can unilaterally cause a reduction in the former spouse's share, for which there is no redress, while his or her own portion actually increases by reason of the dollar-for-dollar exchange of taxable benefits for nontaxable benefits. Given the tortuous and so often unfair twists and turns of military retired pay jurisprudence in Texas and the other community property states, the danger of asking Congress to remedy this injustice is patent. However, this is yet another inequity women in Texas are asked to bear.

H. The New ERISA Arena

Prior to 1997, a nonemployee-spouse had at least some community property interest in the employee-spouse's private retirement plan that was subject to testamentary disposition by the nonemployee-spouse. The court in *Allard v. Frech* [FN161] stated:

Thus, we hold that in light of the settled marital property rule in Texas that a spouse has a community property interest in that portion of the retirement benefits of the opposite spouse earned during their marriage, the retirement benefits in this case were *227 properly characterized as community property, and thus, one-half of such benefits was properly included in the wife's estate. [FN162]

This testamentary interest did not include the payments to a surviving spouse under a defined benefit plan since ten years previously, the court in *Valdez v. Ramirez* [FN163] ruled:

The [Civil Service] Act provides for no payment to persons outside the employee's immediate family. It would be contrary to the whole contract, policy, and plan of the Retirement Act for nearly one-half of Mrs. Valdez's

monthly payments to be taken from her and awarded to her deceased husband's adult children. This would subvert the underlying purpose of the Act, which is to provide financial support and security to aged employees and their immediate families. [FN164]

The question of whether ERISA preempts state laws allowing nonemployee-spouses to transfer, by testamentary instrument, interests in undistributed retirement plans has been specifically addressed in several recent cases with differing results. [FN165] Because of the differing results, the U.S. Supreme Court granted writ of certiorari in *Boggs v. Boggs*, [FN166] to consider the question.

After thirty years of marriage to Isaac Boggs, Dorothy Boggs died. [FN167] At the time of Dorothy's death, their community estate had accumulated approximately \$200,000 in retirement benefits from Isaac's employment. [FN168] Dorothy's will gave one-third of her interest in all of the marital property outright to Isaac, along with a usufruct in the remaining two-thirds. [FN169] At Isaac's death, whatever was left of that two-thirds interest would be shared among the Boggs' three sons. [FN170] A year after Dorothy's death, Isaac remarried; he retired five years later, and died ten years after Dorothy's death. [FN171] His second wife, Sandra, survived him. [FN172] At his death, the three sons of Dorothy and Isaac laid claim to their mother's interest in the retirement benefits accumulated during her *228 lifetime. [FN173] The second wife claimed that Louisiana community property laws were preempted by ERISA, and that she was entitled to everything accumulated during Isaac's thirty-six years of employment, including stock and defined contribution plan interests, which had been rolled into an individual retirement account in Isaac's name, along with the monthly benefits payable under a defined benefit plan. [FN174]

After paying the requisite lip service to the fundamental importance of community property law in defining the marital partnership in a number of states, [FN175] the Court proceeded to rule that, once again, community property law would have to yield to federal law:

ERISA's express pre-emption clause states that the Act 'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan....' We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption.... [FN176]

The Court relied heavily upon the policy reasons provided in ERISA for protecting plan participants and their surviving spouses in reaching its conclusion. [FN177] In addressing the divisibility of the qualified joint and survivor's annuity mandated by ERISA, the Court stated that one objective of ERISA is to "ensure a stream of income to surviving spouses." [FN178] The Court also noted that REA enlarged ERISA's protections for surviving spouses, thus providing another reason for preemption:

ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity.... Testamentary transfers could reduce a surviving spouse's guaranteed annuity below the minimum set by ERISA.... Perhaps even more troubling, the recipient of the testamentary transfer need not be a family member. [FN179]

The Court noted that the primary purpose of ERISA "is to protect *229 plan participants and beneficiaries." [FN180] In this instance, the Boggs' children were neither. [FN181] Only in narrow circumstances, such as pursuant to a QDRO issued in connection with a divorce, does ERISA confer beneficiary status on a nonparticipant. [FN182] ERISA's silence as to the power of testamentary disposition over retirement benefits was also a key factor in the Court's decision. The Court reasoned that "ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist." [FN183]

The Court's holding that the Boggs' sons were not beneficiaries of any of the retirement benefits evidences its view that Dorothy Boggs did not accumulate any rights or interests in these plans despite thirty years of marital partnership with Isaac Boggs. As a matter of fact, the Boggs' sons were made the beneficiaries of all of Dorothy's interest in the plan benefits. [FN184] Isaac Boggs necessarily thought that all of Dorothy's share of the retirement benefits would go to his children at his death. Had he known otherwise, perhaps he would have made other beneficiary designations, assuming ERISA would have allowed him to do so without Sandra's permission. Instead, all of Dorothy's interest is going to one who is a not a family member of Dorothy's or her children, and, at the death of Sandra Boggs, whatever is left of Isaac's interest will go to Sandra's beneficiary. [FN185] Given this litigation, the Boggs' sons are not likely to be named Sandra's beneficiaries. Now we have circled back to what the Court feared as a possible and troubling outcome: A testamentary transfer to a nonfamily member, made possible by the Court's refusal to recognize Dorothy's rights in the retirement benefits. It is worth noting that the benefits included not only a monthly annuity payment, but cash on deposit in an Individual Retirement Account (IRA) and shares of stock. Had Dorothy and Isaac divorced before Dorothy's death, she would have received a portion of the IRA and the stock, which would have been hers to dispose of at her death, whereas her portion of the monthly annuity payments would probably have terminated at her death. The differences between defined benefit plan interests and defined contribution plan interests are so substantial that it seems inappropriate and inadvisable to treat them as if they were interchangeable.

*230 Conclusion

It is difficult to leave a review of the cases discussed in this paper without forming this opinion: The federal government either does not understand the community property system or it is, in fact, biased against women, particularly women who have filled the traditional role of facilitating their husbands' careers and have earned no salary or benefits for their services. In recognition of the community property system, it would be a simple matter for Congress, at the outset, to temper anti-alienation provisions with an exception for spouses in community property states. Alternatively, the U.S. Supreme Court could recognize an implied exception in the acts of Congress for the benefit of spouses in community property states. These things have not happened. The Supreme Court's rationale for its holdings in the majority opinions in *Hisquierdo*, *McCarty*, and *Boggs* is strained, particularly the notions that railroad workers and armed services personnel will not retire if they have to split their retirement benefits with former spouses and that accumulated benefits might end up with unrelated beneficiaries if spouses have testamentary power over their community property interest. One fact is indisputable: None of the case law on the subject involves protecting a woman's retirement benefits from her former husband.

Although some of the problems have gradually been resolved, some serious issues remain to be resolved: (1) the ability of retired, disabled armed services personnel to waive retirement pay in favor of Veteran's Administration disability benefits even after the military retirement pay has been divided by a QDRO, (2) the divisibility of railroad retirement, and (3) the inability of spouses to have testamentary capacity over their community interest in defined contribution plans, if not all types of retirement benefits.

[FN1]. Mr. LaMorgese is an associate in the law firm of Holmes, Robnett & Garza, Highland Park Place, Dallas, Texas.

[FNaa1]. Mr. Holmes is the owner of the law firm of Holmes, Robnett & Garza, Highland Park Place, Dallas, Texas.

[FN1]. *In re Burrus*, 136 U.S. 586, 593-94 (1890).

[FN2]. See Brief of Estate Planning, Trust and Probate Law Section of the State Bar of California as Amicus Curiae in Support of Respondents, *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (No. 96-79), available in 1996 WL 744853, at *14. The nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, Wisconsin is often deemed to be a community property state as a result of its adoption of the Uniform Marital Property Act. See WIS. STAT. ANN. §§ 766.001-.97 (West 1993 & Supp. 1997).

[FN3]. See *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983); *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976).

[FN4]. See Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994)); Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408 (1994)).

[FN5]. See Retirement Equity Act of 1984, Pub. L. 98-397, 98 Stat. 1426 (amending Employee Retirement Income Security Act (ERISA)), 29 U.S.C. § 1056 (1994).

[FN6]. See WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 11.1, at 24 (2d ed. 1971).

[FN7]. See *id.* §§ 20-22, at 41-43.

[FN8]. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 592 (1979) (Stewart, J., dissenting) (citations omitted) (quoting WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1, at 1 (2d ed. 1971)).

[FN9]. TEX. FAM. CODE ANN. § 3.002 (West 1998).

[FN10]. TEX. CONST. art. XVI, § 15; accord TEX. FAM. CODE ANN. § 3.001(1)-(2).

[FN11]. TEX. FAM. CODE ANN. § 3.001(3).

[FN12]. See *Hilley v. Hilley*, 342 S.W.2d 565, 567 (Tex. 1961).

[FN13]. See TEX. FAM. CODE ANN. § 3.102.

[FN14]. See TEX. PROB. CODE ANN. § 385 (West 1980).

[FN15]. TEX. FAM. CODE ANN. § 7.001.

[FN16]. See *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974); *Hedtke v. Hedtke*, 248 S.W. 21, 22 (Tex. 1923).

[FN17]. See *Cooper v. Cooper*, 513 S.W.2d 229, 233-34 (Tex. App.-Houston [[[1st Dist.] 1974, no writ).

[FN18]. See *Cameron v. Cameron*, 641 S.W.2d 210, 213 (Tex. 1982); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139 (Tex. 1977).

[FN19]. See TEX. FAM. CODE ANN. §7.003.

[FN20]. 29 U.S.C. §§ 1001-1461 (1994).

[FN21]. See discussion *infra* Part III.F.

[FN22]. See discussion *infra* Part III.E.

[FN23]. See Retirement Equity Act of 1984, Pub. L. 98-397, 98 Stat. 1426 (amending 29 U.S.C. § 1056(d) (1994)).

[FN24]. See I.R.C. §§ 401-420 (1994).

[FN25]. See *Whorrall v. Whorrall*, 691 S.W.2d 32, 37 (Tex. App.-Austin 1985, writ *dism'd*) (holding that for a payment to qualify as a ‘retirement benefit,’ it must be “an earned property right which accrued by reason of years of service, or must be a form of deferred compensation which is earned during each month of service”).

[FN26]. See 29 U.S.C. §§ 1001-1461 (1994).

[FN27]. See *id.* §§ 1051-1086.

[FN28]. See *id.*

[FN29]. See I.R.C. § 401.

[FN30]. See *id.* § 404.

[FN31]. 29 U.S.C. § 1056(d)(3)(A).

[FN32]. See *id.* § 1056(d)(3)(G)(i).

[FN33]. See TEX. FAM. CODE ANN. § 9.104 (West 1998).

[FN34]. See I.R.C. § 402(e)(1); 29 U.S.C. § 1056(d)(3)(H).

[FN35]. See 29 U.S.C. § 1003(b)(5).

[FN36]. See *id.*

[FN37]. See *id.* §§ 1053-1054.

[FN38]. See *id.* §§ 1051-1054.

[FN39]. See I.R.C. § 412(b).

[FN40]. See *id.* § 411; 29 U.S.C. § 1053.

[FN41]. See I.R.C. § 411; 29 U.S.C. § 1053(a).

[FN42]. See 29 U.S.C. § 1053.

[FN43]. See I.R.C. §§ 411(b)(3)(B), 414(i).

[FN44]. See *id.* § 404(a).

[FN45]. See *id.* § 402.

[FN46]. See *id.* § 72(p)(2).

[FN47]. See *Ex parte Burson*, 615 S.W.2d 192, 194 n.2 (Tex. 1981); *Cearley v. Cearley*, 544 S.W.2d 661, 665-66 (Tex. 1976).

[FN48]. 544 S.W.2d 661 (Tex. 1976).

[FN49]. *Id.* at 662.

[FN50]. See *Dewey v. Dewey*, 745 S.W.2d 514, 518-19 (Tex. App.-Corpus Christi 1988, writ denied).

[FN51]. See *id.* at 518.

[FN52]. See *Cearley*, 544 S.W.2d at 665-66.

[FN53]. *Id.* at 666.

[FN54]. See, e.g., *Busby v. Busby*, 457 S.W.2d 551, 555 (Tex. 1970) (holding that military disability retirement benefits accrued during marriage constitute community property subject to division); *Simmons v. Simmons*, 568 S.W.2d 169, 169 (Tex. App.-Dallas 1978, writ *dism'd*) (holding that long-term monthly disability benefits provided by an employer are community property subject to division); *Marshall v. Marshall*, 511 S.W.2d 72, 74 (Tex. App.-Houston [1st Dist.] 1974, no writ) (holding that disability benefits are subject to division on divorce).

[FN55]. See discussion *infra* Part III.G.

[FN56]. 457 S.W.2d 551 (Tex. 1970).

[FN57]. *Id.* at 555.

[FN58]. 552 S.W.2d 422 (Tex. 1977).

[FN59]. See *id.* at 423.

[FN60]. See *id.*

[FN61]. See *id.* at 423-24.

[FN62]. 647 S.W.2d 945 (Tex. 1983).

[FN63]. See *Taggart*, 552 S.W.2d at 424.

[FN64]. See *id.*

[FN65]. 647 S.W.2d 945 (Tex. 1983).

[FN66]. *Id.* at 947.

[FN67]. See *id.*

[FN68]. 716 S.W.2d 705, 710-12 (Tex. App.-Corpus Christ 1986, no writ).

[FN69]. See *id.* at 710.

[FN70]. *See id.* at 710-11.

[FN71]. *See, e.g.,* *Baxter v. Ruddle*, 794 S.W.2d 761, 763 (Tex. 1990); *Anderson v. Anderson*, 707 S.W.2d 166, 168 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.).

[FN72]. *See Baxter*, 794 S.W.2d at 763; *see also Wilson v. Uzzel*, 953 S.W.2d 384, 390-91 (Tex. App.-El Paso 1997, n.w.h.) (holding that retroactive relief is not available to parties for decrees finalized prior to *Berry* through relitigation of the division of benefits or through clarification orders).

[FN73]. *See Baw v. Baw*, 949 S.W.2d 764, 767-68 (Tex. App.-Dallas 1997, no writ); *Pelzig v. Berkebile*, 931 S.W.2d 398, 402 (Tex. App.-Corpus Christi 1996, no writ); *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 531 (Tex. App.-Houston [1st Dist.] 1994, no writ); *Iglinsky v. Iglinsky*, 735 S.W.2d 536, 538 (Tex. App.-Tyler 1987, no writ).

[FN74]. *Baw*, 949 S.W.2d at 768.

[FN75]. *See Hatteberg*, 933 S.W.2d at 531.

[FN76]. 927 S.W.2d 118 (Tex. App.-Houston [1st Dist.] 1996, writ denied).

[FN77]. *See id.* at 120-21.

[FN78]. *See id.* at 120.

[FN79]. *See id.* at 121.

[FN80]. 686 S.W.2d 707 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.).

[FN81]. *See id.* at 710.

[FN82]. *See In re Reinauer*, 946 S.W.2d 853, 861 (Tex. App.-Amarillo 1997, writ denied); *Sutherland v. Cobern*, 843 S.W.2d 127, 131-32 (Tex. App.-Texarkana 1992, writ denied); *Harrell v. Harrell*, 700 S.W.2d 645, 648 (Tex. App.-Corpus Christi 1986, no writ); *Neese v. Neese*, 669 S.W.2d 388, 390 (Tex. App.-Eastland 1984, writ ref'd n.r.e.).

[FN83]. *Compare Phillips v. Parrish*, 814 S.W.2d 501, 505 (Tex. App.-Houston [1st Dist.] 1991, writ ref'd) (holding that increases which are not attributable to the continuing employment should be divided between the parties), *with Dunn v. Dunn*, 703 S.W.2d 317, 320-21 (Tex. App.-San Antonio 1985, no writ) (holding that post-divorce cost-of-living and inflation increases are not included in the community estate for division of retirement benefits), *and May v. May*, 716 S.W.2d 705, 711 (Tex. App.-Corpus Christi 1986, no writ) (holding that nonemployee-spouse may not share in any post-divorce cost-of-living increases).

[FN84]. *See supra* text accompanying notes 31-34.

[FN85]. *See* Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. § 1056(d)(1) (1994)).

[FN86]. *See* 29 U.S.C. § 1144(a) (1994).

[FN87]. *See id.* § 1056(d)(1).

[FN88]. *See, e.g., Ryan v. Ryan*, 626 S.W.2d 103 (Tex. App.-Beaumont 1981, writ ref'd n.r.e.); *General Dynamics Corp. v. Harris*, 581 S.W.2d 300 (Tex. App.-Waco 1979, no writ).

[FN89]. *See Ryan*, 626 S.W.2d at 104-05 (ruling that retirement benefits are community property divisible upon divorce and that state laws dividing such benefits are not preempted by ERISA).

[FN90]. *See Retirement Equity Act of 1984*, Pub. L. No. 98-397, 98 Stat. 1426 (amending 29 U.S.C. § 1056(d) (1994)).

[FN91]. *See 29 U.S.C. § 1056(d)*.

[FN92]. *See, e.g., Ryan*, 626 S.W.2d at 105; *General Dynamics Corp.*, 581 S.W.2d at 303-04.

[FN93]. 439 U.S. 572 (1979).

[FN94]. *See id.* at 583-91.

[FN95]. *See id.* at 584-85 (citing 45 U.S.C. § 231d(c)(3)).

[FN96]. *See id.* at 589.

[FN97]. *See id.* at 583.

[FN98]. *See id.* at 588-90.

[FN99]. *See id.* at 588.

[FN100]. *Id.* at 585.

[FN101]. *See id.* at 590.

[FN102]. *See id.* at 587, 590.

[FN103]. 582 S.W.2d 395 (Tex. 1979).

[FN104]. *See id.* at 401.

[FN105]. 728 S.W.2d 823 (Tex. App.-Houston [1st Dist.] 1987, no writ).

[FN106]. *See id.* at 824.

[FN107]. *See id.*

[FN108]. *Id.* at 825.

[FN109]. 453 U.S. 210 (1981).

[FN110]. *See id.* at 211-36.

[FN111]. *Id.* at 232.

[FN112]. *See id.* at 233.

[FN113]. *See id.* at 235.

[FN114]. *Id.*

[FN115]. *See* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408 (1994)).

[FN116]. *See* 10 U.S.C. § 1408(c)(1) (1994).

[FN117]. 641 S.W.2d 210 (Tex. 1982).

[FN118]. *See id.* at 212-13.

[FN119]. 626 S.W.2d 485 (Tex. 1981).

[FN120]. *See id.* at 486-87.

[FN121]. *See, e.g.,* Segrest v. Segrest, 649 S.W.2d 610, 613 (Tex. 1983).

[FN122]. 626 S.W.2d 65 (Tex. App.-San Antonio 1981, no writ).

[FN123]. *See id.* at 68.

[FN124]. *See Ex parte* Hovermale, 636 S.W.2d 828, 836 (Tex. App.-San Antonio 1982, no writ).

[FN125]. *See* Koepke v. Koepke, 732 S.W.2d 299, 300 (Tex. 1987); Harrell v. Harrell, 692 S.W.2d 876, 876 (Tex. 1985).

[FN126]. *See, e.g.,* Harrell v. Harrell, 700 S.W.2d 645, 646-47 (Tex. App.-Corpus Christi 1986, no writ) (holding that language in the divorce decree “denying all other relief requested” was not an adjudication of the parties' interest in military retirement pay).

[FN127]. 700 S.W.2d 914 (Tex. 1985).

[FN128]. *See id.* at 915.

[FN129]. *See id.* at 914.

[FN130]. 813 F.2d 1545 (9th Cir. 1987).

[FN131]. *See id.* at 1548.

[FN132]. *See* Pub. L. No. 101-510, § 555(a), 104 Stat. 1569, 1570 (codified as amended at 10 U.S.C. § 1408(c)(1) (1994)).

[FN133]. *See id.*

[FN134]. *Id.*

[FN135]. *See* Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981); *supra* text accompanying notes 119-20.

[FN136]. 894 S.W.2d 113 (Tex. App.-Austin 1995, writ denied).

[FN137]. *See id.* at 117-18.

[FN138]. *See Ex parte Kruse*, 911 S.W.2d 839 (Tex. App.-Amarillo 1995, no writ).

[FN139]. *See Buys v. Buys*, 924 S.W.2d 369 (Tex. 1996).

[FN140]. *See id.* at 370.

[FN141]. *See Buys v. Buys*, 898 S.W.2d 903, 908 (Tex. App.-San Antonio, 1994), *rev'd*, 924 S.W.2d 369 (Tex. 1996).

[FN142]. 924 S.W.2d 369 (Tex. 1996).

[FN143]. *Id.* at 370 (alterations in original).

[FN144]. *Id.* at 375.

[FN145]. *See Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970).

[FN146]. *See Simmons v. Simmons*, 568 S.W.2d 169, 169 (Tex. App.-Dallas 1978, writ *dism'd*) (holding that long-term monthly disability benefits provided by an employer are community property subject to division); *Marshall v. Marshall*, 511 S.W.2d 72, 74 (Tex. App.-Houston [1st Dist.] 1974, no writ) (holding that disability retirement benefits are community property subject to division).

[FN147]. *See Andrlé v. Andrlé*, 751 S.W.2d 955, 956 (Tex. App.-Eastland 1988, writ *denied*) (holding that disability insurance proceeds are community property subject to division).

[FN148]. *See Marshall*, 511 S.W.2d at 74.

[FN149]. *See Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981); *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979); *Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex. App.-El Paso 1980, no writ).

[FN150]. 38 U.S.C. § 5301(a) (1994).

[FN151]. *See Ex parte Johnson*, 591 S.W.2d at 456.

[FN152]. 490 U.S. 581 (1989).

[FN153]. *See id.* at 584-89.

[FN154]. 786 S.W.2d 672 (Tex. 1990).

[FN155]. *See id.* at 673; *see also In re Reinauer*, 946 S.W.2d 853, 857 (Tex. App.-Amarillo 1997, writ *denied*) (holding that the USFSPA does not apply retroactively where a decree became final before the enactment of the USFSPA and *Mansell*); *Jones v. Jones*, 900 S.W.2d 786, 788 (Tex. App.-San Antonio 1995, writ *denied*) (holding that *res judicata* bars a collateral attack on a final divorce decree).

[FN156]. *See Ex parte Burson*, 615 S.W.2d 192, 194-96 (Tex. 1981).

[FN157]. *See id.* at 194.

[FN158]. *See id.* at 195.

[FN159]. *See id.* at 196.

[FN160]. *In re Reinauer*, 946 S.W.2d at 857; *Gallegos v. Gallegos*, 788 S.W.2d 158, 160 (Tex. App.-San Antonio 1990, no writ).

[FN161]. 754 S.W.2d 111 (Tex. 1988).

[FN162]. *Id.* at 114.

[FN163]. 574 S.W.2d 748 (Tex. 1978).

[FN164]. *Id.* at 750.

[FN165]. *Compare Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996) (finding no preemption), *with Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (finding preemption), *and Meek v. Tullis*, 791 F. Supp 154 (W.D. La. 1992) (finding preemption).

[FN166]. 117 S. Ct. 1754 (1997).

[FN167]. *See id.* at 1758.

[FN168]. *See id.*

[FN169]. *See id.*

[FN170]. *See id.*

[FN171]. *See id.*

[FN172]. *See id.*

[FN173]. *See id.* at 1759.

[FN174]. *See id.*

[FN175]. *See id.* at 1760.

[FN176]. *Id.* at 1760-61 (citations omitted) (quoting 29 U.S.C. § 1144(a)).

[FN177]. *See id.* at 1761-62.

[FN178]. *Id.* at 1761.

[FN179]. *Id.* at 1762.

[FN180]. *Id.* (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)).

[FN181]. *See id.* at 1763.

[FN182]. *See* 29 U.S.C. §§ 1055-1056, 1169 (1994); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

[FN183]. *Boggs*, 117 S. Ct. at 1763-64 (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985)).

[FN184]. *See id.* at 1758.

[FN185]. *See id.* at 1766-67.

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