

# Social Security & Pensions

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STARK & STARK

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The allocation of Social Security Benefits and pensions in a divorce are often confused. They are, in fact, separate and distinct issues.

Under Social Security Law, a divorced person is entitled to a “spousal share” of Social Security benefits simply as a result of having been married to a wage earner for more than 10 years. If a person meets Social Security’s defined criteria, they will receive a spousal share of a former spouse’s Social Security benefit regardless of the divorce agreement or Judgment.

The “spousal share” of Social Security is not a deduction from a former spouse’s Social Security benefit. It is the spousal share of Social Security benefits payable in addition to the wage earnings social security, pursuant to Social Security law and regulations. You can easily check your eligibility for spousal Social Security benefit by simply accessing the Social Security website online or visiting your local Social Security office.

On the other hand, pensions benefits are marital assets which are subject to equitable distribution and must be specifically addressed as a part of the divorce. Both you and your spouse’s pension should be analyzed and evaluated usually by an outside consultant retained for the purposes of valuing the pensions.

***Generally speaking, several things must be done with regard to pensions:***

First, the “marital share” of the pension must be determined. Very often a portion of a person’s pension has been accrued for work efforts prior to the marriage and/or will continue to increase as a result of work efforts after a termination of the marriage. A simplified version of the formula used to determine the “marital portion” is to develop a fraction in which years of the marriage is the numerator (the top number) and the person’s total years in the pension fund or plan is the denominator (the bottom number).

Sometimes the actual value of the pension needs to be determined so that one of the parties can be bought out of the pension plan. In other cases, the actual value is not relevant because the parties are going to share the actual pension payments when and if they are received.

In other cases, the retirement funds are actual funds on deposit to the credit of the person’s account. 401(k) plans, IRA accounts and other payroll

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withholding accounts can be easily divided just as if they were bank accounts. However, the recipient's share must be placed into a similar IRA or bank account, or there will be an income tax liability.

In every case in which one or both of the parties participates in any kind of pension or retirement fund, the nature of that fund, its value and the appropriate methodology for its distribution must be carefully analyzed and considered. In most cases, you will have alternative choices as to how you wish to distribute your pension funds to your spouse or, conversely, how you wish to be credited for the value of your spouse's pension fund or accounts.

If there is to be a distribution of the pensions, it must be done by a Qualified Domestic Relation Order (QDRO). Unless that QDRO is prepared, signed by the Judge and filed with the pension administrator your right to the distribution of any pension benefits may be lost.

The Judgment of Divorce itself is not adequate to accomplish a transfer of pension benefits.

In addition to the benefits or value of a pension fund and account, there is often a death benefit payable to a designated beneficiary in the event of the person's death before or after retirement.

If you are to receive any death benefits or are free to designate the beneficiary of our own pension, you must make those beneficiary changes with your pension administrator. If they are not made, there will likely be very complex, difficult and expensive litigation in the event of either party's death.



*Robert J. Durst II is Chair of the Divorce Group of Stark & Stark and is certified by the New Jersey Supreme Court as a Matrimonial Attorney and by the National Board of Trial Advocacy as a Civil Trial Attorney.*

*Mr. Durst is a frequent lecturer on Family Law topics, was a Co-Founder of the New Jersey Summer Family Law Institute and is currently the Co Director of the American Trial Lawyers annual Boardwalk Seminar on Family Law. His leading lectures include a nationally known presentation on the distribution of stock options, the use and distribution of life insurance, and an original series on evidence in divorce cases.*