

PART TWO

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PART TWO

STATE DIVORCE LAW AND YOUR PENSION RIGHTS:

QUESTIONS YOU NEED TO ANSWER

Introduction

Once you know what benefits your husband's retirement system *allows* you to receive, then you need to find out whether your state divorce court is likely to award all or part of those benefits to you. *Part Two* of this handbook discusses the pension issues most likely to come up under state divorce laws. Remember: As explained in the Introduction, state divorce "laws" (also called "domestic relations laws") include state *statutes* and state divorce court *decisions*. *State laws on pension rights at divorce are usually the same for pensions from all retirement systems.*

Because state divorce laws on pensions are still developing, you may discover that your state courts and legislators haven't answered every question about dividing pensions. In these situations, your lawyer will need to help you decide what your best options are, sometimes on the basis of an educated guess about what a court would be likely to say if it were deciding your case.

The lack of precise rules about dividing pensions may at times turn out to be a good thing for a divorcing wife, because it can allow you the flexibility to negotiate the pension-sharing arrangement that is best for your own situation. This part of the handbook points out the advantages and disadvantages of different ways of pension splitting that may be available to you.

It is also intended to help you understand what you are getting in your divorce settlement and how to protect your benefits, so that you will not be surprised or disappointed years later by not receiving the benefits you assumed you would have.

Marital Property Versus Alimony

The rules for awarding *marital property* and *alimony* at divorce are based on state law and therefore vary from state to state. In general:

Marital property (in some states called "community property") means an asset such as a pension, house, car, or furniture, that was earned, or bought with wages that were earned by the husband or wife during the marriage. Once the marital property is divided and the divorce becomes final, a court is not likely to change the division. A share of a monthly pension paid as marital property to a former wife usually does not stop if she remarries.

Alimony usually means monthly support payments (or sometimes, a lump sum) paid by one spouse to the other "dependent" spouse. Often called "maintenance" or "spousal support," alimony is based on the ex-wife's financial need and the ex-husband's ability to pay, and may be modified after the divorce if either spouse's financial circumstances change. Alimony can be paid for a certain number of years or for as long as the ex-wife lives, but usually stops if she remarries.

Most of *Part Two* talks about getting a share of the pension as *marital property*, rather than as *alimony*. This is because divorce courts are more likely to award a pension share as marital property than as alimony.

But if you and your husband are negotiating your own property settlement or agreement, ask your lawyer whether you would be better off arranging to receive part of the pension as alimony. Your husband may agree more readily to give you a pension share as alimony, since this could make him eligible for certain alimony tax deductions. Also, your right to a pension share may be more protected if it is paid as alimony rather than marital property if your husband later falls behind on his payments to you or declares bankruptcy.

Does Your State Law Treat Pensions as Marital Property?

Some states treat all pensions as marital property, while other states treat only some pensions as marital property. However, even if the benefits *are* marital property, a court may not actually divide the pension. Instead, it might give you other marital property of the same value as your share of the pension.

The chances are that a court *won't* treat the pension as marital property and won't divide it if you were not married to your husband at any time while he was working under his pension plan.

A wife has the best chance of receiving a pension share during her ex-husband's lifetime if, at the time of divorce, he has retired and is already collecting his pension, or if he is at least eligible to retire and start getting his pension immediately. Many state courts will also divide a future pension if the husband has worked long enough to earn the right to receive a pension (or "vest" in the pension), even if he isn't eligible to collect benefits right away. An increasing number of courts now consider a pension to be marital property and will divide it even if the husband hasn't been on the job long enough to earn a pension.

If a court does not want to treat the pension as marital property, it may still consider the fact that the husband is entitled to a pension when determining how much alimony he can afford to pay.

Courts usually will not treat the same pension both as marital property *and* a resource for alimony or support payments.

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Disability Benefits

Getting a share of your ex-husband's benefits awarded to you as marital property may be more difficult if he receives a disability retirement benefit, disability insurance benefit, or workers' compensation. (Workers' compensation is a type of benefit paid to a person who has a job-related illness or injury.) A court that typically treats *retirement* benefits as marital property may say that *disability* benefits are the worker's separate property.

A regular (that is, nondisability) retirement benefit can be marital property because it represents "deferred compensation" from employment during the marriage, that is, part of his wages that were set aside for retirement benefits. A disability benefit, on the other hand, is not usually considered by the courts to be deferred compensation, but the courts may still classify it as marital property. To make this decision, the court may look to see what the disability benefit is designed to do.

A disability benefit often has more than one purpose and therefore may be treated as part marital and part nonmarital property.

The court is *more* likely to treat the disability benefits as marital property if it is meant to:

- *Compensate the Worker for Medical Expenses That Arise During the Marriage.* The reimbursement for the couple's medical expenses during the marriage is marital property.
- *Replace a Retirement Benefit the Worker Would Otherwise Have Received;* The part of the disability benefit that replaces retirement benefits earned during the marriage can be treated as marital property. When an employer offers both retirement and disability benefits, the disability benefits are often larger or payable earlier than the retirement benefits. The part of the disability benefits over and above the amount of retirement benefits earned during marriage would then be treated as the worker's separate property.

The court is *less* likely to treat the disability benefit as marital property if the benefit is meant to:

- *Replace the Worker's Future Wages Lost as a Result of the Disability.* Earnings after divorce are usually not marital property.
- *Compensate the Worker for His Own Pain and Suffering, or for a Specific Illness or Injury.* These are considered to be the worker's personal losses or impairments.

In some states, the law says that a disability benefit is never marital property. But this doesn't mean that you necessarily lose out entirely. If your husband is receiving a disability benefit that replaces a pension or retirement benefit, the court may agree to consider as marital property the *value of the retirement benefit* that is being replaced.

How Can You Find Out How Much the Pension Is Worth?

If the pension will be treated as a marital asset, it is important for you to know what the pension is worth. Most pensions are paid monthly over the worker's lifetime, and start at retirement age. The amount a husband is to receive generally depends on how many years he worked, how much he earned, how old he is when he retires, and how long a person his age is expected to live after retirement. For example, a pension of \$1500 a month payable to a retiree who is now 65 years old might be considered to have a lump sum value of \$130,000.

Even though he may collect his benefit as a monthly pension, you may need to know the "*lump sum value*" (sometimes known as "present value") of the pension today if you think you might want to trade off your share for other marital property of the same value. Some courts require pensions to be valued.

Whose Money Counts?

Occasionally, a court will say that a pension is worth no more than the amount of the *employee's* own contributions, that is, the funds that were actually deducted from each paycheck. This means that if the *employer* put money into the pension plan for the employee, that money won't be counted in valuing the benefits. The problem with this approach is that in a number of retirement systems, such as the military retirement system and many state and local government plans, *only* the employer pays in. Similarly, in most private company plans only the employer pays in. Even when the employee does pay in something, the employer usually pays in much more. In such cases, your lawyer may want to try to persuade the court that both employee *and* employer contributions should be counted in valuing the pension.

Using an Actuary

Your lawyer may feel that it is necessary to hire a "*pension actuary*" to value the pension. A pension actuary is a person who is an expert in the technical and mathematical aspects of pensions. An actuary can estimate the amount of the pension your husband is likely to receive in the future, and calculate the current lump sum value of the future monthly pension. The actuary can also help figure your share of the pension, and help you compare different methods of collecting your share. Usually an actuary just provides a written report for your lawyer, but sometimes it is also necessary for the husband's and wife's actuaries to testify in court when the couple cannot agree on what the pension is worth. The fact that there is not just one accepted method of valuing pensions is one of the difficulties in establishing your share of the pension at divorce.

How Is Your Share of the Pension Figured?

You are not automatically entitled to a certain amount of a pension. A former wife's share is usually determined by negotiations between the spouses or their lawyers or, if negotiations are unsuccessful, by the courts. There are several steps in figuring your share. What you will receive may depend, in part, on whether the pension can be considered marital property under state law. Most courts say that only "marital property" can be divided at divorce. Property that is not marital is "separate property." In some states, the courts will also award a portion of one spouse's separate property to the other spouse, if needed for a fair division of assets. In still other states, the law treats as divisible just about all the property that both spouses own at the time of divorce, no matter when it was acquired. But in deciding what is your share, the court may still take into account whether the pension was earned during the marriage.

Post-divorce early retirement benefits. What if your husband's pension plan sets up a special early retirement benefit only after the divorce? You should find out whether state law would allow you to claim such benefits as marital property. You are more likely to be able to share in newly- created early retirement benefits if they are based on your husband's employment while you were married, and are provided under the same plan that you have already been awarded an interest in. For example, if the new benefit is offered to everyone with thirty years of service and your ex- husband worked a portion of his thirty years during your marriage, you might argue (that a portion of the early retirement benefit is marital property. On the other hand, if the new benefit is a lump sum benefit that is paid out of a new plan or by the company itself rather than through the pension plan, you will be less likely to be able to claim a share of the benefit.

What Part of the Pension Counts as Marital Property?

Most often, only the pension benefits accumulated during your marriage count as marital property. If you and your husband were married during all the time that he worked under the pension plan, then the *entire* pension would normally be marital property. But if you were married for only part of your husband's career under his pension plan, then only *that part* of his benefits is marital property.

When Is the Marriage "Over"?

State divorce laws have different rules about when marital property *stops* accumulating. Some states say that marital property is the property that accumulates from the date of your marriage up to the date when the husband or wife moves out of the family home or files for divorce. Other states might say that it stops accumulating only when the divorce becomes final. You will need to find out what the state where you are divorcing says about when your marriage ends.

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Ways of Figuring Marital Property: The Time Rule

This section is intended to give you a rough idea of how courts and lawyers decide how much of the pension is marital property and how they figure your share of that amount.

There are a number of different ways of figuring the property portion of the pension. Explained here is the "*time rule*," one of the simpler methods often used by courts and lawyers negotiating property settlements. You will see how the rule can be used in different situations.

Generally, the time rule method says that the marital property portion of the pension is equal to a certain fraction of your husband's pension benefit. The top number in the fraction is the number of years your husband worked under the plan during your marriage. The bottom number is the total number of years your husband worked (or will work) the plan. Your share comes out of that fraction.

Note: To keep it simple, the numbers in these examples assume the marital property portion of the pension goes from the marriage up to the date of divorce, and that the wife's share will be 50 percent of the "marital property," which may be less than 50 percent of the whole pension. *Your own case may be decided under different rules.*

Here's how this formula might be applied by the court, or used in your property settlement to give you a *dollar amount* of the pension.

Dollar Amount

John has earned a pension of \$200 a month by working 20 years for his company. Jane was married to him for 16 of those 20 years. Therefore, the marital property portion is 16/20 of the pension. The court decides she is entitled to half of the part of the pension that was earned during the marriage. This means she will be entitled to 50 percent of [27] 16/20 of his pension of \$200 a month. The formula would be:

Example 1: Jane's share of the monthly pension is a *dollar amount*.

$$50\% \times \frac{\text{Number of years married while John worked under pension plan}}{\text{Total number of years worked under the plan}} \times \text{John's monthly pension} = \text{Jane's Share}$$

$$50\% \times \{16/20 \times \$200\} = \text{Jane's Share}$$

$$50\% \times \$160 = \$80$$

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The marital property portion of the pension is \$160. Fifty percent of that amount, Jane's share, is \$80 a month.

In this example, the husband had already stopped working under his plan and therefore knew the total number of years worked. He also knew exactly how much his pension benefit would be.

The same method can be used to figure Jane's share of a lump sum. Let's say the total lump sum value of John's pension is \$10,000. Jane's share of the lump sum would be \$4000. The formula would be:

Example 2: Jane's share of a lump sum as a dollar amount

$$50\% \times (16/20 \times \$10,000) = \text{Jane's share}$$

$$50\% \times \$8000 = \$4000$$

Percentage

Sometimes a court will specify that you will get a certain percentage of the pension rather than a specific dollar amount. This is especially likely if your husband won't be collecting his pension until years later, or if there is a chance his benefit will increase after the divorce. By using a percentage, the court doesn't have to know exactly what the pension benefit will be. In Jane's case, the formula would be:

Example 3 Jane's share of the monthly pension as *a percentage*.

$$(50\% \times 16/20) \times \text{John's pension} = \text{Jane's share}$$

$$(50\% \times 80\%) \times \text{John's pension} = \text{Jane's share}$$

$$40\% \times \text{John's pension} = \text{Jane's share}$$

Fifty percent of 16/20 (or 80 percent) is 40 percent. Therefore, Jane will get 40 percent of John's pension, whatever the amount. The dollar amount of her share will increase if his benefit goes up. In the same way her share would also go down if his benefit decreases or turns out to be less than expected.

Percentage As of a Certain Date

A court could purposely limit your share by specifying that you get a percentage of the pension earned only as of a certain date, such as the date of divorce. This means that the amount you receive will *not* increase after divorce even if your ex-husband's benefits increase. A court would be more likely to use this formula if your husband is not yet scheduled to receive his pension because he is still working at the time you divorce. The court might say that Jane's share is:
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Example 4: Jane's share of the monthly pension earned as of a certain date.

"40% of John's monthly pension earned as of the date of the couple's divorce"

Dollar Amount Plus Percentage Increase

The court could protect Jane against a possible decrease in John's benefits by using a combination of the exact dollar and percentage formulas. It could say that her monthly share is:

Example 5: Jane's share of a monthly pension as a dollar amount plus a percentage of the increase.

"\$80 plus 40% of any future increase in John's pension"

In this way she will be assured of getting *no less than* \$80, but she will also be able to share in benefit increases. (This helps protect Jane against any actions of John that might reduce her pension.) Another version of this formula might be:

"\$80 plus 40% of future cost of living increases in John's pension"

This formula would give Jane a portion of the cost of living increases that John might receive after retirement, but none of the increases he might receive due to his additional work or raises in salary.

Future Pensions

In cases where the divorce occurs while the husband is still working, the *total number of years worked under the plan* isn't yet known and neither is the amount of the pension benefit.

A court might decide to go ahead and figure your share as shown in *Example 1* by using only the number of years your ex-husband had already worked under the plan and only the amount of his pension benefit already earned.

Another approach would be for the court to assume that the husband will work until he is first eligible to start collecting his pension. For example, if John needed to work another five years in order to be eligible to retire, instead of calculating with the 20 years he had already worked, the court would use 25 years, the number of years of work he would have at retirement age. In that case, the court could use the estimated pension amount that John would have at retirement, based on 25 years of work. Let's say his benefit would be \$300 a month at retirement age.

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The formula would be:

Example 6: Jane's share of the *estimated future monthly pension as a dollar amount.*

$$(50\% \times 16/25) \times \$300 = \text{Jane's share}$$

$$(50\% \times 64\%) \times \$300 = \text{Jane's share}$$

$$32\% \times \$300 = \$96$$

Jane's share of John's future pension would be \$96.

Delayed Calculation

Sometimes courts prefer not to make so many guesses in order to figure a future pension share. Instead, the divorce court could issue an order that provides you a share of benefits, but doesn't give the exact amount. The court order would only show the formula to be used. Your exact share would not be figured until later. The formula would be:

Example 7: Jane's share of the *future monthly pension to be figured at John's retirement.*

$$50\% \times \frac{16}{\text{Total number of years worked under the plan}} \times \text{John's pension at retirement} = \text{Jane's share}$$

Jane's exact share would be figured once John started collecting his pension. If your court order or property settlement requires the plan to pay your share directly to you, then the order can say that when your husband starts collecting his pension, plan officials will figure your share according to the formula in the court order. Your lawyer should check with the plan first to make sure that this type of court order will be accepted by plan officials.

Disadvantage of the Time Rule

Although the time rule is a popular method of figuring marital property, critics say that its use may be unfair. It assumes that every year is worth the same in pension benefits; that is, it assumes that benefits increase by the same amount in each year under the plan. In fact, most retirement systems are designed so that the worker accumulates fairly small benefits in the earlier years of employment. Then benefits start to accumulate at a much greater rate once the worker has been on the job a number of years, begins receiving a larger salary, or gets close to retirement age. For this reason, your lawyer may want to use a different method of figuring the marital property portion of the pension if you were married only during the later years of your husband's work under his pension plan when he was earning better benefits.

Although the time rule is generally used for pension plans, there are certain types of plans where the time rule may not work to your advantage. Under one type of plan, known as a cash balance pension plan (see page 10 note above), a worker's benefit may increase very little or remain about the same for a number of years. Using the time rule for one of these plans might actually reduce the value of your share while you are waiting to receive it.

If your husband has benefits in a cash balance pension plan or a plan that may convert to a cash balance plan, talk to your attorney about whether the time rule is the best way to figure your share. You also may need to consult a pension actuary for further advice.

Figuring the Marital Share of a Retirement Plan.

The time rule is generally not used for retirement (that is, non-pension) plans, such as 401(k) or profit-sharing plans. Under these plans, it is more usual for the former spouse to get a specific dollar amount or a percentage of the account balance as of a certain date. If your husband began earning benefits under his 401(k) plan before you were married, figuring the marital share means that you would have to find out the amount of the balance in his account at the time you were married. Then you would add to that "pre-marital" balance the earnings on that amount from the date of marriage, and subtract the total (that is, the pre-marital balance plus its earnings) from the current balance. The amount remaining is the marital share to be divided at divorce.

Most retirement plan administrators will not make this calculation for you, but they should at least be able to provide you the information that you need, such as the previous rates of return on the plan's investments, so that you can ask a pension actuary or accountant to figure your share. If your husband wants to claim that part of his benefits are not marital property, then perhaps he -- and not you -- should be the one to get the information and pay the experts to make these calculations.

As you can see, the best method of figuring your pension share depends very much on your particular situation. There isn't a single formula that can or should be used in every case, unless your state's divorce law requires a certain formula. Your lawyer should be able to help you decide the best way to calculate your share.

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IMPORTANT: These examples are *not* meant to show how your court order or property settlement should be written to give you a pension share paid directly from the retirement system. Although a court order or a property settlement may describe the formula for figuring your share, the wording used will need to be more detailed than these examples and should follow the special rules that the retirement system may have for writing court orders. For instance, the retirement system may have a different name for the pension, such as "annuity" or "retired pay." Be sure to read the chapter in *Part Three* of this handbook about the retirement system involved in your case.

What Is Your Fair Share of the Marital Property?

If you plan to ask for a share of your ex-husband's pension as marital property, you need to know that courts, even within the same state, may award pension shares differently from case to case. Courts usually divide pensions and other assets "equitably," according to what that court believes is fair. But "equitably" is not necessarily "equally."

For example, if a woman is older, has been married for a long time, lacks the job skills and education to support herself, and has no pension, the court may award her more of her ex-husband's pension than if she is younger, well- educated, has job skills, or has a pension of her own.

In contrast, courts in California, New Mexico, and Louisiana routinely divide in half pensions and other property earned during the marriage. But unless you are divorcing in one of these states, don't just assume you should settle for half. In other states, the law says that the marital property is to be divided in half, unless husband or wife can show the court that a 50-50 division would be unfair. For example, you may be able to persuade the court to give you more than half the pension if you have been married a long time and have not worked outside the home, and there is not much other property to share in.

If husband and wife have both earned pensions, the court may award each spouse a share of the other spouse's pension, or, if the pensions are about the same size, the court may just award each his and her own pension. If one pension is larger, the couple may agree that the spouse with the smaller pension also receive half the difference between the two pensions. For example, if the husband's pension is worth a total of \$50,000 and the wife's pension is worth \$40,000, the wife might receive all of her own \$40,000 pension plus \$5,000 from the husband's pension. Each spouse will end up with \$45,000 in pension benefits.

Before or After Deductions: What Are You Getting a Share of?

The benefit amount your ex-husband actually receives is likely to be less than the official amount of his pension because taxes and insurance payments are often taken out of a pension before it is paid.

If you are to receive a percentage or fraction of the pension each month, you should know what will be deducted from that pension and whether the deductions are meant to affect the amount of your share. If your benefits are not supposed to be affected by your ex-husband's deductions, then your court order should say so. Your court order or property settlement needs to be very clear about whether your share is based on a pension amount figured *before* or *after* these common deductions.

- *Federal and State Income Taxes.* Most pensions are taxable. A retiree may normally choose to have income taxes withheld by the plan instead of paying the taxes himself. Your pension share may be less than you expected if your ex-husband has excessive amounts of taxes withheld.
- *Health and Life Insurance Premiums.* A retiree who continues to be covered by employer-sponsored health or life insurance may be paying for those benefits through a pension deduction.
- *Survivor's Pension.* Providing a widow's pension for a current or former wife usually requires the retiree to take a reduction in his own pension.

Court orders often use the words "*gross pension*" to mean the official amount specified by the plan, and "*net pension*" to mean the benefit that the retiree actually receives after deductions. However these terms don't always mean the same thing to everyone. *Your lawyer should make sure that your court uses wording that is absolutely clear to you, your husband, and plan officials.*

How Is Your Share Paid?

Once you have an idea how much your pension share might be, you and your lawyer will need to decide what the best way for you to receive your share. Although the rules of the retirement system and state divorce law may have some restrictions, you will need to make a number of decisions about the method and timing of payment of your pension share.

Pension Share or Other Property?

Would you be better off with a share of the pension itself, or should you accept other marital property or cash equal to value of your share of the pension? As an example, in some cases, the wife might want to agree to accept the family home rather than any part of the pension. In other cases, the law may say that the court has no power to give you a share of the pension itself, and can only give you other property or alimony. But if you have a choice and you are considering trading off your pension share, be sure to consider what other income you will have to live on during your retirement.

Who Will Pay?

If you decide to take a share of the 'pension rather than trading it off, do you want the pension benefits to be paid by your ex-husband or by the retirement system? (As noted in *Part One*, many retirement systems will send a pension share directly to the former wife if provided in a court order.) The advantage in collecting directly from the retirement system is that you might receive your benefits on a more regular basis. Benefits could be delayed if you have to wait for your ex-husband to send you a check each month after he gets his own check. Direct payment from the plan also protects you if your former husband should move out of state or out of the country. In addition, if your ex-husband should declare bankruptcy, you may have a better chance of preserving benefits paid to you by the retirement system.

Just keep in mind that retirement system rules for getting direct payment usually require a carefully written court order or property settlement that meets a number of technical requirements. This can mean your lawyer will be spending more time and effort on your case, costing you more money.

Payment Now or Later?

Will you get your pension share starting right after the divorce or will you get it later? Your payments might be delayed until your husband retires, or the court might not even make a *decision* about dividing the pension until after you are divorced.

Many couples, and a number of courts, prefer to see all the marital assets divided and paid out right away. The idea is that the couple will be really "divorced" and can then go their separate ways. Even if you cannot get your entire pension share out of the plan at the time of divorce (because, for example, your ex-husband has not yet retired, or his plan doesn't pay lump sums), the court might decide to award you other marital property equal to the value of your share of the pension.

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On the other hand, you may be forced to wait until your ex-husband retires if the court, state divorce law, or the retirement system says that a pension share cannot be paid to a former wife until the worker starts collecting his benefits. The court order or property settlement issued when you are divorced can provide that you get a certain share of the pension starting whenever your ex-husband retires and collects his own benefits. For example, the court might say that your share will be paid to you "if, as, and when" your ex-husband receives his pension. Rather than issuing an order at the time of your divorce, the court might instead "*reserve jurisdiction*" over the case, that is, agree to decide part of the case later, so that you and your ex-husband would have to come back when he's ready to retire to let the court figure the exact amount of your share and decide what form of benefit you are to receive (such as monthly benefit or lump sum). Having to wait to get your pension share might actually turn out to be a good thing, as you might then be able to share in any increase in his benefits since the divorce.

Your husband's retirement date isn't the only factor that can lead to delayed payment of your pension share. In some states, one or both spouses may ask the court to grant the divorce right away but leave the property division issues, including who gets the pension, to be decided later. This legal proceeding is sometimes called a "bifurcated" divorce.

One caution: If you will not be getting your pension share right away, make sure that your lawyer finds out in advance of the divorce how your pension rights could be affected if your husband remarries or dies during the period after the divorce is granted but before payment scheduled to begin. Remember that the pension rights of a divorced wife generally depend on the terms of a court-ordered property division or a property settlement. His death, for example, could mean you would lose all claim on the pension unless you had been awarded a widow's pension in a court order or property settlement.

If your divorce decree says nothing specific about starting payments, which would be true of a "reserved jurisdiction" or "bifurcated" divorce, then you also need to be concerned about what happens if your ex-husband retires and starts collecting his benefits or dies *before* the court gets a chance to say anything about your pension rights. One thing you might be able to do when you divorce is have a written agreement with him that he will not take any actions that might harm your future rights, such as applying for his pension, before the court has decided how the pension is to be finally divided. You should also consider getting a temporary court order providing for a survivor pension in case your husband dies before a final court order is issued.

Here is an example of what could go wrong if you don't have a court order or other agreement to protect your rights: Soon after the divorce, your ex-husband could leave his company and apply for his pension. As a single retiree, he would be free to withdraw his pension in any way the company permitted, which might include a lump sum. This would mean that he could get all his benefits out of the plan before you had a chance to claim your share.

Monthly Benefit or Lump Sum?

Once you know when you are to be paid, the next question is how, and in what form, you will collect your benefits. A typical method would be to collect your share monthly as the benefits are paid to your ex-husband. Your benefits start and stop when your ex-husband's benefits start and stop.

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If your ex-husband's plan or retirement system offers lump sum payments, you may be able to collect your own benefits as a lump sum. If the plan doesn't offer a lump sum, an alternative might be for your ex-husband to pay you the lump sum *value* of your share of the pension in installments out of his monthly pension. For example, if your share of the pension is worth a total of \$40,000, the court could order your husband to pay you \$1000 a month from his pension until a total of \$40,000, plus interest, has been paid out to you.

What Happens to Your Benefits After Your Ex-husband Dies?

Many divorced women have wrongly assumed that a pension share continues being paid for as long as they live. These women discovered, too late, that their benefits were payable only for the lives of their ex-husbands. To guard against an unexpected loss of benefits, be sure to ask your lawyer what would happen to your pension share if your ex-husband dies before you. What if he dies *before* starting to collect his pension? *After* he starts to collect? [38]

One solution is for your property settlement, to include a provision for a widow's pension. State divorce laws usually allow a couple to provide a widow's pension or other survivor benefit for the former spouse, and retirement system rules often permit the payment of a widow's pension after divorce.

Another possibility would be for your former husband to set up a life insurance policy that names you as beneficiary. If you agree to this arrangement, make sure the insurance is going to be fully paid by him and that you will remain as, beneficiary even if he remarries.

IMPORTANT: Some life insurance programs provided through the federal government allow employees and retirees to drop coverage or change the beneficiary at any time, no matter what their property settlement provides.

There are other ways to ensure that your retirement income lasts as long as you do. If a private pension is involved, it may be possible to have your share of the pension paid over your lifetime. (See page 74.) Or, if you receive your entire share of the pension at once, you may be able to invest it to provide lifetime income.

What Happens To Your Share If You Die First?

If your pension share was awarded to you as your marital property, then it would seem as if you should be able to leave it to whomever you choose in the event of your death. Under many plans, however, this is not the case. If you die before your entire share of the pension has been paid out, you may find that the remaining portion of your share automatically goes back to your former husband. The answer usually depends on the law that governs the pension plan or the rules of the particular plan. The plan may allow you to designate another person or your estate to receive the pension by filling out a beneficiary form provided by the plan. In most cases however, an unpaid pension benefit cannot be left directly to someone else through a will.

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What Happens To Your Share If Your Ex-Husband Becomes Ineligible To Receive His Pension?

If your former husband stops receiving his pension, for whatever reason, you also may be unable to receive the benefits you expected. This might happen if your ex-husband waives his pension, in order to receive another, greater benefit from a different plan or retirement system or perhaps - after being retired for several years -- he decides to return to work for his previous employer who stops paying the pension in the meantime.

The reasons why a pension might stop vary greatly from one retirement system to another. If you are negotiating a property settlement agreement, however your lawyer may want to include a provision in which your husband agrees not to take any action that would reduce or eliminate your pension benefit and that if he does, he will agree to compensate you for your loss. One solution would be for him to pay you alimony equal to what would have been your share of the pension that stops being paid.

If you have already lost your share of the pension benefits because of something your ex-husband did following the divorce, you should be sure to get the advice of a lawyer as soon as possible. Many courts have been sympathetic to divorced wives in this situation and have required former husbands to pay up.

What Is Your Fair Share of the Widow's Pension?

Even if you are to receive half of the retiree's pension during his life, you may want to ask for most or all of the widow's pension. Under many pension plans, the basic widow's pension is already reduced to about half the retiree's pension, since this survivor benefit is for one person, that is, the widow. In other words, if the retiree's benefit is \$1000 a month, the maximum widow's pension is likely to be about \$500 a month. If you are to receive half the retiree's pension (or \$500) during his lifetime, then you should ask for the entire widow's pension to ensure that your retirement income stays the same after your ex-husband's death. If you get only half the widow's pension, your pension benefits will drop from \$500 to \$250 (half of \$500) when he dies.

Will Taxes Affect Your Benefits?

A pension is usually taxable income and you will probably be taxed on your share. Whether you receive a share of the pension or other property in exchange for the pension, the form of benefit you receive and when you are paid will make a difference in the amount of taxes you and your ex-husband will each have to pay. *The general rule is that a divorced spouse is usually taxed on her pension share in the same way, that a retired worker would be taxed.*

It is important to find out how your taxes will be affected before the court rules on your pension rights or you agree to a property settlement involving the pension. Some courts require the husband and wife to find out this tax information before the court will make a decision on the pension division. This is most likely to happen if you will be getting your pension share soon after your divorce. If you won't be receiving your share for a number of years, the court may feel that the tax information is not needed since the tax laws could change before you collect.

Although benefits paid to a former spouse under a domestic relations order are usually considered to be taxable as her income, in some cases, benefits are taxed as the employee-husband's income. This would most likely be the case where you receive your pension share from your ex-husband rather than the plan, or where your former husband's plan is considered to be a "nontax-qualified" plan.

If your husband rather than you will be liable for the taxes on your share of the benefits, then the two of you should agree about whether his taxes will come out of your share, or whether he will pay the taxes in addition to your share. You might agree to reimburse him for the taxes he pays on your share, but your property settlement agreement should require him to first show you his tax return for the year in which you receive your benefits, so that you will know how much he actually paid in taxes on your share.

Child Support. Pension funds paid to a child as child support under a domestic relations order are considered taxable to the employee-parent, not the child. If your child is to receive a portion of your husband's pension benefits under a QDRO, make sure that the QDRO specifies the child as the "alternate payee," and not you. The benefits can still be sent to you on behalf of the child, even if the child is the alternate payee.

For more information on how pensions are taxed, see IRS Publication No.575, *Pensions & Annuities*, available from the IRS by calling (800) 829-3976. It also may be downloaded from the internet at <http://www.irs.gov>

If You Have Trouble Collecting Your Share: Garnishment

If your former husband stops paying court-ordered support, or fails to turn over your share of the pension as ordered, you may be able to force his pension plan to pay you what is owed. This is done by a legal procedure often called "*garnishment*" or "*attachment*." Federal law specifically permits certain retirement benefits to be garnished when alimony or support payments are overdue. These benefits include social security, railroad retirement benefits, federal civil service retirement, military retired pay, private pensions, and federal workers' compensation. Even though state and local government pension plans are not regulated by the federal government, benefits from these plans can often be garnished if your ex-husband fails to pay court-ordered support or fails to pay your pension share as ordered.

Typically, you would need to have your lawyer ask a state domestic relations court to issue a garnishment order. State law usually has rules about when a garnishment order may be issued. Both state *and* federal law have restrictions on collecting the overdue amount, the types of benefits you can get access to, how soon you can collect, and how much you can collect. Federal law spells out how your garnishment order must be written before it can be used to get benefits from private pension plans and the various federal retirement systems. Some state and local retirement systems also have special rules on enforcing garnishment orders.

Your lawyer would need to find out the rules for garnishment that apply to your situation [31]

After The Divorce: Is It Too Late to Get Your Share?

In most cases, a wife who expects to share in her ex-husband's pension must be awarded benefits at the same time the court divides up the other marital assets (unless the court "reserves jurisdiction" so that you can come back later to claim a pension share). But many divorced women have ended up without a pension share because they didn't know their husband had a pension, their lawyer did not bring up the matter of pension rights, or they didn't know that a pension could be a marital asset.

If you only become aware of your pension rights after your divorce, can you still get a share? Most often, the answer is no. Getting a pension share nearly always requires some sort of court order or legal action that you take against your former husband. Once the divorce and property division become final, courts are usually reluctant to let husband or wife bring before the court new matters that could or should have been decided at the time of divorce.

But some ex-wives have been able to win pension benefits years later. Your success will depend mainly on what happened to the pension at divorce and what your state law says about going back to court. Here are some questions to ask yourself to help figure out what are your chances for claiming a pension share now.

Was the Pension Overlooked?

If the pension was not awarded to either you or your husband, or even mentioned at the time of your divorce, you may still have a chance to get a share. In a few states, such as California and Texas, recent court decisions and new state laws have allowed a former wife to ask for a share of an "overlooked" pension years after the divorce.

IMPORTANT: If your ex-husband has died, you are probably out of luck as far as getting benefits goes, no matter what the reasons were that you weren't awarded a pension share at divorce. Once a retiree dies, there are usually no more pension benefits to be paid, unless *previous* arrangements had been made to pay a survivor. For you as an ex-wife, such an arrangement would usually mean that a court had awarded you a widow's pension or that, after your divorce, your ex-husband voluntarily named you to receive a widow's pension, assuming his retirement system allowed him to do so. Retirement systems rarely provide an *automatic* widow's pension to an ex-wife.

Was Your Ex-husband Awarded the Whole Pension?

It is most difficult to get a pension share awarded after divorce if the original divorce court awarded the entire pension to your ex-husband or if you signed a property settlement or separation agreement which provided the pension to your ex-husband. A new court will normally assume that you already had your chance to try to get part of the pension.

Were You Defrauded?

Occasionally, a former wife ends up without a pension share because, at the time of divorce, her husband concealed the fact that he had a pension, or deliberately misrepresented his benefits, or refused to provide important information about them. Unfortunately, once your divorce is final, a later court probably won't let you ask for a share based on his fraud because courts usually say that it is the responsibility of each party in a divorce case to investigate and prove the facts before the case is first decided. You may be in a better position to challenge his concealment, however if your property settlement contains a statement effect that husband and wife have each made a full disclosure of his or her assets.

Or a court may be more willing to give you another chance to claim those benefits if your ex-husband used threats or coercion to prevent you from taking advantage of your pension rights.

The laws on fraud in a divorce vary from state to state. If you believe there was a pension "cover-up," talk to a lawyer. State law may require you to make your claim within a short time - possibly within one year - after your divorce.

Are You Receiving Alimony?

Sometimes, even after the divorce, a court may agree that a divorced wife should be paid a pension share as alimony or support. *If you are already collecting alimony*, a court may be willing to increase your payment - and have the alimony paid from the pension - if you can show that there has been a "substantial change in circumstances." For example, if, compared to when you were divorced, you now need a greater amount of support, or your ex-husband has a greater ability to pay, you may be able to persuade the court to order that part of your ex-husband's pension should be used to increase your alimony.

The fact that your ex-husband has retired and started collecting his pension since your divorce is not necessarily a reason for the court to give you an increase in alimony. In fact, a worker is likely to have a lower income after retirement, which might give your ex-husband a reason to ask the court to *reduce* your alimony.

Did Your Lawyer Commit Malpractice?

A few ex-wives have successfully sued their former divorce lawyers for malpractice because the lawyers did not protect their clients' pension rights. You may have grounds to sue your former lawyer *if* you can show that the lawyer's wrong advice or lack of advice was the reason you didn't get your pension share. Your lawyer has the duty to research the law that applies to your case, and to find out what assets your husband has and how much they are worth.

But the fact that your divorce lawyer did not ask for a pension share does not necessarily mean that there was malpractice if state divorce law or the retirement system rules *at the time of your divorce* didn't definitely provide for pension division. Many of the laws relating to pensions have only been developed in recent years.

If the court agrees that there was malpractice, your former lawyer may be required to pay you an amount of money equal to the pension share you would have been awarded at divorce if you had been properly represented.

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If you think your divorce lawyer did not protect your rights, you may want to get the advice of a lawyer who specializes in legal malpractice to find out whether you have a case. Be sure to find out what legal time limits may apply to filing a malpractice case.

Will the New Pension Reforms Help You?

You may have heard about laws passed since your divorce pension rights to former wives. The problem is that most of these reforms are not retroactive: that is, they do not right old wrongs. In general, the law that applies to your case is the law that was in effect at the time your divorce became final.

Although Congress has enacted many protections for spouses, there is still *no* federal law that *requires* pensions to be divided. The decision about whether to divide the pension remains with courts. But you should read the section in *Part Three* of this handbook concerning the particular type of system involved in your case to see how changes law might affect you.

If your ex-husband worked under a state or local government retirement system, you or your lawyer may want to contact that retirement system to find out whether there have been any changes in plan rules that would apply to already divorced spouses.

While a number of state divorce laws have improved and now say that pensions *must* be treated as a marital asset at divorce, most of these state law changes apply only that take place *after* the laws go into effect. Although there are rare exceptions, these new laws usually do not authorize a court to reconsider a final divorce decree or make a pension award after divorce.

Should You Take Action?

If you believe you did not get the pension benefits to which you were entitled, talk to a lawyer who specializes in family law to find out what the law says about your situation. This section has given only general guidelines about getting a pension share after divorce: the laws in this area can and do change, usually in favor of ex-wives.

If your lawyer says you might be successful in claiming a pension share now, then you will need to figure out whether going back to court would be worthwhile. If you would be asking for a share of a pension as marital property, keep in mind that, at best, you would probably be able to share in only that part of the pension earned during your marriage.

If you were divorced years ago and most of your ex-husband's work under his retirement system took place *after* your divorce, then it is likely that you could share in only a small part of his pension. Also consider: If you do win your case, how will you *collect* your share? What can you do if your ex-husband refuses to pay you?

Compare the benefits you stand to gain against the necessary time and expense of pursuing legal action.