

## BILL ANALYSIS

C.S.H.B. 410  
By: Goodman  
Juvenile Justice & Family Issues  
Committee Report (Substituted)

### BACKGROUND AND PURPOSE

Under current Texas law, there have been several inconsistencies regarding how to characterize, for purposes of the community property system, various fringe benefits from employment.

C.S.H.B. 410 clarifies the rules applicable on how to characterize, for community property purposes, the various types of pension rights, stock options and insurance benefits.

### RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### ANALYSIS

**SECTION 1.** Amends Subchapter A, Chapter 3, Family Code, by adding Sections 3.007 and 3.008 relating to certain employee benefits. Subsection (a) deals with one type of pension right, the defined benefit pension. For Texas community property purposes, only that portion of the pension earned during marriage is community property. Texas courts have applied different and conflicting approaches to make this determination. For example, some courts have determined that each month of employment contributes the same amount toward the eventual pension. Others have disagreed with this view, holding that later years of employment are worth more than earlier years. *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983). This Subsection sets forth a mechanism for Texas courts to apply the *Berry* case in the various situations that may arise.

Subsection (b) provides for a community property interest in a defined benefit plan to be determined as if the spouse began to participate in the plan on the date of marriage and ended that participation on the date of dissolution or termination of the marriage, regardless of whether the benefit had vested.

Subsection (c) clarifies that principles of tracing, a rule generally applicable to community property issues, also applies to pension accounts. If it can be shown that a spouse had some stock in his pension account on the date of the wedding, and that the spouse kept this stock in the account throughout the marriage, the value of the stock on the date of the wedding, as well as any increase in value of that stock during marriage, would be the separate property of that spouse.

Subsection (d) provides for stock options and restricted stock. For some reason Texas case law has provided little guidance about how to characterize such rights when the right is received during the marriage but the restrictions have not been removed as of the date of divorce. It is generally accepted that stock options, as a general rule, represent compensation to the employee for the period from the date of grant until the date they become exercisable. This subsection characterizes options in a manner consistent with that assumption. For example, if an option is granted during marriage but not yet exercisable at divorce, it would be partly community and partly separate property of the employee spouse. The community portion of the fractional ownership would be determined by computing the time from the date of grant to the date of divorce, and dividing that by the total time from the time of grant to the date of vesting. If the employee was married for one

year after the date of grant and the options vest after two years, the options would be 50% community. This approach is applied by almost all states that have considered this issue.

Section 3.008 clarifies how to characterize insurance benefits. Subsection (a) clarifies that the replacement theory should be applied to characterize casualty insurance recoveries during marriage. This is consistent, for example, with *McIntire v. McIntire*, 702 S.W.2d 284 (Tex. App. - Houston [1<sup>st</sup> Dist] 1985, writ ref'd n.r.e.) For example, if a separate property house burns down during marriage, the insurance recovery for the house would be separate property.

Subsection (b) also adopts a replacement theory for workmen's compensation and disability insurance recoveries. So, for example, if a spouse is hurt during marriage, the benefits would be community to the extent they replace lost wages during marriage and to the extent they replace post-divorce lost wages, they would be separate. This approach has been accepted by most states.

**SECTION 2.** The changes in law made by this Act apply to a suit for dissolution of a marriage pending before a trial court on or filed on or after the effective date of this Act; and with respect to Section 3.007, Family Code, as added by this Act, to the estate of a person who dies on or after the effective date of this Act.

**SECTION 3.** The Act takes effect September 1, 2005.

#### **EFFECTIVE DATE**

September 1, 2005.

#### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

C.S.H.B. 410 modifies the original H.B. 410 by changing the caption in Section 3.007 deleting "SEPARATE" from the caption. Also adds to Section 3.007, a new Subsection (b) which defines the community component of retirement, for clarification purposes.