



Divorce and Retirement:

*How to Take Control of
Retirement Benefits*



THE WOMEN'S INSTITUTE FOR A SECURE RETIREMENT

WISER's mission is to improve the long-term financial security of all women through education and advocacy. WISER supports women's opportunities to secure adequate retirement income through research, workshops, and partnerships.

ACKNOWLEDGEMENTS

This report was written by Anne E. Moss, a Washington, D.C. attorney whose practice concentrates on dividing retirement benefits in divorce. Thanks also to Suzanne Scruggs, Cheryl Gannon, Lara Hinz, and Maggie Boys.



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“My divorce lawyer advised me to ask for the pension benefit with the warning that I would hate myself 20 years from now if I didn’t try for it. I am so grateful.”

Marty Miller

INTRODUCTION

When you’re in the midst of a divorce, you have to juggle so many things. The emotional toll is hard enough to manage along with the practical issues — and there are many. You may still have young children living at home. And if so, you have to figure out child support. And think through alimony if that is even an option. And the house. And closing joint accounts and opening up new accounts — even for utilities. Applying for new credit. Oh, and then there’s coming up with ways to make it on your own financially.

One practical issue that women often fail to make a priority is getting a fair share of retirement assets. Retirement funds may be among the biggest assets you have as a couple. It’s important to know that these funds are not automatically split in a divorce.

Read on to learn how you can protect yourself against losing the retirement assets you’re entitled to receive. Don’t gloss over this issue — it could mean the difference between comfort and teetering on the edge once you reach retirement age.



THE IMPORTANCE OF RETIREMENT BENEFITS

Retirement benefits are not automatically split during a divorce. Just like other marital assets, a divorce court judge or an agreement made between you and your spouse divides the benefits. Learn as much as you can about the benefits you and your spouse earned during the marriage. Then make sure you and your lawyer take steps to protect your right to those benefits.

Even if you and your spouse have agreed to divorce through a mediation process, consider hiring a lawyer to advise you along the way. It is an extra expense, but it will cost a lot more if you make uninformed decisions.

Retirement benefits come from a variety of employer-provided plans — pension plans, 401(k) plans, deferred compensation plans, and 403(b) plans, among others.¹ Note that your spouse may have 401(k) assets sitting in an Individual Retirement Account (IRA), if there was a job change during the marriage. Make sure you consider all former employers, because any type of employer can sponsor retirement benefits. Also, check joint tax returns for required information that may help.

Retirement Benefits as Marital Property

The divorce law in just about every state considers retirement benefits earned by either spouse during the marriage as “marital property” (or “community property” if you live in a community property state). But there are some differences among the states,

¹ This booklet does not discuss Social Security benefits. But be aware — you do not have to trade your right to spousal Social Security benefits for another marital asset. For more information about Social Security benefits and divorce, see WISER’s fact sheet: *Social Security and Divorce: What You Need to Know* at wiserwomen.org.



especially when it comes to identifying what retirement benefits are “marital property.”

You need to ask two key questions:

1. What benefits are divisible? Depending on state law, all retirement benefits earned during the marriage may be divisible. These include “traditional” pension plans — defined benefit plans and defined contribution plans, such as 401(k) and 403(b) account plans. States differ in what types of benefits they consider marital property. For example, Maryland considers disability retirement benefits as *divisible marital property*. California considers them as *separate property that belongs to the disabled person*.

2. When does marital property stop accumulating? Some states consider the date of divorce as the time when marital property stops accumulating. Other states may divide property earned only up to the date of separation or some other date.

How to Get Information

It’s very important that you get information about pension and retirement benefits earned by you and your spouse. Find out whether or not your spouse currently receives benefits. Contact your current and former employers to find out about your benefits. You could ask your spouse for information on benefits, or you could go directly to current and former employers. Before releasing this information, the employers might require your spouse’s written authorization or an order from the court.

🌸 **Be clear on this critical point:**

Have all the information about your spouse’s retirement benefits *before* you divorce. It is nearly impossible to go back to court and ask for a share of your ex-spouse’s benefit that you learn about after the fact.



Negotiate an Agreement or Let the Court Decide

A written property settlement negotiated during a divorce is usually beneficial to both spouses. A property settlement agreement usually goes into detail about who pays what and who gets what. This includes alimony and child support, child custody and visitation, the home, cars, investments, personal possessions and retirement benefits. The agreement will eventually become part of the divorce decree. Lawyers usually negotiate the terms of the agreement for the spouses. If you and your spouse cannot agree on how to divide the retirement benefits or any other issue, you may have to go to court and let the judge decide. Beware: it is extremely expensive and risky to go to court and let the judge decide. Also, you will have to abide by the court's decision, so you may not come out with what you had asked for.

Options for Dividing Retirement Benefits

You and your spouse could decide to divide all the retirement benefits in half. But you may have other alternatives. For instance, if you and your husband have several retirement accounts between you, one option is to "equalize" them. If your spouse has a retirement account with a total value of \$100,000 and your account totals \$60,000, the property settlement agreement could indicate that you will keep your \$60,000 and get \$20,000 of your spouse's benefits. In this scenario, each of you 'equalizes' at \$80,000.

If your divorce involves a traditional pension plan, you may need to hire a pension actuary to determine the total value of the benefits.



The House or the Retirement Funds

Think carefully before waiving your right to retirement benefits in exchange for your spouse's share of the house. This is a common arrangement but may not always be the best choice. While owning the house may seem like the best option, you may find after just a few years that you cannot afford the mortgage, taxes, repairs or upkeep. Or you could decide to sell the house a few years later and incur a hefty capital gains tax and realtor commission costs which can be as high as 6%, closing costs ranging from 3 to 5%, and repair costs necessary to sell the house which average 4%. These selling costs can significantly cut into whatever equity there is in the house. While these additions are a percentage of the selling costs, they may be a much bigger percentage of the equity. Keep in mind that the retirement benefits you walk away from could come back to haunt you when you reach retirement age.

GET A “QUALIFIED DOMESTIC RELATIONS ORDER” (QDRO)

If you plan to ask for a share of your spouse's retirement benefits, you need a *qualified domestic relations order*

or *QDRO* (pronounced “quadro”). (Orders for retirement plans of government employees may have different names.) The QDRO is a court order that is usually written by one of the couple's attorneys. It orders the retirement plan to pay you a specified share of the benefits based on the terms of your divorce agreement. Your lawyer will submit the QDRO to the court for a judge's signature. After the judge signs the QDRO, send it to the plan administrator as soon as possible. Your agreement should specify whether you or your spouse is responsible for preparing the QDRO and paying the related fees.

“The QDRO is like having the ticket to get into the movie. No ticket, no access to the movie.”



❁ What happens if you don't get a QDRO?

You could end up like thousands of women who reach retirement age only to find out that they won't get what the divorce decree stated because the documentation wasn't handled properly. See the WISER Factsheets: *12 Mistakes Lawyers Make Preparing Pension Orders During a Divorce* and *10 Important Questions to Ask Your Lawyer During a Divorce*.

How to Minimize QDRO costs

Lawyers may charge several hundred dollars or more in legal fees for drafting a QDRO. Typically, the spouse who is receiving the transfer pays the legal fees to prepare the QDRO. This issue might be negotiable. If you are the recipient, talk to your lawyer about asking your husband to pay the fee. Be sure you understand ahead of time what your lawyer charges for this work. Also, ask whether the divorce fees include expenses for the QDRO. It may be a separate expense.

Some 401(k)-type plans charge QDRO processing fees. They typically range from \$300 to \$1,200. The plan will automatically deduct the fee from either your share or your former spouse's share of the account. Be sure your lawyer checks with the plan administrator to find out whether the plan charges QDRO fees. If so, the QDRO should clearly state which party will pay the fee or whether you will split it. You or your attorney should be able to negotiate this payment with your spouse.

One way to help keep the fee as low as possible is for your lawyer to write your QDRO based on a model or sample QDRO that the plan administrator provides. This makes it more likely that the plan administrator will readily accept the QDRO and reduces the chance that your lawyer will have to rewrite it. Be forewarned that your lawyer may reject this approach. The model QDRO could contain provisions that may harm you, such as one in which you waive certain legal rights.



Other QDRO Issues

Whenever possible, a traditional Defined Benefit Pension should be split **at the time of divorce by determining the Actuarial Present Value of the benefit**. To split that actuarial calculation an Actuary is needed. If done this way, the divided benefit is not dependent on when the ex-spouse decides to retire or if the ex-spouse survives to retirement age. The divorcing spouse can take the benefit independent of the other's actions. In addition, this prevents finding out later that the benefit was not protected by a survivor's benefit.

Both your property settlement agreement and the QDRO should provide details about your share of the benefits, such as:

- ❁ **How will your share be determined?** Usually a QDRO specifies a certain percentage or formula for the retirement plan to use. Sometimes, though, it says the former spouse gets a certain dollar amount of the benefits. Your attorney should be able to tell you which method applies to your situation.

- ❁ **When will you get your share?** The answer depends on a variety of factors:
 - The divorce laws in your state
 - What the retirement plan allows
 - Whether your former spouse is still working under the plan or retired.

You might receive payment immediately after you divorce, or you might have to wait until your ex-spouse reaches retirement age or actually retires and applies for the pension.

- ❁ **How will your share be paid?** You may receive it as a single lump sum, a monthly pension, or in some other form.

- ❖ **What happens to your share if your spouse dies before you are paid?** Under some plans, you may lose benefits if the QDRO does not provide some type of survivor protection for you. Ask your attorney whether your QDRO should provide survivor or death benefits.
- ❖ **What if you die first?** If you die before you receive all your benefits, what happens to your remaining share? Does it revert to your ex-spouse? Or to the pension plan? Or can you designate a beneficiary (on a form the plan provides) to receive these benefits? Ask your lawyer about your options. (Note: Your will does not have any effect on money still in a retirement plan.)
- ❖ **Does the plan have cost-of-living increases?** Some plans, usually governmental plans, pay cost-of-living increases to retirees. You should ask for a share of these, if possible.
- ❖ **Will you receive interest on your share if there is a delay in your payment?** This issue would most likely come up if you were receiving a share of a 401(k) or similar type of savings plan. If you are getting 50 percent of the account balance as of the date of divorce or date of separation, you may have to wait several months to receive your share. Consider requesting a share of any investment earnings or interest that your husband receives on your portion of the account while it is still in the plan.
- ❖ **Does your spouse have a loan from the plan?** Some retirement plans, such as 401(k) plans, typically allow employees to take loans. Whether the plan deducts the loan amount from his share or yours depends on when and for what reason your husband took the loan, and what your state's divorce law says about marital debt.



- ❖ **What tax will you owe on your share?** At the time of the division of a qualified plan such as a 401(k) account the spouse can withdraw a sum penalty free. The withdrawn amount requires a tax payment on it, but there is no extra 10% age penalty even if the person is under age 59¹/₂. This is only true for Defined Contribution Account plans and **only at the time of the division**. If the divorced spouse decides later on that she needs money from her share of the plan she would no longer be eligible for this exception.

Part or all of the retirement benefits you receive through a QDRO will probably become taxable income. You can delay paying income taxes on a lump sum payment by rolling it over into an IRA or another qualified plan (such as your own 401(k) account). If you roll the funds over directly, you won't owe taxes until you withdraw the funds. One important exception includes benefits paid to you as child support (instead of as marital property or alimony). These are taxable to the employee and not the former spouse. For more information on taxes, see IRS Publication 575, *Pension and Annuity Income*, and Publication 590, *Individual Retirement Accounts*, at www.irs.gov.

Your QDRO Checklist

- ❖ You must get a QDRO for retirement benefits.
- ❖ Have your lawyer ask the plan administrator ahead of time if the plan charges a QDRO processing fee or has a model.
- ❖ Direct your lawyer to ask your husband to pay part of your legal fees and any QDRO processing fees.
- ❖ Submit it to the court for a judge's signature.
- ❖ Send the QDRO immediately to the retirement plan for approval by the plan administrator.

CONCLUSION

Divorce is difficult on so many levels and that probably is an understatement. It is important that you educate yourself ahead of the process about your rights to retirement benefits in a divorce. Most divorce lawyers are well-versed in family law and perhaps know about retirement benefits, but are not experts. Many divorce lawyers will ‘farm out’ the more difficult aspects of retirement benefits. You may need to ask a lot of questions to make sure your lawyer takes every step needed to protect your rights. Getting your share of retirement benefits isn’t simply a matter of fairness. It could be the difference between comfort and hardship in your retirement years.

The Administration on Aging and the Women’s Institute for a Secure Retirement (WISER) have jointly established a web-based *National Education and Resource Center on Women and Retirement Planning*. The Resource Center’s overriding goal is to assist the Aging Network in educating women of all ages about planning for their future financial, health and long-term care, and to promote greater awareness and utilization of materials by average women.

Materials available on the Resource Center’s website are for personal use, or for distribution through an agency or organization. WISER’s website address is www.wiserwomen.org. The Resource Center’s website can be reached from WISER’s home page.

The Administration on Aging also funds pension information and counseling projects. See Appendix 3 for contact information.



APPENDIX 1

Ten Ways to Avoid Losing the Pension During a Divorce

Beware: don't assume your family law/divorce lawyer knows the many federal and state laws that set the rules for splitting pensions.

Ask your lawyer:

- 1.** Do you have experience dividing pension plans and drafting pension orders — Qualified Domestic Relations Orders or QDROs?
- 2.** Do you have the necessary information from **all** of my spouse's pension plans?
- 3.** Do you know that different types of benefits must be specifically included in the pension order?
- 4.** Will my payments stop if my spouse dies? Should I be asking for a survivor's benefit? If I remarry, will that change or stop any of my benefits?
- 5.** How will state laws affect what I get, and can we negotiate something better?
- 6.** What could happen to my former spouse in the future that could reduce or stop my benefits?
- 7.** Have you investigated all possible requirements or legal loopholes that might prevent me from receiving benefits?
- 8.** Have you prepared a pension order to be signed by the court at the time of my divorce?
- 9.** Has the order been pre-approved by the pension plan?
- 10.** Will you follow up to make sure that the final pension order is sent to the pension plan and officially accepted by the plan administrator?

APPENDIX 2

Additional WISER Resources on Retirement Plans and Divorce

These resources are available on WISER's website, www.wiserwomen.org:

WISER Fact Sheets:

- *Divorce: 7 Key Questions You Need to Ask About Your Spouse's Pension*
- *Divorce, A Time for Caution*
- *12 Mistakes Lawyers Make Preparing Pension Orders During Divorce*
- *IRAs and Divorce*
- *Pensions and Divorce*
- *10 Important Questions to Ask Your Lawyer During a Divorce*
- *Social Security and Divorce: What You Need to Know*
- *Credit and Divorce*
- *Protecting Your Finances During A Divorce*
- *Marriage and Finances: Planning for the Unexpected*

Divorce Laws by State: The American Bar Association publishes annually updated charts that summarize basic laws in each state by topic, including custody, alimony and grounds for divorce. www.americanbar.org/groups/family_law/resources/family_law_in_the_50_states.html

State Retirement Pension Plans: Each state retirement system has its own rules relating to the division of state employees' pensions in divorce proceedings. The Pension Rights Center has a map you can click on to find out the retirement system rules in your state: www.pension-rights.org/publications/factsheet/state-retirement-plans-and-divorce

Web Resources: Check out www.divorcehelp.com for good basic information. A number of other divorce websites list state resources, attorneys, interactive bulletin boards and other resources. For example, www.divorcesource.com, www.divorce.support.com, www.divorcenet.com, and www.divorceinfo.com.



APPENDIX 3

Administration on Community Living (ACL) Pension Counseling Projects

The U.S. Administration on Aging's Pension Counseling and Information Program currently serves 30 states. Free legal assistance is available to individuals experiencing a problem with their pension, profit sharing or retirement savings plans. For more detailed information about what the projects do, check out the brochure about the program and watch our video.

Contact one of the pension counseling projects below if you, your company, or your pension plan are located within a project's service area. Assistance is provided free of charge.

Pension Rights Center

Not located within a service area? You may be able to find help with your questions by visiting the Pension Rights Center's Pension-Help America.



Illinois Pension Assistance Project

Illinois Pension Assistance Project
Serving Illinois
Toll Free: (888) 425-6067



Mid-America Pension Rights Project

Michigan Pension Rights Office
Serving Indiana, Michigan, and Tennessee
Toll Free: (866) 735-7737



Ohio Pension Rights Office
Serving Kentucky, Ohio, and Pennsylvania
Toll Free: (866) 735-7737

Mid-Atlantic Pension Counseling Project



New York Pension Rights Office
Serving New Jersey and New York
Toll Free: (800) 355-7714

New England Pension Assistance Project



New England Pension Assistance Project
*Serving Connecticut, Maine, Massachusetts,
New Hampshire, Rhode Island and Vermont*
Local: (617) 287-7307
Toll Free: (888) 425-6067

South Central Pension Rights Project



Texas Pension Rights Office
*Serving Arkansas, Louisiana, Missouri,
New Mexico, Oklahoma, and Texas*
Toll Free (800) 443-2528

Upper Midwest Pension Rights Project



Minnesota Pension Rights Office
*Serving Iowa, Minnesota, North Dakota,
South Dakota, and Wisconsin*
Toll Free: (866) 783-5021

Western States Pension Assistance Project



California Pension Rights Office
Serving Arizona, California, Hawaii, and Nevada
Toll Free: (866) 413-4911
Local: (916) 930-4911



Other

Arizona

PCOA Pima Council on Aging

(520) 790-7262

www.pcoa.org

help@pcoa.org

Chicago

Chicago Pension Rights Project

Legal Assistance Foundation of Metropolitan Chicago

(312) 341-1070

www.lafchicago.org

TTY: (866) 801-0505

Kentucky

Legal Helpline for Older Kentuckians

Toll Free: (800) 200-3633

Massachusetts

Gerontology Institute, University of Massachusetts, Boston

Local: (617) 287-7300

Toll Free: (888) 425-6077

www.umb.edu/gerontologyinstitute

nepad@umb.edu

Pennsylvania

PA Senior Law Help Line

Local: (215) 988-1242

Toll Free: (877) 727-7529

www.seniorlawcenter.org

helpline@seniorlawcenter.org



Sonja Meets Her Future Self

This booklet provides a multi-generational look at retirement planning and the valuable lesson of Save, Spend, and Give. It can be used in elementary school classrooms or simply shared with the children in your life. (\$4.75)

WISER/NAPSA Brief: Elder Financial Abuse

Elder financial fraud victimizes hundreds of thousands of elderly persons each year. Learn the most effective ways to prevent and respond to the problem. (\$2)



Divorce and Retirement: How to Take Control of Retirement Benefits

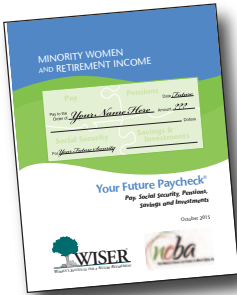
Because pension and retirement benefits are not automatically split in a divorce, this short, common-sense guide emphasizes the importance of these benefits and offers valuable information on marital property, negotiating an agreement, and getting a qualified domestic relations order (QDRO). (\$4)

Don't Run with Your Retirement Money

Understanding your resources including lump-sum payments and how best to keep them for the future. A joint project of WISER and the Actuarial Foundation. (\$5)



from WISER Retirement

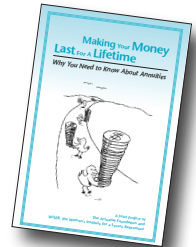


☐ *Minority Women and Retirement Income — Your Future Paycheck*

What Minority Women Need to Know About Pay, Social Security, Pensions, Savings and Investments. (\$7)

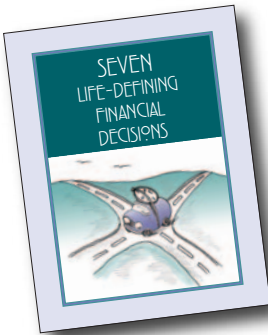
☐ *Making Your Money Last for a Lifetime*

Why You Need to Know About Annuities. (\$3)



☐ *Seven Life-Defining Financial Decisions*

Making the Most of Life's Key Decisions — from careers and marriage to savings and retirement, our consumer guidebook offers tips for making the right choices. (\$5)



☐ *Financial Steps for Caregivers: What You Need to Know About Money and Retirement*

If you are a family caregiver, it is important to plan for your own retirement security. WISER's tool for financial planning for caregivers can help. (\$5)



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See information about our quarterly newsletter and order form on reverse

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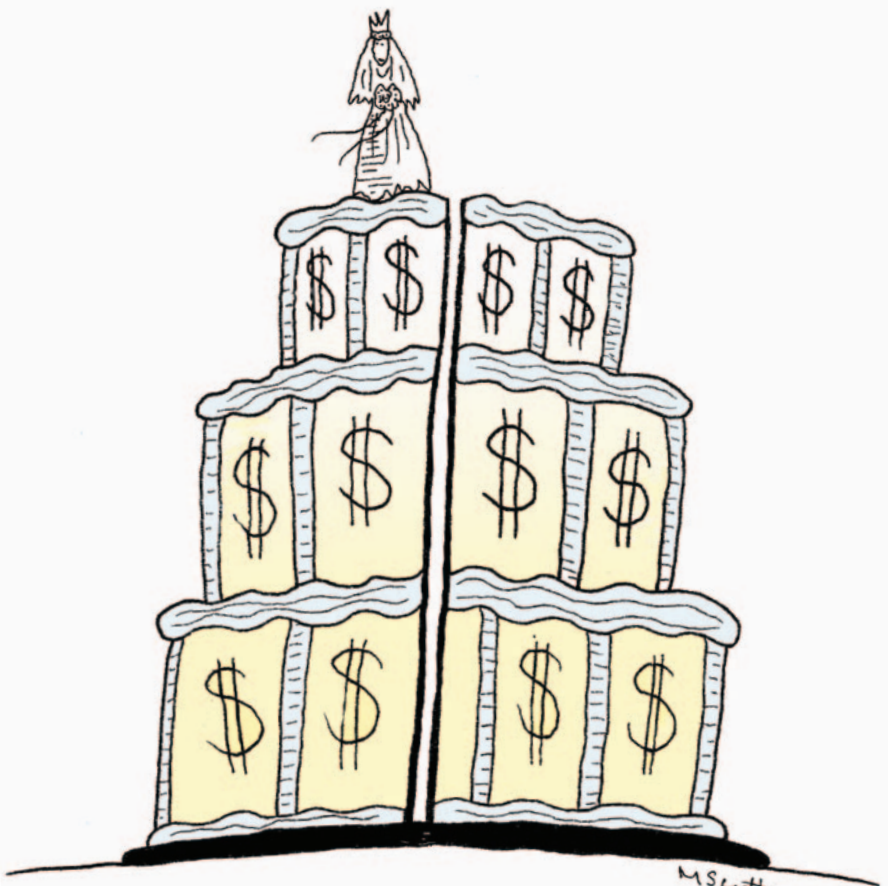
City _____ State _____ Zip _____

Please send payment to:

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M Scott

Providing Women with a Secure Financial Future

The Women's Institute for a Secure Retirement (WISER) is dedicated to the education and advocacy that will improve the long-term financial quality of life for women.

As the only organization to focus exclusively on the unique financial challenges that women face, WISER supports women's opportunities to secure adequate retirement income through research, workshops, and partnerships.



WISER, in partnership with the U.S. Administration on Aging (AoA), maintains the National Education and Resource Center on Women and Retirement Planning (the Center) to provide user-friendly financial education and retirement planning tools for low-income women, women of color and women with limited English-speaking proficiency. WISER's mission is to inform women about the issues that affect their long-term financial security and to stress the importance of taking an active role in planning for their future retirement. Through the Center's one-stop-gateway, women have access to comprehensive, easily understood, information that allows them opportunities to plan for income during retirement and to plan for long term care as they need it. The Center also serves as a national clearinghouse and technical assistance center for retirement planning information tailored specifically for women.



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