

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[Max Rodden](#) is a North Carolina Bar Board Certified Family Law Specialist and has been practicing family law since 1991. He represents clients in all aspects of family law, and has extensive trial experience at all levels of North Carolina courts including district, superior, special proceedings, juvenile, small claims, administrative proceedings, the Court of Appeals and the Supreme Court.

Division of Retirement Benefits between Former Spouses

May 24, 2019 | by

A common concern among spouses facing separation and [divorce](#) is the prospect of dividing their retirement accounts because of the misconception that retirement accounts have to be liquidated to be divided, resulting in taxes and penalties for early withdrawal. There are alternatives to liquidating the account and dividing the funds remaining after taxes and penalties.

Individual retirement accounts, [401\(k\)s](#), and retirement accounts similar to them contain funds that accumulate in ways that involve tax advantages to the owners of the accounts. The value of these types of accounts is derived from the value of the investments contained in them, such as stocks, bonds, or mutual funds.

It is common knowledge that because of the tax benefits associated with retirement accounts, funds cannot be withdrawn from them without taxes and penalties being imposed. Even if the account owner is willing to pay the taxes and penalties, he or she still might not be allowed to withdraw funds from the account due to certain restrictions that apply. Under normal circumstances, retirement accounts may not be transferred to another person during the life of the account owner.

In light of these restrictions, legislation was enacted to allow for the division of retirement accounts in the context of separation and divorce through a special kind of court order. To accomplish the division of a retirement account, the financial institution or government department handling the account must approve the wording of the order, so orders to divide retirement accounts are often referred to as qualified domestic relations order or by the acronym [QDRO](#). Orders for government plans, such as those for teachers or military service members, have different names and corresponding acronyms, but the effects are the same. The [Plan Administrator](#) is the financial institution that handles the account for nongovernmental plans and is responsible for carrying out the order. The plan administrator or government department administering the account often provides literature on the procedures and guidelines for the preparation of orders to comply with the internal requirements and governmental regulations concerning the division of retirement funds.

The information in this article generally applies also to retirement benefits that represent a future stream of monthly installments, often referred to as a pension. A spouse's right to receive a pension is often an asset to be divided as part of a divorce. With some exceptions outside the scope of this article, the pension payments are usually divided when they are received. The amount of time the marriage coincided with the time of employment during which the pension was earned dictates the portion of each payment paid to each spouse.

Under circumstances of a divorce when division of retirement benefits is appropriate, the account or pension is divided according to the terms of the applicable court order. In the case of a lump sum type of account, the spouse who already owns the account retains his or her share of the account while another tax-deferred account is established for the other spouse. This process occurs without the withdrawal of tax-deferred funds nor any taxes or penalties. The spouse who receives the new tax-deferred account should seek the advice of a financial adviser or tax professional about how to proceed after the new account is established. In the case of a pension, the government department or financial institution handling the retirement benefits typically sends each of the spouses his and her share of each payment as directed by the court order.

Court orders dividing retirement benefits typically contain details related to various contingencies, designation of beneficiaries, survivor benefits, timing of receipt of benefits, optional forms of benefits, and allocation of associated costs. These details are often complicated and involve important rights for each party going through separation and divorce. A spouse must assert his or her marital rights to the other party's retirement benefits in a timely manner or those rights could be lost. Therefore, a family law attorney who has experience with orders regarding retirement benefits should be consulted about preserving a spouse's right to the other spouse's retirement assets, the potential need for related orders, and preparation of such orders.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, North Carolina 27609

Phone: 919.250.2000
Fax: 919.250.2100

COLUMBIA OFFICE

1720 Main St.,
Suite 104
Columbia, SC 29201

Phone: 864.751.5523
Fax: 888.784.2250