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Major Busby, having completed twenty years of service in the Air Force, became eligible for voluntary retirement in September 1962. In June 1963, Major Busby and his wife were divorced, and the officer's eligibility for retirement benefits was not considered by the court in dividing the property of the marriage. On the same day the divorce decree was entered, the Air Force, having discovered that the officer was a diabetic, ordered that he be retired because of his disability. In 1967 Mrs. Busby filed suit for partition of the disability retirement benefits paid to her husband as of that date and of those to be paid in the future. The trial court entered judgment that Mrs. Busby take nothing, but the Texas court of civil appeals reversed, ruling that she should recover one-half of the benefits as her community interest.[1] *Held, affirmed*: Retirement benefits that vest during marriage constitute community property. *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

I. Three Problems Inherent in Determining The Character of Military Retirement Benefits

Any analysis to determine the character of property as separate or community must necessarily begin with this basic premise: All the property acquired by the husband or wife during marriage is community property, except that which is acquired by gift, devise, or descent.[2] It follows that if military retirement benefits are a part of the community estate and not the separate property of the serviceman-spouse, those benefits must be (1) a property right, (2) acquired during marriage, and (3) not merely a gift to the serviceman-spouse.

Property Right or Mere Expectancy. Since the Texas Constitution defines the community estate as *property*,[3] any interest that falls short of a property right can never be subject to the laws which determine marital property rights in this state. Thus, until any interest a spouse might have in military retirement benefits becomes a property right, that interest cannot be community property.

At some point between the date an officer in the armed forces is commissioned and the date he begins to receive retirement pay, he acquires the right to that payment. It may be cogently argued that this right vests

parties rendered consideration inappropriate. A statutory procedure, similar in many aspects to the New York statute, was attacked on fourteenth amendment grounds. The statutory framework provided that a landlord seeking to evict tenants for nonpayment of rent could file an affidavit, in court, whereupon the sheriff would be ordered to deliver the premises to the landlord. Four days' notice was required, but the only way the tenant could prevent immediate eviction was to submit a counter-affidavit and post a bond equal to double the rent past due. This double rent would be forfeited upon a judicial determination in favor of the landlord. However, if no bond could be posted, the tenant would not be entitled to a judicial determination at all.

[1] 439 S.W.2d 687 (Tex. Civ. App.—Austin 1969).
[2] Tex. Fam. Code Ann. tit. 1, § 5.01 (1970).
[3] Tex. Const. art. XVI, § 15.

upon the date of the officer's retirement. In that case the election to retire operates as a condition precedent to the acquisition of a vested interest in retirement benefits. The right to elect to retire, and not the right to the benefits, is conditioned solely upon the completion of a prescribed number of years in the service (usually twenty years for an officer on active duty).[4] Under this theory rights under community property laws would attach only upon the officer's election to retire, for only then could he be said to have acquired some *property* right.

An alternative approach might be to consider the right to retirement benefits vested upon the date the requisite tenure of service is completed. In that case the completion of twenty years of active duty operates as the only condition precedent to the acquisition of the vested right. The failure to elect to retire prior to death or dishonorable discharge operates as a condition subsequent, working a forfeiture of the previously vested right to retirement benefits. Under this theory community property laws attach with the completion of a prescribed number of years in the service; the application of the laws determining marital property rights does not depend upon the officer's actual election to retire.

In *Mora v. Mora*[5] the latter argument was favored by the San Antonio court of appeals. That court relied upon the holding in *Herring v. Blakeley*,[6] the first Texas supreme court case to recognize the interest of an employee-spouse in a qualified benefit plan as *vested*[7] prior to the actual payment of those benefits.[8] In an attempt to distinguish *Herring* the serviceman-spouse in *Mora* argued that, unlike profit-sharing and annuity schemes, military retirement benefit programs included provisions making all benefits subject to forfeiture on death prior to actual retirement. It appears from the opinion in *Mora* that the use of the term "forfeiture" undermined the serviceman's own argument. The court was quick to point out that "[o]nly rights in existence can be forfeited."[9] Thus, in *Mora* the interest of a serviceman-spouse in military retirement benefits was deemed to have become a property right upon the completion of twenty years of active service—the amount of time sufficient to entitle him to elect to retire. The *Mora* court's application of the principle in *Herring* to military retirement benefits makes clear the fact that such benefits will

[4] With the approval of the Secretary of the Air Force, an officer may be retired upon request after twenty years of service. 10 U.S.C.A. § 8911 (1970). The officer then becomes entitled to retirement pay. 10 U.S.C.A. § 8889 (1970). A schedule of computation is provided at 10 U.S.C.A. § 8991 (1970).

[5] 429 S.W.2d 660 (Tex. Civ. App.—San Antonio 1968), *error dismissed, w.o.j., noted in* 22 Sw. L.J. 888 (1969).

[6] 385 S.W.2d 843 (Tex. 1965).

[7] Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans—Recent Developments and Proposed Guidelines for the Future*, 44 TEXAS L. REV. 860, 865 (1966) [hereinafter cited as Hughes].

[8] It is submitted that the facts in *Herring* and *Mora* are not perfectly analogous. In the former case the court stressed that the employee-spouse had full and unconditional ownership of a benefits account, but was not yet entitled to draw upon that account. In *Mora*, since there was not an account, there was no property to which ownership could attach. *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 23 Sw. L.J. 44, 45 n.7 (1969).

[9] 429 S.W.2d at 662.

be considered property rights, even though the actual payment of such benefits is wholly dependent upon the serviceman's election to retire.

Acquisition During Marriage. The community has no interest in property which is not acquired during the existence of the community.[10] Assuming a serviceman's interest in his military retirement to be a property right that vests upon the completion of a requisite tenure of service, community property laws still do not attach so as to affect that right unless it is *acquired*[11] during marriage.

A basic rule of Texas community property law is that the character of property is determined as of the date of its acquisition.[12] Since a serviceman's interest in retirement benefits does not become a property right prior to the completion of twenty years of service,[13] no property right may be *acquired* prior to that date. Thus, any interest in military retirement benefits is community property only if the serviceman is married as of the date he becomes entitled to elect to retire and collect those benefits.[14] It follows that the marital status of the serviceman on the date he completes the requisite tenure of service fixes the character of the property as separate or community.[15] In this argument the inception-of-title rule is controlling.[16]

Another approach might be to apply the inception-of-title doctrine differently, asserting that the title to military retirement benefits is fixed with the enlistment or commission of the serviceman.[17] This argument is specious, however, because any interest in the benefits is not a property right as of that date, but a mere expectancy.[18]

A third possibility might be to disregard the inception-of-title rule

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[10] TEX. FAM. CODE ANN. tit. 1, § 5.01 (1970).

[11] Nevertheless, the term *acquired* is to be given a broad interpretation. Lee v. Lee, 112 Tex. 392, 247 S.W. 828 (1923). Such an interpretation supports the idea that the term should not be limited to present possessory interests.

[12] Smith v. Buss, 135 Tex. 566, 144 S.W.2d 529 (1940); Hughes 869.

[13] In *Mora*, 429 S.W.2d at 662, it was held that the serviceman's interest became a property right only after sufficient military service.

[14] An analogy may be drawn to the situation in which one takes possession of real property as a naked trespasser, later marries, and, still later, acquires title to the property by adverse possession. It has been held that the property takes its character from the time of the running of the statute and, therefore, is the community property of the title holder and his spouse. Bishop v. Lusk, 8 Tex. Civ. App. 30, 27 S.W. 306 (1894).

[15] In construing the Arizona community property statute (one very similar to the Texas law) a United States court of appeals reached precisely this conclusion. Commissioner v. Wilkerson, 368 F.2d 552 (9th Cir. 1966), *aff'g* 44 T.C. 718 (1965). It is interesting to note that this case was cited in the civil appeals opinion in *Busby*, 439 S.W.2d at 690. For a complete discussion of *Wilkerson*, see Lay, *Retirement Income Credit and Community Property: A Problem of Vesting*, 42 TUL. L. REV. 304, 310 (1968). *See also* Hughes 870.

[16] This term refers to the concept that the time of acquisition fixes the character of the property as separate or community. *See* Note, *Community Property—Deferred Compensation Plans—Interest of the Nonemployee Spouse at Divorce*, 19 SW. L.J. 370, 374 (1965).

[17] An analogy may be drawn to the situation in which one takes possession of real property under color of title, later marries, and, still later, perfects that title through adverse possession. It has been held that the property takes its character from the time of the original claim and, so, is the separate property of the claimant. Strong v. Garrett, 148 Tex. 265, 224 S.W.2d 471 (1949). The analogy breaks down, however, if the officer has no colorable title to retirement benefits upon his commission.

[18] *Mora* compels this conclusion.

altogether and apply the "apportionment principle."[19] Under this theory military retirement benefits are characterized according to the marital status of the serviceman throughout his military career.[20] If, for example, a serviceman were single for the first five years of his military career, and then married for the next ten years, and then single once again (following dissolution of the marriage) for the final five years of his twenty-year period of active service, one-half of his military retirement pay would be the community property of the marriage dissolved five years earlier. The fact that he was single at the time he acquired a property right in the benefits would not defeat the right of the community to a portion of the payments. Stated another way, the community owns an interest commensurate with the number of years it existed during the period in which the interest of the serviceman-spouse matured.

A final method for resolving the character of military retirement benefits according to their acquisition during marriage would be to apply the inception-of-title rule to determine the existence of any community interest, and then apply the apportionment principle to determine the extent of that interest. That is, the marital status of the serviceman at the end of twenty years would determine whether or not the community estate was entitled to *any* portion of the retirement pay; the number of years of marriage during the serviceman's military career would determine how much of the newly acquired property right belonged to the community. It is not absolutely clear, but it appears that Texas courts have accepted this last method.

In *Kirkham v. Kirkham*[21] the serviceman-spouse married after twelve years in the military. During the eighth year of marriage he became entitled to military retirement benefits.[22] Two years later his wife sued for divorce and was awarded a thirty per cent interest in his retirement pay. The appellate court affirmed the lower court's division of the property by holding that the benefits *accrued* during marriage and, therefore, were community property. It is not clear what the court meant by its use of the term "accrued." Perhaps the court meant to imply that the right to the benefits had *vested* during the marriage. If so, such an implication would seem to favor the inception-of-title doctrine. It is not clear, however, whether the existence of the community interest depended upon the marital status of Mr. Kirkham at the time the right to retirement benefits vested (*i.e.*, at the end of his twenty-year tenure of service).[23] In addition, the holding implies that the community interest extended to *all* the benefits. Under the apportionment principle, however, only two-fifths

[19] This theory has also been referred to as the "tracing principle." *See, e.g.*, Note, *supra* note 16, at 374-75. But the term is somewhat misleading since it is usually associated with another unrelated rule of community property law.

[20] If a serviceman marries after enlistment or commission, the extent of the community interest may be calculated by dividing the number of months in the service into the number of months during the marriage relationship which were spent in the service.

[21] 335 S.W.2d 393 (Tex. Civ. App.—San Antonio 1960).

[22] Since the election to retire was not discussed in the case, it is reasonable to assume that the serviceman in *Kirkham* took advantage of his right to retire as soon as that right vested.

[23] Since the parties were married at the end of the husband's twenty-year service career, the court was not forced to consider this possibility.

of the benefits were clearly the property of the community.[24] Nevertheless, the court actually affirmed a decision which awarded Mrs. Kirkham a portion of the benefits roughly in keeping with her share of the community as determined under the apportionment principle.[25] In the final analysis the case does little to explain exactly what prerequisites must be met in order for the community to acquire an interest in military retirement benefits. The actual result of the case does, however, indicate a preference for the application of the apportionment principle.

Mora goes further in resolving the question of acquisition during marriage. As in *Kirkham* the suit for divorce was instituted after the officer had served long enough to establish his eligibility for benefits upon his election to retire. As shown earlier, the *Mora* court considered the benefits *vested* by reason of sufficient time in the service.[26] This holding implies that acquisition during marriage contemplates a vesting of property rights while the parties are husband and wife. It follows that the community can acquire a property right in the prospective benefits only if the all-important date when eligibility to retire attaches actually falls during the existence of the marriage. *Mora*, therefore, appears to favor the inception-of-title doctrine.[27] However, the *Mora* court then proceeded to actually calculate the community share of the potential benefits. The community was considered to have acquired an interest commensurate with the number of months during the service career which were spent in marriage. Under this holding the extent of the community interest is governed by the marital status of the serviceman during his tenure in the service.[28] The inception-of-title principle is used to determine whether a community interest actually exists, and the apportionment principle is applied to determine the extent of that interest.

Compensation or Gift. Even if an interest may be said to amount to a vested property right which is acquired during marriage, a showing that the property was acquired by gift defeats the community property presumption.[29] A few older cases alluded to retirement plans as "charitable enterprises."[30] As gifts they necessarily became the separate property of the donee-spouse. These cases overlooked the fact that the principal prerequisite to participation in a retirement plan is the continued employment of the participant. Today retirement benefits are uniformly considered a form of employee compensation. Thus, the more recent cases have

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[24] The parties were husband and wife for eight years of the husband's twenty-year service career.

[25] Although the wife's share of the precise community interest was shown to be 27.8%, the additional award was said to be within the discretion of the trial court. *See* note 49 *infra.*

[26] *See* note 13 *supra.*

[27] *See* note 16 *supra.*

[28] Webster v. Webster, 442 S.W.2d 786 (Tex. Civ. App.—San Antonio 1969), is in accord. In that case a spouse had served in the Air Force for twenty-four years; throughout the final twenty years he was married. On divorce his wife was awarded 10/24ths of his retirement benefits.

[29] TEX. FAM. CODE ANN. tit. 1, §§ 5.01, 5.02 (1970).

[30] *See* Note, *supra* note 16, at 372, and cases cited therein.

consistently held that such benefits are community property so long as they are acquired during marriage.[31]

The military retirement benefit cases are in accord. In *Kirkham* the benefits were characterized as "an earned property right."[32] Eight years later *Mora* reinforced this conclusion.[33] This argument against treating retirement benefits as community property has apparently been settled in favor of the community.

II. Busby v. Busby

Since any community interest that is not divided on divorce gives rise to a tenancy in common between the former spouses,[34] a subsequent determination that any undivided interest was a part of the community estate would sustain the right of either of the former spouses to a partition of that interest. The right to partition is purely an incident of the cotenancy relationship.[35] Thus, the central issue in *Busby v. Busby*[36] was whether Major Busby's military retirement benefits should be characterized as separate or community property. A demonstration of the community character of those benefits was essential to establish Mrs. Busby's right to a share of the retirement payments.

After formulating that issue, the Texas supreme court considered Major Busby's contention that, since he had not elected to retire at the time of the divorce, he had acquired no property rights in the benefits as of that date. If he had acquired no property rights in the benefits during marriage, it followed, in applying the inception-of-title rule, that the community could have no interest in those benefits. The court endorsed the proposition that the property right to the benefits vested when Major Busby became entitled to elect to retire. Since he was married on that date, the right to the benefits was held to have vested during marriage.

Major Busby also asserted that if he had acquired a right at all, its characterization must have been fixed at the time of his commission, which was prior to the marriage. But the fact that the right to retire with benefits vests only with the completion of the requisite number of years in the service ruled out the possibility that the right could have been acquired earlier. Thus, the court apparently endorsed the idea that "acquisition during marriage" demands that the right to retire must attach prior to dissolution of the marriage.

Next the court considered Major Busby's contention that *Mora* was distinguishable because it represented a division of property under the broad discretionary powers afforded trial courts in cases of divorce.[37] The court pointed out that *Mora* went so far as to actually calculate the community interest. Since the *Mora* court undertook a determination of the

[31] *See, e.g.*, Herring v. Blakely, 385 S.W.2d 843 (Tex. 1965).
[32] 335 S.W.2d at 394.
[33] 429 S.W.2d at 662.
[34] Taylor v. Catalon, 140 Tex. 38, 166 S.W.2d 102 (1942).
[35] Keller v. Keller, 135 Tex. 260, 141 S.W.2d 308 (1940).
[36] 457 S.W.2d 551 (Tex. 1970).
[37] *See* Tex. Fam. Code Ann. tit. 1, § 3.63 (1970).

community share, it apparently did not rely solely upon the equitable power of division on divorce. By so holding the supreme court dispelled the argument that any division of a serviceman's retirement benefits on divorce amounts to nothing more than a divestiture of his separate property, a mere exercise of the district court's broad discretion.

Almost as an aside, the *Busby* court summarily dismissed the notion that retirement benefits were a mere gratuity. *Kirkham*, it was said, clarified the fact that such benefits were earned property rights. Since they are onerously acquired, and not rewards or charitable contributions, they cannot be considered gifts. Thus, it appears settled that military retirement benefits do not fall under this constitutional exception to the rule that property acquired during marriage is the property of the community.[38]

Finally Major Busby alleged that since *Mora* and *Kirkham* had dealt with *voluntary* retirement benefits, they were distinguishable from a case in which the serviceman's retirement was involuntary. The court did not consider this to be a meaningful distinction. The statutes authorizing both types of retirement were examined in detail.[39] The court simply concluded that there was no difference between the two plans that would call for the application of a different rule to determine the character of the benefits.

III. The Problems Unresolved by Busby

By approving the *Mora* holding, *Busby* will be cited for the proposition that the interest of a serviceman in his military retirement benefits becomes a vested property right when only the election to retire separates him from actual payment. Since no property may be acquired until it is first property, it follows from this holding that such rights may be considered *acquired* only upon the completion of a prescribed number of years of active military service. As a result of this decision two of the previously discussed alternatives for determining acquisition during marriage are ruled out.[40] Of the two remainng possibilities, one considers only the marital status of the serviceman on the date the property right vests as the factor determining the character of the benefits.[41] The other possibility also considers the marital status at the date the right vests to be the factor in determining the *existence* of the community interest. Yet this second approach goes further to consider the *extent* of that interest as determined by the marital status of the serviceman throughout his military career.[42] It is not clear which of these theories for determining the character of the serviceman's retirement benefits is adopted in *Busby*.

In *Busby* the court gives considerable attention to the *Mora* opinion.

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[38] *See* Note, *supra* note 16, at 372, and cases cited therein.

[39] Disability retirement benefits are authorized under the provisions of 10 U.S.C.A. § 1201 (1970). For the statutes governing voluntary military retirement benefits, see note 4 *supra*.

[40] *Busby* clearly rejects the argument that the serviceman's interest is incepted with his commission. Furthermore, *Busby* dismisses the theory that the existence of any community interest is determined solely by the marriage of the serviceman at any point during his military career.

[41] This is the inception-of-title rule.

[42] This theory is a hybrid of the inception-of-title rule and the apportionment principle.

Mora seems to endorse the latter theory, recognizing both the inception-of-title doctrine and the apportionment principle. Yet it does not follow that *Busby* observes the holding in *Mora* in all respects. Although *Busby* goes so far as to spell out the calculation by the *Mora* court of the community interest in the latter case, the *Busby* court does not follow that rationale in partitioning the community interest earned by Major Busby.

The court of civil appeals' decision in *Busby* resulted in a reversal of the lower court's decision,[43] and an award to Mrs. Busby of one-half of *all* the retirement payments. The Texas supreme court, in affirming that decision ignored the fact that Major Busby had joined the Air Force four years prior to his marriage to Mrs. Busby. Under an application of the *Mora* decision the community interest in Major Busby's retirement benefits should have been calculated as four-fifths of the total benefits.

Any attempt to rationalize why the supreme court endorsed the *Mora* holding and then, without explanation, ignored one major aspect of the method followed therein would be conjecture. It should be noted, however, that the opinion in *Mora* never discussed the reason for dividing the benefits according to the marital status of the serviceman throughout his military career. Perhaps the *Mora* court simply assumed that the community could not possibly possess an interest in that portion of an expectancy which had matured prior to marriage. Yet, regardless of whether the *Busby* court made any such assumption, a contrary result was reached in *Busby*—and with no accompanying reasoning.

If *Busby* does in fact stand for the proposition that the marital status of the serviceman during the course of his service career is irrelevant, and, thus, only the marital status at the date the property right vests is controlling, the consequences are bound to lead to inequities. If, for example, a serviceman, under a twenty-year military retirement program, marries in his nineteenth year of service and divorces in his twenty-first year, his spouse of only two years will innure to one-half of his total benefits upon retirement. Merely because the serviceman was married upon completion of the crucial twentieth year, his total benefits are characterized as community property. A subsequent divorce will, most likely, result in an assignment to his wife of one-half of all the payments he will receive from the date of his election to retire until his death. The resulting inequity to the serviceman-spouse is apparent.[44]

On the other hand, any rule that requires the existence of any community interest in military retirement benefits to be determined solely by the marital status of the serviceman upon the date when the property right vests (*i.e.*, at the end of twenty years) is likely to produce inequitable results, reducing to a nullity the interest of a former wife. Under

[43] 439 S.W.2d 687 (Tex. Civ. App.—Austin 1969).

[44] As to non-military retirement benefits, it has been suggested that even though an employee is not entitled to all of his benefits at the date of divorce, any interest which has been acquired should be treated as community property. Hughes 871. This rule is well suited to determining the character of an interest in a periodic payment retirement plan. The problem is that under the rule in *Busby* nothing is acquired prior to twenty years of active service. Thus, community property laws cannot attach at an earlier date.

such a rule, for example, if husband and wife are married on the same date the husband joins the service, but the marriage is dissolved during the nineteenth year, the community has no interest in the rights which vest one year later. It should be noted that even an application of the reasoning in *Mora*, recognizing both the inception-of-title doctrine as controlling and the apportionment principle as determining the extent of the interest, would produce such a result. It appears, then, that in formulating a rule which recognizes military retirement benefits as property rights prior to actual retirement, the courts in both *Mora* and in *Busby* have devised a theory that is bound to engender inequitable results for some spouses of servicemen.[45] *Busby* compounds the problem, however, because a rule which ignores altogether the marital status of the serviceman throughout his career (*i.e.*, even for the purpose of determining the extent of the interest of the community), but demands that the serviceman be married at the date the property right becomes vested, can produce inequitable results for both spouses.

Busby does make one fact clear. The same rule that determines the character of voluntary retirement benefits should be applied to determine the character of disability retirement benefits. The details and prerequisites of each type of retirement are given considerable attention. Nevertheless, the court fails to consider glaring differences. Disability benefits are obviously more contingent than are benefits under voluntary retirement programs. Under a voluntary military retirement plan an interest in prospective benefits may be characterized as a vested property right because, assuming the serviceman has served for a prescribed number of years, only the election to retire separates him from actual payment. The contingency is entirely within the control of the serviceman. In a plan providing for disability benefits, on the other hand, the contingency separating the serviceman from actual payment is the disability itself. Thus, it may be cogently argued that any right to disability benefits vests no sooner than the disability is discovered. The disability itself operates as a condition precedent to prevent the vesting of any right to benefits until the serviceman is shown to be disabled. The benefits should, therefore, be treated as expectancies to which community property law does not attach until the benefits have been realized.[46]

Since Major Busby's disability was incurred prior to his divorce and since he was ordered to retire on the date the divorce decree was entered, the court was probably correct in holding that the right to the disability benefits was acquired during marriage. Under the inception-of-title doctrine it follows that the community acquired some interest in those benefits. At the time of the divorce, however, no benefits had actually been paid. This raises the problem of how courts may partition property that has vested, but which is not yet *in esse*. The problem is not confined to

[45] Without such a rule, however, the constitutional prerequisite of acquisition during marriage is not met. Furthermore, to disregard the necessity for such a rule is to disregard the inception-of-title doctrine, one of the strongest principles in the Texas law of community property.

[46] Hughes 870.

the situation in which the right to disability benefits is acquired. Such a difficulty will also arise in dividing voluntary retirement benefits that are deemed to have become property rights, but which are unavailable for division because the serviceman-spouse has not yet elected to retire. Furthermore, the problem will not be confined to suits for partition, but will also appear in suits for divorce. Certainly a divorce court may take remainder and reversionary interests into account in assessing the community estate and making a division of the property of the spouses. But forcing a present distribution of the interest in a vested plan that is to be paid in the future, whether upon divorce or in a suit for partition, may be inequitable to the beneficiary of the plan.[47] In *Mora* Justice Cadena, recognizing that valuation of such a community interest was not free from complications, suggested that the serviceman be required to make periodic payments to his former spouse *if and when* the benefits are received.[48] Strictly speaking, under the facts in *Busby*, Major Busby was precluded from receiving the voluntary retirement benefits to which he would have otherwise been entitled upon his election to retire. Thus, any interest he had in voluntary retirement was forfeited upon his receipt of disability benefits. Since such benefits were never received and all incident rights to payment under the formerly vested right were erased, any interest formerly vested in the community was likewise abrogated. Perhaps, if the disability benefits Major Busby received had been awarded after the date of the divorce, Major Busby could have used such an argument to show that the rights acquired by the community before dissolution had been forfeited because of his disability. Nevertheless, since the officer was ordered to retire the same day the divorce became final, the court was not forced to contend with this argument. The disability was both incurred and discovered during marriage. The right to the benefits intended to compensate that disability was, therefore, subject to the law determining the extent of any community interest.

IV. Conclusion

Busby represents the Texas supreme court's first confrontation with the problems inherent in considering the character of military retirement benefits. The facts presented in *Busby* were particularly suitable for conclusively determining the community's interest in such benefits, because a determination of the existence and extent of that interest were essential to reach the question of partition.[49] Unfortunately *Busby* does not answer

[47] *Id.* at 880.

[48] 429 S.W.2d at 663.

[49] Since in a suit for partition of property not divided upon divorce the character of the property is a crucial factor, the question of characterization was squarely before the court in *Busby*. The courts of civil appeals have not been so compelled to resolve this issue. The few earlier cases on point involved divorce suits. As a result, any imprecision on the part of the lower courts in calculating the community interest was considered an exercise of the broad powers given to the courts in dividing property upon divorce. *Kirkham* is exemplary of this approach. The most striking example, however, is found in Berg v. Berg, 115 S.W.2d 1171 (Tex. Civ. App. —Fort Worth 1938), *error dismissed*. In that case it was held that the character of the property in question need not be determined at all. Characterization was not a controlling issue,