



The Basics 2/27/2008 12:01 AM ET

## How divorce hits your 401(k)

If your marriage is breaking up, here's one more thing to think about: The major effect it'll have on your employer-sponsored retirement plan.

By [divorce360.com](http://divorce360.com)

You've worked hard over the years and have set aside a big nest egg for your retirement through your company's 401(k) plan. Or perhaps your spouse has been the breadwinner while you've taken care of the kids, but you know the "family" 401(k) is sizable.

What you might not have anticipated are the consequences divorce could have on an employer-sponsored retirement plan. Here are some commonly asked questions and answers:

**Q: Is a 401(k) marital or separate property in the case of divorce?**

**A:** Typically, the amount in a 401(k) accumulated during a marriage is considered marital property.

**Q: I know my spouse has a large 401(k), and I'm afraid that if he thinks I might file for divorce, he'll borrow from the plan or make withdrawals. How can I protect myself?**

**A:** This is a potential problem for dependent spouses. Some plan sponsors or employers require spousal consent for an employee to take out a loan or make a withdrawal from his or her 401(k).

But this depends on the plan document of the employer. Most employers do not require spousal consent. Once a divorce is pending, you can call the plan's record keeper and ask him or her to flag the account so your spouse cannot take out a loan or withdraw from the account. Some record keepers will do so.

**Q: By what mechanism is a 401(k) divided in divorce?**

**A:** It's split up through a qualified domestic-relations order, or QDRO. That's a decree, order or property settlement under state law relating to child support, alimony or marital property rights that assigns part or all of the participant's benefits to an alternate payee. Generally the alternate payee is the spouse, but it could be a child or another dependent.

**Q: Can I avoid an early-withdrawal penalty if I cash out part of my share of a 401(k) that I receive during divorce proceedings?**

**A:** Yes. When the 401(k) is divided, you, as the alternate payee, have a one-time opportunity to take out 401(k) money without paying the normal 10% income tax penalty for withdrawing before age 59½. However, it is likely that you would have to pay income tax on any distribution.

### Video on MSN Money

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▶ [The 2 types of divorce](#)

Even a prenuptial agreement doesn't guarantee a separation will go smoothly.

**Q: If I'm the alternate payee, what can I do with my share of the 401(k)?**

**A:** If you want to keep your share of the 401(k) in a tax-deferred account, you can roll it into an individual retirement account. The benefit to this option is that you can continue to contribute to the account, and you'll have a wide range of investment options.

Alternatively, you could stipulate in the QDRO agreement that you'd like to leave your share in the existing 401(k) plan. The plan's administrator would create a separate account for you. However, your ability to add and withdraw from this account might be tied to your ex-spouse's retirement plan. You may find that by rolling your share into an IRA, you'll have more autonomy over your money.

*This article was reported and written by Elizabeth Cox for divorce360.com.*

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