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**The Difficult Task of Handling Pensions in a Divorce**

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The division of retirement benefits in a divorce can be more complicated than most divorcing couples imagine. Following is an explanation of the two most common pension benefits, a pension plan and a 401(k), and how the Courts have determined they should be handled in most divorce cases.

Pension plans typically have no cash value and can't be liquidated until retirement. The other, 401(k) plans, do have a cash value based on pre-tax dollars and can be liquidated before retirement subject to tax penalties. When both spouses have the same type retirement benefit, the division of their benefits is relatively straightforward. It's when one spouse has a pension plan and the other has a 401(k) that the division of their benefits becomes complicated.

Pension plans can be funded by an employee's own contributions, an employer's contributions, or both. If an employee contributes to his or her pension, then it is easier to see how that pension is indeed a marital asset. However, even pension plans funded entirely by an employer's contributions are distributable as marital assets "to the extent that it has a reasonably ascertainable present value" and the employee's interest in it is "more than a mere expectancy." The party seeking to include the pension fund as a marital asset bears the burden of proving "a reasonably ascertainable value." This is accomplished by hiring an actuary skilled in pension valuation.

Once it can be proven that the pension holder has a valuable vested interest in the pension plan, it is presumptively considered a marital asset. The rationale for including noncontributory pension plans as marital assets is that such plans must be deemed to be bargained-for consideration in lieu of a higher present salary. If, instead of the pension, the employer had offered higher wages, these monies would have been available to the parties during the marriage. The result then would have been either a larger marital estate available for distribution upon divorce or at least a higher standard of living enjoyed by both parties during the marriage. Thus, any vested pension which is deemed a marital asset should be distributed or accounted for even if the plan is subject to the contingency that the employee survive to a certain age or work a specific number of years.

Deferring distribution of pension benefits until the benefit is received by the pension-holding spouse is one acceptable method of distributing that marital asset. However, it is also acceptable for the Court to award to the non-pension holding spouse a cash amount equivalent to the pension holder's share of the pension benefits while allowing pension holder to retain the entire pension itself. The only requirement is that the award result in a fair and equitable distribution of the marital estate.

If you are contemplating divorce and have pension questions, feel free to contact me. I'm happy to help.