



# PROFESSOR LEX

BY HARVEY I. HAUER

**Dear Professor Lex:**

**I have a divorce case in which my client has a 401(k). His 401(k) was well funded before his marriage. During his marriage, his 401(k) appreciated in value. While my client put some of his earnings during the marriage into the 401(k), we can demonstrate that a portion of the appreciation from the date of the marriage to the present was due to the appreciation of part of the premarital investments. We would like to segregate the appreciation of the premarital investments from the rest of the 401(k)'s appreciation, as it should be treated as separate property. Do you think we will be successful in making this separate property claim?**

Dear Practitioner:

A case with similar facts as yours is *McNamara v Horner*, 249 Mich App 177 (2002). In *McNamara, supra*, "defendant contend[ed] that because each party had made contributions to their respective retirement funds and TDAs before the marriage, they were entitled to have part of the appreciation from the[ ] accounts excluded from the marital estate." *Id* at 183-184. However, the Court of Appeals "disagree[d]..." with that contention. *Id* at 184.

The Court of Appeals reasoned that:

while there is evidence that the parties contributed the same percentage of their salaries to their respective retirement plans, there is no evidence that the parties contributed an equal dollar amount

to their retirement plans during the marriage. Instead, the evidence only indicated that each party contributed a percentage of their income to the plans and that they each contributed \$9,500 a year to their separate TDAs. Further, the evidence indicated that these funds were commingled with funds each party contributed before marriage. Thus, the assets in these "premarital accounts" did not increase in value because of "wholly passive" appreciation, *Reeves [v Reeves, 226 Mich App 490 (1997)]*, but instead by additional contributions, as well as appreciation. Thus, because of the parties' commingling of premarital and marital assets, it is not possible to accurately determine the premarital appreciation of these assets.... [*Id* at 184-185.]

Based on that reasoning, the Court of Appeals held that "the trial court correctly held that the entire appreciation of the retirement funds and TDAs were part of the marital estate." *Id* at 185. You should carefully read *McNamara, supra*, to ascertain if the facts therein can be distinguished from the facts in your case, and perhaps require a different result.

**Answer respectfully submitted by  
Harvey I. Hauer, Hauer & Snover.**

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

