

Retirement, Divorce and You

Retirement planning is part of most marriages, and should be part of every divorce. You and your spouse worked together to accumulate savings and retirement benefits, and you are entitled to your share of both, regardless of who earned either one. Retirement assets can be divided now without paying income tax until the benefits are distributed, but you usually must have the assistance of a knowledgeable attorney to do this correctly.



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There are two kinds of retirement benefits: **1. savings** plans, such as IRAs, 401(k) Plans, Thrift Savings Plans, and other “defined contribution” plans into which the employee and sometimes the employer deposits money, where the money grows, just like a bank savings account; **2. pension** plans, also called “**defined benefit**” plans, which usually pay a monthly amount starting at retirement and ending at the end of a lifetime. Sometimes there are survivor benefits, too, so a partial benefit is paid to the surviving (non-employee) spouse. Even though retirement may be 20 or 30 years away, you are entitled to get detailed information now about how much value is in the retirement benefits you and your spouse have, and you are entitled to receive your fair share of the benefits when they are distributed.

Pay attention to whether benefits are “vested” or “unvested.” If a benefit is unvested, the employee must do something more (usually be employed for more time) before the benefit is fully earned. Both vested and unvested benefits are divided in a divorce.

How to get information about retirement benefits

If you and your spouse are cooperative, you can each request information from your retirement plan administrators and share that information. Just ask them to send you what they usually send to divorce lawyers. It won't be everything your lawyer will need, but it will be a good start.

Another way to get information is to send a Subpoena Duces Tecum to the retirement plan administrators. This document is usually prepared by a lawyer, as a specific form is required and it must be very precise about the type of information it requests. It must be signed either by a lawyer or a judge. If you are representing yourself, a judge must sign the subpoena. You do not need your spouse's consent for a Subpoena Duces Tecum.

What do I do with the information I get?

First you determine the “present value” of the retirement benefit. The present value is the amount of money you would need to set aside in savings today to earn the promised benefit. For defined contribution benefits, this is easy — the present value is usually the amount that is in the retirement benefit account today.

The present value of a defined benefit is a little more complicated. Using commonly accepted mathematical formulas, and assumptions about future interest rates and how long the employee will live, an expert called an “actuary” can calculate the present value of a pension, or defined benefit. Sometimes these calculations will also include assumptions about what the employee’s future earnings will be, and a cost of living allowance may also be built into the benefit.

A defined benefit of only a few hundred dollars a month can be very valuable. It is usually worth spending a little bit of money to have an actuary determine the present value of a defined contribution benefit. Find out which actuary you should use by asking a knowledgeable attorney.

What do I do when I know the present value of the retirement benefits?

The retirement benefits are divided fairly between you and your spouse.

IRA accounts and many federal, state and local government defined benefit (pension) plans are divided with special language in your “Decree of Dissolution.” The special language is regulated by federal and state statutes; usually, you must very strictly comply with the statutory requirements. Benefits like Employee Stock Option Plans are often regulated only by contract between the employee and employer. Special provisions in your Decree of Dissolution can protect your interest in ESOP benefits, too.

ERISA qualified retirement benefits, which include 401(k) Plans and some pensions, are divided in “Qualified Domestic Relations Orders.” A QDRO is a separate court order that is entered in court at the same time as the Decree of Dissolution.

If part of the retirement benefit was earned during the marriage or while you and your spouse lived together (community property), and part before then or after separation (separate property), the community and separate values of the retirement benefit can be calculated separately. Usually, but not always, the separate part of the retirement stays with the employee spouse and the community part is divided between the two spouses.

The rules for dividing retirement benefits are very complicated, and differ depending upon the benefit that is being divided. Even if the retirement plan administrator provides you with suggested court orders, you should consult with a knowledgeable attorney before dividing your benefits. If it is not done right the first time, frequently you cannot change the errors. Errors can, and usually do, result in income taxes and penalties that could otherwise have been prevented, and sometimes result in the benefit not being divided at all.

After the Decree of Dissolution is finalized, how do I receive my money?

For each retirement benefit that you are supposed to receive, deliver a certified copy of your Decree of Dissolution or Qualified Domestic Relations Order, whichever is appropriate, to the plan administrator or to the financial institution responsible for each plan. Include, with each certified copy, a letter asking that the retirement benefit be divided according to the Decree or QDRO. Use certified mail, return receipt requested if you send the Decree by US Mail. **YOU SHOULD DO THIS IMMEDIATELY AFTER THE DECREE IS ENTERED.** If you wait too long, the Decree does not effectively divide the benefit, and the employee keeps everything. There will be special IRS forms for you to fill out before the benefits are divided. You should seek the advice of a certified public accountant or other tax advisor before completing these forms so that you do not make mistakes that will cause you to owe taxes or penalties to the IRS.

PLEASE NOTE that after the benefits are divided, they will not be paid to you until they can be distributed under the applicable law or employer contract.

What if I am representing myself and do not have an attorney?

There are family law attorneys who are knowledgeable in the area of retirement benefits who can coach you in obtaining information, valuing, and dividing the retirement benefits you and your spouse have accumulated. They can help you draft the legal documents you need and tell you what to do with them. There are so many different ways to make mistakes that investing some money in your future can really pay off. The limited use of an attorney for this purpose is a necessity if you or your spouse have retirement benefits. Invest in yourself. You deserve it!

FOR REFERRAL TO FAMILY LAW ATTORNEYS WHO PROVIDE LIMITED LEGAL SERVICES (or full representation, if you can afford to retain an attorney):

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