
WISER Special Report

Divorce, a Time for Caution

An Introduction to the 12 Worst Mistakes Lawyers Make in Preparing Pension Orders

Don't Lose Out on Important Retirement Benefits Because of a Mistake Made by Your Divorce Lawyer.

Take the example of Patricia Kingston: She was married for 25 years to a man who worked for the same company for 30 years. When her lawyer negotiated her right to the pension benefit, he neglected to include a survivor benefit. Unfortunately, her husband died at an early age so she will receive nothing from his pension benefit.

Largest Asset at Divorce—Getting a Fair Share of the Pension Can Be Important Insurance for Your Retirement Security.

Retirement benefits can be a couple's largest asset to be divided at divorce. Benefits that may be treated as marital property include company pension and 401(k) plans, federal, state and local government employee retirement plans, military retirement and Individual Retirement Accounts, among others.

The Process—Getting Part of the Pension is Not Just a Simple Matter of the Wife Applying for a Share of Her Husband's Retirement Benefits.

Rather, the divorce court needs to issue a special court order requiring the retirement plan in very certain specific terms to give her a portion of her husband's benefits. The exact name of the appropriate pension order varies depending on the type of plan (private or governmental). The most commonly used court order is for the private pension system; it is called a Qualified Domestic Relations Order, or QDRO.

Who Prepares the Court Order?

It is usually the job of the wife's lawyer (if she is the one claiming the pension share) to prepare the pension order. This means that your lawyer first has to have all the right information about the law and your husband's retirement plans. This includes being familiar with the federal law that governs private pensions, as well as your

state's marital property law. The lawyer also has to know the various features of that particular company's plan, as well as the plan's own procedures for processing Qualified Domestic Relations Orders.

Don't Assume Anything!

Most women reasonably assume that their lawyers know all about the many federal and state laws that set the rules for pension-splitting. Unfortunately, many lawyers either do not know or do not take the time to find out all the information needed to prepare a pension order that will be acceptable to the pension plan *and* fully protect the wife's interests. They also don't explain to their clients all their rights and options in collecting a pension share. Other lawyers don't follow up to make sure that pension plan officials receive and approve the final pension order promptly after the divorce is final.

The result of these mistakes, in many cases, is that the former wife loses some or all of the retirement benefits she expected to receive. Sometimes, the errors made by a lawyer can be fixed by asking the court to issue an amended pension order, or the ex-wife is able to recover some of her benefits by suing her former lawyer for malpractice. Though, unfortunately, in too many instances nothing can be done, and the former wife simply loses out on the benefits that should have rightfully been hers.

The 12 worst mistakes lawyers make in preparing pension orders are:

1. The lawyer doesn't ask for the important information about the husband's pension and retirement benefits soon enough.

Long *before* you sign a property settlement agreement or go to court, your lawyer should obtain the plan document (that is, the full set of rules) or the summary plan booklet for each pension plan. The attorney should also ask for the plan's procedures for "domestic relations orders." Among other features, the plan may have certain options or restrictions about when the former spouse's share can be paid to her under a domestic relations order. These sorts of details can make a difference in your negotiations with your husband.



Note: The rules for most *government* retirement plans (federal, state and local) are usually found in publicly available statutes and regulations rather than a "plan document." Your lawyer should be familiar with these laws.

2. The lawyer fails to prepare any pension order.

If you are entitled to a share of your ex-husband's retirement benefits, it is important that your lawyer makes sure the court signs a pension order at the time of your divorce. Otherwise, years

later, you may have to pay another lawyer to finish the job. In the worst case, if your ex-husband has died, retired or remarried, you may lose some of the benefits you could have received if a pension order had been prepared beforehand.

3. The lawyer fails to obtain information about every retirement benefit of the husband's that might be marital property.

These days, many employees are covered by more than one pension or retirement plan at the same time. For example, an employee in a large company may be covered by a pension plan, a "401(k)" savings plan, and an employee stock ownership plan (ESOP). Benefits under all of these plans may be marital property, and your lawyer needs information about each of them. Also, your husband may still have benefits coming from previous jobs. If necessary, your lawyer should ask the court to issue a subpoena (an order to provide certain documents or information) to each employer or former employer asking for details about all retirement benefit plans.

4. The lawyer fails to obtain information about all the features of a particular pension plan.

Benefits under different pension and retirement plans vary widely, with some plans paying more than one type of benefit. For example, some plans provide cost of living increases to retirees. Others will pay specially enhanced benefits to employees who agree to retire early, meaning that your husband's benefit might suddenly

increase when he reaches a certain age or number of years of service. If your pension order doesn't specifically name each type of benefit, the plan administrator may not be obligated to pay you a share of them.

5. The lawyer fails to ask for a survivor benefit or doesn't advise the wife that none is available.

Be sure to ask whether your former husband's death will have any effect on your benefit. What if he dies before he starts collecting his own benefit? In many situations, a former spouse will share in her husband's pension only as long as he is living, unless the court has also specifically awarded her a survivor's pension. Also, some state and local government plans won't pay survivor's pensions to divorced spouses under any circumstances.

You need to know how your retirement income will be affected. If you learn that pension benefits won't continue after your husband's death, you may want to try to get him to buy a life insurance policy with you as beneficiary to protect your retirement income.

6. The lawyer fails to explain to the wife how retirement benefits are usually divided under state law.

State marital or community property laws usually specify how pension and retirement benefits are to be divided at divorce. How is your marital share figured? When can it be paid? Your lawyer should explain to you how these laws apply to your situation. If state law

isn't very helpful to divorcing women, could you negotiate something better? For example, even if state law says you have to wait to collect your pension share until your husband actually retires, you may be able to work out an agreement with your husband that will let you collect your benefits right away, if that would be more favorable to you.

7. The lawyer fails to explain to the wife what the former husband might do in the future that would reduce or eliminate her share of the benefits.

What if your ex-husband never applies for his own pension? What if he is injured on the job or disabled? What if he waives his rights to his pension? Would these or other acts affect your benefits? If so, what legal recourse would you have? Make sure that your property settlement agreement allows you some options if the worst happens. As an example, you may want to be able to ask the court to require your former husband to pay you alimony or other property if he interferes with your right to the pension benefits.

8. The lawyer fails to explain what effect your remarriage may have on your benefits.

Some federal, state and local government employee benefits will stop if the former wife remarries. For example, both federal civil service and military survivor pensions terminate if the former spouse remarries prior to age 55. Also, any pension benefits that have been awarded to you as alimony or

spousal support, rather than marital property, will likely terminate upon your remarriage since alimony and support payments are usually cut off when the former spouse remarries.

9. The lawyer is unaware of unusual requirements or loopholes in the law that could result in the pension order being rejected by the plan administrator.

Some pension and retirement plans are not required to accept any court order transferring benefits to a former spouse. These include many benefit plans for highly-paid company executives as well as certain "deferred compensation" plans for state and local government employees. Likewise, federal government retirement systems have many unexpected requirements for paying pensions to former spouses.

For example, the government won't pay you a share of military retirement benefits awarded as marital property unless you were married for at least ten years of your husband's military service. Also, a federal civil service survivor pension is usually not available if the pension order is signed by the court after the divorce is final and the employee has retired.

10. The lawyer fails to have the proposed pension order pre-approved by the plan in advance of being sent to court.

You cannot get your pension money until the plan administrator has officially accepted the pension order signed by the court. But if the order does not follow

the rules of the plan, it will likely be rejected and your lawyer will have to go back to court to get an amended order that the plan will accept. You can avoid unnecessary delay and legal fees if your lawyer will ask the plan administrator to tell you in advance whether the proposed order will be acceptable.

Most company pension plan administrators as well as many state and local plan officials will informally review a proposed pension order before it has been signed by the divorcing couple or the judge. Federal government plans, unfortunately, usually will not review pension orders in advance.

11. The lawyer fails to follow up after the divorce to make sure that the final pension order is sent to the plan and officially accepted by the plan administrator.

Your pension order should be signed by the judge at the time of your divorce, or as soon as possible afterward. Then your lawyer should mail a copy of the final order to the pension plan administrator – but that’s not the end of it. Sometimes a pension plan will lose a pension order or just let pension orders pile up for months without looking at them. It is very important to follow up

to make sure that the plan receives your pension order and notifies you or your lawyers promptly in writing that the order has been accepted, even if you were not expecting to receive your benefits until years later.

12. The lawyer fails to explain to the wife her right to Social Security benefits.

Social Security benefits are usually not treated as marital property by state divorce courts, but if you were married at least ten years, then you may be automatically eligible under federal law for Social Security benefits as a divorced spouse. For this reason, it might be a good idea for your lawyer to ask your husband to provide you with a benefit estimate that he can get from the Social Security Administration. You can obtain more information about the rules for collecting benefits by calling Social Security at (800) 772-1213 or looking at the agency’s website at www.ssa.gov.

A Final Note of Caution! Don’t leave everything to your lawyer. If you have questions about your pension rights at divorce, be sure you get the answers you need before your divorce is final, even if you have to be the one to collect some of the information.