

## RETIREMENT PLANS MAY BE MARITAL PROPERTY SUBJECT TO DIVISION IN A DIVORCE CASE

In today's economy, where real estate values have diminished and there accordingly may be little or no equity in marital residences to divide, often a pension or other form of retirement plan may, to the extent accrued during marriage, be the most valuable asset available to divide in a divorce case.

There are two basic types of retirement plans, namely:

(a) A Defined Benefit Plan – This is the classic pension where an employee, following retirement, receives a monthly payment, typically for life. This form of retirement plan is rapidly becoming rare as employers, as a cost saving measure, are changing over to a defined contribution plan.

(b) A Defined Contribution Plan – This is a 401(k) type plan where an employee pays in pretax money, which is usually matched, up to a certain level, by the employer. The funds invested accumulate (and ideally grow in value) and then the monies can be withdrawn at retirement when the tax bite is presumably going to be lower.

Under a 1984 federal law, a portion of either type of plan can be awarded to the non-employee spouse. To do so requires a special form of court order known as a qualified domestic relations order, usually referred to as a “QDRO”.

A pension is usually divided so that the non-employee spouse receives a share of each monthly payment to which the employee spouse would otherwise be entitled. The amount of such non-employee share is normally calculated using the following formula:

*Gross Monthly Pension Payment to which employee is entitled x 50% x marital years during  
which the pension is earned ÷ total years working toward pension*

The 401(k) type plan is normally divided on a percentage basis (such as 50/50 or 60/40), starting with the value as of the date of marital separation, with the addition of any increase in value in such interest between the date of valuation and the date of rollover.

Properly handled, there is no income tax impact to the employee spouse of such divisions. The non-employee spouse will pay taxes on his or her share of the monthly pension payments when received. Any tax on an interest awarded in a 401(k) plan, which interest is directly rolled into a tax-deferred plan established by the non-employee spouse, will be deferred until money is withdrawn.

Obviously it is vital, in any divorce case, that the retirement plans of each spouse be identified as soon as possible and sufficient documentation obtained to implement a reasonable division of such assets.