

## **DIVORCE - DIVISION OF MARITAL PROPERTY – RETIREMENT ASSETS**

In the State of New York, unless there is a prenuptial agreement in place, from the moment you say “I do” any assets accumulated during the marriage are considered marital property, no matter who is responsible for accumulating the assets or how they are titled.<sup>1</sup> This includes pensions, IRA’s, 401(k)’s, 403B’s and similar retirement assets.

When couples get divorced, each spouse is often entitled to a portion of the pension of the other spouse. For example, if the wife (pensioned spouse) worked as a teacher in a public school, and received a New York State pension as a benefit of employment, the husband (non-pensioned spouse) would be entitled to a portion of it.

How much is the non-pensioned spouse actually entitled to? Simply stated, the non-pensioned spouse is entitled to a percentage of the pension equal to ½ of the pension benefit that accrued while the parties were married. As you can imagine, figuring out exactly how much the non-pensioned spouse is entitled to requires the utilization of a mathematical formula.

Preparing the document which divides the pension typically comes at the end of the divorce process, whether the case goes to a trial or is settled between the parties.

When a divorce case ends a Judgment of Divorce is signed by the judge and entered with the clerk of the court. If the parties settled the case between themselves, the Judgment of Divorce is usually accompanied by a Stipulation of Settlement.

Then another court order, called a Qualified Domestic Relations Order (QDRO) or Domestic Relations Order (DRO), must be prepared by your attorney, approved by the applicable pension administrator, signed by the Court and ultimately filed with the pension fund.

This Order relates solely to the division of each spouse's pension or other retirement assets. (The Judgment of Divorce is the document which officially and legally proves you are divorced, and is signed before the QDRO or DRO is finalized).

The guiding principle in the preparation of this document is that each spouse is entitled to 50% of the pension benefits of the other spouse that accrued during the time of the marriage.

Here is the basic formula:

$$50\% \times \frac{\text{Number of months of the marriage}}{\text{Number of months the pensioned spouse was employed}}$$

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<sup>1</sup> There are certain exceptions to this rule. For example, if one receives an inheritance during the marriage and keeps it separate this is not considered marital property.

The longer the pensioned spouse was accruing pension time before the marriage and the longer the pensioned spouse works after the date the summons and complaint was filed,<sup>2</sup> the smaller the percentage of the non-pensioned spouse receives when the pension attains “pay-out” status. It should be noted that the cutoff date for computing the length of the marriage is typically the date the divorce action, (the filing of the summons and complaint) was filed with the clerk of the court.

Often, pension plans will only implement the language of a QDRO or DRO that complies with a certain format. Because of this, as well as the difficulty in factoring in market values and other variables, the QDRO or DRO is usually prepared by a person who specializes in drafting these orders under the guidance of the attorneys for the parties, and with the approval of the pension plan administrator.

Once the QDRO or DRO is prepared, pre-approved by the fund, and signed by the court it is filed with the administrator of the pension fund. The fund administrator is then compelled to implement the language of the order and divide pension between the parties accordingly. Once the order is filed spouse never worked for the company has a property right in that company's pension fund.

One should always seek alternatives prior to getting divorced but if you truly believe that you have no alternative and that your marriage needs to be dissolved, please let us help you.

Call us today! We are knowledgeable, helpful and will always act in your best interests.

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<sup>2</sup> Generally, the date used in determining the end of the accrual of the non-pensioned spouse's property rights is the date the summons and complaint is filed, but that is not always the case.