Premarital Assets: Is What's Mine Actually Mine? 401K Plans and IRAs

May 11, 2022 | by Cimmerian Morgan

During a divorce, one of the most frequent questions asked is "What happens to assets that were owned prior to the marriage, such as 401k plans and IRAs?"

A common misconception in New Jersey is that all assets held at the time of a divorce are subject to equitable distribution. In truth, there are several exceptions to consider. One of the most common exceptions is that assets acquired prior to the marriage may be exempt from equitable distribution upon a divorce.

As an example, if you individually owned a 401k plan or IRA prior to the marriage and did not make further contributions to the 401k plan or IRA during the marriage, then it would remain your separate property upon a divorce and your spouse would not have a marital interest in the 401k plan or IRA.

However, if contributions were made to your 401k or IRA plan during the marriage, then those marital contributions, plus any growth on those contributions, would become a marital asset and would be subject to equitable distribution upon a divorce. The premarital contributions and any growth on those contributions would continue to be exempt from equitable distribution.

Rollovers and Comingling of Retirement Assets

Another question frequently asked regarding premarital retirement assets is "What happens in a divorce if I rolled over my premarital 401k plan into an IRA during my marriage?"

If no contributions were made to the 401k or the rollover IRA during the marriage, the rollover IRA is not subject to equitable distribution. If contributions were made during the marriage, then a portion of

the rollover IRA would be marital and subject to equitable distribution. The assistance of an accountant can be beneficial in differentiating the premarital portion of the IRA from the marital portion. Choosing an attorney who works collaboratively with such accountants for this purpose is important.

In other situations, the other spouse's name may have been added to the IRA during the marriage. In that instance, the asset may be deemed by the court to have been "commingled," meaning that premarital funds were blended with marital funds, therefore making a substantially greater portion, or all, of the asset subject to equitable distribution.

Dividing the Marital Portion of a Qualified Retirement Account

Once the marital portion of a 401k or IRA has been determined and distinguished from any premarital portion, a particular financial instrument is then needed to transfer 50% of that marital portion to the other spouse. In the instance of a 401k, an instrument known as a Qualified Domestic Relations Order ("QDRO") is needed to effectuate the transfer without incurring taxes or penalties. There are several companies that provide this service relatively inexpensively. It is important, however, that you retain an attorney and a QDRO expert familiar with the law on the subject to make sure both your settlement agreement and the QDRO are properly written.

With regard to IRAs, the marital portion can generally be divided more simply by the entry of "transfer orders" or similar orders from the court directing the institution holding the IRA to transfer 50% of the marital portion to the other spouse. Once again, it is essential to retain an attorney who has a command of the applicable law and will properly draft the necessary settlement agreement and transfer order.

In sum, the portion of retirement assets acquired prior to the marriage is generally exempt from equitable distribution, but proper techniques must then be employed to separate the premarital value of the retirement assets from their marital value upon equitable distribution. A skilled family law attorney is essential to ensuring that this process is undertaken correctly.