



*Divorce and Retirement:*  
How to Take Control of  
Retirement Benefits



**WISER**<sup>®</sup>

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 pensions and 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, as well as Kathy Stokes Murray. Thanks also to Cheryl Gannon, Claire Moshenberg, Martha Patzer, and Laurel Beedon.



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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.”*

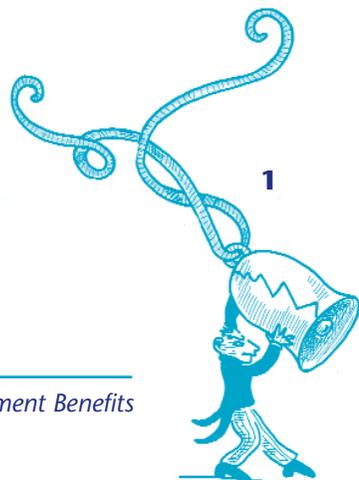
*Marty Miller, 2009*

## *Introduction*

When you’re in the midst of a divorce, you have to juggle so many things. The emotional toll itself is hard enough to manage. You need to add to this all the practical issues — and there are many. You may still have the kids living at home. And 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. Oh, and then there’s coming up with ways to make it on your own financially.

One practical issue that women often overlook 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.





# The Importance of Retirement Benefits

Let's start with the fact that retirement benefits are not automatically split during a divorce. Just like other marital assets, a divorce court judge or an agreement between you and your spouse divides the benefits. Find out as much as you can about the benefits earned by you and your husband during the marriage. Then make sure you and your lawyer protect your right to those benefits.<sup>1</sup>

Retirement benefits come from a variety of employer-provided plans — pension plans, 401(k) plans, deferred compensation plans, and 403(b) plans, among others.<sup>2</sup> Note that your spouse may have 401(k) assets sitting in an Individual Retirement Account (IRA), if he changed jobs during your marriage. Make sure you consider all former employers, because any type of employer can sponsor retirement benefits.

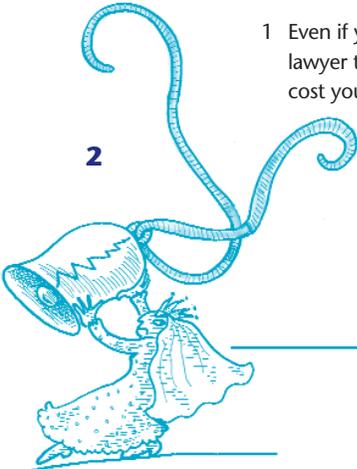
## Retirement Benefits as Marital Property

The divorce law in just about every state considers retirement benefits earned by either husband or wife 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, especially when it comes to specifying what retirement benefits are “marital property.”

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

2 This booklet does not discuss Social Security benefits. 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](http://wiserwomen.org).

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You need to ask two questions:

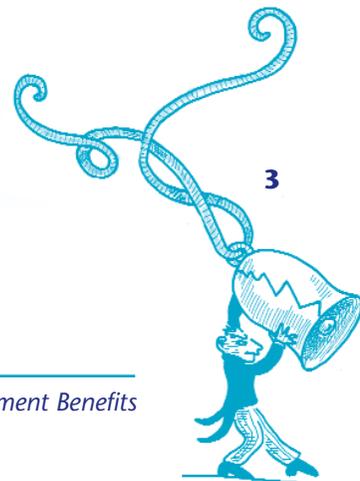
**1. What benefits are divisible?** All retirement benefits earned during the marriage may be divisible depending on state law. These include defined benefit plans and defined contribution plans, such as 401(k) and 403(b) plans. States differ in what types of benefits they consider marital property. For example, Maryland considers disability retirement benefits *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 husband. Find out whether or not your husband currently receives benefits. Contact your current and former employers to find out about your benefits. You could ask your husband for information on his benefits, or you could go directly to his current and former employers. Before releasing this information, the employers might require your husband's written authorization or an order from the court.

**❁ Be clear on this critical point:** have all the information about your husband's retirement benefits *before* you divorce. It is nearly impossible to go back to court and ask for a share of your ex-husband's benefit that you learn about after the fact.





## Negotiate an Agreement or Let the Court Decide

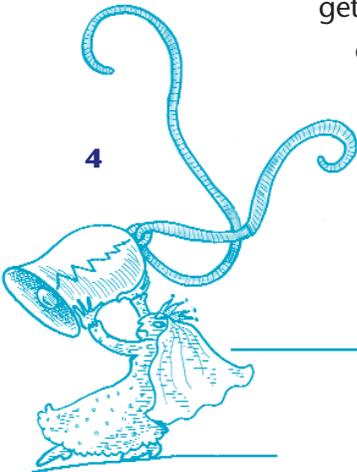
It is usually beneficial to both spouses in a divorce to negotiate a written property settlement. A property settlement agreement usually goes into detail about who pays what and who gets what. This includes alimony and child support, child custody and visitation, the home, cars, investments, personal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

## Options for Dividing Retirement Benefits

You and your husband 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 husband's retirement accounts have a total value of \$100,000 and yours totals \$60,000, the property settlement agreement could indicate that you will keep all your benefits and get \$20,000 of his benefits. In this scenario, each of you ‘equalizes’ at \$80,000.

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



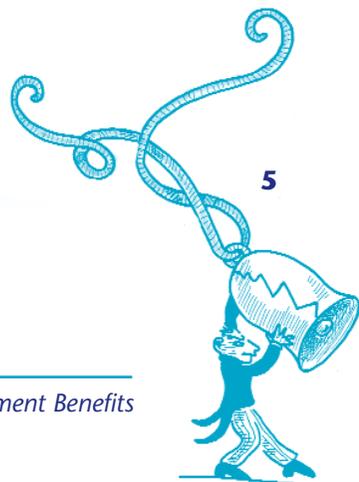


Think carefully before waiving your right to pension benefits in exchange for your husband's share of the house. This is a common arrangement but not always the best choice. While owning the house may seem like the best option, you may find after just a few years that you cannot afford the mortgage, taxes or upkeep. Or you could decide to sell the house a few years later and incur a hefty capital gains tax. Keep in mind that the pension benefits you walk away from could come back to haunt you when you reach retirement age.

## Get a “Qualified Domestic Relations Order” (QRDO)

If you plan to ask for a share of your husband's retirement benefits, you need a *qualified domestic relations order* or QDRO. (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 husband is responsible for preparing the QDRO and paying the related fees.

**❁ 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.





*"When I was going through my divorce, the best advice I received was to never stop asking questions. Talk to everyone you know until you get the information you need. My divorce was complicated, but I didn't allow that fact to interfere with my QDRO and the retirement income I was entitled to under the law."*

*Debbie Hillmer*

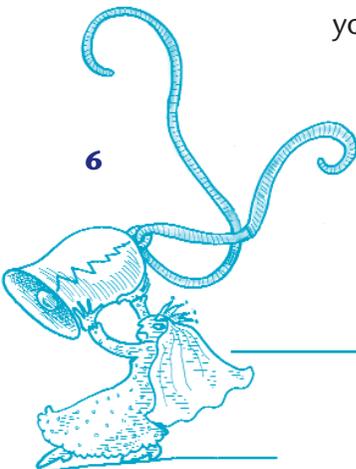
## How to minimize QDRO costs

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 husband's share of the account.

Be sure your lawyer checks with the plan administrator upfront 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 should be able to negotiate this with your spouse.

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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 Issues for the QDRO

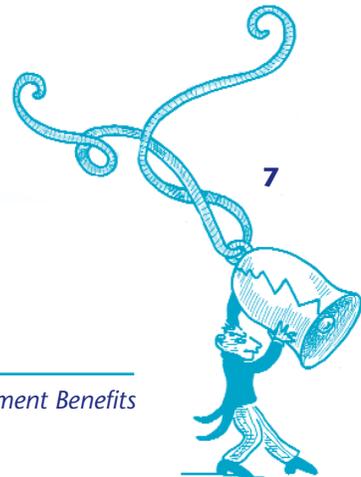
Both your property settlement agreement and QDRO should provide details about your share of the benefits, such as:

**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 husband is still working under the plan or retired.

You might receive payment immediately after you divorce, or you might have to wait until your husband reaches retirement age or actually retires and applies for his 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 husband 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.

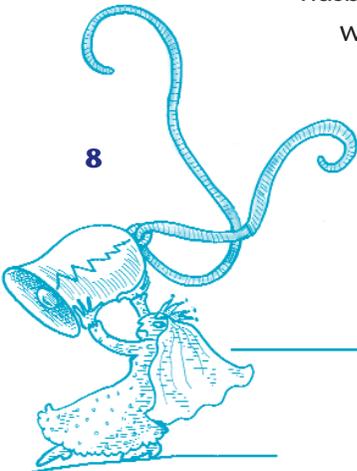
**What if you die first?** If you die before you receive all your benefits, what happens to your remaining share? Does it revert to your ex-husband? Or to the pension plan? Or can you designate a beneficiary (on a form the plan provides) to receive these benefits? Ask your lawyer about your options. (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 get 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 husband have a loan from the plan?** Some retirement plans, such as 401(k) plans, typically allow employee loans. Whether the plan deducts the loan amount from his share or yours depends

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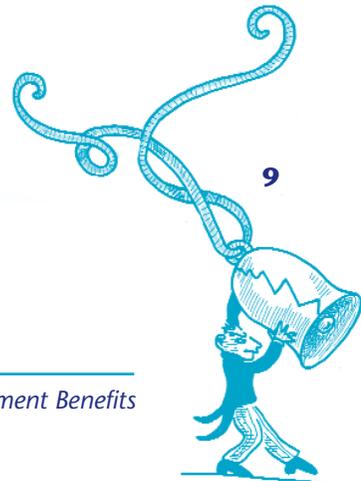


on when and for what reason your husband took the loan, and what your state's divorce law says about marital debt.

**What tax will you owe on your share?** 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](http://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 hard. That may be the understatement of the decade. It is very important that you educate yourself ahead of time about your rights to retirement benefits in a divorce. Most lawyers are well-versed in family law and retirement benefits. If not, they usually 'farm out' the more difficult aspects. 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.

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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.

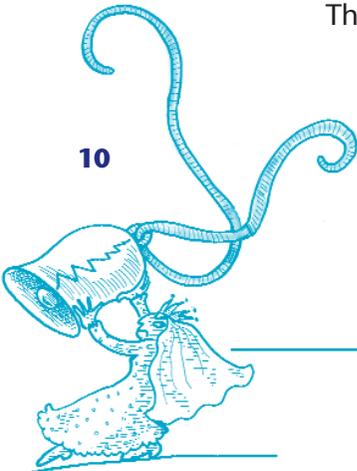
Materials available on the Resource Center's website for personal use, or for distribution through an agency or organization.

WISER's website address is [www.wiserwomen.org](http://www.wiserwomen.org).

The Resource Center's website can be reached from WISER's home page.

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



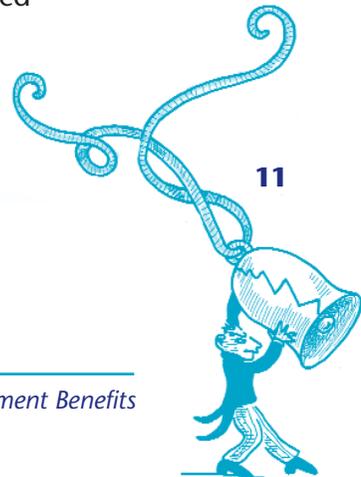


## Appendix 1.

### Ten Ways to Avoid Losing the Pension During a Divorce

Ask your lawyer these questions! Don't assume your lawyer knows about the many federal and state laws that set rules for pension splitting.

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 husband'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 he dies? Should I be getting 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 my former husband do in the future that would 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 Pensions and Divorce**

These resources are available on WISER's website at [www.wiserwomen.org](http://www.wiserwomen.org):

***WISER Special Report:***

*7 Key Questions You Need to Ask Before the Divorce is Finalized*

***WISER Fact Sheets:***

*Credit and Divorce*

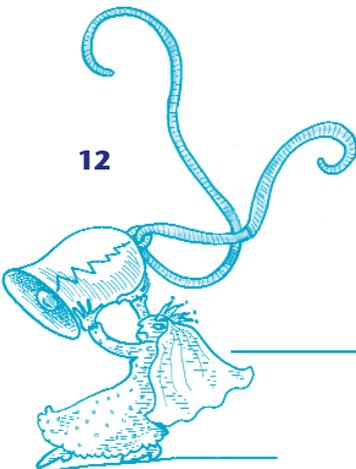
*Divorce Resources*

*IRAs and Divorce*

*Pensions and Divorce*

For additional information, you can contact WISER by e-mail at [info@wiserwomen.org](mailto:info@wiserwomen.org) or write to WISER at

1146 19th St. NW Suite 700  
Washington D.C. 20036





## Appendix 3.

### Pension Counseling Projects

The Administration on Aging pension information and counseling projects provide free pension and retirement savings plan counseling and assistance to older individuals.

#### **Pension Rights Center**

1350 Connecticut Avenue, NW Suite 206  
Washington, DC 20036  
202-296-3776  
[www.pensionrights.org](http://www.pensionrights.org)

#### **Pension Help Centers:**

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##### **California Pension Rights Project**

California Senior Legal Hotline  
Serving CA, NV, AZ and HI  
Local: 916-930-4911  
Toll free: 866-413-4911

##### **Chicago Pension Rights Project**

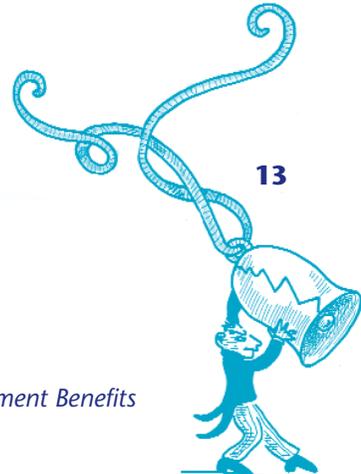
312-341-1070

##### **Iowa**

Pension Rights Office  
Iowa Legal Aid  
Serving IA  
Local: 515-282-8161  
Toll free: 800-992-8161

##### **Michigan**

Michigan Pension Rights Office  
Elder Law of Michigan, Inc.  
Serving MI, TN, and parts of PA  
Toll free: 866-735-7737





### **Minnesota**

Pension Rights Office  
Minnesota Senior Federation  
Serving MN, WI, ND and SD  
Toll free: 866-783-5021

### **New England**

Pension Assistance Project  
Serving CT, ME, MA, NH, RI and VT  
Local: 617-287-7307  
Toll free: 888-425-6067

### **New York**

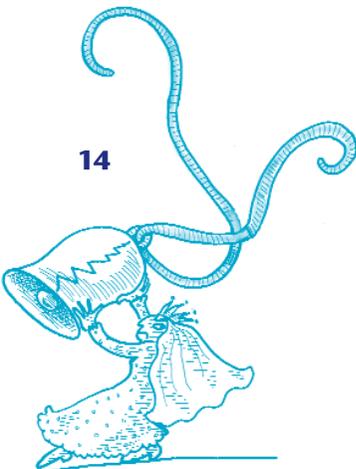
Pension Rights Office  
South Brooklyn Legal Services  
Serving NY and NJ  
Local: 718-237-5500  
Toll free: 800-355-7714

### **Ohio**

Ohio Pension Rights Office  
ProSeniors  
Serving OH, KY, and parts of PA  
Toll free: 866-735-7737

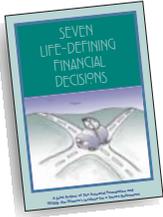
### **Texas**

Pension Rights Office  
Texas Legal Services Center  
Serving TX, LA, MO, and OK  
Toll free: 800-443-2528



# WISER Publications

To request one copy of the following WISER publications, please check the box next to each publication you would like to receive. To request two or more copies of any of the publications, please contact WISER for pricing information (to cover shipping and handling).



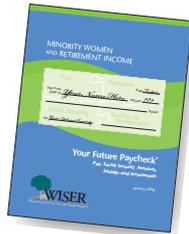
- Seven Life-Defining Financial Decisions:** Making the most of life's key decisions—from careers and marriage to savings and retirement, consumer guidebook offers tips for making the right choices. (\$6.00)

## WISER's Quarterly Newsletter

- WISERWoman**  
(\$15 for one year)



- Minority Women and Retirement Income—Your Future Paycheck:** From the full report, this report focuses on minority women's pay, Social Security, pensions, savings and investments. (\$5)



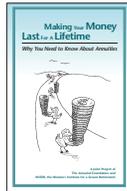
## WISER Special Reports (\$3)

- Special Report: and...the Pay Gap's Connected to the Retirement Gap
- Special Report: Widowhood: Why Women Need to Talk About This Issue
- Issues for Elders: Predatory Lending and Tips for Avoiding Scams
- Special Report on Divorce: Seven Key Questions You Need to Ask About the Pension
- Divorce, A Time for Caution: The 12 Worst Mistakes Lawyers Make in Preparing Pension Orders
- Special Report on Long-Term Care Insurance
- Special Report: The Effects of Caregiving



- Financial Steps for Caregivers:** What you need to know about money and retirement. (\$4)

- Making Your Money Last for a Lifetime: Why You Need to Know About Annuities** (\$3)



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Enclosed is my check payable to **WISER** in the amount of: \$ \_\_\_\_\_

Please send payment to **WISER** Women's Institute for a Secure Retirement  
1146 19th Street NW • Suite 700  
Washington, DC 20036



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www.wiserwomen.org  
info@wiserwomen.org



## *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 fair pensions and adequate retirement income through research, workshops, and partnerships.*



WISER was founded in 1996 with a grant from the Heinz Family Foundation. Since then, it has received financial support from numerous individual donors and a host of charitable foundations. WISER was also awarded a highly competitive grant from the U.S. Administration on Aging to launch the National Education and Resource Center on Women and Retirement Planning.



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