



**Rightfully Yours:
Past-Due Child Support, Alimony,
and Securing Your Share of
Your Ex's Pension**

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Self-Counsel Press Inc.
(a subsidiary of)
International Self-Counsel Press Ltd.

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CHAPTER 1

Did Your Divorce Decree Grant You a Portion of Your Ex-Husband's Future Pension? (It Should Have!)

You're in the middle of a bitter divorce. The attorneys are jockeying for position as they attempt to divide your marital assets. Just who will end up with that old gun collection, anyway? Who will be the lucky party that gets Aunt Ethel's original, hand-made Christmas ornaments? And let's not forget Poochie, your 12-year old, one-eyed Pekinese. As with all divorces, it seems that certain assets acquired during the marriage just seem to belong to your husband. It's almost a given. You know, the "manly" items, such as the gas grill, power tools, pool table, subscription to *Guns & Ammo*, and let's not forget that fine collection of remote controls. Of course, the wife usually gets to keep all of the cooking and cleaning supplies. After all, what's the husband going to do with these items? So, while he gets all the neat stuff, you end up with the Eureka vacuum cleaner, the Farberware, spice rack, and of course, Aunt Ethel's original, hand-made Christmas ornaments with a value placed at \$10,000 by your husband's divorce attorney.

1. Don't Forget the Pension

While your attorney is racking up a bill at the rate of \$200 to \$400 an hour, it's no time to be penny-wise and pound-foolish. As the saying goes, don't sweat the small stuff. It may not be cost-effective to waste thousands of dollars in legal fees over the "stuff" that accumulated during the marriage, especially when the value of your husband's pension benefits is typically the largest marital asset. It may be many times more valuable than your home. That's right. Unknown to you, while your husband was giving you grief over the past 20 years (except for that one evening in June of '94 that sticks out in your mind), he was silently building a marital fortune through his pension benefits at work. At the time of his retirement, the pension benefits could be worth \$500,000 or more.

Throughout the United States, the vast majority of large employers and even many smaller employers offer their employees some sort of retirement plan coverage. It could take the form of a 401(k) savings or profit-sharing plan, or it could be a pension plan that provides a monthly pension check for life on retirement. Many companies even sponsor more than one pension plan for their employees. For example, employees may be covered under both a 401(k) savings plan and a pension plan at the same time during their careers.

Before 1984 it was very difficult, if not impossible, for a divorced spouse to receive her marital rights to the pension benefits earned by the husband during the marriage. As a result, if your divorce occurred before 1984, it's very likely that your divorce decree did not mention your ex-husband's pension benefits at all. Both the decree and your separation agreement were probably silent on this issue. And even if the divorce court agreed that you were entitled to a portion of your ex-husband's pension benefits, it was still almost impossible for you to realize these benefits. Pension plan administrators were reluctant to send (and even prohibited by law from sending) former spouses a portion of the pension earned by their employees before 1984.

However, in 1984, a new federal pension law was enacted that made it much easier for former spouses to receive a portion of the pension benefits earned by their ex-husbands. These were referred to as the QDRO laws. Today, it's well-settled law that the pension benefits earned by your spouse during the marriage are considered *marital property* subject to equitable distribution on divorce. In essence, most domestic

relations courts consider the nonparticipant spouse to be a *co-owner* of the pension benefits earned during the marriage by the husband. Beginning in 1984, former spouses of plan participants became eligible to receive their rightful share of the pension benefits *directly* from the plan administrator each month without having to rely on payments from ex-husbands. Imagine that. Upon the ex-husband's retirement, a former spouse could receive a pension check for life mailed directly to her home each month, just as if she were the plan participant. These new QDRO laws became part of the major federal pension law known as the Employee Retirement Income Security Act of 1974 (ERISA).

2. It's Your Property Right

If your divorce occurred after 1984, and your ex-husband was an *active* participant under a company pension plan or 401(k) plan, your attorney should have addressed this issue in your separation agreement or judgment entry of divorce. You *should* have been awarded a portion of your ex-husband's pension benefits that were earned (or accrued) during the marriage. Let me say this again. If your ex-husband was actively employed and covered under a company pension or 401(k) plan at any time during your marriage, you should be entitled, in your own right, to a portion of his eventual pension or savings plan benefits.

As a former spouse of a plan participant, you are considered to be a *co-owner* of the pension benefits earned during the marriage and do not merely stand in the shoes of a creditor. You should have been awarded a *property* interest in his pension benefits. The pension benefits earned during the marriage are just another asset to be "put on the table" when divvying up the marital assets, just like the toaster oven and the microwave. As one Ohio court said, "A pension plan is an investment made by both spouses during the marriage to provide for their later years. It's only equitable that each party enjoys their rightful share to half of the marital portion of the pension that accrued during the marriage."

Don't let your attorney forget about this very important pension asset. Many attorneys are very intimidated by QDROs and the federal pension laws and do not like dealing with pension issues during a divorce. But because more and more employees are covered by pension plans today, it should be of central concern to the attorney and the nonparticipant spouse.

It's also important to understand that your receipt of a portion of your ex-husband's pension payment is not automatic. Even if your divorce decree states that you are entitled to a portion of your ex-husband's pension benefits, you will never see any of these benefits unless a separate legal document called a QDRO was prepared by your attorney and submitted to the pension plan administrator for review and approval.

3. It's Not Alimony

Don't confuse your *property rights* with alimony or spousal support. When a domestic relations court grants you a portion of your ex-husband's pension benefits at divorce, it is merely assigning to you a piece of property that you already own. In the court's eyes, half of the pension benefits earned during the marriage are already yours. It just takes a QDRO to secure your property right. Your property interest in your ex-husband's pension is not considered alimony or spousal support. It belongs to you just as your ex-husband's share of the pension belongs to him. However, it is critical that your divorce decree include language that awards you a portion of your ex-husband's pension benefits. Even though the court considers you to be a co-owner of the pension, your share is not automatic by any means. If your attorney has not already done so, he or she should negotiate the division of your ex-husband's pension benefits during the divorce proceeding. Then your divorce decree or separation agreement should include language that expressly awards you a portion of his pension benefits. And finally, your attorney should prepare a QDRO for submission to your ex-husband's employer. This is necessary to secure your property interest in the pension benefits.

Any alimony or support payments (child support or spousal support) that may be granted to you at divorce are separate and distinct from the property rights granted to you at divorce. Unlike alimony or spousal support, which provides you with immediate and perhaps only temporary support after the divorce, you will generally not be eligible to receive your share of the pension benefits until your ex-husband is eligible to retire. But in many cases, depending on the type of pension plan involved, you can start receiving your share of the pension either immediately or before he actually retires. And your share of any defined contribution plan benefits (such as a 401(k) plan) can generally be paid to you immediately once the QDRO has been approved by the plan administrator.

4. How Much Is the Retirement Benefit Worth?

Before getting into a discussion of how much your spouse's retirement is worth, it is important to understand the distinction between the two basic types of retirement plans offered by companies today: defined contribution plans and defined benefit pension plans.

4.1 Defined contribution plans

The first type of retirement plan, and the simpler of the two, is called a *defined contribution plan*. Defined contribution plans come in many flavors. Some are referred to as 401(k) plans. Others are called profit-sharing plans, savings plans, or thrift plans. They all have one thing in common: a “pot” of money that is maintained for each plan participant and that grows each year with contributions and interest. By a pot of money, I mean that the company maintains an *individual account* for each employee. It's very similar to the individual retirement account (IRA) that one may open at a bank.

4.1.a Calculating the value of a plan

You can always calculate the value of a defined contribution plan by simply looking at the *total account balance* line on a plan statement. Typically, employees receive annual statements that show the current year's contributions and investment earnings and the end-of-year total account balance. The contributions to an employee's account under a defined contribution plan generally come from one of two sources. The first source is generally from the employee's own paycheck. In other words, your ex-husband may have elected to contribute a portion of his weekly paycheck to the plan. Usually, this is done on a *pre-tax* basis, which means that his contributions (the portion taken out of his paycheck) were distributed directly into his retirement plan account before being taxed by Uncle Sam. The second source of contributions to a defined contribution plan comes from the employer itself. Your ex-husband's employer may make matching or voluntary contributions over and above those contributed by your ex-husband. The contributions in the retirement plan are then generally invested in one or more available mutual fund alternatives (or in company stock, if applicable). Typically, employees can spread their contributions in any way they choose from among several investment alternatives, ranging from low-risk money market accounts to high-risk and more volatile types of funds.

At any time, the value of your ex-husband's defined contribution plan is merely reflected by the total account balance as of that date. For example, if you divorced on July 1, 1999, you should be entitled to half of the total account balance under your ex-husband's defined contribution plan that accumulated during the marriage until July 1, 1999. You, or your attorney, could obtain a financial statement from the plan administrator that shows the total account balance on that date. Assuming that your ex-husband did not participate in the plan before your marriage, you would simply be entitled to one-half of the total account balance on July 1, 1999. This "what you see is what you get" type of plan is fairly easy to incorporate into the marital estate during a divorce or dissolution proceeding. A professional pension evaluator is not needed for these types of plans. Again, a participant's benefits under a defined contribution plan are based solely on the amounts contributed to his accounts, plus any income, expenses, gains, and losses that may be allocated to his accounts. When participants retire or terminate their participation under a defined contribution plan, they can usually elect to receive their benefits in the form of a single lump sum distribution, payable immediately.

4.1.b What is vesting?

Perhaps you have heard the phrase, "He is only 40 percent vested under the profit-sharing plan." What does this mean? Most defined contribution plans have *vesting* clauses that apply to employer contributions. The word vesting refers to that portion of the employee's total account balance that he or she has *earned*. It's the amount that's *non-forfeitable* even if he or she were immediately to quit or retire. The portion of a participant's benefits that are considered vested cannot be taken away. For example, many 401(k) plans have a vesting schedule as follows: After one year of service, the employee may become 20 percent vested in the contributions made to his or her account by the employer. The next year, the employee will be 40 percent vested in those contributions; the year after that, 60 percent vested, and so on, until he or she becomes 100 percent vested after five years of service. If a plan participant quits employment after two years of service, when he is 40 percent vested, this means that he or she is eligible to receive only 40 percent of the value of the contributions made to the plan by the employer. The remaining 60 percent is lost and forfeited back to the plan. The amount that is lost is often referred to as a *forfeiture*.

A plan's vesting schedule, however, never applies to plan contributions made by the employee through voluntary payroll deductions. These employee contributions are always considered 100 percent vested. So, if your ex-husband elected to contribute a portion of his own paycheck to the plan, via convenient payroll deductions, he will always be 100 percent vested in his own contributions. These contributions can never be taken away from the employee or otherwise forfeited. Even if an employee quits after two years on the job, when he or she is only 40 percent vested in the contributions made by the employer, he or she will still be entitled to receive 100 percent of any employee contributions made to the plan during the two years of employment.

4.2 Defined benefit pension plans

The second type of retirement plan is called a *defined benefit pension plan*, a plan that pays out benefits in the form of a monthly pension check when someone retires. Unlike a defined contribution plan, such as a 401(k), generally no individual accounts are maintained under a defined benefit pension plan. This fact alone distinguishes it from a defined contribution plan. A defined benefit pension plan is merely a promise (albeit a contractual one) that the company makes to its employees to provide them with a monthly "pension check for life" once they retire. A participant's pension benefits are normally based on a plan formula that typically includes years of service with the company as well as the average salary earned by the employee during the final years of employment. A participant is generally not entitled to receive a lump sum distribution under a defined benefit pension plan. The benefits are typically payable only in the form of a "monthly lifetime annuity" starting when the participant retires, which ensures that the participant will receive a monthly pension check for the rest of his or her life.

Because account balances are not maintained for people under a defined benefit pension plan, it's difficult for employees and their spouses to get a feel for the true value of the plan. That's why benefits accrued by participants throughout their career under defined benefit pension plans are more of a mystery. That's why employees who are only 30 or 40 years old may know that they will someday be getting a pension check each month when they retire, but they cannot tell you how much it will be. Nor can they tell you how much their eventual

pension is worth in today's dollars. And there's the rub. During a divorce, it's critical for a divorce attorney to attach a lump sum "value" to all of the marital assets, including the pension. While it's relatively simple to determine the value of a defined contribution plan simply by looking at the latest plan statement, it's a different matter entirely when it comes to your ex-husband's defined benefit pension plan.

For discussion purposes, when I use the words "pension plan" throughout this book, I am referring to a "defined benefit pension plan." The amount of benefits that a participant is entitled to receive under a pension plan is called his or her *accrued benefit*. Therefore, if an employee retires at age 65 with an accrued benefit of \$2,000, he or she will receive a \$2,000 monthly pension check for the rest of his or her life. Because no individual accounts are set up for employees under a pension plan, never use the words "account balance" when discussing your ex-husband's pension benefits.

Now, the all-important question. At your divorce, how much of your ex-husband's pension benefits are you entitled to receive as your marital share? The answer is not simple. Trying to determine how much a pension plan is worth is a difficult task even for attorneys. Quite often, divorce attorneys will hire an actuary or other pension professional to evaluate the pension. In order to evaluate your ex-husband's accrued benefit under the pension plan at the time of your divorce, the pension professional must figure out the "present-day lump sum value" of his anticipated future monthly stream of retirement income. Just knowing that your ex-husband has earned an accrued benefit of \$800 per month (as calculated by his employer) at the time of divorce does not answer the question. Under a pension plan, a participant generally cannot receive his full, unreduced accrued benefit until he reaches the plan's normal retirement age (usually age 65). And even if you did know that his monthly accrued benefit was \$800 when you divorced, what does this currently mean in terms of an immediate lump sum dollar amount? This is why it's necessary for the attorney to hire a pension professional. They must determine, in today's dollars, how much a future lifetime pension is worth. To do this, they incorporate such factors as mortality tables and interest rate charts.

Let's look at an example: Assume that John, age 45, has worked at an auto company for the last 20 years. Based on the plan formula, his accrued benefit is calculated to be \$1200 per month. This means that

if John were to quit his employment today, he would be eligible to receive \$1200 per month for his entire lifetime, starting when he turns age 65. It is not a measure of how much he could receive immediately on termination of employment. Now, assume that you are getting a divorce from John today. Your attorney's pension evaluation expert would have to calculate how much John's future \$1200 monthly accrued benefit is worth in today's dollars. This is called a *present value*. Based on actuarial statistics, which involves a lot of number crunching by the expert, his \$1200 future monthly lifetime pension payments may have a present value of \$120,000 today. Assuming that it's all marital (that his pension was earned entirely during the marriage), you would be entitled to \$60,000 today, as your equitable ownership share of the pension.

5. The Use of Offsetting Assets

Many attorneys choose to use other nonpension-related assets when dividing the pension benefits of the husband. For example, if your husband's pension is valued at \$120,000 at the time of divorce and you have equity in your home of approximately \$120,000, perhaps the attorneys will work out a scenario in which you will get to keep the house and your ex-husband will keep his pension free and clear. However, because the value of the pension is quite often the largest marital asset, there may be no other offsetting assets to consider. In this case, your attorney must provide you with your own slice of your ex-husband's pension benefits. This is done through a QDRO (as explained further in Chapter 2).

6. A QDRO Is a Must

In order to secure your share of the pension, your attorney must prepare a QDRO and submit it to the pension administrator for review and approval. QDROs are fairly complex creatures in their own right, and the vast majority of divorce attorneys do not understand how to draft them. Without a properly drafted QDRO, you may never see any portion of your ex-husband's pension or 401(k) benefits, even though your divorce decree or separation agreement states in plain English that you are entitled to a portion of such retirement benefits.