What Happens in a Divorce if Someone has a Pension?

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Trying to determine how to divide a pension can be very involved. It is best to seek the help of an attorney if you or your spouse are seeking a divorce and either of you has a pension.

How does the Court decide who gets what in a divorce?

When a couple files a request with the Court for a divorce, the Court will divide the "marital estate". This will include all assets and debts the couple had on the day the Petition for Dissolution was filed. To be a part of the marital estate, someone in the marriage must have a "present and vested interest" in the asset on the day the divorce was filed.

What is a present and vested interest?

If a person has earned a present right to the asset that cannot be taken away, then the asset is considered vested. The term present right means that even if you do not have the asset now, you are promised the asset and no one can take it away.

This rule applies to pensions. For example, Joe has worked at the ABC Corporation for ten years and is a participant in the company pension plan. On the day Joe files for divorce, Joe leaves ABC for another job. The rules of the ABC Corporation pension plan say that Joe will still be able to receive the ABC Corporation pension benefits when he reaches retirement age. The ABC Corporation pension would be considered vested and it would be part of the marital estate to be divided. Even though Joe was not receiving the pension on the day the divorce petition was filed and he stopped working for the ABC Corporation, the rules of the ABC pension plan said that even if Joe left the company he still gets the pension. Joe earned a present right to the pension that could not be taken away. Joe has a vested interest in the pension.

Are there different types of pensions?

There are two main types of pensions: defined benefit plans and defined contribution plans.

What is a defined benefit plan?
A defined benefit plan is one where the employer agrees to pay a certain benefit to the employee based upon a number of things including how long the worker has been there and how much money the worker earns.

What is a defined contribution plan?

A defined contribution plan is one where the employer agrees to contribute a certain amount of money to the plan on an annual basis. An example of a defined a contribution plan is a 401k plan where both the worker and the employer might contribute to the account.

How does a Court divide a defined benefit pension during a divorce?

Often during a divorce, neither person is actually getting the pension yet. If the pension is a defined plan, there really is not a pot of money to divide. There is a promise to pay sometime in the future (when the person reaches retirement age). It becomes a pot of money only when the person with the vested interest can start receiving the pension.

If the pension is a defined benefit plan, the Court can order the pension money to be divided when the pension starts to be received. The pension will likely be taxable. A document called a Qualified Domestic Relations Order (QDRO, which sounds like "kwad-dro") can be filed. A QDRO will transfer the pension benefits to the ex-spouse who did not work for the company in a way that will not cause the other spouse to pay taxes on the transferred benefits. The ex-spouse who is receiving the pension benefits would have to pay the taxes on the money he or she receives.

How does a Court divide a defined contribution pension during a divorce?

A QDRO can be used to complete the same type of transfer with a 401k (or other defined contribution plan). In this situation, a specific amount of money is identified to go the ex-spouse. The ex-spouse gets to choose when to get the money. When the ex-spouse gets the money, the ex-spouse must pay the taxes on it. If the ex-spouse withdraws the money earlier than allowed by law, the ex-spouse may have to pay the penalties for the early withdrawal as well.

This article provided some general information about what happens if there is a pension when a couple files for divorce. It is important to talk with a lawyer or tax professional about your particular case.

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