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COMMUNITY PROPERTY—Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: *Hughes v. Hughes*

I. INTRODUCTION

In *Hughes v. Hughes*,¹ the New Mexico Supreme Court addressed the issue of whether a husband's Federal Civil Service disability benefits are community property. The court concluded that the benefits were community property to the extent that the community contributed to the Civil Service Fund.² The court further held that the wife's interest in the disability benefits was not related to when the husband's right to the benefits vested.³

This Note presents an analysis of the supreme court's decision in *Hughes v. Hughes* and provides an overview of the approach other courts have used with regard to the issues addressed in *Hughes*. Additionally, this Note will discuss the effect of the decision on future New Mexico marital estate divisions of Federal Civil Service benefits.

II. BACKGROUND

The *Hughes v. Hughes* opinion lacks an explanation of community property principles or of the Federal Civil Service Retirement and Disability System. Before analyzing the court's decision, this Note will briefly discuss these concepts.

A. Community Property

The principle that underlies the concept of community property⁴ is that whatever a husband and wife earn during their marriage is a product of their joint efforts and should belong to them jointly.⁵ Separate property is property owned by either party before the inception of the marriage or

1. 96 N.M. 719, 634 P.2d 1271 (1981).

2. *Id.* at 722, 634 P.2d at 1274.

3. *Id.* at 723, 634 P.2d at 1275. A pension is "vested" when it is not subject to a condition of forfeiture when the employee terminates employment before retirement. *Copeland v. Copeland*, 91 N.M. 409, 412, 575 P.2d 99, 102 (1978).

4. Community property exists in the states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. For a more complete treatment of community property, see W. DeFuniak & M. Vaughn, *Principles of Community Property* (2d ed. 1971).

5. *Id.* at 2.

property acquired by gift, bequest, devise, distribution, or descent, during the marriage.⁶

Historically, management and control of the community property rested in the husband. This feature of community property, however, has been considerably modified in many jurisdictions in favor of joint management and control.⁷ Also, community property may be used to satisfy the debts of the community but not to satisfy the separate debts of each spouse.⁸

Finally, as a general rule, the surviving spouse is entitled to one-half of the community property, the other half passing according to the will of the deceased spouse, or if there is no will, according to the statute for intestate succession in that jurisdiction.⁹

B. Federal Civil Service Retirement and Disability System

Congress established by statute a system of retirement benefits for civilian employees of the federal government, payable on the basis of age and years of service or disability.¹⁰ Congress created the Civil Service Retirement and Disability Fund to collect the monies needed for the retirement and disability annuities.¹¹ The Fund consists of deductions from the basic pay of government employees¹² and regular government appropriations of equal amounts.¹³

The Civil Service Retirement and Disability System pays out benefits based on the employee's earnings record and years of service, rather than on the employee's contributions to the Fund.¹⁴ The system pays out retirement or disability annuities based on the employee's average pay.¹⁵ In general, then, higher benefits accrue for longer periods of service.

6. N.M. Stat. Ann. § 40-3-8(A) (1978).

7. New Mexico has followed the trend of joint management and control of community property at least as to real property. In New Mexico, the spouses must join in all transfers, conveyances, or mortgages, or in contracts to transfer, convey or mortgage any interest in community real property and separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common. N.M. Stat. Ann. § 40-3-13 (1978). Either spouse alone, however, has full power to manage, control, dispose, or encumber the entire community personal property. N.M. Stat. Ann. § 40-3-14 (1978).

8. In New Mexico, the separate debt of a spouse is first satisfied from the debtor spouse's separate property. If such property is insufficient, however, the debt may be satisfied from the debtor spouse's one-half interest in the community property. N.M. Stat. Ann. § 40-3-10 (1978). See N.M. Stat. Ann. § 40-3-11 (1978), for New Mexico's approach of setting priorities for the satisfaction of community debts.

9. N.M. Stat. Ann. § 45-2-804 (1978). See N.M. Stat. Ann. §§ 45-2-101 to 113 (1978 & Cum. Supp. 1982), for New Mexico's intestacy laws.

10. 5 U.S.C. §§ 8331 - 8348 (1976).

11. 5 U.S.C. § 8348 (1976).

12. 5 U.S.C. § 8334 (1976). The employee's consent to the pay deduction is a condition of government employment. *Id.* at § 8334(b).

13. 5 U.S.C. § 8334(a) (1976).

14. *Stouper v. Jones*, 284 F.2d 240, 243 (D.C.Cir. 1960).

15. 5 U.S.C. § 8339(a) (1976).

Various combinations of age and years of service will entitle an employee to retirement benefits in the form of a monthly annuity: (1) reaching fifty-five years of age and completing thirty years of service; (2) reaching sixty years of age and completing twenty years of service; or (3) reaching sixty-two years of age and completing five years of service.¹⁶

An employee will receive disability benefits if he or she has completed five years of service and the Civil Service Commission finds the employee to be disabled.¹⁷ A finding of disability means that the employee is totally incapacitated for useful and efficient service in his or her last grade or class of position. Furthermore, the employee's disease or injury must not be due to vicious habits, intemperance, or willful conduct on his or her part within five years before becoming disabled.¹⁸

III. STATEMENT OF THE CASE

Mr. and Mrs. Hughes (Husband and Wife) were married in 1964, at which time the United States Government employed Husband. In 1973, Husband became permanently disabled and the government prematurely retired him because of this disability.¹⁹ In 1980, Wife sued in the District Court of Bernalillo County for dissolution of her marriage to Husband and for a division of the marital estate.²⁰

Husband had contributed to the Federal Civil Service Retirement and Disability Fund for approximately eighteen years; he was married to Wife for eleven of these eighteen years. Husband began receiving an annuity

16. 5 U.S.C. § 8336(a), (b), (g) (1976).

17. 5 U.S.C. § 8337(a) (1976).

18. 5 U.S.C. § 8331(6) (1976).

19. 96 N.M. at 721, 634 P.2d at 1273. The Civil Service commission granted Husband disability from the service because of a bleeding ulcer. The supreme court noted, however, a discrepancy in the record about the exact time Husband became disabled. The supreme court remanded the case to the trial court for a determination of when Husband actually became disabled and how long community contributions were made to the Civil Service Fund. *Id.* at 725, 634 P.2d at 1277.

20. *Id.* at 720, 634 P.2d at 1272. The treatment of Husband's disability benefits was not the only issue in dispute by Husband and Wife. The other issues were:

1. whether Wife unduly influenced Husband to transfer the family residence from Husband's separate property to joint tenancy in Husband and Wife; and,
2. whether Husband intended to transmute ownership in the family residence so as to become community property.

Id. at 721, 634 P.2d at 1273. The district court held that wife did not unduly influence Husband to transfer ownership in the family residence to joint tenancy, and further held that Husband fully intended that the family residence become community property. *Id.* at 724-25, 634 P.2d at 1276-77. Husband then appealed these decisions to the supreme court. The supreme court affirmed the district court's decision on the undue influence issue, but reversed the district court's other decision and held that the family residence was held by the parties in joint tenancy. *Id.* at 725, 634 P.2d at 1277. These issues involved a fact determination by the court and are not within the scope of this Note.

from the Fund in 1975. At the time of the divorce proceeding, Husband was receiving more than \$500 a month in disability benefits.

The District Court of Bernalillo County held that Husband's future disability benefits were partially community property and that Wife was entitled to a 133/220²¹ share of Husband's future annuity payments. Husband appealed the district court's division to the New Mexico Supreme Court.²²

IV. DISCUSSION

A. The Hughes Supreme Court Decision

Husband argued that the Federal Civil Service disability benefits he received were his separate property. He contended that the disability annuity represented compensation for his inability to compete for other employment; thus, the annuity was analogous to a personal injury recovery or a workmen's compensation recovery. Furthermore, Husband argued that in New Mexico, courts treated personal injury recoveries²³ and recoveries under the Workmen's Compensation Act²⁴ as a separate property because they were in lieu of wages and the divorced spouse could have no interest in the future wages of the other spouse. Finally, Husband argued that the disability benefits were his separate property because his right to receive the benefits vested five years²⁵ after he began

21. The district court determined this ratio as follows:

community contributions to fund	= eleven years, one month	= 133 months
total contributions to fund	= eighteen years, four months	= 220 months

The district court was incorrect, however, in awarding Wife a 133/220 share of Husband's future annuity payments. Since each spouse receives only one-half of the community property on dissolution of marriage, Wife's proper share should have been one-half of 133/220 or a 133/440 share. The supreme court noted this error and remanded the case to the trial court for a proper calculation. *Id.* at 725, 634 P.2d at 1277.

22. Husband appealed the case to the supreme court because the New Mexico Court of Appeals does not have jurisdiction over divorce proceedings. *See* N.M. Stat. Ann. § 34-5-8 (1978).

23. In New Mexico, a personal injury recovery is the injured spouses' separate property. *Roberson v. U-Bar Ranch, Inc.*, 303 F. Supp. 730 (D.N.M. 1968); *Soto v. Vandeventer*, 56 N.M. 483, 245 P.2d 826 (1952). The courts' rationale for this holding is that a spouse brings his or her body to the marriage and is entitled to take it away upon dissolution of the marriage. Personal injury proceeds are compensation for an injured part of the body and as such should be retained in full by the injured spouse on dissolution of marriage. *Soto v. Vandeventer*, 56 N.M. at 494, 245 P.2d at 832. The court in *Hughes* did not respond to this analysis, apparently on the theory that Husband's disability benefits were not a personal injury recovery.

24. In New Mexico, compensation benefits payable under the Workmen's Compensation Act for injuries sustained by a spouse during marriage are not community assets. *Richards v. Richards*, 59 N.M. 308, 283 P.2d 881 (1955). In *Richards*, the court held that a workmen's compensation recovery is a personal injury recovery and the analysis of *Soto v. Vandeventer*, *supra* note 23, should apply. 59 N.M. at 310, 283 P.2d at 882. The court in *Hughes* did not respond to this argument made by Husband.

25. *See supra* text accompanying note 17.

making contributions to the Fund and before his marriage to Wife. Wife argued that the disability benefits received by Husband should be considered community property, at least to the extent community funds were contributed to the Retirement and Disability Fund.

The issue of whether disability benefits were community property had never been before an appellate court in New Mexico.²⁶ In deciding the *Hughes* case, then, the supreme court had to rely on federal and other state court decisions.²⁷

The New Mexico Supreme Court first looked at *McCarty v. McCarty*,²⁸ a recent United States Supreme Court decision. *McCarty* held that United States military pay was separate property;²⁹ the New Mexico Supreme Court, however, held that the application of *McCarty* to the *Hughes* case must be limited because *McCarty* appeared to be a narrow holding.³⁰

The New Mexico Supreme Court found that the effect of *McCarty* applied only to those retirement benefit cases in which Congress, through legislation, had decided the question of whether the benefits were community or separate property.³¹ Congress, the court noted, had indicated in legislation that military retirement pay was to be treated as separate property.³² Furthermore, the court noted that other federal benefits³³ were to be treated as community or separate property to the extent that Congress had so indicated.³⁴ Congress has never indicated how Federal Civil Service disability benefits should be treated; therefore, the New Mexico Supreme Court held that federal law did not apply to the *Hughes* case and that an analysis of state case law was necessary.³⁵

The *Hughes* court turned to the case of *Guy v. Guy*,³⁶ in which the Idaho Supreme Court held that disability benefits received under a group term disability insurance policy were community property to the extent that the benefits were earned either through community labor or through community contributions.³⁷ Furthermore, the court in *Hughes* stated that

26. 96 N.M. at 721, 634 P.2d at 1273.

27. *Id.*

28. 453 U.S. 210 (1981).

29. *Id.* at 236.

30. 96 N.M. at 722, 634 P.2d at 1274.

31. *Id.*

32. *Id.*

33. The Supreme Court in *McCarty* stated that Congress enacted legislation that requires the United States to recognize the community property division of Civil Service retirement benefits by a state court and requiring a community property division of Foreign Service retirement benefits. 453 U.S. at 230. The Civil Service retirement legislation and the Foreign Service legislation referred to by the Supreme Court are at 5 U.S.C. § 8345(j)(1) (Supp. III 1979), and at 22 U.S.C. § 4054 (Supp. IV 1980), respectively.

34. 96 N.M. at 722, 634 P.2d at 1274.

35. *Id.*

36. 98 Idaho 205, 560 P.2d 876 (1977).

37. *Id.* at 208, 560 P.2d at 879.

an asset earned during marriage was presumed to be community property in New Mexico.³⁸

The *Hughes* court then noted that part of Husband's disability benefits were earned during marriage. Husband earned the benefits with community financial contributions and community labor for approximately eleven out of the total eighteen years in which Husband contributed to the fund. The court held that the district court was correct in its determination that Husband's disability benefits were community property to the extent that the community contributed.³⁹

The *Hughes* court next turned to Husband's argument that the disability benefits were his separate property because his right to receive the benefits vested five years after he began making contributions to the disability fund and two years before his marriage to Wife. The court rejected this argument, stating that time of vesting has not been considered significant⁴⁰ in the analysis of whether retirement benefits were separate or community property in New Mexico.⁴¹ The court referred to *Copeland v. Copeland*,⁴² in which the New Mexico Supreme Court held that a husband's retirement benefits, though vested, were community property because the husband's right to receive the benefits had not yet actually matured.⁴³ The court therefore held that Wife's interest in Husband's disability benefits was not related to when Husband's right to the disability benefits actually vested.⁴⁴

38. 96 N.M. at 722, 634 P.2d at 1274. See N.M. Stat. Ann. § 40-3-12 (1978).

39. 96 N.M. at 722, 634 P.2d at 1274. The court remanded the case to the trial court for a determination of the actual period of community contributions to the disability fund. See *supra* notes 19 and 21.

40. Time of vesting has also been considered not significant in all other community property jurisdictions. The principal rationale for rejecting the vesting argument is that retirement and disability benefits can be such a valuable asset that to deny one spouse a portion of these benefits merely because the benefits had or had not vested or matured would be contrary to the notion of equal division of property inherent in community property theory. See *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), the leading case in this area, for a more thorough discussion.

41. 96 N.M. at 722, 634 P.2d at 1274.

42. 91 N.M. 409, 575 P.2d 99 (1978).

43. *Id.* at 412, 575 P.2d at 102. The court in *Copeland* differentiated between the terms "vested" and "matured." A pension plan is "vested" when it is not subject to a condition of forfeiture when the employee terminates employment before retirement; a pension "matures" when the employee is entitled to receive the benefits which he has earned through the years and is eligible to retire. *Id.* Therefore, in *Hughes*, Husband's claim that his disability benefits had vested meant only that his benefits were not subject to forfeiture. Husband was not actually entitled to receive the disability benefits until the benefits matured—that is, when he became disabled.

44. 96 N.M. at 723, 634 P.2d at 1275.

B. Other Jurisdictions' Approaches

Community property jurisdictions have generally treated retirement benefits as community property.⁴⁵ The courts have considered these benefits to be compensation for past, rather than present or future services; when the services took place during marriage, the benefits constituted community property.⁴⁶ Community property jurisdictions, however, have been split on the question of whether disability benefits are community property.

1) View that disability pay is not community property.

Courts from Arizona, Texas, and California have treated some kinds of disability pay received or to be received after the dissolution of marriage as the injured spouse's separate property.⁴⁷ One rationale given by these courts was that the disability pay in question was compensation for the injured spouse's present and future anguish or his or her diminished ability to earn a living in the future. Because the divorced spouse could have no interest in the future wages of the other spouse, these courts have held that the disability benefits were the injured spouse's separate property. On the other hand, these courts have stated that retirement benefits were deferred compensation for services rendered prior to retirement and were community property to the extent that the spouse earned the benefits during marriage.⁴⁸

In *In re Marriage of Jones*,⁴⁹ the California Supreme Court held that disability benefits were a personal injury award. The court stated that a military injury was the peculiar anguish of the person who suffers it, and

45. As a result of *McCarty v. McCarty*, *supra* note 28, however, community property jurisdictions may not treat military retirement pay as community property because Congress has indicated that United States military pay is separate property. See 453 U.S. at 236.

46. *In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371, *cert. denied*, 419 U.S. 825 (1974), *overruled on other grounds*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *LeClert v. LeClert*, 80 N.M. 235, 236, 453 P.2d 755, 756 (1969).

47. See, e.g., *Rickman v. Rickman*, 124 Ariz. 507, 605 P.2d 909 (Ct. App. 1980) (holding disability benefits received by a husband from the Veteran's Administration for a service-connected disability are the husband's separate property); *In re Marriage of Olhausen*, 48 Cal. App. 3d 190, 121 Cal. Rptr. 444 (1975) (holding the disability benefits payable to a police officer for an on the job injury are the officer's separate property); and *Ramsey v. Ramsey*, 474 S.W.2d 939 (Tex. Civ. App. 1972) (holding compensation payments received by a husband from the Veteran's Administration for service connected disabilities are the husband's separate property).

48. *Rickman*, 124 Ariz. at 509, 605 P.2d at 911; *Olhausen*, 48 Cal. App. 3d at 193, 121 Cal. Rptr. at 445; *Ramsey*, 474 S.W.2d at 941.

49. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975), *overruled on other grounds*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

the injury could never be wholly shared even by a loving spouse and surely not by a departed spouse after the dissolution of the marriage.⁵⁰ Like other personal injury awards in California then, the court held that the military disability benefits were the spouse's separate property.⁵¹

2) *View that disability pay is community property*

Courts from Idaho and Texas have taken the position that some kinds of disability benefits were community property subject to division between spouses upon their divorce.⁵² In *Guy v. Guy*, the Idaho Supreme Court looked at the source of the benefits rather than at the purpose of the disability payments. Because community labor was the source of the husband's disability benefits, the court held that the benefits were community property even though they were compensation for the husband's personal injury.⁵³

Similarly, in *Dominey v. Dominey*, the Texas Court of Civil Appeals stated that navy disability payments, though labeled "disability," were a part of a bundle of benefits, such as pay, quarters, and travel allowances, earned by service.⁵⁴ Because the spouse earned the disability payments during marriage, the court held that the benefits were community property.⁵⁵

Finally, in *In re Marriage of Butler*, the Texas Court of Civil Appeals held that a husband's civil service disability benefits were community property.⁵⁶ In this case, the husband started his participation in the civil service retirement and disability plan while he was married to his wife.⁵⁷ The husband also had completed more than twenty-nine years of service for the government when he became disabled and was therefore entitled to receive retirement pay.⁵⁸ The court implied in its decision that the husband's disability pay was actually retirement pay and held that the disability benefits were community property.⁵⁹

50. *Id.* at 463, 531 P.2d at 424, 119 Cal. Rptr. at 112.

51. *Id.*

52. See, e.g., *Guy v. Guy*, 98 Idaho 205, 560 P.2d 876 (1977); *In re Marriage of Butler*, 543 S.W.2d 147 (Tex. Civ. App. 1976), *overruled on other grounds*, 554 S.W.2d 137 (Tex. Civ. App. 1977); *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Civ. App.), *cert. denied*, 409 U.S. 1028 (1972).

53. 98 Idaho at 208, 560 P.2d at 879.

54. 481 S.W.2d at 475.

55. *Id.* See also *Copeland v. Copeland*, 544 S.W.2d 183 (Tex. Civ. App. 1976), holding that a husband's General Motors disability benefits were not an award of damages for personal injury but an earned property right. The court held that the benefits were community property because the husband earned the disability benefits during marriage.

56. *Butler*, 543 S.W.2d at 150.

57. *Id.*

58. *Id.*

59. *Id.*

3) *View that disability pay is part community and part separate property*

A recent trend by courts from Arizona, California, and Washington has been to treat some kinds of disability pay as part community property and part separate property.⁶⁰ These courts have held that the benefit payments in question were really a combination of retirement and disability pay. The approach by these courts is more flexible than a rule that would treat all disability pensions as separate property and would not distinguish between a disability pension that took the place of a regular retirement pension and a pension awarded for disability alone.⁶¹

These courts have advocated various methods in determining how husband and wife should divide up the benefits. In *In re Marriage of Kosko*,⁶² the Arizona Court of Appeals stated that the trial court should determine the present value of the retirement component of the benefits and divide this amount equally between husband and wife. The court should then award the disability component to husband or wife as his or her sole and separate property.⁶³

In *In re Marriage of Samuels*,⁶⁴ the California Court of Appeals awarded the benefits in full to the injured spouse as disability pay until retirement age was reached. When the injured spouse reached retirement age, the court would then treat the benefits as retirement benefits and divide them equally between the spouses.⁶⁵

Finally, the benefits could be awarded under a "pay as it comes in" system. Under this system, the trial court could divide each disability payment as the employee received it into its retirement portion and its disability portion. The court would then split up the retirement portion between husband and wife, while the injured spouse would receive the disability portion in full.⁶⁶

60. See, e.g., *In re Marriage of Kosko*, 125 Ariz. 517, 611 P.2d 104 (Ct. App. 1980) (holding Civil Service disability benefits are part community property and part separate property); *In re Marriage of Pace*, 132 Cal. App. 3d 548, 183 Cal. Rptr. 314 (1982) (holding Civil Service disability benefits are part community property and part separate property); *In re Marriage of Samuels*, 96 Cal. App. 3d 122, 158 Cal. Rptr. 38 (1979) (holding Civil Service disability benefits are part community property and part separate property); *In re Marriage of Mason*, 93 Cal. App. 3d 215, 155 Cal. Rptr. 350 (1979) (holding an electrical worker's disability pension as part community property and part separate property); and *In re Kittleson*, 21 Wash. App. 344, 585 P.2d 167 (1978) (holding military disability benefits are part community property and part separate property).

61. *In re Kittleson*, 21 Wash. App. at 353, 585 P.2d at 173.

62. 125 Ariz. 517, 611 P.2d 104 (Ct. App. 1980).

63. *Id.* at 519, 611 P.2d at 106.

64. 96 Cal. App. 3d 122, 158 Cal. Rptr. 38 (1979).

65. *Id.* at 129, 158 Cal. Rptr. at 42.

66. *Copeland v. Copeland*, 91 N.M. 409, 414, 575 P.2d 99, 104 (1978).

C. *Effect of the Hughes Decision*

Under the Federal Civil Service Retirement and Disability System, an employee can receive either retirement or disability benefits. In many cases, however, the disability benefits received by the injured spouse take the place of regular retirement benefits. Treating these benefits as strictly community or separate property can create an inequitable division of property. For instance, an employee who has worked for the government for nineteen years can retire in one year.⁶⁷ If this employee becomes totally disabled before retirement, he or she will technically receive "disability" benefits. Treating these disability benefits solely as the injured spouse's separate property in a divorce proceeding would not recognize the other spouse's nineteen years of contributions to the Fund. Such a holding would go against the principle of equal division of property which is inherent in community property theory.

On the other hand, an employee who has worked for the government for only five years will also receive disability benefits if he or she then becomes totally disabled. In such a circumstance, the benefits do not take the place of retirement benefits, but instead compensate the injured spouse for his or her future anguish and inability to work. Treating these benefits as community property in a divorce proceeding would deprive the injured spouse of one-half of a major part of his or her only future income.

The best approach in Federal Civil Service disability benefits cases would be to treat the benefits as part community property and part separate property. This approach would recognize that in some circumstances the disability benefits are really a combination of disability and retirement pay.

If the *Hughes* court had used this approach, the court would have treated Husband's disability benefits as primarily retirement pay and partially disability pay. Because Husband could have retired in eight years when he was sixty years of age,⁶⁸ the court could have treated Husband's disability benefits as his separate property for eight years, and as community property thereafter.⁶⁹ Alternatively, the court could have determined the present value of the retirement portion of Husband's benefits and divided this amount between Husband and Wife. The court could have then awarded the disability portion to Husband as his sole and separate property. Or finally, the court could have used the "pay as it comes in" system and required Husband to pay Wife her share of the

67. See *supra* text accompanying note 16.

68. At the time of the divorce proceedings, Husband was fifty-two years of age and if not disabled, could have retired in eight years.

69. The disability benefits would still be community property only to the extent the community contributed to the Civil Service Fund.

retirement portion of the disability benefits as the government paid out each benefit.

V. CONCLUSION

As a result of the *Hughes* decision, the courts will treat a married employee's Federal Civil Service benefits⁷⁰ as community property to the extent the community contributed to the Civil Service Fund during marriage. This produced an equitable result on the facts of the *Hughes* case, because Husband and Wife received an equitable share of Husband's benefits and because Husband nearly completed the twenty years of service which would have entitled him to a retirement annuity. Nevertheless, the *Hughes* rule will not produce an equitable result for a case in which the employee becomes disabled immediately after becoming eligible for disability benefits. To avoid this inequity, the New Mexico Supreme Court should have held that Federal Civil Service disability benefits are part retirement pay and part disability pay, the retirement portion being community property and the disability portion being the injured spouse's separate property.

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70. The effect of the *Hughes* decision on New Mexico state employee disability benefits is uncertain. New Mexico's retirement and disability system is very similar to the Federal Civil Service system, however, in that New Mexico's system can award either a retirement or disability annuity to a retired or disabled state employee. Therefore, it seems certain that state disability benefits are community property also. For more information on New Mexico Public Employee's Retirement Act, see N.M. Stat. Ann. §§ 10-11-1 to -38 (1978 and Supp. 1981).