

*Domestic Relations*

**PENSION PLANS AS PROPERTY  
IN DIVORCE PROCEEDINGS**

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In many divorce situations, one of the marital assets which the parties may fail to consider is a pension plan earned by one or both of the parties during all or part of the marriage. The party's attorney should always determine if either party has participated in a pension plan program through his or her employment. A pension plan program can include profit sharing, pension, 401K and thrift and savings plans.

The general rule is that amounts earned through pension plans during the years of the marriage are marital assets. The theory behind this rule is that amounts paid by an employer into a plan are fringe benefits with a real value to an employee. If the amounts were not being put aside in a pension plan, they would presumably be paid directly to the employee, and both parties would benefit from the extra income.

Every divorce situation is different, so there is no guarantee that the non-employee spouse will share in the pension benefits earned. In every situation, however, these monies should be considered as part of the marital assets to be divided.

The first step in considering a pension plan is determining its present value. A party's employer may be able to provide this information, or it

### **Pension Plans (cont'd)**

can be computed by an actuary. Actuaries compute the present value of a vested pension plan by factoring the specific characteristics of the plan with certain assumptions regarding retirement date, interest rates, life expectancy of the beneficiary, and others.

However, determining the present value of a pension is only the first step in dividing pension benefits. What if the parties own pension benefits worth \$100,000, plus another \$80,000 worth of property in the form of a home, savings or other property? Prior to federal legislation, the court was faced with a difficult decision in dividing these assets. Assuming that the marital assets were to be divided equally, the court had to find some way of giving a share in the pension plan to the non-employee spouse. While the court could order the employee spouse to pay \$10,000 in cash to the non-employee spouse, there was a certain amount of potential unfairness involved. Not only did the non-employee spouse get tangible assets (since our example presumes that the pension is not yet being received), the employee spouse was forced to make a payment of \$10,000 without knowing whether he or she would actually live to receive the pension benefits.

The federal governments's response to this problem is found in the Retirement Equity Act. The Act sets forth a method of dividing the pension benefits between both parties. By means of a Qualified Domestic Relations Order (QDRO), the court can order that a specific dollar amount of pension benefits or a specific percentage of pension benefits be paid to a non-employee spouse at the time the benefits are paid to the employee spouse, or at a normal retirement age of the employee spouse. There are many ways to vary the QDRO, depending upon the type of pension plan

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involved and the situations of the parties. The importance of the QDRO is its removal of much of the uncertainty in dividing a pension benefit. For example, the court can order that 50% of the pension benefit be paid to the non-employee spouse at the earliest time the employee spouse would retire with full benefits. The non-employee spouse then receives one-half (1/2) of the pension benefit earned up to the date of the court's order in a separate check sent directly to him or her from the plan's administrator at the time specified. The benefit is not dependent upon the employee's survival to retirement age and does not get delayed if the employee spouse elects to continue working.

If one or both parties have pension plans to which contributions were made during the marriage, the pension or pensions should be considered marital assets. The pension can be divided by awarding the non-employee spouse other offsetting assets, or it can be divided by the use of QDRO.

Problems associated with the division of complex marital assets such as pensions and profit sharing plans illustrate the need for representation of the parties by counsel who are familiar with the present state of the law in this ever increasing area of litigation.