



WHY THE LAWYER REPRESENTING YOU IN YOUR DIVORCE IS SO CONCERNED ABOUT RETIREMENT PLANS

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Your Lawyer is Looking Out for You

From a basic perspective, your attorney's job is to help you understand your rights and obligations and the practical considerations surrounding them, to assert your position and seek a result advantageous to you consistent with honest dealing, to negotiate on your behalf and reconcile the divergent interests of the parties, and to maintain communication adequately to achieve these results. In the context of retirement plans, this means your attorney might need to interview both parties and obtain account statements and other records from the parties or the retirement plan administrators or custodians. This might be done by informal requests, or by more formal means such as interrogatories, depositions or subpoenas. Accordingly, your attorney might invest quite a bit of time learning about the various retirement plan benefits and what rights you and your former spouse may have to such benefits. Obtaining complete and accurate data takes time, and repeated follow up is often necessary. The psychological dynamics in divorce can be difficult to say the least, but try not to get annoyed or suspicious by your own attorney's focus on retirement plans. Your attorney simply needs to know all about the retirement plans of the parties in order to ensure that you get a fair shake.

Retirement Plans are a Big Deal

Retirement Plans are commonly among the largest assets subject to division upon divorce.¹ Indeed, retirement plans are often the single largest asset. Retirement benefits that accrue during the marriage are part of the marital estate, whether such retirement benefits are in your name, or your former spouse's name.² Because the combined retirement benefits are commonly quite substantial and subject to division upon divorce, they are normally a large part of the property settlement.

Many Retirement Plan Benefits are Complicated

Once in a while the division of a retirement plan is simple, but most of the time there are things to consider that we don't think about every day. Even for the simpler plans such as 401(k) plans, the issue of outstanding loans can make the division of the plan problematic.

For more complex plans such as pensions, there is more to consider than just the basic accrued benefit. There are survivor benefits, early retirement benefits, post-retirement cost-of-living adjustments, and disability benefits that must be considered. Determining which of these benefits to share with the non-employee spouse, and in what amounts, can be difficult, especially since there are various ways to define how much of the pension is the "marital portion."³ If your attorney cannot obtain the information about the retirement plans, she or he will not be in a good negotiating position with regard to the plans. Further, there may be benefits that have not been considered, and accordingly, the QDRO might not meet the intent of the parties as well as it could have. It is very important to cooperate with your attorney, and be diligent in obtaining information from the other side and from the various plan administrators.

The fact that retirement plans are complicated is exacerbated by the fact that most people think they are simple. This misconception leads to delays in discovery, improper expectations and disappointment. You need only read a Summary Plan Description (SPD) for any retirement plan (even a plan that is not very complex) to realize that they are complicated, highly regulated, difficult to assign assets.

The Judgment of Divorce may Order the Sharing of Benefits, But an Additional Court Order is Necessary to actually Divide the Retirement Plan

Federal Law imposes strict requirements on retirement plans when it comes to the assignment of benefits. A court order that meets these requirements is called a Qualified Domestic Relations Order ("QDRO"). Government sponsored retirement plans are divided to court orders similar QDROs, but for purposes of this article the term QDRO is used. Even a well drafted Judgment of Divorce will not meet all the requirements, though it is technically possible. Commonly the attorneys will hire a retirement plan expert, who specializes in divorce litigation support and QDRO preparation. Your attorney might inform you that this will be necessary, just as it might be necessary to hire an expert to value a business or give medical testimony.



Timing Is Everything

While the divorce is pending, your attorney might want to obtain a restraining order preventing distributions from the retirement plans in question, such Order to be sent to the various plan administrators. This prevents the premature withdrawal of funds that were supposed to be assigned by QDRO, whether intentional or unintentional.

It is extremely important that the QDRO be entered in court and sent to the plan administrator as near to the date the Judgment of Divorce as possible. This is because the death, termination of employment or remarriage of the participant can have profound effects on the non-employee spouse's right to benefits. *It is quite commonly very difficult or impossible to obtain the intended benefits if much time passes between the date of divorce and the date the QDRO is finally prepared.*

For example, if the plan administrator did not receive the QDRO, and the participant dies, the new spouse might get 100% of the survivor benefits under the Plan, leaving the former spouse without the awarded portion of the benefit, and without any portion of the survivor benefit.

Also consider the case where the plan administrator never received the QDRO, and the participant remains single, retires and commences pension benefits. In this case the normal form of benefit is generally a single life annuity for the participant's lifetime, and while a portion of the benefit can be paid to the former spouse, all benefits would stop when the participant dies, with no further payments of any kind payable to the former spouse.

Consider yet another case where a specific dollar amount was to be assigned from a 401(k). Presume in this case that the 401(k) was from a previous employer and no contributions have been made to the plan since the divorce. If the account value has decreased substantially, there may not be enough in the 401(k) to satisfy the award that should have been effectuated by a QDRO back when the divorce was final.

Another example is where there has been substantial growth in a 401(k). The former spouse was to receive 50% of the value on the date of divorce, adjusted by gains and losses attributable thereto from the date of divorce until distribution. The investment return has been good – around 15% per year, and just five years later what would have been a \$50,000 award has grown to be over \$105,000. While \$105,000 is the correct amount to assign, the participant might have a harder time parting with the larger amount, even though the \$55,000 growth is attributed to the former spouse's award. The former spouse might get the same result with better cooperation from the participant-spouse if the QDRO were done at the time of divorce and the funds were invested in the former spouse's own IRA with the same or similar investments.

Another timing problem arises when the QDRO assigns the marital portion of a defined contribution plan such as a 401(k). If the marriage was a number of years ago, the plan administrator might not have the data necessary to calculate the date of marriage value. If the parties cannot find the information previous retirement plan record keepers might be sought out, but it is possible that the date of marriage value might never be discovered. This is no one's fault, but this problem should not be discovered at the last minute, and parties and counsel should set about finding this information early in the divorce process in order to avoid a divorce that is complete except for one item that cannot be done – the proper division of the marital portion of the 401(k).

What if the participant retires and withdraws all his funds before the Plan Administrator gets the QDRO? The Plan cannot be forced to also pay the former spouse. Now the parties are back in court, and the former spouse has to try to get the awarded amount from a different asset, if any such asset exists.

The above examples are just a few of the ways that division of retirement plans can go wrong if not done timely. It takes the timely cooperation of the parties and their attorneys, together with good discovery and communication with the Plan Administrators and any other professionals who are to be consulted, in order to properly divide retirement plans. Your lawyer understands that timing is important, and your cooperation is needed in order to protect your rights.

Some Retirement Plans Can't be Divided

There are a few retirement plans offered by employers that cannot be divided even if the judgment of divorce says the parties shall divide them. These plans are usually called non-qualified deferred compensation plans, some of which can be divided by court order, and some of which cannot. Your attorney needs to know whether or not the particular plan can be divided by a "QDRO type" court order, because if it cannot, he or she needs to factor it into the settlement some other way, perhaps by offset against another asset and/or present value calculation, or by sharing of benefits in the non-qualified deferred compensation plan when they are eventually paid to the participant.

Summary

In conclusion, your attorney needs your cooperation while the sometimes lengthy process of retirement plan division is completed. Retirement plans are normally the largest or second largest asset to be divided, and your attorney wants to make sure your rights are protected. Retirement plans are complicated and very technical, so your attorney might need to do a lot of discovery and hire an expert to assist in understanding how the retirement plans are to be divided,



and to prepare the appropriate court orders dividing the plans. Most retirement plans can be divided by a court order called a QDRO, which is a court order in addition to the judgment of divorce. The division of retirement plans must be done timely in order to prevent anyone of a number of problems that can arise.

Endnotes

1. Legal separation is another matter pursuant to which retirement assets may be assigned. Such assignment can be pursuant to a court order for spousal and/or child support, as well as pursuant to a property settlement. Retirement assets may be assigned to a spouse, former spouse or child as long as the assignment is pursuant to a domestic relations matter in accordance with state law. For the sake of simplicity, the context of this article shall be that of the property settlement provisions of divorce, and the interested party will be the former spouse.
2. In addition to benefits that accrue during the marriage, the Court may also include retirement benefits that are *attributable* to the period of the marriage, even if such benefits are payable only upon certain contingencies or not yet vested.
3. A discussion of how to define "marital portion" is outside the scope of this article. Suffice to say that your attorney must usually consider, and often negotiate the exact meaning of "marital portion."

