

Family Law Institute- Removing Roadblocks: Dividing Retirement Benefits During Divorce

October 23-24, 2015





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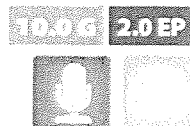
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Family Law Institute— Removing Roadblocks: Dividing Retirement Benefits During Divorce

Friday, Oct. 23-Saturday, Oct. 24, 2015 • 9 a.m.-4:30 p.m.
State Bar Center, Albuquerque



\$409: Standard Fee
\$379: Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members
\$469: Webcast Fee

10.0 C (Friday Only) **2.0 EP (Saturday Only)**

\$249: Standard Fee
\$219: Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members
\$279: Webcast Fee

Planning Committee: Tiffany Oliver Leigh, Kymberleigh Dougherty, Maria Montoya Chavez, Twila Larkin, Kathy Wissel, Claire Sanderson Hanna and Mary Ann Burmester

Learn about options that are available for your clients and which are more appropriate in specific situations. Hear an update on e-filing, and tips about avoiding malpractice from leading malpractice lawyers.

OCTOBER 23, 2015

8:30 a.m. Registration and Continental Breakfast
9 a.m. **Key N.M. Retirement Plans: Overview and Practice Tips**
Danielle R. Panter, Karen Janway and Leah Barker
10:30 a.m. Break
10:45 a.m. **N.M. State Pensions, ERB/PERA: Overview and Practice Tips**
Robert J. Shulman and Claudia Armijo
12:15 p.m. Lunch (provided at the State Bar Center)
1:15 p.m. **Financial Analysis of Retirement Options**
Jerome Johnson CPA, LLC
The Forensic Firm
2:45 p.m. Break
3 p.m. **Panel Discussion**
Brian Shoemaker, Moderator
4:30 p.m. Adjourn

OCTOBER 24, 2015

9 a.m. **The Mystery of Ruggles: Point/Counterpoint with Janet Clow and Sarah Bennett**
Brian Shoemaker, Moderator
10:15 a.m. Break
10:30 a.m. **Federal Retirement: FERS/TSP Overview and Practice Tips**
Raymond S. Dietrich
11:45 p.m. Lunch (provided at the State Bar Center)
12:45 p.m. **The Effect of Divorce on Social Security Benefits**
Brad Yablonsky, UBS Financial Services
2:15 p.m. Break
2:30 p.m. **Tips for Avoiding Malpractice (2.0 EP)**
Daymon B. Ely and Briggs F. Cheney
4:30 p.m. Adjourn

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FLI Hypotheticals:

#1: Long-term Marriage:

George & Sherry were married in June 1985 and he started to work right after the honeymoon (within 10 days). This is a 30 year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. George is 57 and his DOB is 2/1/1958. He intends to retire at age 62. She is age 50 and her DOB is 3/1/1965. When he first started to work, his income was \$18,000/year and after 5 years, he got a promotion and was making \$35,000/yr. Starting in 2010, his salary was \$92,000 with no raises.

#2: Mid-range Marriage:

Tony and Karen were married in June 2000 but he started working in June of 1990. This is a 15 year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015 (15 year marriage). Tony is 50 and his DOB is 2/1/1965. He intends to retire in another 5 years at age 55 with 30 years of service. Karen is 55 now and her DOB is 3/1/1960. When Tony first started working, his income was \$20,000/yr. When they got married, he began earning \$35,000/yr. In 2010, his income went up to \$60,000/yr. and that has been his income for the past 5 years.

#3: Short-term Marriage:

Andy and Mary were married in June 2005 and Mary started working right after the honeymoon. This is a 10 year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. Both are 45 years old. Andy's DOB is 2/1/1970 and Mary's DOB is 3/1/1970. Mary would like to retire in 15 years when she is 60.

Questions:

1. What is the estimated amount of monthly pension benefit for (a) full amount; (b) survivor beneficiary options(s); (c) if the plan has a separate interest, what would that estimated benefit be?
2. What is the formula or how did you calculate the amount?
3. Was there any reduction or penalty in the monthly benefit because of the age of the person retiring?
4. Do you have any suggestions to add to these hypotheticals that would help you with your presentation?

Could we possibly get your answers/calculations back by June 15th?

DANIELLE R. PANTER

Danielle grew up in Rockland County, New York (the southernmost part of “upstate” New York). She went to Cornell (BA 1981), University of Richmond (The TC Williams School of Law) (JD 1984) and Georgetown (LL.M. Labor Law 1985).

She practiced law in two large Manhattan firms for 6.5 years.

Danielle moved to Albuquerque in 1992 to join Keleher & McLeod, PA. On October 1, 1997, Danielle and four of her Keleher partners left Keleher and formed Hurley, Toevs, Styles, Hamblin & Panter, PA. They each got their names in the title of the new firm. The firm also goes by the short name “Hurley Law Firm”.

Since 1997, two additional partners, Thomas F. Blueher and Gregory W. MacKenzie, and four associates, Joseph Popplewell, Monica A. Davis, Elisabeth A. Millich and Carmela Starace joined the firm. The firm now has 11 lawyers.

Danielle has 30 years’ experience practicing employee benefits law, and has represented Presbyterian since 1995. Employee benefits law includes tax and labor law, all types of pension and health and welfare plans, and Affordable Care Act and executive compensation work.

Since its founding in 2008, Danielle is a member of the Pacific Area TE/GE IRS Practitioners’ Council. She was also a member of the predecessor practitioner’s council, the Mountain States TE/GE IRS Practitioners’ Council.

Karen Janway is currently the Director of Benefits and Administrative Support at Presbyterian Healthcare Service. In this role, she oversees the Health and Welfare Plans, five retirement plans, executive benefit plans, and workers' compensation.

Karen has over 37 years of Benefits experience. During this time, Karen has worked with plans in the for-profit and the non-profit arena. Over her 20 year tenure with Presbyterian Healthcare Services, she has seen participation in the defined contribution plans increase from 44% to 78%. Throughout her career she has had 3 IRS audits and 2 Department of Labor audits and is proud of the fact that no significant or no findings at all were the results of the audits.

Karen has a Bachelor's Degree in Business Administration from Eastern New Mexico University. She is a member of the Western Pension and Benefits Chapter, the Society of Human Resource Management, Presbyterian Consumer Advisory Board, the Self insured Workers' Compensation Association, and a commissioner for the state of NM Self-insurers' Guarantee Fund Commission. She has taught the benefits module in the University of New Mexico Human Resources degree programs (under-graduate and graduate).

Leah Barker has been a Pension Administrator at Sandia National Laboratories since March 2011, serving as a Retirement Specialist to their more than 6,500 pension eligible employees. She joined Sandia with 16 years in the banking industry, 10 of which were as Director of Human Resources. In addition, Leah spent a few years as an Employee Benefits Account Manager for a local insurance brokerage, serving multiple Employee Benefits clients whose sizes ranged from 30 employees to 1,200 employees. Leah earned her Professional in Human Resources Certification through Human Resources Certification Institute in 2002 and graduated from Western States School of Banking at NM State University in 2008. She later obtained her License in Life, Accident and Health Insurance through the New Mexico Insurance Division in 2009. Leah currently serves as the main point of contact at Sandia National Laboratories for the administration of their pension QDROs.

Elyse Eckart is a native of Albuquerque and attended UNM for undergrad and the University of Pennsylvania Law School. Following law school, Elyse joined the employee benefits and executive compensation practice in the Los Angeles office of Jones Day. After a short stint at the Rodey law firm in Albuquerque, Elyse had the opportunity to move in house to Sandia National Labs.



B I O G R A P H Y

Marianne B. Hill

*Deputy General Counsel
Sandia National Laboratories*

Marianne Hill is Deputy General Counsel and Assistant Corporate Secretary for Sandia Corporation, a subsidiary of Lockheed Martin Corporation, which manages and operates Sandia National Laboratories for the United States Department of Energy National Nuclear Security Administration. She has been at Sandia National Laboratories since 2002 serving as Deputy General Counsel, Litigation Director and General Law Attorney.

Ms. Hill is responsible for managing Sandia's legal, prime contract, and export control activities. As Assistant Corporate Secretary, she supports the Corporate Secretary and Sandia's Board of Directors. She advises on a number of general law matters, including benefits.

Prior to joining Sandia, Ms. Hill was at the law firm of Wiggins, Campbell, and Wells P.A., and a former judicial law clerk to the Honorable James J. Wechsler, New Mexico Court of Appeals.

Ms. Hill began her career as a technical and logistics project manager for the Department of Defense at Edwards AFB and with Hughes Aircraft Company at Hahn AB, Germany. Ms. Hill was a commissioned officer in the United States Air Force Reserves reaching the rank of Captain.

Ms. Hill has a J.D. magna cum laude (Order of the Coif) from the University of New Mexico School of Law, M.S. in Management from Golden Gate University, and a B.S. in Mathematics and B.A. in Spanish from the University of Notre Dame.

Ms. Hill is a member of the American Bar Association, the Association of Corporate Counsel, the Department of Energy Contractor Attorneys Association, and the Albuquerque Bar Association. She is on the Board of Directors for Leadership New Mexico.

Robert J. Shulman received a BS in TV-Radio from Ithaca College in 1970. After a career in radio broadcasting in Albuquerque and Chicago and the music industry in Los Angeles, Robert decided to get a real job and received a JD, Cum Laude from Pepperdine School of Law in 1995. He has practiced pension law for over sixteen years as staff counsel with the Educational Retirement Board of New Mexico. He has been teaching business law and political science courses at the Albuquerque campus of the University of Phoenix since 2001.

Claudia Armijo

Public Employees Retirement Association of New Mexico (PERA)

Ms. Armijo has served as assistant general counsel at PERA since May 2014. She works extensively with member services on a wide variety of pension benefit matters. Ms. Armijo is primarily responsible for the review of divorce related documents in the division of pension benefits.

Prior to working at PERA, Ms. Armijo worked for the legislature as an attorney/bill drafter at the Legislative Council Service (LCS). At the LCS, Ms. Armijo specialized in drafting pension and investment legislation, and in that capacity, she drafted the 2013 and 2014 public pension overhaul bills applicable to the PERA Act, Educational Retirement Act, Judicial Retirement Act and the Magistrate Retirement Act.

Ms. Armijo earned her law degree from the University of Denver, College of Law in Denver Colorado, and a Bachelor's of Science degree in Business and Management from the University of Redlands, in Redlands, California.

Jerome Johnson, CPA/ABV/CFF, CVA

Jerome is a principal in Jerome Johnson CPA, LLC, *The Forensic Firm*. He is experienced in providing forensic accounting services in various types of litigation: is routinely appointed as the court's neutral Rule 11-706 witness, and also serves as a settlement facilitator in the New Mexico District Court. He has provided expert witness testimony in the areas of business valuation, tax aspects of marital dissolution, alimony, child support, wrongful termination, and minority shareholder issues.

As a member of the American Institute of Certified Public Accountants, Jerome has served as Chair of the Task Force on Family Law, was a member of the Forensic and Litigation Services Committee, and has also presented at the AICPA/AAML National Divorce Conference. In addition, he is a contributing author to the *Family Law Services Handbook – The Role of the Financial Expert*. He is the past President of the New Mexico Collaborative Practice Group and has chaired the AICPA Family Law Conference three times.

Jerome is a member of the American Institute of Certified Public Accountants and the New Mexico State Society of Certified Public Accountants, and holds the accredited Certified in Financial Forensics (CFF) as well as the Accredited in Business Valuation (ABV) certifications from the American Institute of Certified Public Accountants. Additionally, Jerome holds the Certified Valuation Analyst (CVA) designation from the National Association of Certified Valuation Analysts. He is a graduate of Regis University in Denver Colorado.

BRIAN SHOEMAKER, ESQ.

Brian Shoemaker was first trained as a mediator in 1988, and has been a licensed lawyer for 24 years. He obtained a certificate in Dispute Resolution in 1991, and was initially trained in Collaborative Practice more than 10 years ago. He is licensed in the State of New Mexico, and is also licensed in the US Court of Appeals (10th Circuit), the US Court of Appeals for the Armed Forces, the US District Court for the District of New Mexico, the Central District of Utah, and the US Army Court of Criminal Appeals. Brian Shoemaker has tried more than 50 jury trials in both federal and state district courts, and has tried scores of matters in many counties and venues throughout the State of New Mexico. Mr. Shoemaker has served as criminal prosecutor in federal courts, criminal defense counsel in both federal and New Mexico state courts. He served both on Active Duty and in the Reserves for the US Army as a Judge Advocate. Brian has been honored by his peers in US Best Lawyers in America for Family Law for the past five years, 2012-2016.

Mr. Shoemaker has served as President, Secretary, and Board Member for the New Mexico Collaborative Practice Group and as Co-Chair of the New Mexico State Bar's Alternative Dispute Resolution Committee. He continues to be very active both in practice and as a national and state trainer in dispute resolution processes, not limited to mediation, collaborative practice, and various communication and conflict resolution modalities and negotiation practices. Brian Shoemaker has also been trained by both the National Institute of Trial Advocacy, the US Army Trial Advocacy, and has presented in multiple settings on various litigation topics, including Family Law. Mr. Shoemaker served on the Board of Directors for Samaritan Counseling Center and the Advisory Board for the Samaritan Center for Changing Families. Brian has also been a scout master for BSA in multiple troops and as a soccer coach. Mr. Shoemaker's humanitarian commitments include Albuquerque Healthcare for the Homeless, Roadrunner Food Bank, St. Martin's Hospitality Center, Dismas House, Samaritan Counseling Center and World Vision, among others.

Janet Clow is a New Mexico Board Certified Family Law Specialist practicing primarily in the area of Family Law. She is a trained collaborative practice attorney. She began her career as a law clerk for the New Mexico Court of Appeals. After clerking, she became a criminal defense attorney at the New Mexico Public Defender's Office. She was appointed by Governor Anaya to Chief Public Defender in 1983 and oversaw all litigation and managed the support and financial aspects of the New Mexico Public Defender's Office. She entered private practice in 1986, litigating numerous complex civil cases before dedicating most of her time to domestic relations matters for over 15 years. She serves as a "Master of the Bench" in the Oliver Seth Inn of Court for Northern New Mexico. She also serves as hearing officer for the New Mexico Supreme Court Disciplinary Board. She is recognized in the Best Lawyers of America and Southwest Super Lawyers. She has an AV Preeminent Peer Review rating from Martindale Hubbell. She was named the Best Lawyers' 2013 and 2015 Santa Fe Family Law 'Lawyer of the Year'.

SARAH E. BENNETT, ESQ.

Sarah E. Bennett received her B.A. in 1971 and her J.D. in 1975 from the University of Texas at Austin. She became a member of the State Bar of New Mexico in 1975 and was admitted to the United States Supreme Court Bar in 1979. She has practiced in a wide variety of litigation areas, including criminal defense and prosecution, plaintiff's personal injury litigation, corporate and business litigation, professional malpractice, state taxation, appellate work and divorce and family law. She has been involved in divorce and family law matters since 1982, and exclusively in those fields since 1995. She was first Board certified as a Family Law Specialist in 2003. She has participated in many collaborative divorces since 2002, and devotes a significant portion of her practice to Collaborative divorce.

Trainings. Ms. Bennett was first trained in Collaborative Divorce Practice in 2002 and has participated in regular training in advanced Collaboration every year since then. She is also trained as a Mediator.

Memberships. She is a long time member of the International Academy of Collaborative Professionals, the New Mexico Collaborative Practice Group, Inc., the Santa Fe Collaborative Practice Group, and the Northern New Mexico Collaborative Divorce Alliance. Ms. Bennett is also a member of the New Mexico Supreme Court Domestic Relations Rules Committee; the New Mexico Bar Association; the American Bar Association and its Family Law Section; the First Judicial District Bar Association and the New Mexico Women's Bar Association. She is former President of Children First: Co-Parenting Support Services. She serves as trainer and frequent judge for the Santa Fe Chapter of Teen Court.

Honors. Ms. Bennett has been listed in Best Lawyers in America since 2003. In 2012 she was named Santa Fe Family Lawyer of the Year by Best Lawyers in America. She has been listed in the Martindale-Hubbell Bar Register of Preeminent Attorneys and in the Martindale-Hubbell Bar Register of AV Preeminent Women Attorneys since 2001. She is listed in Southwest Super Lawyers for 2015 and several years prior. The firm Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP, with which Ms. Bennett has been associated since 1981, was listed by U.S. News - Best Lawyers "Best Law Firms" rankings for 2011 through 2015.

BIO

Raymond S. Dietrich

Raymond S. Dietrich manages a multi-jurisdictional law practice specializing in the drafting and litigation of Qualified Domestic Relations Orders (“QDROs”) and related issues. Mr. Dietrich has created a unique niche law practice that specializes in an area of law that is notoriously mishandled. Mr. Dietrich is licensed and actively practices law in Arizona, Nevada, Virginia, the District of Columbia, Florida, and New York. Mr. Dietrich is the author of *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney* (Copyright © 2015 Matthew Bender). The firm’s website is located at www.galleongroup.net. 602.252.7227.

Brad Yablonsky is a Financial Advisor with UBS Financial Services. His focus is helping clients and prospects in understanding Social Security and Medicare and integrating those benefits with other assets to maximize spendable income and reduce overall risk. Originally from New Jersey, Brad traveled to Albuquerque in 2001 "just to visit", though now proudly calls it home. He earned a Bachelor's degree from Rutgers University and holds Series 7, 66 and Insurance licenses. Brad volunteers for PB&J Family Services, Cuidando Los Ninos and All Faiths Receiving Home. Brad recently joined the board of the Senior Citizens Law Office, a non-profit organization which offers free legal advice and representation to seniors on healthcare, public benefits, advance directives, consumer rights and other issues. While not working, he enjoys performing and teaching as a drummer and percussionist.

BRIGGS F. CHENEY

Briggs F. Cheney graduated from the University of New Mexico School of Law in 1972 and has practiced in New Mexico ever since. He has been involved in local, state and national bar activities which have coincided with his practice and which have focused on the defense of lawyers in legal malpractice and representation of lawyers in the disciplinary arena. Mr. Cheney has been recognized for his work in these areas in Best Lawyers in America and Southwest Super Lawyers along with other recognitions. He has long been involved in the State Bar's Lawyer Professional Liability and Insurance Committee as a chair and member, and he has served on the ABA's Standing Committee for Lawyer Professional Liability. As somewhat of a professional hobby, Mr. Cheney has been involved with the state bar's Lawyer Assistance Committee which provides assistance to lawyers who suffer from the disease of addiction and other impairments.

DAYMON B. ELY

Daymon B. Ely graduated from Arizona State University College of Law in 1982. He is licensed to practice in both Arizona and New Mexico. Since graduating from ASU he has practiced in New Mexico. Mr. Ely has been a sole practitioner since 1989. He was also Editor in Chief of the NMTLA Journal and its President in 1993. For the past 15 plus years his practice has focused on legal malpractice.

Presbyterian Plans

Procedures

Release

Fact Sheets

Model Orders

Calculations of Hypotheticals

PRESBYTERIAN HEALTHCARE SERVICES - SHARED SECURITY PLAN
 PRESBYTERIAN HEALTH PLAN - SHARED SECURITY PLAN
 PRESBYTERIAN HEALTHCARE SERVICES - EMPLOYEES' PENSION PLAN

QUALIFIED DOMESTIC RELATIONS ORDER PROCEDURES

The following exhibits are attached to these procedures:

Exhibit 1	Participant's Release of Benefit Information
Exhibit 2	Plan Fact Sheets
Exhibit 3	Sample PHS - Shared Security QDRO
Exhibit 4	Sample PHP - Shared Security QDRO
Exhibit 5	Sample Pension Separate Interest QDRO

The sample QDROs are orders familiar to the HR Consultant. If a sample is used, the review of your order is faster. No one is required to use a sample QDRO, and the parties are each responsible for determining which plans need to be divided and whether or not a sample QDRO is suitable. If a Participant or potential Alternate Payee is uncertain about in which plans the employee participates, the Participant or Alternate Payee should submit the question and a release to the HR Consultant.

PART A - RULES APPLICABLE TO ALL PLANS

1. Introduction. The plan administrator is required to comply with certain court orders (or judgments, decrees or approved property settlements) requiring distribution of a Participant's benefits under the plan to provide marital property, support or alimony to a spouse, former spouse or dependent. This requirement was enacted by the Retirement Equity Act of 1984, and is found both in the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986, as amended (the "Code").

The plan administrator of each of the plans is each plan's respective administrative committee: the PHS - Shared Security Committee, PHP - Shared Security Committee, and Pension Committee. Each of these committees has adopted these procedures (the "Procedures") for use by their respective plans. Citations in the Procedures are to ERISA, but parallel sections of the Code also apply.

The committees delegated their responsibility to make an initial determination whether or not a draft order is a qualified domestic relations order ("QDRO") to the PHS HR Consultant. All pertinent documentation and requests for QDRO information

should be addressed to the PHS HR Consultant at the following address and telephone numbers:

Presbyterian Healthcare Services
HR Consultant

U.S. Mail:
P.O. Box 26666
Albuquerque, N.M. 87125-6666

Hand-Delivery:
Cooper Building
9521 San Mateo NE
Albuquerque, N.M. 87113

Telephone: (505) 923-8750
Fax: (505) 923-8958

The HR Consultant has the right to amend the Procedures at any time. The HR Consultant has the complete authority, in his or her sole and absolute discretion, to construe the terms of the Procedures (and any related or underlying documents) including, without limitation, the authority to determine the status of an order as a QDRO and eligibility for, and amount of, benefits due under a plan to any Alternate Payee, Participant and/or beneficiaries pursuant to a QDRO. All decisions of the HR Consultant are final and binding upon all parties affected thereby. No spoken response can modify the terms of the official plan documents, and any such discussions do not constitute a promise or guarantee of benefits.

2. Elements of a QDRO. To be qualified, the following nine items must be included:

- (1) The name and last known mailing address (if any) of the Participant and the name and mailing address of each Alternate Payee covered by the order;
- (2) The amount or percentage of the Participant's benefits to be paid by the plan to each such Alternate Payee, or the manner in which such amount or percentage is to be determined;
- (3) The number of payments or period to which such order applies; and
- (4) Each plan to which such order applies;

The QDRO must be a domestic relations order that specifically:

- (5) Relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a Participant; and

- (6) Is made pursuant to a state domestic relations law (including a community property law);

In addition to meeting these criteria, the QDRO may not alter the amount, form, timing, or other provisions of benefits otherwise payable under the plan(s). In other words, the QDRO must:

- (7) Not require the plan to provide any type or form of benefit, or any option not otherwise provided under the plan;
- (8) Not require the plan to provide increased benefits (determined on the basis of actuarial value); and
- (9) Not require the payment of benefits to an Alternate Payee that are required to be paid to another Alternate Payee under another order previously determined to be a QDRO.

3. Obtaining Participant Information from the Plan Administrator. In order to obtain information regarding the status of a plan Participant relative to his or her employee benefit plan information, attorneys must furnish the plan administrator with a written, signed release from the Participant or a subpoena. Once the plan administrator receives the proper release or subpoena, the attorney may request the following information regarding the status of the plan Participant, including but not limited to:

- Beneficiary designations;
- Names of all plans under which Participant is covered;
- Status of plan Participant, whether active, retired or terminated with rights to a vested pension;
- Date of retirement or termination of employment, as applicable;
- Frozen accrued benefit under the PHS defined benefit pension plan, the Presbyterian Healthcare Services Employees' Pension Plan (the "Pension Plan"), see C.5 ("Plan Closed in 2006 and Frozen in 2012");
- Current account balance information for the PHS and/or PHP defined contribution plan(s), the Presbyterian Healthcare Services Shared Security Plan and the Presbyterian Health Plan Shared Security Plan (collectively, the "Shared Security Plans");
- If retired, the form of benefit option elected by the Participant upon retirement (i.e., single-life annuity, joint and survivor annuity, etc.);
- Pension Plan early retirement provisions and applicable reduction factors;
- Available distribution options;
- Earliest age at which the Alternate Payee can commence his or her share of the benefits; and
- Pension Plan joint and survivor annuity reduction factors, if applicable.

4. Review of Draft Orders and Appeal of HR Consultant's Decision. The HR Consultant will formally review a draft order submitted unless specifically instructed by the parties to provide only informal comments.

Drafting attorneys seeking pre-approval for their QDROs should understand that there may be adverse consequences for the Alternate Payee if the Participant retires or dies before the plan administrator receives and approves an executed and certified order. If an Alternate Payee or Participant dies after a draft order has been submitted to a plan but before it has been formally accepted, and the HR Consultant is aware of the death, the plan will allow the Alternate Payee 90 days from the date of death to obtain a nunc pro tunc QDRO retroactively effective to before the date of death.

The HR Consultant will notify the Participant and Alternate Payee of receipt of an order and provide a copy of the Procedures. Within a reasonable period thereafter, the HR Consultant will notify the Participant and Alternate Payee in writing of his or her final determination regarding the qualified status of the order. All notices will be mailed to the address(es) specified in the order. If the Participant and Alternate Payee are represented by lawyers, notice to the appropriate lawyer will constitute notice to the Participant or Alternate Payee, as applicable. The HR Consultant's written determination that an order is a QDRO is a final and binding determination.

If the HR Consultant determines that an order is not a QDRO, he or she will issue a written determination explaining the reason(s) for so concluding. The Participant and the Alternate Payee have the right to appeal such determination, by written request filed with the appropriate plan administrative committee (sent c/o the HR Consultant at the above address), within 60 days after receipt of the unfavorable determination, under the plan's claims procedure. The claims procedure is found in the ERISA section of the plan's summary plan description, and is incorporated here. If no appeal is filed within the 60-day period, the HR Consultant's determination is final and binding.

If an appeal is properly filed, the appropriate plan administrative committee will review the HR Consultant's decision and issue a written determination on appeal with 60 days after the appeal was received. (120 days if the Participant or Alternate Payee is notified that special circumstances require additional time for a response on appeal.) The Participant or Alternate Payee must exhaust the claims appeal procedure prior to bringing a court action.

5. Payment to Alternate Payee Before the Participant Separates From Service. A domestic relations order will be deemed qualified even if it requires payment of benefits to an Alternate Payee prior to the Participant's separation from service. Under the PHS - Shared Security and the PHP - Shared Security Plan, there is no required minimum Participant's age for a distribution to the Alternate Payee. There is such a requirement under the Pension Plan, see Part C.2 below.

6. Administrative Hold and Segregation of Benefits. The HR Consultant may place an administrative hold on all or a portion of a Participant's benefits, delaying payment of benefit, loans or in-service withdrawals to the Participant, for a reasonable period of time. The HR Consultant may place an administrative hold after receiving

notice that a domestic relations order is being sought or that the parties are attempting to rectify any deficiencies in an order.

An administrative hold does not prevent the Participant from directing investments under the Shared Security plans. A Participant may apply for a loan during the administrative hold, but only if the requested loan amount does not encumber the Alternate Payee's assigned interest under the draft QDRO. There must be sufficient funds remaining in the Participant's accounts after the loan has been processed to cover the Alternate Payee's assigned share of the benefits as set forth in the draft QDRO. If the draft QDRO is unclear regarding the assignment of benefits to the Alternate Payee, then no such loan will be permitted during the administrative hold period.

The administrative hold will be removed if the HR Consultant receives:

- a. an order that is determined to be a valid QDRO;
- b. a divorce decree, judgment or property settlement agreement that clearly provides that the Participant is awarded all of his or her interest in the plan;

If the documents are silent on the issue of retirement benefits, the HR Consultant may require that the Participant submit a written notarized statement attesting that his or her ex-spouse was not awarded any interest in the plan, or the HR Consultant may contact one of the parties' attorneys for clarification on this matter; or

- c. A written, signed, and notarized waiver by the Participant's ex-spouse of his or her interest in the Participant's plan.

If either party (or legal counsel) at any time during the QDRO process, but prior to distribution of the Alternate Payee's benefits, raises any disputes, claims or assertions, in writing, regarding the QDRO, its interpretation or the accuracy of the Alternate Payee's benefits as calculated by the plan's recordkeeper or actuary, the HR Consultant will maintain and/or reinstate the administrative hold on the Participant's accounts/benefits (or the Alternate Payee's already segregated accounts/benefits) to prevent a distribution from being made to either party.

Under Section 206(d)(3)(H), during any period in which the qualified status of an authenticated domestic relations order is in dispute (by a Participant, or Alternate Payee, a court, or otherwise), the HR Consultant will account separately for the amounts that would have been payable to the Alternate Payee(s) during such period had the order been determined to be qualified (the "segregated amounts"). If the draft order contains ambiguous or conflicting language whereby the Alternate Payee's portion of the benefits cannot be readily ascertained, no withholding will take place.

If the HR Consultant determines the order to be qualified within 18 months after the deferral of benefits, it will pay the segregated amounts (plus any interest earned

thereon) to the person or persons entitled to receive them. If, after the 18-month period has expired, the parties have not perfected the order or the HR Consultant is unable to make such determination, the segregated amounts (plus any interest) will be paid to the person who would have received the amounts had the order not been issued. Any determination that an order is qualified after the expiration of the 18-month period will apply prospectively (*i.e.*, the plan shall not be liable for payments to the Alternate Payee(s) for the period before the order is determined to be qualified). The plan shall be discharged from any obligation or liability to any Participant or the Alternate Payee(s) to the extent of any payment made pursuant to the Procedures.

7. Authentication. In order to receive payments from the plan, the Alternate Payee(s) must furnish the HR Consultant with a copy of the domestic relations order that has been certified by the clerk of the court, judge or other official in a manner that provides an assurance to the HR Consultant that the document is authentic.

8. Preretirement Death Benefits/Specificity Required. If a QDRO so provides, a former spouse may be awarded the right to receive some or all of the preretirement spousal death benefit. The amount of the preretirement spousal death benefit that is available for subsequent spouses of the Participant is reduced commensurately. If a QDRO indicates that a former spouse is to be regarded as the surviving spouse for purposes of the preretirement spousal death benefit, then unless the Order explicitly limits the amount of the preretirement spousal death benefit to be received by the former spouse, the former spouse will be deemed to have been awarded the entire preretirement spousal death benefit, and no portion of the preretirement spousal death benefit will be available for a subsequent spouse of the Participant.

9. Benefit Commencement/Taxation. If, or when, pursuant to the terms of the plan and the QDRO, the Alternate Payee is or becomes eligible for benefit commencement, the Alternate Payee must contact the HR Consultant at the address set forth above in Part A.1 to elect benefit commencement. If pursuant to the terms of the plan or the QDRO (or both), the Alternate Payee's benefit is not immediately payable, it shall be noted in the Participant's file that the Participant's benefit is subject to a QDRO and such file shall contain pertinent information regarding the Alternate Payee and the terms of the QDRO.

For information on the taxation of a distribution to an Alternate Payee see the plan's distribution forms. The 10% early distribution tax applicable to distributions to Participants under age 59 ½ (or who terminated service with the plan sponsor before age 55) does not apply to a distribution to an Alternate Payee under a QDRO.

10. Scope of Discussions with the Plan Administrator Regarding QDRO Fairness and Equitability Issues. The Plan Administrator will avoid discussing fairness or equitability issues regarding the division of benefits under a QDRO. It is the responsibility of the parties' legal counsel to negotiate the substantive provisions of a QDRO. The Plan Administrator will limit its review to the technical requirements for QDROs as set forth under Section 206(d)(3).

11. Correcting or Terminating Payments. If incorrect payments are made or put in process, the HR Consultant can suspend or terminate payments to Alternate Payee and

Participant as permitted under the plan. Either the Participant or Alternate Payee may contest such suspension or termination through any administration remedies available under the plan. Payments by the plan pursuant to the QDRO will be without prejudice to any right the plan has under applicable law to seek recoupment or offset for overpayment. If the plan pays one party a portion of the other party's benefits under the plan and QDRO, the party receiving the overpayment will return that portion to the plan, which in turn, will pass that portion onto the other party.

PART B - SPECIAL RULES APPLICABLE ONLY TO THE SHARED SECURITY PLANS

- 1. Divide Accounts as of a Relatively Current Date.** The HR Consultant has access to past account records but only within a reasonable period of time. Accounts must be divided as of a relatively current date.
- 2. How the Alternate Payee's Account is Established.** After a QDRO is approved by the plan, the Alternate Payee's account is established by moving contributions from the Participant's accounts into an account for the Alternate Payee. Unless the order provides otherwise, the Alternate Payee's account is established pro rata from the Participant's Roth (after tax) and non-Roth (before tax) accounts, pro rata from the Participant's investments under the plan, and pro rata from the contribution types accounts within such investments.
- 3. The Alternate Payee is Responsible for Investing His or Her Account.** The Alternate Payee is responsible for directing the investment of the separate account until the date such benefits are distributed to him or her. The Alternate Payee's account will reflect any income, losses, appreciation and depreciation until such distribution. The rules applicable to the investment of a Participant's interest under the Plan shall apply to investment by the Alternate Payee. Please refer to the summary plan description regarding how to provide investment direction.
- 4. Fixed Interest Account Investment.** The MetLife Fixed Interest Account is subject to an early withdrawal (surrender) charge, ("EWC") summarized by the following chart:

Year of Deposit into Fixed Account	Amt. of EWC in 2015
2008	1%
2009	2%
2010	3%
2011	4%
2012	5%
2013	6%

The EWC will reduce the amount payable to the Alternate Payee. Contact MetLife at 1-800-543-2520 to determine the amount of a Participant's EWC.

PART C - SPECIAL RULES APPLICABLE ONLY TO THE PENSION PLAN

The Pension Plan is different from the PHS - Shared Security and PHP - Shared Security plans. The Pension Plan is a defined benefit plan where benefits are calculated based on a year of service and compensation formula, not an individual account. The Pension Plan was frozen on December 31, 2012. There are no increases in any benefits from additional service or compensation after December 31, 2012.

Assets are invested in a combined trust by the employer and fund benefits for the entire plan population as a whole rather than any individual Participant's benefits. In contrast, the PHS - Shared Security and the PHP - Shared Security Plan are defined contribution plans where a Participant's benefit depends on his or her individual account invested by the Participant.

The rules set forth in this section apply only to the Pension Plan.

1. Separate Interest/Shared Payment. The U.S. Department of Labor developed the terms "separate interest" and "shared payment" to describe two different ways a QDRO can be drafted. The attached sample domestic relations order for the Pension Plan (Exhibit 5) is a separate interest order.

A separate interest QDRO is an order that divides the Participant's benefit (rather than just the payments) into two separate portions with the intent of giving the Alternate Payee a separate right to receive a portion of the benefit to be paid over the Alternate Payee's lifetime at a time and in a form different from that chosen by the Participant. The benefits are based on the Alternate Payee's life expectancy as calculated by the plan's actuary. The Alternate Payee may choose any benefit form available under the plan to an unmarried Participant.

The Alternate Payee's decision to commence benefits early, before the Participant attains age 65 (or retires, if later), has to be made based on the Alternate Payee's own situation. A decision to commence benefits early will trigger early retirement reductions, and depending on whether the Alternate Payee is the same age as the Participant, actuarial reductions. On the other hand, if the Alternate Payee does not commence her benefit, and the Participant dies, the Alternate Payee could receive less than if he or she started benefits, depending on the QDRO's preretirement survivor annuity provisions.

A shared payment QDRO "splits" the actual payments made with respect to Participant under the plan to give the Alternate Payee part of each payment. Under this approach, the Alternate Payee will not receive any payments unless the Participant receives a payment or is already in pay status. Payments are based on the Participant's life expectancy. This approach is required when a support order is being drafted after a Participant has already begun to receive a stream of payments from the plan (such as an annuity). If the Participant's benefit is in pay status, ask the HR Consultant for a sample shared payment QDRO.

The Pension Plan provides that once a Participant commences benefits, the form of benefits is irrevocable, and therefore, any QDRO obtained after a Participant's benefits have commenced is required to be a shared payment QDRO. There is one

exception to this in the Pension Plan: If a Participant or Alternate Payee provides notice to the HR Consultant at the time of the Participant's retirement that a QDRO is forthcoming, the Participant may commence benefits in the form of a Joint and 50% Surviving Spouse Annuity and change to any other available form of benefit if the final determination is made that the Order is a QDRO within the 18 month period after the Participant's annuity starting date.

Participants who elected benefits in a 60- or 120-month Guaranty Annuity can change the beneficiary of the guaranteed payments at any time during the guaranteed period with applicable spousal consent.

2. Timing of Distribution to the Alternate Payee. The order must specify the date the Alternate Payee's benefits commence, or that they can commence anytime on or after the Participant's earliest retirement age. The earliest retirement age is defined in ERISA § 206(d)(3)(E)(ii) to mean the earlier of:

- a. the date on which the Participant is entitled to a distribution under the plan; or
- b. the later of the date: (i) the Participant attains age 50, or (ii) the earliest date on which the Participant could begin receiving under the plan if the Participant separated from service.

How these rules apply depend on whether the Participant is still employed by PHS or not, and whether or not the Alternate Payee's benefit has a value of \$20,000 or less. If the Participant is no longer employed, (a) above applies, and the earliest retirement age is immediately if the benefit is valued at \$20,000 or less. The earliest retirement age is 55 if the benefit is greater than \$20,000.

If the Participant is still employed by PHS, the Alternate Payee cannot receive his or her portion of the benefits until the Participant attains at least age 50. Benefits would be payable when the Participant attains age 50 only if the Alternate Payee is entitled to a lump sum presently valued at \$20,000 or less. If the Alternate Payee's benefit is presently valued at more than \$20,000, the earliest date when the Alternate Payee can receive benefits is when the Participant attains age 55 (because in that case (b)(ii) above applies).

These rules are summarized by the following chart:

Participant Still Employed by PHS	Benefit \$20,000 or Less	Benefit More Than \$20,000
	Alternate Payee must wait until Participant is age 50	Alternate Payee must wait until Participant is age 55
Participant <u>Not</u> Employed By PHS	Alternate Payee can elect an immediate Lump-Sum, Qualified Rollover, Combination of Lump-Sum and Qualified Rollover, or life annuity	Alternate Payee must wait until Participant is age 55 and can elect life annuity 5- or 10- year certain and life annuity

The latest date benefits can commence to the Alternate Payee is the earlier of the date the Participant attains age 65 (or later retirement age if still working) or commences his or her retirement benefits.

3. Early Retirement Subsidy. Because the sample QDRO for the Pension Plan is a separate interest QDRO, it permits the Alternate Payee to receive payments commencing at the Participant's earliest retirement age based on the Alternate Payee's age when benefits begin, using the plan's early retirement and optional form of benefit conversion factors. The plan's early retirement factors are more generous than a pure actuarial reduction would dictate. Under the sample QDRO, the Alternate Payee is receiving a portion of the early retirement subsidy. The Alternate Payee's early retirement subsidy is in addition to the early retirement subsidy provided to the Participant.

4. Death of Participant or Alternate Payee Before Payments Begin to Alternate Payee. If the Participant dies before payments begin to the Alternate Payee, if the order provides, the Alternate Payee may be entitled to the preretirement spousal death benefit, see Part A.8. above.

The Pension Plan provides a pre-retirement survivor annuity if the Participant dies before the earlier of the date retirement benefits begin to the Participant, or benefits under the QDRO begin to the Alternate Payee. The annuity is equal to 50% of the Participant's monthly retirement benefits at age 55, or later date of death.

In paragraph 8(c), the sample QDRO contains two options for dividing the pre-retirement survivor annuity, (c)(1) or (c)(2). Option (c)(1) provides the Alternate Payee with a portion of the pre-retirement survivor annuity based on the length of time the parties were married. For example, if the parties were married 75% of the time the Participant worked for PHS, the Alternate Payee would receive 75% of the pre-retirement survivor annuity, which is 37.5% (75% x 50%) of the Participant's benefit. In this case, the other 12.50% (25% x 50%) of the pre-retirement survivor annuity would be payable to the Participant's spouse at the time of his or her death. If the Participant was not married at death, the remaining % of the pre-retirement survivor annuity reverts to the plan.

If the parties select Option (c)(2), the Alternate Payee receives the entire pre-retirement survivor annuity, worth 50% of the Participant's benefit over the Participant's entire period of service with PHS. When a pre-retirement survivor annuity is paid, the other 50% of the benefit reverts to the plan in all cases, not just QDRO cases.

If the Alternate Payee dies before commencing his or her payments, the Pension Plan provides that the Alternate Payee's benefit reverts to the Participant. An Alternate Payee may prefer to start his or her portion of the benefit as early as possible to avoid the risk of forfeiting the benefit upon the Alternate Payee's death. See Part C.1 regarding the consequences of the Alternate Payee's decision to elect early payment.

5. Plan Closed in 2006 and Frozen in 2012. The Pension Plan is closed to employees hired on or after January 1, 2006. If an employee was initially hired on or after January 1, 2006 the employee will have no pension benefit.

Employees rehired on or after January 1, 2006 had their benefits frozen on December 31, 2005.

A group of active employees elected to freeze their pension benefit accruals on December 31, 2006 in exchange for additional Shared Security benefits. These employees who elected the Shared Security benefits receive no pension benefit increases due to additional compensation earned or services after December 31, 2006.

The plan was frozen for all Participants on December 31, 2012. There is no increase in any Participant's benefit for additional service or compensation after December 31, 2012.

PRESBYTERIAN HEALTHCARE SERVICES - SHARED SECURITY PLAN
PRESBYTERIAN HEALTH PLAN - SHARED SECURITY PLAN
PRESBYTERIAN HEALTHCARE SERVICES - EMPLOYEES' PENSION PLAN

QUALIFIED DOMESTIC RELATIONS ORDER PROCEDURES

Participant's Release of Benefit Information

1. Authorization

I hereby authorize Presbyterian Healthcare Services ("PHS") and Presbyterian Health Plan ("PHP") to disclose my personal compensation and employee benefit information (including all plans, policies and related information) as described below. I understand that this authorization is voluntary, I may refuse to sign, and I may revoke this authorization at any time by submitting my revocation in writing to the HR Consultant.

The information that can be disclosed includes, but is not limited to, the following information:

- Beneficiary designations;
- Names of all plans under which I am covered;
- Participation status, whether active, retired or terminated with rights to a vested pension;
- Date of retirement or termination of employment, as applicable;
- Frozen accrued benefit under the PHS defined benefit pension plan, the Presbyterian Healthcare Service Employees' Pension Plan (the "Pension Plan");
- The date my Pension Plan benefit was frozen (2005 for some participants, 2006 or 2012 for others) see QDRO Procedures, C.5;
- Current account balance information for the PHS and/or PHP defined contribution plan(s), the Presbyterian Healthcare Services Shared Security Plan and the Presbyterian Health Plan Shared Security Plan (collectively, the "Shared Security Plans");
- If retired, the form of benefit option I elected upon retirement (i.e., single-life annuity, joint and survivor annuity, etc.);
- Pension Plan early retirement provisions and applicable reduction factors;
- Available distribution options;
- Earliest age at which the Alternate Payee can commence his or her share of the benefits; and
- Pension Plan joint and survivor annuity reduction factors, if applicable.

My employee benefit information can be disclosed to (check applicable boxes and insert name, address and telephone number):

☐ My spouse/former spouse: _____

☐ The attorney of my spouse/former spouse: _____

2. Important Information and Release of PHS and PHP

I have read and understood the following statements:

- I may revoke this authorization at any time by notifying the Presbyterian Healthcare Services HR Consultant in writing, but the revocation will not have any effect on any actions taken before the revocation was received.
- I hereby release Presbyterian Healthcare Services, Presbyterian Health Plan, and their predecessors, successors, affiliates, and all of their respective present and former officers, directors, employees, agents, attorneys, advisors and assigns from any and all claims, causes of action, demands, and/or liability known or unknown, suspected or unsuspected, regardless of whether in law or equity, and regardless of whether under local, state or federal law arising at any time from disclosure of my

compensation or employee benefits information.

3. Notarized Signature of Participant

Your Signature

Date

Print Your Name

Notary:

STATE OF _____)
) ss.
COUNTY OF _____)

Signed or attested before me on this _____ day of _____
_____, 20____, by _____.

(Seal, if any)

Notary Public

My commission expires: _____

Return completed form to:

Presbyterian Healthcare Services
HR Consultant

U.S. Mail:

P.O. Box 26666
Albuquerque, N.M. 87125-6666

Hand-Delivery:

Cooper Building
9521 San Mateo, N.E.
Albuquerque, N.M. 87113



PRESBYTERIAN HEALTHCARE SERVICES – SHARED SECURITY PLAN
PRESBYTERIAN HEALTH PLAN – SHARED SECURITY PLAN
PRESBYTERIAN HEALTHCARE SERVICES – EMPLOYEES' PENSION PLAN

PHS - SHARED SECURITY FACT SHEET

Type of Plan:	Defined Contribution Plans - Two separate plans: a 403(b) plan and a 401(a) plan												
Withdrawals under a QDRO:	As soon as administratively feasible following the approval of the QDRO by the HR Consultant (2-3 weeks after the QDRO is received). The Alternate Payee is required to elect a distribution by completing the Plan's distribution forms.												
Available Distribution Options for Alternate Payee under a QDRO:	If benefit is over \$5,000: Lump-Sum Distribution, Qualified Rollover, Combination of Lump-Sum Distribution and Qualified Rollover, Periodic Payment (monthly, quarterly or annual of an amount certain, over a fixed reasonable period of time).												
Participant's Vested Percentage:	403(b) plan: 100% 401(a) plan, Matching and Graded Contributions: <table><tr><th>Years of Service</th><th>Vesting Percentage</th></tr><tr><td>Less than 2</td><td>0%</td></tr><tr><td>2</td><td>25%</td></tr><tr><td>3</td><td>50%</td></tr><tr><td>4</td><td>75%</td></tr><tr><td>5 or more</td><td>100%</td></tr></table> Employees hired before January 1, 2009 are 100% vested in their Graded Contributions, but not their Matching Contributions.	Years of Service	Vesting Percentage	Less than 2	0%	2	25%	3	50%	4	75%	5 or more	100%
Years of Service	Vesting Percentage												
Less than 2	0%												
2	25%												
3	50%												
4	75%												
5 or more	100%												
Plan Administrator:	PHS - Shared Security Committee Presbyterian Healthcare Services P.O. Box 26666 Albuquerque, N.M. 87125-6666												
QDRO Initial Determinations:	HR Consultant												
QDRO Appeals:	PHS - Shared Security Committee												

This Fact Sheet is intended as a brief outline to assist family law attorneys drafting qualified domestic relations orders. Should there be any conflict between the terms and provisions contained in this Fact Sheet and the official Plan Document, the terms of the official Plan document will prevail.



PRESBYTERIAN HEALTHCARE SERVICES - SHARED SECURITY PLAN
PRESBYTERIAN HEALTH PLAN - SHARED SECURITY PLAN
PRESBYTERIAN HEALTHCARE SERVICES - EMPLOYEES' PENSION PLAN

PHP - SHARED SECURITY FACT SHEET

Type of Plan:	Defined Contribution Plan - 401(k) plan												
Withdrawals under a QDRO:	As soon as administratively feasible following the approval of the QDRO by the HR Consultant (2-3 weeks after the QDRO is received). The Alternate Payee is required to elect a distribution by completing the Plan's distribution forms.												
Available Distribution Options for Alternate Payee under a QDRO:	If benefit is over \$5,000: Lump-Sum Distribution, Qualified Rollover, Combination of Lump-Sum Distribution and Qualified Rollover, Periodic Payment (monthly, quarterly or annual of an amount certain, over a fixed reasonable period of time).												
Participant's Vested Percentage:	Employee's salary reduction contributions: 100% Matching and Graded Contributions: <table><tr><th>Years of Service</th><th>Vesting Percentage</th></tr><tr><td>Less than 2</td><td>0%</td></tr><tr><td>2</td><td>25%</td></tr><tr><td>3</td><td>50%</td></tr><tr><td>4</td><td>75%</td></tr><tr><td>5 or more</td><td>100%</td></tr></table> Employees hired before January 1, 2009 are 100% vested in their Graded Contributions, but not their Matching Contributions.	Years of Service	Vesting Percentage	Less than 2	0%	2	25%	3	50%	4	75%	5 or more	100%
Years of Service	Vesting Percentage												
Less than 2	0%												
2	25%												
3	50%												
4	75%												
5 or more	100%												
Plan Administrator:	PHP - Shared Security Committee Presbyterian Healthcare Services P.O. Box 26666 Albuquerque, N.M. 87125-6666												
QDRO Initial Determinations:	HR Consultant												
QDRO Appeals:	PHP - Shared Security Committee												

This Fact Sheet is intended as a brief outline to assist family law attorneys drafting qualified domestic relations orders. Should there be any conflict between the terms and provisions contained in this Fact Sheet and the official Plan document, the terms of the official Plan document will prevail.



PRESBYTERIAN HEALTHCARE SERVICES - SHARED SECURITY PLAN
 PRESBYTERIAN HEALTH PLAN - SHARED SECURITY PLAN
 PRESBYTERIAN HEALTHCARE SERVICES - EMPLOYEES' PENSION PLAN

PHS - EMPLOYEES' PENSION PLAN FACT SHEET

Type of Plan:	Defined Benefit Plan		
Withdrawals under a QDRO after approval by the HR Consultant (2-3 weeks after the QDRO is received). The Alternate Payee is required to elect a distribution by completing the Plan's distribution forms.		Benefit \$20,000 or Less	Benefit More Than \$20,000
	Participant still employed	Alternate Payee can receive a distribution when the Participant is 50 or older	Alternate Payee can receive a distribution when the Participant is age 55 or older
	Participant no longer employed by PHS	Alternate Payee can receive an immediate distribution	Alternate Payee can receive a distribution when the Participant is age 55 or older
Available Distribution Options for Alternate Payee under a QDRO	Benefits \$20,000 or Less		Benefits More Than \$20,000
	Participant is under age 55	Participant is age 55 or older	
	As described above, the Participant must be: • 50 or older, if still employed by PHS, or • No longer employed by PHS		
	• Lump Sum • Qualified Rollover • Combination of Lump-Sum and Qualified Rollover • Life Annuity	• Lump Sum • Qualified Rollover • Combination of Lump-Sum and Qualified Rollover • Life Annuity • Life Annuity with 60 Months Certain • Life Annuity with 120 Months Certain	• Life Annuity • Life Annuity with 60 Months Certain • Life Annuity with 120 Months Certain • If you are likely to die within the next 24 months based on the opinion of a physician selected by the Pension Committee, Lump Sum



Vesting Percentage:	Years of Service	Vesting Percentage	
	1	0%	
	2	0%	
	3	0%	
	4	0%	
	5 or more	100%	
Plan Administrator:	Pension Committee Presbyterian Healthcare Services P.O. Box 26666 Albuquerque, N.M. 87125-6666		
QDRO Initial Determinations:	HR Consultant		
QDRO Appeals:	Pension Committee		

This Fact Sheet is intended as a brief outline to assist family law attorneys drafting qualified domestic relations orders. Should there be any conflict between the terms and provisions contained in this Fact Sheet and the official Plan document, the terms of the official Plan document will prevail.

PHS AND PHP - NONQUALIFIED PLANS FACT SHEET

Name of Plan:	Presbyterian Healthcare Services Section 457(b) Plan Note: There is a sample PHS - Shared Security QDRO with 457(b) Plan provisions. Contact the HR Consultant for a copy.
Withdrawals under a QDRO:	Payable on the first day of the third month after the later of the issuance of the order by the court, or the acceptance by the plan as a QDRO
Available Distribution Options for Alternate Payee under a QDRO:	Lump-Sum Distribution
Participant's Vested Percentage:	100%
Plan Administrator:	Presbyterian Healthcare Services Human Resources Senior Vice President P.O. Box 26666 Albuquerque, N.M. 87125-6666
QDRO Initial Determinations:	HR Consultant
QDRO Appeals:	Human Resources Senior Vice President Presbyterian Healthcare Services

Name of Plan:	PHP 2009 Elective Nonqualified Deferred Compensation Plan
Withdrawals under a QDRO:	Payable on the first day of the third month after the final order is received by the plan
Available Distribution Options for Alternate Payee under a QDRO:	Lump-Sum Distribution
Vesting Percentage:	100%
Plan Administrator:	Presbyterian Healthcare Services Human Resources Senior Vice President P.O. Box 26666 Albuquerque, N.M. 87125-6666
QDRO Initial Determinations:	HR Consultant
QDRO Appeals:	Human Resources Senior Vice President Presbyterian Healthcare Services

This Fact Sheet is intended as a brief outline to assist family law attorneys drafting qualified domestic relations orders. Should there be any conflict between the terms and provisions contained in this Fact Sheet and the official Plan document, the terms of the official Plan document will prevail.

_____, JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO

No. _____

_____,)
Petitioner,)
)
vs.)
)
_____,)
Respondent.)

QUALIFIED DOMESTIC RELATIONS ORDER
REGARDING PRESBYTERIAN HEALTHCARE SERVICES
SHARED SECURITY PLAN

THIS MATTER having come before the court upon the stipulations of the parties contained in the Marital Settlement Agreement which was incorporated by reference into the Final Decree of Divorce and adopted by the Court as an Order of the Court and which divided the parties' property, and the Court having reviewed the pleadings and being otherwise advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction over the subject matter and the parties. The parties and the Court intend this order to be a Qualified Domestic Relations Order ("QDRO") pursuant to the Retirement Equity Act of 1984, Public Law 98-397, and amendments thereto and in compliance with Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended, and Sections 414(p)(2) and 401(a)(13) of the Internal Revenue Code of 1986, as amended (the "Code").

2. _____ ("Participant") is employed by Presbyterian Healthcare Services (hereinafter "PHS"). The name and identification number of the plans are: (a) Presbyterian

Healthcare Services Section 403(b) Plan, ERISA Plan Number 002, Fidelity Plan Number 83302 (the “employee contribution portion”); and (b) Presbyterian Healthcare Services 401(a) Plan and Trust, ERISA Plan Number 003, Fidelity Plan Number 83301 (the “employer contribution portion”). Both plans are collectively referred to as the “Plan.” The federal identification number assigned by the IRS to PHS is 85-0105601. The Participant’s Social Security number will be provided to the Plan by cover letter.

3. The interest in the Plan as of _____ is hereby declared to be 100% divisible property under the laws of New Mexico and is 100% vested. The former spouse, _____ has a property interest in the Plan.

4. This order applies to the Plan. The Plan Administrator of the Plan is the PHS – Shared Security Committee. Any notices or other documents required to be filed with the Plan Administrator shall be hand-delivered to the Benefits Department, Cooper Building, 9501 San Mateo Blvd., N.E., Albuquerque, NM 87113, or sent by first class mail to the Benefits Department, Presbyterian Healthcare Services, P.O. Box 26666, Albuquerque, New Mexico 87125-6666.

5. The Participant’s last known address is _____, Albuquerque, New Mexico _____. If the Participant’s mailing address changes before all benefits payable to the Participant and [his] [her] beneficiary have been distributed, the Participant shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

6. The Alternate Payee is _____ (“Alternate Payee”), Date of Birth _____, and [his] [her] last known address is _____, Albuquerque, New Mexico, _____, The Alternate Payee’s Social Security number will be provided to the

Plan by cover letter. If the Alternate Payee's mailing address changes before all benefits payable to the Alternate Payee and [his] [her] beneficiary have been distributed, the Alternate Payee shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

7. The Alternate Payee is the former spouse of the Participant. The parties were married on _____. They were divorced by Final Decree of Dissolution of Marriage filed herein _____.

8. The benefits of the Plan are to be divided and paid as follows:

a) Settlement retirement benefits.

(i) Amount of Benefits. The Alternate Payee shall be entitled to receive settlement retirement benefits from the Plan as [his] [her] sole and separate property. The settlement retirement benefits shall be determined using the following formula:

50% [Options regarding amount of benefits awarded to the Alternate Payee: Alternatively, insert a higher or lower percentage, or a specific dollar amount based on the parties' agreement]	x	The value of all of the Participant's accounts in the Plan, including any rollover amounts and the total amount of the Participant's loan(s) from the employee contribution portion of the Plan, under the Plan as of _____ including all _____ (insert date) income, losses, appreciation or depreciation from such date until such amounts are segregated into separate accounts for the Alternate Payee under paragraph 8.d) or 9.c).

If a specific dollar amount is desired, use the following subparagraph (i) instead of the subparagraph (i) above:

(i) Amount of Benefits. The Alternate Payee shall be entitled to receive settlement retirement benefits from the Plan as [his] [her] sole and separate property. The amount of the Alternate Payee's benefits is \$ _____ [insert dollar amount] as of _____ including all income, losses, _____ (insert date)

appreciation or depreciation from such date until such amounts are segregated into separate accounts for the Alternate Payee under paragraph 8.d) or 9.c).

Use this Paragraph for Either Option

The entire amount of the Participant's loan from the employee contribution portion of the Plan shall be allocated to the Participant's separate account under the employee contribution portion of the Plan.

(ii) Time of Distribution of Benefits.

The Alternate Payee is required to elect a distribution by completing the Plan's distribution forms. The Alternate Payee may elect to receive [his] [her] pro rata portion (in accordance with the fraction set forth in (i)) of the Participant's accounts in the Plan: _____.

[Insert whichever option, 1 or 2 applies]

Option 1 - As early as possible.

Immediately.

**Option 2 - As late as possible -
Alternate Payee must wait until
the Participant is entitled to a
distribution under the Plans.**

No earlier than the date the
Participant is entitled to payment
because of retirement or termination.

Neither the Participant nor the Alternate Payee shall be permitted to borrow or take a hardship distribution from the Alternate Payee's portion of the Participant's benefits under the Plans.

(iii) Form of Benefits. The foregoing formula is not intended to restrict any benefit election available to the Participant or to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of the Alternate Payee's benefit. The Participant and Alternate Payee are entitled to select any benefit option available to each under the Plan.

b) Death of Participant. In the event the Participant dies prior to the commencement of benefit payments, the Alternate Payee shall still be entitled to receive the same dollar amount of benefit set forth above in paragraph 8.a).

The Alternate Payee shall be considered a surviving spouse to the extent necessary to provide [him] [her] with the same dollar

amount set forth in paragraph 8.a).

The foregoing formula is not intended to restrict any benefit election available to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of Alternate Payee's benefit. The Alternate Payee is entitled to select any benefit option available to [him] [her] under the Plan.

If the Participant dies before his or her benefits become payable after calculation of the Alternate Payee's portion, the remainder of the Participant's preretirement survivor annuity shall be payable to his or her surviving spouse or designated beneficiary, as applicable.

c) Death of Alternate Payee. In the event the Alternate Payee dies (i) before benefits under the Plan have commenced or (ii) after benefits under the Plan have commenced, but based on an available payment option in which the Alternate Payee's portion of the Plan benefits continue beyond the Alternate Payee's life, such benefits which would have otherwise been payable to the Alternate Payee shall be paid to such beneficiary designated by the Alternate Payee provided the payment of such benefits is consistent with the terms and conditions of the Plan at the time of the Alternate Payee's death. If no such beneficiary is designated, such benefits shall be paid pursuant to those provisions of the Plan which govern beneficiary designations, under which Alternate Payee shall be deemed to be the Participant.

d) As soon as administratively feasible after the Plan Administrator's acceptance of this order as a QDRO, the Plan Administrator shall deposit the Alternate Payee's portion of the Participant's benefit into separate accounts in the Alternate Payee's name. The Alternate Payee's portion of the Participant's benefit will be withdrawn pro rata from the Participant's Roth (after tax) and non-Roth (before tax) accounts, pro rata from the investments under the Plan, and pro rata from the various accounts within such investments. If the Participant is invested in the Fixed Interest Account, the withdrawal may be subject to an early withdrawal (surrender) charge which will reduce the amount the Alternate Payee receives if the Alternate Payee's portion is a percentage of the Participant's assets. The Alternate Payee will be responsible for directing the investment of the separate account until the date such benefits are distributed to [him] [her]. The Alternate Payee's account will reflect any income, losses, appreciation and depreciation until such

distribution. The rules applicable to the investment of a Participant's interest under the Plan shall apply to investment by the Alternate Payee.

e) It is acknowledged that this section is a division of property and allocates ownership rights between the parties. Each party's share of the benefits and rights stated are the sole and separate property of each, and the payment of any benefits under the Plan is not intended to be alimony within the meaning of Section 71 of the Code. The balance of the retirement after calculation of the Alternate Payee's interest is the sole and separate property of the Participant.

f) The Alternate Payee shall include all Plan benefits received by [him] [her] pursuant to this order as and when received by [him] [her] in [his] [her] gross income and the Participant need not do so.

g) For the purposes of Section 72 and Section 402(a)(1) of the Code, the Alternate Payee and not the Participant shall be treated as the distributee of any distribution or payment made to [him] [her] by the Plan pursuant to this order.

9. Copies of this order shall be sent by ordinary mail by counsel for the Alternate

Payee to the Plan Administrator who shall pursuant to 29 USC Section 1056(d)(3)(G):

a) Promptly notify the Participant, the Alternate Payee and any other Alternate Payee, the receipt of a copy of the order by the Plan Administrator, the Plan's procedure for determining the qualified status of a domestic relations order;

b) Within a reasonable time after receipt of a copy of this order, determine whether this order is a QDRO and notify the Participant, the Alternate Payee and any other Alternate Payee of such a determination;

c) Depending on the determination of whether or not this order is a QDRO, segregate in a separate account the amounts which would have been payable to the Alternate Payee during such period if this order had been determined to be a QDRO, pursuant to 29 USC Section 1056(d)(3)(H)(i).

10. This order is intended to be a QDRO made pursuant to the Retirement Equity Act of 1984 and any amendments thereto, and its provisions shall be administered and interpreted in conformity with the Act.

11. The Court retains jurisdiction to amend this order and orders to establish or maintain its qualifications as a QDRO under the Retirement Equity Act of 1984, and any amendments thereto.

12. The Plan will retain any rights it may have under its terms to correct, suspend, or terminate payments to Alternate Payee and Participant provided that either the affected party may contest such correction, suspension or termination through any administrative remedies available under the Plan. Payments by the Plan pursuant to the QDRO will be without prejudice to any right the Plan has under applicable law to seek recoupment or offset for overpayment. If the Plan pays one party a portion of the other party's benefits under the Plan and the Order, the party receiving the overpayment will return that portion to the Plan, which in turn will pass that portion on to the other party.

District Court Judge

APPROVED:

Attorney for Petitioner

Attorney for Respondent

JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO

No. _____

_____,)
Petitioner,)
)
vs.)
)
_____,)
Respondent.)

QUALIFIED DOMESTIC RELATIONS ORDER
REGARDING PRESBYTERIAN HEALTHCARE SERVICES
SHARED SECURITY AND 457(b) PLANS

THIS MATTER having come before the court upon the stipulations of the parties contained in the Marital Settlement Agreement which was incorporated by reference into the Final Decree of Divorce and adopted by the Court as an Order of the Court and which divided the parties' property, and the Court having reviewed the pleadings and being otherwise advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction over the subject matter and the parties. The parties and the Court intend this order to be a Qualified Domestic Relations Order ("QDRO") pursuant to the Retirement Equity Act of 1984, Public Law 98-397, and amendments thereto and in compliance with Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended, and Sections 414(p)(2) and 401(a)(13) of the Internal Revenue Code of 1986, as amended (the "Code").

2. _____ ("Participant") is employed by Presbyterian Healthcare Services (hereinafter "PHS"). The name and identification number of the plans are: (a) Presbyterian

Healthcare Services Section 403(b) Plan, ERISA Plan Number 002, Fidelity Plan Number 83302 (the “employee contribution portion”); (b) Presbyterian Healthcare Services 401(a) Plan, ERISA Plan Number 003, Fidelity Plan Number 83301 (the “employer contribution portion”); and (c) Presbyterian Healthcare Services 457(b) Plan (the “457(b) Plan”), a nonqualified deferred compensation plan with no ERISA Plan Number, Fidelity Plan Number 83321. All three plans are collectively referred to as the “Plan.” The federal identification number assigned by the IRS to PHS is 85-0105601. The Participant’s Social Security number will be provided to the Plan by cover letter.

3. The interest in the Plan as of _____ is hereby declared to be 100% divisible property under the laws of New Mexico and is 100% vested. The former spouse, _____ has a property interest in the Plan.

4. This order applies to the Plan. The Plan Administrator of the Plan is the PHS – Shared Security Committee for the employee and employer contribution portions of the PHS – Shared Security Plan and the PHS Vice President, Human Resources for the 457(b) Plan. Any notices or other documents required to be filed with the Plan Administrator shall be hand-delivered to the Benefits Department, Cooper Building, 9501 San Mateo Blvd., N.E., Albuquerque, NM 87113, or sent by first class mail to the Benefits Department, Presbyterian Healthcare Services, P.O. Box 26666, Albuquerque, New Mexico 87125-6666.

5. The Participant’s last known address is _____, Albuquerque, New Mexico _____. If the Participant’s mailing address changes before all benefits payable to the Participant and [his] [her] beneficiary have been distributed, the Participant shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

6. The Alternate Payee is _____ ("Alternate Payee"), Date of Birth _____, and [his] [her] last known address is _____, Albuquerque, New Mexico, _____, The Alternate Payee's Social Security number will be provided to the Plan by cover letter. If the Alternate Payee's mailing address changes before all benefits payable to the Alternate Payee and [his] [her] beneficiary have been distributed, the Alternate Payee shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

7. The Alternate Payee is the former spouse of the Participant. The parties were married on _____. They were divorced by Final Decree of Dissolution of Marriage filed herein _____.

8. The benefits of the Plan are to be divided and paid as follows:

a) Settlement retirement benefits.

(i) Amount of Benefits. The Alternate Payee shall be entitled to receive settlement retirement benefits from the Plan as [his] [her] sole and separate property. The settlement retirement benefits shall be determined using the following formula:

[Options regarding amount of benefits awarded to the Alternate Payee: Alternatively, insert a higher or lower percentage, or a specific dollar amount based on the parties' agreement]	50% x	The value of all of the Participant's accounts in the Plan, including any rollover amounts and the total amount of the Participant's loan(s) from the employee contribution portion of the Plan, under the Plan as of _____ including all (insert date) income, losses, appreciation or depreciation from such date until such amounts are segregated into separate accounts for the Alternate Payee under paragraph 8.d) or 9.c) or for the 457(b) Plan, distributed to the Alternate Payee under paragraph 8.a)(ii).

If a specific dollar amount is desired, use the following

**subparagraph (i) instead of the
subparagraph (i) above:**

(i) Amount of Benefits. The Alternate Payee shall be entitled to receive settlement retirement benefits from each plan identified in paragraph 2. as [his] [her] sole and separate property. The amount of the Alternate Payee's benefits from each plan is \$ _____ [insert per plan dollar amount] as of _____ [insert date] including all income, losses, appreciation or depreciation from such date until such amounts are segregated into separate accounts for the Alternate Payee under paragraph 8.d) or 9.c) or for the 457(b) Plan, distributed to the Alternate Payee under paragraph 8.a)(ii).

Use this Paragraph for Either Option

The entire amount of the Participant's loan from the employee contribution portion of the Plan shall be allocated to the Participant's separate account under the employee contribution portion of the Plan.

(ii) Time of Distribution of Benefits.

The Alternate Payee is required to elect a distribution by completing the Plan's distribution forms. The Alternate Payee may elect to receive [his] [her] pro rata portion (in accordance with the fraction set forth in (i)) of the Participant's accounts in the Plan: _____.

[Insert whichever option, 1 or 2 applies]

Option 1 - As early as possible.

Immediately.

**Option 2 - As late as possible -
Alternate Payee must wait until
the Participant is entitled to a
distribution under the Plan.**

No earlier than the date the
Participant is entitled to payment
because of retirement or termination.

Notwithstanding the foregoing, the 457(b) Plan distribution will be made in one cash lump sum on the first day of the third month after the later of the date this order is filed by the Court, or the date the order is accepted by the 457(b) Plan Administrator as a QDRO.

Neither the Participant nor the Alternate Payee shall be permitted to borrow or take a hardship distribution from the Alternate Payee's portion of the Participant's benefits under the Plan.

(iii) Form of Benefits. Except as provided for the 457(b) Plan, the foregoing formula is not intended to restrict any benefit election available to the Participant or to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of the Alternate Payee's benefit. The Participant and Alternate Payee are entitled to select any benefit option available to each under the Plan.

b) Death of Participant. In the event the Participant dies prior to the commencement of benefit payments, the Alternate Payee shall still be entitled to receive the same dollar amount of benefit set forth above in paragraph 8.a).

The Alternate Payee shall be considered a surviving spouse to the extent necessary to provide [him] [her] with the same dollar amount set forth in paragraph 8.a).

The foregoing formula is not intended to restrict any benefit election available to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of Alternate Payee's benefit. Except as provided with respect to the 457(b) Plan distribution, the Alternate Payee is entitled to select any benefit option available to [him] [her] under the Plan.

If the Participant dies before his or her benefits become payable after calculation of the Alternate Payee's portion, the remainder of the Participant's preretirement survivor annuity shall be payable to his or her surviving spouse or designated beneficiary, as applicable.

c) Death of Alternate Payee. In the event the Alternate Payee dies (i) before benefits under the Plan have commenced or (ii) after benefits under the Plan have commenced, but based on an available payment option in which the Alternate Payee's portion of the Plan benefits continue beyond the Alternate Payee's life, such benefits which would have otherwise been payable to the Alternate Payee shall be paid to such beneficiary designated by the Alternate Payee provided the payment of such benefits is consistent with the terms and conditions of the Plan at the time of the Alternate Payee's death. If no such beneficiary is designated, such benefits shall be paid pursuant to those provisions of the Plan which govern beneficiary designations,

under which Alternate Payee shall be deemed to be the Participant.

d) Except as provided with respect to the 457(b) Plan distribution, as soon as administratively feasible after the Plan Administrator's acceptance of this order as a QDRO, the Plan Administrator shall deposit the Alternate Payee's portion of the Participant's benefit into separate accounts in the Alternate Payee's name. The Alternate Payee's portion of the Participant's benefit will be withdrawn pro rata from the Participant's Roth (after tax) and non-Roth (before tax) accounts, pro rata from the investments under the Plan, and pro rata from the various accounts within such investments. If the Participant is invested in the Fixed Interest Account, the withdrawal may be subject to an early withdrawal (surrender) charge which will reduce the amount the Alternate Payee receives if the Alternate Payee's portion is a percentage of the Participant's assets. The Alternate Payee will be responsible for directing the investment of the separate account until the date such benefits are distributed to [him] [her]. The Alternate Payee's account will reflect any income, losses, appreciation and depreciation until such distribution. The rules applicable to the investment of a Participant's interest under the Plan shall apply to investment by the Alternate Payee.

e) It is acknowledged that this section is a division of property and allocates ownership rights between the parties. Each party's share of the benefits and rights stated are the sole and separate property of each, and the payment of any benefits under the Plan is not intended to be alimony within the meaning of Section 71 of the Code. The balance of the retirement after calculation of the Alternate Payee's interest is the sole and separate property of the Participant.

f) The Alternate Payee shall include all Plan benefits received by [him] [her] pursuant to this order as and when received by [him] [her] in [his] [her] gross income and the Participant need not do so.

g) For the purposes of Section 72 and Section 402(a)(1) of the Code, the Alternate Payee and not the Participant shall be treated as the distributee of any distribution or payment made to [him] [her] by the Plan pursuant to this order.

9. Copies of this order shall be sent by ordinary mail by counsel for the Alternate Payee to the Plan Administrator who shall pursuant to 29 USC Section 1056(d)(3)(G):

- a) Promptly notify the Participant, the Alternate Payee and any other Alternate Payee, the receipt of a copy of the order by the Plan Administrator, the Plan's procedure for determining the qualified status of a domestic relations order;
- b) Within a reasonable time after receipt of a copy of this order, determine whether this order is a QDRO and notify the Participant, the Alternate Payee and any other Alternate Payee of such a determination;
- c) Depending on the determination of whether or not this order is a QDRO, segregate in a separate account the amounts which would have been payable to the Alternate Payee during such period if this order had been determined to be a QDRO, pursuant to 29 USC Section 1056(d)(3)(H)(i).

10. This order is intended to be a QDRO made pursuant to the Retirement Equity Act of 1984 and any amendments thereto, and its provisions shall be administered and interpreted in conformity with the Act.

11. The Court retains jurisdiction to amend this order and orders to establish or maintain its qualifications as a QDRO under the Retirement Equity Act of 1984, and any amendments thereto.

12. The Plan will retain any rights it may have under its terms to correct, suspend, or terminate payments to Alternate Payee and Participant provided that either the affected party may contest such correction, suspension or termination through any administrative remedies available under the Plan. Payments by the Plan pursuant to the QDRO will be without prejudice to any right the Plan has under applicable law to seek recoupment or offset for overpayment. If the Plan pays one party a portion of the other party's benefits under the Plan and the Order, the

party receiving the overpayment will return that portion to the Plan, which in turn will pass that portion on to the other party.

APPROVED:

District Court Judge

Attorney for Petitioner

Attorney for Respondent

3b

JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO

No. _____

_____	)
Petitioner,	)
	)
vs.	)
	)
_____	)
Respondent.	)

QUALIFIED DOMESTIC RELATIONS ORDER
REGARDING PRESBYTERIAN HEALTH PLAN
401(k) PROFIT SHARING PLAN

THIS MATTER having come before the court upon the stipulations of the parties contained in the Marital Settlement Agreement which was incorporated by reference into the Final Decree of Divorce and adopted by the Court as an Order of the Court and which divided the parties' property, and the Court having reviewed the pleadings and being otherwise advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction over the subject matter and the parties. The parties and the Court intend this order to be a Qualified Domestic Relations Order ("QDRO") pursuant to the Retirement Equity Act of 1984, Public Law 98-397, and amendments thereto and in compliance with Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended, and Sections 414(p)(2) and 401(a)(13) of the Internal Revenue Code of 1986, as amended (the "Code").

2. _____ ("Participant") is employed by Presbyterian Health Plan (hereinafter "PHP"). This order applies to the Presbyterian Health Plan 401(k) Profit Sharing

Plan, Plan Number 001, Fidelity Plan Number 83303 (the "Plan"). PHP's Employer Identification Number is 94-3037165. The Participant's Social Security number will be provided to the Plan by cover letter.

3. The interest in the Plan as of _____ is hereby declared to be 100% divisible property under the laws of New Mexico and is 100% vested. The former spouse, _____ has a property interest in the Plan.

4. This order applies to the Plan. The Plan Administrator of the Plan is the PHP - Shared Security Committee. Any notices or other documents required to be filed with the Plan Administrator shall be hand-delivered to the 401(k) Committee, c/o Benefits Department, Presbyterian Healthcare Services, Cooper Building, 9501 San Mateo Blvd., N.E., Albuquerque, NM 87113, or sent by first class mail to the Benefits Department, Presbyterian Healthcare Services, P.O. Box 26666, Albuquerque, New Mexico 87125-6666.

5. The Participant's last known address is _____, Albuquerque, New Mexico _____. If the Participant's mailing address changes before all benefits payable to the Participant and [his] [her] beneficiary have been distributed, the Participant shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

6. The Alternate Payee is _____ ("Alternate Payee") and [his] [her] last known address is _____, Albuquerque, New Mexico, _____. The Alternate Payee's Social Security number will be provided to the Plan by cover letter. If the Alternate Payee's mailing address changes before all benefits payable to the Alternate Payee and [his] [her] beneficiary have been distributed, the Alternate Payee shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

7. The Alternate Payee is the former spouse of the Participant. The parties were married on _____. They were divorced by Final Decree of Dissolution of Marriage filed herein _____.

8. The benefits of the Plan are to be divided and paid as follows:

a) Settlement retirement benefits.

(i) Amount of Benefits. The Alternate Payee shall be entitled to receive settlement retirement benefits from the Plan as [his] [her] sole and separate property. The settlement retirement benefits shall be determined using the following formula:

50% [Options regarding amount of benefits awarded to the Alternate Payee: Alternatively, insert a higher or lower percentage, or a specific dollar amount based on the parties' agreement]	x	The value of all of the Participant's accounts in the Plan, including any rollover amounts and the total amount of the Participant's loan(s) under the Plan as of _____ (insert date) including all income, losses, appreciation or including all depreciation from such date until such amounts are segregated into separate accounts for the Alternate Payee under paragraph 8.d) or 9.c).

If a specific dollar amount is desired, use the following subparagraph (i) instead of the subparagraph (i) above:

(i) Amount of Benefits. The Alternate Payee shall be entitled to receive settlement retirement benefits from the Plan as [his] [her] sole and separate property. The amount of the Alternate Payee's benefits is \$ _____ [insert dollar amount] as of _____ including all income, losses,
(insert date)
appreciation or depreciation from such date until such amounts are segregated into separate accounts for the Alternate Payee under paragraph 8.d) or 9.c).

The entire amount of the Participant's loan from the Plan shall be allocated to the Participant's separate account under the Plan.

(ii) Time of Distribution of Benefits.

The Alternate Payee is required to elect a distribution by completing the Plan's distribution forms. The Alternate Payee is entitled to receive [him] [her] pro rata portion (in accordance with the fraction set forth in (i)) of the Participant's accounts in the Plan: _____.

[Insert whichever option, 1 or 2 applies]

Option 1 - As early as possible.

Immediately.

**Option 2 - As late as possible -
Alternate Payee must wait until
the Participant is entitled to a
distribution under the Plans.**

No earlier than the date the
Participant is entitled to payment
because of retirement or termination.

Neither the Participant nor the Alternate Payee shall be permitted to borrow or take a hardship distribution from the Alternate Payee's portion of the Participant's benefits under the Plans.

(iii) Form of Benefits. The foregoing formula is not intended to restrict any benefit election available to the Participant or to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of the Alternate Payee's benefit. The Participant and Alternate Payee are entitled to select any benefit option available to each under the Plan.

b) Death of Participant. In the event the Participant dies prior to the commencement of benefit payments, the Alternate Payee shall still be entitled to receive the same dollar amount of benefit set forth above in paragraph 8.a).

The Alternate Payee shall be considered a surviving spouse to the extent necessary to provide [him] [her] with the same dollar amount set forth in paragraph 8.a).

The foregoing formula is not intended to restrict any benefit election available to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of Alternate Payee's benefit. The Alternate Payee is entitled to select any benefit option available to [him] [her] under the Plan.

If the Participant dies before his or her benefits become payable after calculation of the Alternate Payee's portion, the remainder of the Participant's preretirement survivor annuity shall be payable to his or her surviving spouse or designated beneficiary,

as applicable.

c) Death of Alternate Payee. In the event the Alternate Payee dies (i) before benefits under the Plan have commenced or (ii) after benefits under the Plan have commenced, but based on an available payment option in which the Alternate Payee's portion of the Plan benefits continue beyond the Alternate Payee's life, such benefits which would have otherwise been payable to the Alternate Payee shall be paid to such beneficiary designated by the Alternate Payee provided the payment of such benefits is consistent with the terms and conditions of the Plan at the time of the Alternate Payee's death. If no such beneficiary is designated, such benefits shall be paid pursuant to those provisions of the Plan which govern beneficiary designations, under which Alternate Payee shall be deemed to be the Participant.

d) As soon as administratively feasible after the Plan Administrator's acceptance of this order as a QDRO, the Plan Administrator shall deposit the Alternate Payee's portion of the Participant's benefit into separate accounts in the Alternate Payee's name. The Alternate Payee's portion of the Participant's benefit will be withdrawn pro rata from the Participant's Roth (after tax) and non-Roth (before tax) accounts, pro rata from the Participant's investments under the Plan, and pro rata from the various accounts within such investments. If the Participant is invested in the Fixed Interest Account, the withdrawal may be subject to an early withdrawal (surrender) charge which will reduce the amount the Alternate Payee receives if the Alternate Payee's portion is a percentage of the Participant's assets. The Alternate Payee will be responsible for directing the investment of the separate account until the date such benefits are distributed to [him] [her]. The Alternate Payee's account will reflect any income, losses, appreciation and depreciation until such distribution. The rules applicable to the investment of a Participant's interest under the Plan shall apply to investment by the Alternate Payee.

e) It is acknowledged that this section is a division of property and allocates ownership rights between the parties. Each party's share of the benefits and rights stated are the sole and separate property of each, and the payment of any benefits under the Plan is not intended to be alimony within the meaning of Section 71 of the Code. The balance of the retirement after calculation of the Alternate Payee's interest is the sole and separate property of the Participant.

f) The Alternate Payee shall include all Plan benefits received by [him] [her] pursuant to this order as and when received by [him] [her] in [his] [her] gross income and the Participant need not do so.

g) For the purposes of Section 72 and Section 402(a)(1) of the Code, the Alternate Payee and not the Participant shall be treated as the distributee of any distribution or payment made to [him] [her] by the Plan pursuant to this order.

9. Copies of this order shall be sent by ordinary mail by counsel for the Alternate Payee to the Plan Administrator who shall pursuant to 29 USC Section 1056(d)(3)(G):

a) Promptly notify the Participant, the Alternate Payee and any other Alternate Payee, the receipt of a copy of the order by the Plan Administrator, the Plan's procedure for determining the qualified status of a domestic relations order;

b) Within a reasonable time after receipt of a copy of this order, determine whether this order is a QDRO and notify the Participant, the Alternate Payee and any other Alternate Payee of such a determination;

c) Depending on the determination of whether or not this order is a QDRO, segregate in a separate account the amounts which would have been payable to the Alternate Payee during such period if this order had been determined to be a QDRO, pursuant to 29 USC Section 1056(d)(3)(H)(i).

10. This order is intended to be a QDRO made pursuant to the Retirement Equity Act of 1984 and any amendments thereto, and its provisions shall be administered and interpreted in conformity with the Act.

11. The Court retains jurisdiction to amend this order and orders to establish or maintain its qualifications as a QDRO under the Retirement Equity Act of 1984, and any amendments thereto.

12. The Plan will retain any rights it may have under its terms to correct, suspend, or terminate payments to Alternate Payee and Participant provided that either the affected party

may contest such correction, suspension or termination through any administrative remedies available under the Plan. Payments by the Plan pursuant to the QDRO will be without prejudice to any right the Plan has under applicable law to seek recoupment or offset for overpayment. If the Plan pays one party a portion of the other party's benefits under the Plan and the Order, the party receiving the overpayment will return that portion to the Plan, which in turn will pass that portion on to the other party.

District Court Judge

APPROVED:

Attorney for Petitioner

Attorney for Respondent

____ JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO

No. _____

_____,)
Petitioner,)
vs.)
_____,)
Respondent.)

QUALIFIED DOMESTIC RELATIONS ORDER
REGARDING PRESBYTERIAN HEALTHCARE SERVICES
EMPLOYEES' PENSION PLAN

THIS MATTER having come before the court upon the stipulations of the parties contained in the Marital Settlement Agreement which was incorporated by reference into the Final Decree of Divorce and adopted by the Court as an Order of the Court and which divided the parties' property, and the Court having reviewed the pleadings and being otherwise advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction over the subject matter and the parties. The parties and the Court intend this order to be a Qualified Domestic Relations Order ("QDRO") pursuant to the Retirement Equity Act of 1984, Public Law 98-397, and amendments thereto and in compliance with Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended, and Sections 414(p)(2) and 401(a)(13) of the Internal Revenue Code of 1986, as amended (the "Code").

2. _____ ("Participant") is employed by Presbyterian Healthcare Services (hereinafter "PHS"). The name and identification number of the Plan is the Presbyterian

Healthcare Services Employees' Pension Plan (hereinafter the "Plan"), Plan Number 001. The federal identification number assigned by the IRS to PHS is 85-0105601. The Participant's Social Security number will be provided to the Plan by cover letter.

3. The interest in the Plan as of _____ is hereby declared to be 100% divisible property under the laws of New Mexico and is 100% vested. The former spouse, _____ has a property interest in the Plan.

4. This order applies to the Plan. The Plan Administrator of the Plan is PHS. Any notices or other documents required to be filed with the Plan Administrator shall be hand-delivered to the Benefits Department, Cooper Building, 9521 San Mateo, N.E., Albuquerque, NM 87113, or sent by first class mail to the Benefits Department, Presbyterian Healthcare Services, P.O. Box 26666, Albuquerque, New Mexico 87125-6666.

5. The Participant's last known address is _____, Albuquerque, New Mexico _____. If the Participant's mailing address changes before all benefits payable to the Participant and [his] [her] beneficiary have been distributed, the Participant shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

6. The Alternate Payee is _____ ("Alternate Payee"), Date of Birth _____, and [his] [her] last known address is _____, Albuquerque, New Mexico, _____. The Alternate Payee's Social Security number will be provided to the Plan by cover letter. If the Alternate Payee's mailing address changes before all benefits payable to the Alternate Payee and [his] [her] beneficiary have been distributed, the Alternate Payee shall inform the Plan Administrator in writing of any change in address as set forth in paragraph 4.

7. The Alternate Payee is the former spouse of the Participant. The parties were married on _____. They were divorced by Final Decree of Dissolution of Marriage filed herein _____.

8. The benefits of the Plan are to be divided and paid as follows:

a) Settlement retirement benefits. In the event the Participant _____ is entitled to receive a benefit from the Plan, the Alternate Payee _____ shall be entitled to receive settlement retirement benefits as [his] [her] sole and separate property. The settlement retirement benefits shall be determined using the following formula to be distributed by the Plan beginning at the Participant's earliest retirement date under the Plan or at another time the Alternate Payee elects to receive benefits so long as such benefits may be paid as provided for by the Plan. Notwithstanding the foregoing, the Alternate Payee shall commence his or her share of the benefits no later than the Participant's actual date of benefit commencement. The Alternate Payee is required to elect a distribution by completing the Plan's distribution forms.

Years of Benefit Service during marriage	x .5 x	Monthly benefit for Participant at Normal or Late Retirement Date,
Total Years of Benefit Service	[Alternatively,	including any cost of living
[Do not fill in how many years of	insert a higher	allowances and increases of such
Benefit Service. This will be	or lower	monthly benefit after retirement,
calculated by the HR Consultant]	number	assuming that Participant elects
	depending on	lifetime annuity only over
	the parties'	Participant's lifetime commencing at
	agreement]	the date Alternate Payee elects to
		commence benefits

[Notes:

1. The Plan is frozen for all Participants no later than on December 31, 2012 (earlier for some groups of Participants). No benefits increase due to any service or compensation after December 31, 2012.

2. The Alternate Payee's benefits are based on the Participant's average annual compensation during the five (5) consecutive plan year periods in which the Participant's compensation was the highest during this or her entire period of Plan participation until the Participant's applicable freeze date, assuming he or she completed 1,000 hours of service per year. The Plan is frozen for all Participants on December 31, 2012, and for certain Participants in 2005 or 2006. See C.5 of the QDRO Procedures. There are no

increases in Plan benefits due to compensation earned or service on or after the Participant's applicable freeze date.]

The foregoing formula is not intended to restrict any benefit election available to the Participant or to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of the Alternate Payee's benefit. The Participant and Alternate Payee are entitled to select any benefit option available to each under the Plan. The Alternate Payee may elect any benefit option available to a participant who is not married, and the Plan's early retirement and optional form of benefit reduction factors will be applied based on the Alternate Payee's lifetime, and elected time and form of benefit.

b) Termination. In the event the Participant _____ terminates employment with this employer, the Alternate Payee _____ shall be immediately entitled to receive a portion of any benefits distributed to Participant according to the formula set forth in paragraph a) above.

Please refer to C.4 of the QDRO Procedures for additional information about Option c(1) and (2)

_____ Option c(1)
(Alternate payee receives only
portion of survivor benefit annuity.)

c) Death of Participant. In the event the Participant dies prior to the commencement of benefit payments, the Alternate Payee shall be entitled to receive a portion of the preretirement survivor annuity based upon the following formula:

Years of Benefit
Service during marriage
Total Years of Benefit Service

x

The amount of each survivor annuity
payment based upon the life
expectancy of the Alternate Payee

[Do not fill in how many years of
Benefit Service. This will be
calculated by the HR Consultant]

For the purposes of eligibility for pre-retirement survivor benefits, the Alternate Payee shall be considered a surviving spouse to the extent of [his] [her] fractional interest defined above in this sub-paragraph.

The foregoing formula is not intended to restrict any benefit election available to the Alternate Payee, but is intended to set forth the method to be used in calculating the amount of Alternate Payee's benefit. The Alternate Payee is entitled to select any benefit option available to [him] [her] under the Plan.

If the Participant dies before his or her benefits become payable after calculation of the Alternate Payee's portion, the remainder of the Participant's Pre-Retirement Death Benefit shall be payable to his or her surviving spouse or designated beneficiary, as applicable.

_____ Option c(2)
(Alternate payee receives entire
survivor benefit annuity.)

c) Death of Participant. In the event the Participant dies before his or her benefits become payable, the Alternate Payee shall be entitled to receive the pre-retirement survivor annuity.

For the purposes of eligibility for the pre-retirement survivor benefits, the Alternate Payee shall be considered a surviving spouse.

This section is not intended to restrict any benefit election available to the Alternate Payee, but is intended to set forth the Alternate Payee's interest in the pre-retirement survivor annuity.

The Alternate Payee is entitled to select any benefit option available to [him] [her] under the Plan.

d) Death of Alternate Payee. In the event the Alternate Payee dies before distribution of his or her benefits under the Plan have commenced, the Alternate Payee's portion of the benefits will revert to the Participant.

In the event the Alternate Payee dies after benefits under the Plan have commenced, but based on an available payment option in which the Alternate Payee's portion of the Plan benefits continue beyond the Alternate Payee's life (e.g.: term certain or life annuity on Participant's life), such benefits which would have otherwise been payable to the Alternate Payee shall be paid to such beneficiary designated by the Alternate Payee provided the payment of such benefits is consistent with the terms and conditions of the Plan at the time of the Alternate Payee's death. If no such beneficiary is designated, such benefits shall be paid pursuant to those provisions of the Plan which govern beneficiary designations, under which Alternate Payee shall be

deemed to be the Participant.

e) It is acknowledged that this section is a division of property and allocates ownership rights between the parties. Each party's share of the benefits and rights stated are the sole and separate property of each, and the payment of any benefits under the Plan is not intended to be alimony within the meaning of Section 71 of the Code. The balance of the retirement after calculation of the Alternate Payee's interest is the sole and separate property of the Participant.

f) The Alternate Payee shall include all pension Plan benefits received by [him] [her] pursuant to this order as and when received by [him] [her] in [his] [her] gross income and the Participant need not do so.

g) For the purposes of Section 72 and Section 402(a)(1) of the Code, the Alternate Payee and not the Participant shall be treated as the distributee of any distribution or payment made to [him] [her] by the Plan pursuant to this order.

9. Copies of this order shall be sent by ordinary mail by counsel for the Alternate

Payee to the Plan Administrator who shall pursuant to 29 USC Section 1056(d)(3)(G):

a) Promptly notify the Participant, the Alternate Payee and any other Alternate Payee, the receipt of a copy of the order by the Plan administrator, the Plan's procedure for determining the qualified status of a domestic relations order;

b) Within a reasonable time after receipt of a copy of this order, determine whether this order is a QDRO, and notify the Participant, the Alternate Payee and any other Alternate Payee of such a determination;

c) Depending on the determination of whether or not this order is a QDRO, segregate in a separate account the amounts which would have been payable to the Alternate Payee during such period if this order had been determined to be a QDRO, pursuant to 29 USC Section 1056(d)(3)(H)(i).

10. This order is intended to be a QDRO made pursuant to the Retirement Equity

Act of 1984 and any amendments thereto, and its provisions shall be administered and interpreted in conformity with the Act.

11. The Court retains jurisdiction to amend this order and orders to establish or maintain its qualifications as a QDRO under the Retirement Equity Act of 1984, and any amendments thereto.

12. In the event that the Plan Trustee inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee pursuant to the terms of this Order, the Participant shall immediately return such payments to the Plan Administrator. Upon receipt of the repayment, the Plan Administrator shall issue an amended Form 1099 to the Participant so that he is not liable for any income taxes associated with the Alternate Payee's assigned share of the benefits. Notwithstanding the above, rather than requiring the Participant to return the inadvertent payments, the Plan Administrator may, in their sole discretion, recoup such payments on a prospective basis by reducing the Participant's monthly pension benefits on a temporary basis until a full recovery is made.

Similarly, in the event that the Plan Trustee inadvertently pays to the Alternate Payee any benefits otherwise payable to the Participant, the Alternate Payee shall immediately return such payment to the Plan Administrator. Upon receipt of the repayment, the Plan Administrator shall issue an amended Form 1099 to the Alternate Payee so that he or she is not liable for any income taxes associated with the Participant's benefit. Notwithstanding the above, rather than requiring the Alternate Payee to return the inadvertent payments, the Plan Administrator may, in their sole discretion, recoup such payments on a prospective basis by reducing the Alternate Payee's monthly pension benefits on a temporary basis until a full recovery is made.

13. The Plan will retain any rights it may have under its terms to correct, suspend, or terminate payments to Alternate Payee and/or Participant provided that the affected party may contest such correction, suspension or termination through any administrative remedies available

under the Plan. Payments by the Plan pursuant to the QDRO will be without prejudice to any right the Plan has under applicable law to seek recoupment or offset for overpayment.

APPROVED:

District Court Judge

Attorney for Petitioner

Attorney for Respondent

#1 Long-Term Marriage/George and Sherry

Step 1: Calculate George's Average Annual Plan Compensation ("AAPC") and Average Monthly Plan Compensation ("AMPC").

2012	92,000
2011	92,000
2010	92,000
2009	35,000
2008	35,000
Total	346,000
AAPC	69,200
AMPC	5,766.66

Name:	George	Years Employed by PHS:	34
Retirement Date:	12/31/2020	Applicable Freeze Date:	12/31/2012
Age:	62	Years of Benefit Service until Applicable Freeze Date:	26.5
Average Annual Plan Compensation on Applicable Freeze Date:	\$69,200 (\$5,766.66 AMPC)	Years of Benefit Service before 1994:	8.5
Payment Form Elected:	Joint and 50% Survivor Annuity	Years of Benefit Service after 1993 until his Applicable Freeze Date:	18

To calculate George's monthly benefit:

Step 2: Multiply AMPC times 1.5% (.015) times the number of Years of Benefit Service before 1994.

$$\$5,766.66 \times .015 \times 8.5 = \$735.25$$

Step 3: Multiply AMPC 1.15% (.0115) times the number of Years of Benefit Service after 1993 until the Applicable Freeze Date. The part of the benefit formula for pay in excess of Covered Compensation does not apply because George's Average Annual Plan Compensation is less than that amount.

$$\$5,766.66 \times .0115 \times 18 = \$1,193.70$$

Subtotal: \$1,928.95

Step 4: Early Retirement Reduction Factor (SPD, p.14) 78.4% to age 62.

$$\$1,928.95 \times .784 = \$1,512.30$$

Step 5: Multiply the subtotal by the factor applicable to George's elected payment form, joint and 50% survivor annuity, 94% (.94). For the factors that apply to payment forms, see Forms of Payment in the **How Benefits Are Paid** section.

$$\begin{array}{rcl} \$1,512.30 \times .94 = & \$1,421.56 & \\ & \text{George's monthly benefit} & \end{array}$$

Step 6: Calculate Sherry's continuation after George's death (if she is awarded survivor benefit). Multiply by 50% (.50).

$$\begin{array}{rcl} \$1,421.56 \times .50 = & \$710.78 & \\ & \text{Sherry's monthly benefit after} & \\ & \text{George's death} & \end{array}$$

There is a separate interest payable immediately since George is 57 (older than 55). It is calculated based on George's current age, 57, which requires multiplying by 53.2% in Step 4. Then there is an actuarial reduction based on Sherry's age. The actuarial reduction can only be calculated by the Plan's actuary.

#2 Mid-Term Marriage/Tony and Karen

Step 1: Calculate Tony's Average Annual Plan Compensation ("AAPC") and Average Monthly Plan Compensation ("AMPC").

2012	60,000
2011	60,000
2010	60,000
2009	35,000
2008	35,000
Total	250,000
AAPC	50,000
AMPC	4,166.66

Name:	Tony	Years Employed by PHS:	30
Retirement Date:	12/31/2020	Applicable Freeze Date:	12/31/2012
Age:	55	Years of Benefit Service until Applicable Freeze Date:	21.5
Average Annual Plan Compensation on Applicable Freeze Date:	\$50,000 (\$4,166.66 AMPC)	Years of Benefit Service before 1994:	3.5
Payment Form Elected:	Joint and 50% Survivor Annuity	Years of Benefit Service after 1993 until his Applicable Freeze Date:	18

To calculate Tony's monthly benefit:

Step 2: Multiply AMPC times 1.5% (.015) times the number of Years of Benefit Service before 1994.

$$\$4,166.66 \times .015 \times 3.5 = \$218.75$$

Step 3: Multiply AMPC 1.15% (.0115) times the number of Years of Benefit Service after 1993 until the Applicable Freeze Date. The part of the benefit formula for pay in excess of Covered Compensation does not apply because Tony's Average Annual Plan Compensation is less than that amount.

$$\$4,166.66 \times .0115 \times 18 = \$862.50$$

Subtotal: \$1,081.25

Step 4: Early Retirement Reduction Factor (SPD, p.14) 46% to age 55.

$$\$1,081.25 \times 46 = \$497.37$$

Presbyterian calculations

Step 5: Multiply the subtotal by the factor applicable to Tony's elected payment form, joint and 50% survivor annuity, 94% (.94). For the factors that apply to payment forms, see Forms of Payment in the **How Benefits Are Paid** section.

$$\begin{array}{rcl} \$497.37 \times .94 = & \$467.53 & \\ & \text{Tony's monthly benefit} & \end{array}$$

Step 6: Calculate Karen's continuation after Tony's death (if she is awarded survivor benefit). Multiply by 50% (.50).

$$\begin{array}{rcl} \$467.53 \times .50 = & \$233.76 & \\ & \text{Karen's monthly benefit after} & \\ & \text{Tony's death} & \end{array}$$

There is a separate interest payable when Tony reaches age 55, it is calculated based on Tony's age, 55, then there is an actuarial reduction based on Karen's age. The actuarial reduction can only be calculated by the Plan's actuary.

#3 Short-Term Marriage/Andy and Mary

Step 1: Calculate Mary's Average Annual Plan Compensation ("AAPC") and Average Monthly Plan Compensation ("AMPC"). Compensation is assumed to be the same as Tony's.

2012	60,000
2011	60,000
2010	60,000
2009	35,000
2008	35,000
Total	250,000
AAPC	50,000
AMPC	4,166.66

Name:	Mary	Years Employed by PHS:	25.5
Retirement Date:	12/31/2030	Applicable Freeze Date:	12/31/2012
Age:	60	Years of Benefit Service until Applicable Freeze Date:	7.5
Average Annual Plan Compensation on Applicable Freeze Date:	\$50,000 (\$4,166.66 AMPC)	Years of Benefit Service before 1994:	0
Payment Form Elected:	Joint and 50% Survivor Annuity	Years of Benefit Service after 1993 until her Applicable Freeze Date:	7.5

To calculate Mary's monthly benefit:

Step 2: Multiply AMPC times 1.5% (.015) times the number of Years of Benefit Service before 1994. There are no years before 1994.

0

Step 3: Multiply AMPC 1.15% (.0115) times the number of Years of Benefit Service after 1993 until the Applicable Freeze Date. The part of the benefit formula for pay in excess of Covered Compensation does not apply because Mary's Average Annual Plan Compensation is less than that amount.

$$\$4,166.66 \times .0115 \times 7.5 = \$359.37$$

Subtotal: \$359.37

Step 4: Early Retirement Reduction Factor (SPD, p.14) 64% to age 60.

$$\$359.37 \times .64 = \$230.00$$

Step 5: Multiply the subtotal by the factor applicable to Mary's elected payment form, joint and 50% survivor annuity, 94% (.94). For the factors that apply to payment forms, see Forms of Payment in the **How Benefits Are Paid** section.

$$\$230.00 \times .94 =$$

\$216.20

Mary's monthly benefit

Step 6: Calculate Andy's continuation after Mary's death (if he is awarded survivor benefit). Multiply by 50% (.50).

$$\$216.20 \times .50 =$$

\$108.10

Andy's monthly benefit after
Mary's death

There is a separate interest payable in 10 years when Mary is 55. It is calculated based on Mary's age, 55, which requires multiplying by 46% in Step 4. Then there is an actuarial reduction based on Andy's age (but probably not much since he is only one month younger). The actuarial reduction can only be calculated by the Plan's actuary.

Sandia Plans

Pension Plan QDRO Highlights
Procedures and Guidelines

Model Orders:

- Defined Contribution
Plan

- Defined Benefit-Shared
Interest

- Defined Benefit-
Separate Interest

Calculations of Hypotheticals



**Sandia Corporation Retirement Income Plan
Pension Plan QDRO Highlights**

1. Qualification Process:

Sandia has outsourced the qualification of these orders to:

AonHewitt
Sandia Corporation Qualified Order Team
P.O. Box 1433
Lincolnshire, IL 60069-1433
QDRO FAX line - 847-883-9313
Toll free number – 866-310-8042

Draft orders can be submitted to AonHewitt for preliminary review prior to submitting to the courts. Attorneys may contact AonHewitt with questions that may arise in association with the development of the order.

AonHewitt notifies Sandia to place a hold on pension benefit of participant once an order is received by them. Once qualified, AonHewitt notifies the attorneys and submits the qualified order to Sandia.

2. Survivor Annuity Options:

If Participant is already in benefit pay status, the survivor elections were already made at time of commencement and are irrevocable.

If Participant is not yet in pay status, then Survivor benefit designation for Alternate Payee must be determined in the order.

Sandia's Retirement Income Plan has a 100% Pre-Retirement Spousal Survivor option payable only to a qualified spouse (and alternate payee).

*Reduction for Service Pension (worked to retirement eligibility) typically does not apply. Reduction for Deferred Vested Pension is based on integrated schedule determined by age of participant and date of death.

**Sandia Corporation Retirement Income Plan
Pension Plan QDRO Highlights**

Upon commencement of benefit payments, there are multiple Post Retirement Survivor Options.

- A. 100% Spousal Survivor Option
 - *10% Reduction for Service Pension (worked to retirement eligibility)
 - *14% Reduction for Deferred Vested Pension
- B. 50% Spousal Survivor Option
 - *5% Reduction for Service Pension (worked to retirement eligibility)
 - *7% Reduction for Deferred Vested Pension
- C. 50% Contingent Survivor Option (Contingent = any one individual who is not the spouse or Alternate Payee)
 - *Reduction schedule based on age difference between Participant and Contingent

Shared Interest Order: The Alternate Payee may be designated as the surviving spouse for preretirement and postretirement survivorship to the extent of the Alternate Payee's community interest defined in the order. Preretirement Survivor benefits not assigned to the Alternate Payee would automatically pay to a qualified current spouse in the event of death of Participant prior to commencement. Post Retirement Survivor benefits not assigned to the Alternate Payee can be assigned to a new spouse or a contingent survivor by the Participant at time of commencement. The order must address who is responsible for the cost of the survivor reduction.

Separate Interest Order: The Alternate Payee may be designated as the surviving spouse for Preretirement Survivorship to the extent of the Alternate Payee's community interest defined in the order. The Alternate Payee's Preretirement Survivor benefit would be payable in lieu of any other benefits that may have been payable as a result of this Order. If Preretirement Survivor benefits are not designated for the Alternate Payee, should the Participant predecease the Alternate Payee prior to the commencement of benefit payments, the Alternate Payee's entitlement pursuant to the terms of this Order shall be forfeited and the Alternate Payee will receive no benefit payments from the Plan. Post Retirement Survivor benefits are independently designated by Participant and by Alternate Payee at time of benefit commencement. Participant may designate a new spouse or a contingent as survivor for his/her benefit. Alternate Payee may designate a Contingent Survivor for his/her benefit, but cannot designate a spouse.

3. Benefit Commencement:

Shared Interest Order: Benefits to the Alternate Payee will commence if and when payments commence to the Participant. The Alternate Payee's benefit shall be determined based upon the Plan Participant's benefit as of the Valuation Date

Sandia Corporation Retirement Income Plan
Pension Plan QDRO Highlights

stipulated in the order, using the pension plan age factors of the Participant at date of commencement.

Separate Interest Order: The Alternate Payee may choose to commence benefit payments at the Participant's earliest retirement age (as defined by the Plan) but no later than when the Participant actually commences payment. The Alternate Payee's benefit shall be determined based upon the Plan Participant's Normal Retirement Benefit as of the Valuation Date stipulated in the order. **The Alternate Payee's benefit shall be actuarially adjusted to provide for a benefit payable over the Alternate Payee's lifetime.**

*Normal Retirement Age is age 65 as defined by the pension plan. Both the pension plan age factors used in the benefit calculation in a Shared Interest Order and the actuarial factors used in the benefit calculation in a Separate Interest Order result in lower monthly benefit amounts when commencing at an earlier age. However, the age factors within the pension plan provide for an unreduced benefit by age 62, whereas, the actuarial factors do not.

4. Alternate Payee contact with Sandia:

It is the responsibility of the Alternate Payee to keep Sandia up to date with their mailing address. Alternate Payee should contact the Sandia Benefits Customer Service Line at (505)844-4237 (option 2) with any address changes.

Alternate Payee may also contact the Customer Service Line to give notice of their intent to commence benefits under a Separate Interest Order. Sandia reaches out to the Alternate Payee when payments are required to commence due to the Participant's commencement.

5. Frequent Issues that Result in Failure to Qualify:

Some of the most frequently identified issues that result in a failure of AonHewitt to qualify an order are:

- Survivor Benefits not addressed
- Cost of Survivor Reduction not addressed
- Assignment of Benefits to Alternate Payee is not clearly defined
- Incomplete Participant and/or Alternate Payee data

Procedures and Guidelines Relative to Qualified Domestic Relations Orders

For use with benefit plans sponsored by

Sandia Corporation

Effective February 2011



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Article 1

Introduction

These procedures for the processing and qualification of domestic relations orders are adopted by the Sandia Corporation Employee Benefits Committee or its delegate of the Sandia Corporation Savings and Income Plan, and the Sandia Corporation Retirement Income Plan (hereinafter collectively referred to as the "Plans" or singly the "Plan") pursuant to its authority to adopt rules and procedures for the Plans. The Plans are qualified plans under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code") and subject to the provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The Code and ERISA provide that a Participant's benefits under a qualified plan may be assigned to an "Alternate Payee" (a spouse, former spouse, child, or dependent) pursuant to a domestic relations order (DRO) provided that the DRO meets the qualification requirements of the Code, ERISA, and the provisions of the Plan. A DRO that meets these qualification requirements is a qualified domestic relations order, or a "QDRO." These procedures are effective as of February 2011, and amend and restate any previous QDRO procedures used by the Plans. These procedures may be amended from time to time.

Unless a DRO meets the necessary criteria that make it a QDRO, the Plan Administrator is not permitted to make a distribution to anyone other than a Plan Participant. According to the United States Department of Labor, the determination of whether a DRO is a QDRO is made by the Plan Administrator. The Plan Administrator for the Plans is Sandia Corporation (Sandia), acting through the Sandia Corporation Employee Benefits Committee.

The information contained in these procedures is provided to help Plan Participants, potential Alternate Payees, and attorneys who are, or will be, drafting DROs to the Plan understand the review and determination process. Much of the information in this document is specific to the Plans.

A Sample QDRO Form that may be used as a model is included as part of these procedures. Use of the language in the Sample QDRO Form is not required, but it will help expedite the review process. The Plan Administrator gives no assurances that language in the Sample QDRO Form will meet the requirements that a state court may impose on an order. The Sample QDRO Form is intended solely as a guide for use by legal counsel and does not represent legal advice.

Article 2

Basic Terms and Definitions

- **Accrued Pension Benefit**—means the specific amount or percentage of a Participant's pension benefit as of a particular date based on a formula utilizing in part the Participant's years of Credited Service, generally stated as a monthly amount.
- **Adverse Claim**—means a Domestic Relations Order, Proposed Order, Attorney Letter, Restraining Order, Joinder, or Divorce Decree.
- **Alternate Payee**—means a person who is assigned a portion of a Participant's Plan account/benefit under the terms of a DRO. To be an Alternate Payee, a person must be the spouse, former spouse, or child, or otherwise be a dependent of the Participant.
- **Code**—means the Internal Revenue Code of 1986, as amended from time to time, and as in effect on the relevant date to be interpreted hereunder.
- **Company**—means Sandia Corporation and any successor company which continues the Plan.
- **Coverture Fraction**—means a fraction, the numerator of which is the number of years and months the Participant and the Alternate Payee (spouse or former spouse) were married while the Participant accrues pension benefits under the Plan, and the denominator of which is the number of years and months the Participant continues to accrue pension benefits under the Plan until the date pension benefits commence to the Alternate Payee or earlier if so stated in the Order.
- **Domestic Relations Order (or DRO)**—means an order issued by a court or state agency of proper jurisdiction relating to a domestic relations proceeding that gives a person (called the "Alternate Payee") the right to receive all or part of the Participant's Plan benefits. *[Note: A DRO is not a Qualified Domestic Relations Order (QDRO) until the Plan Administrator determines that it meets the requirements to be qualified.]*
- **Employee Benefits Committee**—means the committee that is responsible for controlling and managing the operation and administration of the Plans.
- **ERISA**—means the Employee Retirement Income Security Act of 1974, as amended from time to time, and as in effect on the relevant date to be interpreted hereunder.
- **Joinder**—means a notice from a court that a Plan is named as a party in a domestic relations matter.
- **Legal Department**—means an internal department of the Company responsible for the legal affairs of the Company.
- **Participant**—means an employee or former employee of the Company who has an account/benefit under the Plan.
- **Plan or Plans**—means the Sandia Corporation Savings and Income Plan, , and the Sandia Corporation Retirement Income Plan.
- **Plan Administrator**—means Sandia Corporation, acting through the Employee Benefits Committee. Responsibilities that have been assigned to the Plan Administrator throughout these procedures may be reassigned or outsourced by the Plan Administrator.

- **Plan recordkeeper (or recordkeeper)**—means an outside vendor responsible for maintaining individual account balances within the Plan. Fidelity Investments is the current Plan recordkeeper for the savings plans, and Sandia Corporation is the current Plan recordkeeper for the retirement plans.
- **Proposed Order**—means an unsigned or draft order which is submitted to the QDRO Processor for review prior to the order being signed on behalf of a court or administrative agency.
- **Qualified Domestic Relations Order (or QDRO)**—means a Domestic Relations Order that meets the statutory requirements of Section 414(p) of the Code and Section 206(d)(3) of ERISA, as well as meeting the Plan's requirements that are set out in these written QDRO Procedures.
- **QDRO Procedures**—means these procedures for the review and processing of Domestic Relations Orders submitted to the Plan. The QDRO Procedures include the entire contents of this package as seen on the cover page.
- **QDRO Processor**—the person or organization appointed or hired by Sandia Corporation to review and process Domestic Relations Orders received by the Plans. The QDRO Processor shall review such orders in accordance with these QDRO Procedures and thereupon make recommendations to the Plan Administrator for the acceptance or rejection of such orders, but shall have no discretionary authority in regard to the determination of these matters. Aon Hewitt is the current QDRO Processor for the Plans.
- **QDRO Restriction**—means restrictions that are placed on the account/benefit of a Plan Participant after the Plan Administrator or the QDRO Processor receives a DRO or some other written documentation that the account/benefit is, or may become, the subject of a proceeding pursuant to a domestic relations law. See Section A of Article 3 for a list of what items constitute written documentation for this purpose. With respect to the Savings Plans, the Participant will be unable to take a loan, withdrawal, or distribution from the Plans while the account/benefit is restricted. An Account Restriction does not prevent the Participant from changing (or stopping) his or her contribution rate or from changing the account investment mix, to the extent the Participant has such rights under the Plan.

With respect to the Retirement Plans, if the Participant has commenced monthly annuity pension benefits prior to the receipt by the QDRO Processor of a court-executed DRO, the QDRO Processor will notify the Plan recordkeeper to place a restriction on the Participant's benefit. The amount or the restriction shall be the amount specified as payable to an Alternate Payee by the court-executed DRO (or the value of the amount determined by applying the percentage of the participant's benefits designated in the court-executed DRO as payable to the Alternate Payee or by applying the method specified in the court-executed DRO for determining such amount) to be held by the Plan while the DRO is under review.

If the Participant has not commenced monthly annuity pension benefits prior to the receipt by the QDRO Processor of a court-executed DRO or an Adverse Claim, the recordkeeper will be instructed to place a QDRO indicator in the Participant's file to restrict future payments.

- **Retirement Plan**—means the Sandia Corporation Retirement Income Plan.
- **Sample QDRO Form**—means a form adopted by the Plan Administrator and made part of these QDRO Procedures to assist an attorney who is drafting a DRO for submission to the Plan. The Plan Administrator gives no assurance that the form complies with any particular state laws and asserts that providing this form should not be construed as the practice of law in any jurisdiction. The Plan does not require that a DRO be submitted on the sample form to be qualified.
- **Savings Plan**—means the Sandia Corporation Savings and Income Plan.



- **Summary Plan Description (or SPD)**—means a detailed summary of the provisions of the Plan, the contents of which are dictated by ERISA.
- **Valuation Date**—means the date that the Participant's account is to be valued for purposes of computing a split of the account pursuant to a QDRO. For savings plan purposes, this date may not be a date earlier than October 1, 1993. A QDRO must specify the Valuation Date, provided that if the order fails to provide a Valuation Date the Plan Administrator may establish the Valuation Date as the date of account segregation.

Article 3

Inquiries and Review Procedures

A. Initial Inquiry Procedure

1. An initial inquiry regarding the Plan's QDRO procedures begins with the Participant, the Alternate Payee, or an attorney representing one of these parties contacting the Plan Administrator, either through the Company's Legal Department or the QDRO Processor, and advising the Plan Administrator that a Participant's account/benefit is, or may become, the subject of a proceeding pursuant to a domestic relations law (a "domestic relations proceeding"). The initial inquiry may take the form of (i) correspondence, (ii) a court-issued subpoena or other legal document served on the Plan Administrator, (iii) a draft domestic relations order, (iv) a final domestic relations order signed by a judge or other appropriate government official, or (v) a Joinder as described below. If a written inquiry is made through the Company, such inquiries shall be referred to the QDRO Processor.
2. If requested as part of the initial inquiry, the QDRO Processor will send to the Participant and the Alternate Payee, or their legal representatives, a copy of the Plan's QDRO Procedures and a Sample Domestic Relations Order along with written notice that the Plan has received this request.
3. If the initial inquiry includes, or is followed by, written documentation that a Participant's account/benefit may be subject to a QDRO or that a DRO is forthcoming, then with respect to the Savings Plans, the QDRO Processor will instruct the recordkeeper to place a restriction on the Participant's account/benefit(s) under one or more Plans as identified in the document. A QDRO restriction will not occur on verbal inquiry alone. Parties who make verbal initial inquiries will be informed that they must send written documentation (items (ii) through (v) of paragraph 1 above) for an account to be restricted. With respect to the Retirement Plans, if the initial inquiry includes, or is followed by written documentation that a Participant's benefit may be subject to a QDRO or that a DRO is forthcoming, no restriction is placed on the benefit; however, the QDRO Processor will instruct the recordkeeper to flag the pension record to prevent the commencement of payment while a domestic matter is pending. If a Participant is already in payment status upon receipt of any notice, benefit payments will not be suspended unless a court-executed DRO is received and clearly indicates the amount to be assigned to an Alternate Payee.
4. If a pleading that has been filed under an order joining the Plan as a party to the domestic relations proceeding (Joinder), such Joinder will be forwarded to the QDRO Processor. The QDRO Processor shall be responsible for reviewing and responding to any Joinder received by the Plan Administrator.

B. QDRO Restriction

1. With respect to the Savings Plans, once the Plan Administrator has been properly notified (as set forth in Section A above) that a Participant's account is, or may become, the subject of a proceeding pursuant to a domestic relation proceeding, a QDRO restriction will be placed on the Participant's entire account. While the restriction is in place, the Participant cannot obtain withdrawals or distributions, or initiate new loans from the Plan(s). While the restriction is in place with respect to the Savings Plans, the Participant can (i) make additional contributions and loan payments (if any) to the account, (ii) discontinue or modify their deferral arrangement, and (iii) initiate investment direction changes. In addition, the employer may continue to make contributions to the account in accordance with the rules of the Savings Plans and the account will continue to incur investment earnings and losses.

With respect to the Retirement Plan, the restriction is only placed if the Participant has commenced monthly annuity pension benefits prior to receipt of the proper notification set forth in Section A above. If the Participant has commenced monthly pension benefits prior to the receipt by the QDRO Processor, the amount restricted and paid to the Alternate Payee will be in the amount, percentage or by applying the method specified in the court-executed QDRO as payable to the Alternate Payee. If the Participant has not commenced monthly annuity pension benefits prior to the receipt by the QDRO Processor, the QDRO Processor will instruct the recordkeeper to place a "flag" on the Participant's benefit to restrict future payments.

2. When a restriction has been placed on an account/benefit, the QDRO Processor shall prepare, sign, and send (or cause to be sent) a "Notification of Restriction" to the Participant. Alternatively, the QDRO Processor may send this notification to the legal representative of a party who has designated his or her legal representative for receipt of notice. This notification may be sent as part of the mailing that includes the QDRO Procedures and may be combined with any other notice required under the procedures. The notice will also explain what events must occur before the QDRO restriction can be lifted.
3. Once a DRO is received by the QDRO Processor, the QDRO restriction can only be lifted:
 - (a) upon a determination that the DRO is a QDRO coincident with a split of the account/benefit into separate accounts for the Participant and the Alternate Payee(s);
 - (b) after receipt by the QDRO Processor of a court order stating that the potential Alternate Payee waived their rights to benefits under the Plan(s);
 - (c) after receipt by the QDRO Processor of a letter or release from the Alternate Payee or a letter from his or her attorney indicating that the Participant's account/benefit is no longer the subject of, or intended to be the subject of, a domestic relations proceeding;
 - (d) when there is no activity in accordance with Section B.4 below;
 - (e) pursuant to Section E.1(c)(2)a upon a determination that the DRO is not a QDRO, but only after expiration of 90 days from the date of notice of such determination and in the event there is no objection by an interested party in response to such notice; or

(f) upon expiration of the 18-month period as described in Section E.2 below.

4. If a DRO is not received within six (6) months following placement of the QDRO restriction, the QDRO Processor may lift the restriction and revoke any actions taken by the Plan Administrator or QDRO Processor in response to an initial inquiry, without further notice to the interested parties. However, if the QDRO Processor determines that based on the specific facts and circumstances the QDRO restriction should remain in effect for a longer period, such QDRO restriction shall continue until the QDRO Processor determines that such extension of the restriction is no longer necessary.
5. If a DRO is received within a reasonable period of time following placement of the QDRO restriction, it will be processed in accordance with Section E of this Article 3. The 18-month period referred to in subsection E.2 will commence only after a DRO is actually received. Any period of administrative suspension or other action taken by the Plan Administrator or QDRO Processor prior to receipt of the DRO will not be included within that 18-month period.

C. Documentation

1. All inquiries and correspondence or legal documents related to a DRO shall be directed to or forwarded to the QDRO Processor.
2. All parties shall be instructed to send a DRO to the following address to be reviewed in accordance with these QDRO Procedures: P.O. Box 1433, Lincolnshire, IL 60069, Attention: Sandia QDRO Department
3. Copies of any documentation related to a DRO received by the Company shall be forwarded to the QDRO Processor.
4. Upon receipt of written documentation, the QDRO Processor will open a QDRO file on the Participant's account/benefit.

D. Sharing Information

1. These QDRO Procedures may be provided to anyone who requests them. Additionally, the Participant, Alternate Payee, or their legal representatives also may be provided general Plan information such as the Summary Plan Description and other items to the extent required under ERISA or the Code (not specific to the Participant's account/benefit) upon request.
2. Information that is specific to a Participant's account/benefit will only be provided directly to an Alternate Payee or to a legal representative of one of the parties if the Plan Administrator has been provided one of the following:
 - (a) The written consent of the Participant to share information pertaining to his or her account/benefit; or
 - (b) A valid subpoena for information or an order issued by the court of proper jurisdiction in relation to a domestic relations matter.

3. Participant account/benefit information is subject to the limitations of the Plan's recordkeeping system. Due to these limitations the Plan Administrator may not be able to comply with certain requests for historical data pertaining to a Participant's benefits. The Plan Administrator and recordkeeper are not required to retain copies of a Participant's prior statements regarding his or her account activity. If account information is not readily available due to limitations of the recordkeeping system, the Plan Administrator, QDRO Processor, and/or recordkeeper shall not be required to re-create account information as part of the QDRO review process.
4. Participant information that is to be provided to the Alternate Payee or to a legal representative will be provided by hard copy via the U.S. mail or private postal delivery, and will not be shared over the telephone, via facsimile transmission, or by email.

E. Review Procedure

1. Procedures upon receipt of a DRO
 - (a) Upon receipt of a DRO, the QDRO Processor shall prepare, sign, and send (or cause to be sent) a written notice to each person named in the DRO (at the address specified in the DRO, if applicable), together with a copy of these Procedures (if not previously provided). This notice may be combined with any other notice required by these QDRO Procedures.
 - (b) Upon receipt of a DRO, the Plan Administrator shall separately account for amounts which would be payable to the Alternate Payee if the DRO is determined to be a QDRO (except for any amounts that would not be distributable in any event during the period in which these procedures are applicable). No part of this amount shall be paid to the Alternate Payee until the DRO is determined to be a QDRO, nor will this amount be made available to the Participant.
 - (c) Upon receipt of a DRO, the QDRO Processor shall review the DRO to determine whether it satisfies the requirements for a QDRO pursuant to the Code, ERISA, the Plan, and these Procedures. The QDRO Processor shall prepare, sign, and send (or cause to be sent) the appropriate notice of the determination of the qualification of the order. Unless extraordinary circumstances exist, the notice will be mailed by first class mail within a reasonable time following the receipt of the DRO to all persons named in the order and any representatives designated in writing by such persons (the "Interested Parties"). The notice may be combined with any other notice required under these QDRO Procedures.
 - (1) If the QDRO Processor determines that the DRO meets the requirements for a QDRO, the QDRO Processor shall prepare, sign, and send (or cause to be sent) written notification to all Interested Parties that a determination has been made that the DRO is a QDRO.

- (2) If the QDRO Processor determines that the DRO does not meet the requirements for a QDRO, the QDRO Processor shall prepare, sign, and send (or cause to be sent) written notification to all Interested Parties that a determination has been made that the DRO as drafted is not a QDRO. Such notice shall state the reason or reasons for the determination.
 - a. If no Interested Party disputes this negative determination within 120 days of the date on such notice, the determination that the order is **not** a QDRO shall become final and the QDRO Processor shall release the QDRO restriction, if any, and release any other restrictions placed on the Participant's account.
 - b. If, within 120 days of the date on such notice, any Interested Party disputes this determination or notifies the Plan Administrator or QDRO Processor that steps are being taken to revise the order to make it a QDRO, the QDRO Processor shall either (i) if the determination is in dispute, refer the dispute to the legal counsel, who may be counsel for Sandia, for resolution; or (ii) if the order is to be revised, permit such revision to be made, provided the revision is made within a reasonable time, subject to the 18-month time limit described below in subsection E.2 below.
- (3) The notice of determination provided under subsection (2) above will include a copy of these QDRO Procedures unless the procedures were provided at the time of the initial inquiry.

2. Procedures upon final determination

- (a) If, at any time within 18 months from the date on which the first payment would be required to be made under the DRO, a final determination is made that the DRO (as revised, if applicable) is a QDRO, the Plan Administrator shall follow the terms of the QDRO.
- (b) If, at the end of this 18-month period no final determination has been made that the DRO is a QDRO, the QDRO Processor shall prepare, sign, and send (or cause to be sent) written notification of the fact to all Interested Parties. The Plan Administrator shall release the QDRO restriction, if any, or release any other restrictions placed on the Participant's account, and allow the Participant to access the account in accordance with the Plan. If it is subsequently determined that the DRO (as revised, if applicable) is a QDRO, the subsequent QDRO determination shall be applied prospectively only.

3. Procedures for Draft Orders or Amended Orders

- (a) Interested Parties are encouraged to submit a draft DRO for review before filing it with the court. The QDRO Processor will review a draft DRO in the same manner as it reviews a completed, court-executed order; provided, however, that the QDRO Processor will not provide a notice of determination as provided in Section E.1(c). Instead, the QDRO Processor will prepare, sign, and send (or cause to be sent) notification to the drafting party of any changes that are necessary to qualify the DRO. If no changes are required, the notice will simply instruct the attorney to have the draft order executed by the appropriate court officials, filed with the court, and resubmitted to the QDRO Processor for final approval and processing. In either case, the drafting party will be provided with a copy of these QDRO Procedures unless the procedures were provided at the time of the initial inquiry.

- (b) If a determination is made that an order does not qualify as a QDRO (see Section E.1(c)(2) above), the Interested Party may submit for review a draft revised order or a draft amended order incorporating the recommendations made by the QDRO Processor. The QDRO Processor will review the revised or amended draft order in the same manner as it reviews a completed, court-executed order; provided, however, that the QDRO Processor will not provide a notice of determination as provided in Section E.1(c). An order which supersedes or amends an order already entered by the court must clearly state such fact.

F. Determination Notices

If a DRO is not qualified, the notice provided pursuant to Section E.1(c) (2) of Article 3 will include the following information:

- (a) The reason(s) the order is not qualified;
- (b) Citation of the Plan provisions or reference to QDRO procedures upon which the determination is based;
- (c) Instruction that the parties may, within the time period specified, submit a revised or amended DRO for further review; and
- (d) A descriptive listing of any additional documentation, information, or revisions essential for the order to be qualified and an explanation of why the listed items are necessary.

Notice of such a determination shall be provided via U.S. Postal Mail. The Plan will continue to maintain the restriction on the Participant's account for 120-day period following such notice to permit the parties to submit a new DRO. If, after 120 days, the Plan Administrator has not received a new DRO, the account restriction will be released.

G. Segregating the Benefits Following Qualification

If the DRO is determined to be a QDRO in accordance with these QDRO Procedures, the QDRO Processor will send the appropriate information to the Plan's recordkeeper to allow the recordkeeper to calculate the amount to be segregated from the Participant's account for the benefit of the Alternate Payee.

With respect to the Savings Plans, the recordkeeper shall establish an account for the Alternate Payee with the Plan. The Alternate Payee's separate account will be invested in accordance with the investment selections that the Participant had in effect for his or her account on the date of the segregation. In the absence of instructions to do otherwise, the Alternate Payee's account will remain invested in that manner.



Once the Alternate Payee's account has been established within the Plan, the recordkeeper will provide the Alternate Payee with the appropriate documents, forms, and instructions for the Alternate Payee to request a direct rollover or total distribution from the Plan. If the Alternate Payee's properly completed election form is not returned within 30 days from the date it was mailed to the Alternate Payee, the Alternate Payee's separate account will be distributed in cash in one lump sum, less applicable federal and state income tax withholding.

With respect to the Retirement Plans, the recordkeeper shall establish a permanent record of the Alternate Payee's QDRO assignment in its records. **Generally**, the Alternate Payee will be entitled to commence a payment from the Plan at any time following the Participant's attainment of earliest retirement age (as defined by the Plan) unless the QDRO requires that the Alternate Payee commence payment if and when the Participant chooses to commence payment.

If the Participant has commenced monthly annuity pension benefits prior to the receipt by the QDRO Processor of a court-executed QDRO, the QDRO Processor will provide the Alternate Payee with a Withholding Certificate for pension or Annuity Payments (W-4P). The QDRO Processor will advise the Alternate Payee that pension benefits will commence as soon as administratively possible after completion and return of form W-4P to the QDRO Processor. If the tax forms are not returned within 30 days from the date of the letter accompanying such forms, taxes will be withheld at the current tax tables as though marital status is married with three (3) allowances (M-3). This may be changed anytime thereafter by the Alternate Payee.

H. Miscellaneous Savings Plan Provisions

1. **Award more than vested interest.** Only a Participant's vested benefit may be assigned pursuant to a QDRO. A DRO shall fail to be a QDRO if it awards the Alternate Payee an aggregate interest in the Participant's account that is greater than the amount of the Participant's total vested account balance at the time of the determination of qualification. Unless a QDRO states otherwise, an assignment to an Alternate Payee of a percentage of the Participant's account will be calculated on the Participant's vested balance as of a date that is a Valuation Date excluding the value of an outstanding loan balance, if any, on the Valuation Date.
2. **Calculating award to Alternate Payee and reconstructing account history.** A QDRO may assign the Alternate Payee a percentage of the Participant's account balance or a flat dollar amount, provided such amount does not exceed the vested account balance of the Participant as of the date of determination of qualification. In either case, a Valuation Date must be specified in the order or otherwise determinable by the Plan Administrator (see the definition of Valuation Date in Article 2). However, the Plan Administrator will not qualify any DRO that requires the Plan to reconstruct a Participant's past financial history in the Plan to determine the amount to segregate from the Participant's account. Specifically, the Plan Administrator will not qualify a DRO if the order requires that the Alternate Payee receive a percentage of the Participant's account computed as of a date that is not a Valuation Date.

3. **Calculating investment earnings and losses on Alternate Payee's portion.** Unless otherwise stated in the QDRO, and subject to the prohibition on reconstructing an account's history as set forth in Section H.2 above, investment gains and losses will be allocated on a pro rata basis to the Alternate Payee's portion based upon gains and losses credited to the Participant's account from the Valuation Date to the date of the account segregation. Investment gains and losses will be based on the investment of the Participant's account pursuant to the terms of the Plan. The Alternate Payee's portion of an account under the Plan will be invested in accordance with the Participant's investment directions in effect immediately prior to segregation of the account.

Notwithstanding the provisions of Section H.2 or H.3, the drafter of a DRO is responsible for definitively stating what benefits are being assigned to the Alternate Payee. A formula in the order that does not clearly state the amount of benefits being assigned or that requires the Plan to reconstruct an account history to a date that is not a Valuation Date will not be a QDRO.

4. **Loans.** If a Participant's account has an outstanding loan balance or had an outstanding loan balance during any portion of a QDRO calculation period, the loan will **not** be treated as an asset of the Plan for purposes of splitting the account unless the DRO provides to the contrary.
5. **Investment Funds.** The Alternate Payee's interest shall be segregated on a pro rata basis from all of the investment funds and accounts (excluding an outstanding loan balance, if any) in which the Participant has a vested account balance under the Plan.

I. Miscellaneous Retirement Plan Provisions

1. **Award more than accrued pension benefit.** A DRO shall fail to be a QDRO if it awards the Alternate Payee a monthly pension benefit which exceeds the Participant's accrued pension benefit as of a particular date.
2. **Calculating award to Alternate Payee.** A QDRO may assign the Alternate Payee a percentage, a dollar amount, or a Coverture Fraction of the Participant's benefit as of an accrued pension benefit date provided such amount does not exceed the Participant's accrued pension benefit as of the accrued pension benefit date.

Notwithstanding the provisions of Section H.2 or H.3, the drafter of a DRO is responsible for definitively stating what benefits are being assigned to the Alternate Payee. A formula in the order that does not clearly state the amount of benefits being assigned or that requires the Plan to reconstruct a benefit history to a date that is not a Valuation Date will not be a QDRO.



J. Tax Liability Under a QDRO

A DRO will fail to be a QDRO if it attempts to assess the tax liability for a QDRO-mandated distribution contrary to the Code. In general, the Code requires that:

- (a) A distribution made to an Alternate Payee who is the spouse or former spouse of the Participant is taxable to the Alternate Payee. With respect to the Savings Plan, the Alternate Payee may elect a tax-deferred rollover of this type of distribution.
- (b) A distribution made to an Alternate Payee who is not the spouse or the former spouse of the Participant is generally taxable to the Participant. This type of distribution may qualify for rollover; consult with a tax professional for further information.
- (c) With respect to the Savings Plan, a distribution made as a result of a QDRO is not subject to the 10% premature distribution penalty.
- (d) For cash distributions from the Savings Plan, the recordkeeper will notify the appropriate party that State income tax will be withheld if the distribution is subject to State income tax withholding.
- (e) With respect to the Retirement Plan, state income tax withholding will not be processed unless the Alternate Payee requests, in writing, that the state tax be withheld. The Alternate Payee must also submit a state income tax withholding form electing a specific dollar amount to be withheld. The QDRO Processor will not be responsible for providing any state income tax withholding forms to the Alternate Payee. In the event a state mandates state income tax withholding, state taxes will be automatically withheld in accordance with state law.

Qualified Domestic Relations Order—Defined Contribution Model Language

Sandia Corporation

November 2014

Sandia Corporation Savings and Income Plan



Sample Qualified Domestic Relations Order

This sample Qualified Domestic Relations Order (QDRO) is expressly provided for informational use only. Use of this sample QDRO is intended to facilitate more rapid approval of a QDRO. However, this sample is just one of many ways to draft QDROs. Provision of this sample is not intended as advice on which type or form of QDRO is most appropriate for any particular situation. The parties and their representatives should carefully review all substantive options available to them. Neither Sandia Corporation nor any of its affiliates, employees, agents, or counsel is authorized to give legal or tax advice to parties to a QDRO. They make no representation as to the sufficiency of this sample under applicable federal or state law or as to the sample's legal or tax consequences. Sandia Corporation assumes no responsibility or liability for any harm or damages, financial or otherwise, resulting from the use of this sample, and is not obligated to approve or qualify any proposed domestic relations order that conforms with this sample. Any inconsistencies between this sample and a proposed or court-signed domestic relations order will be determined by Sandia Corporation under the applicable Sandia Corporation savings plan provisions.

The parties are encouraged to submit a proposed domestic relations order for review and predetermination prior to submission to the court. All correspondence relating to domestic relations matters should be sent to the Plans' designated agent for QDRO Administration:

Sandia Qualified Order Team
P.O. Box 1433
Lincolnshire, IL 60069-1433



Instructions for the Completion of the Sample Qualified Domestic Relations Order for Defined Contribution Plans

The enclosed sample Qualified Domestic Relations Order (the "Order") is divided into several sections with each part representing specific information or decisions to be agreed upon by the Interested Parties. The following instructions are to assist the parties with the completion of this sample Order. Should questions arise or if assistance is necessary, please contact a QDRO Specialist at **(866) 630-2256**. The initial section on the first page of the sample Order must be completed as provided by the court regarding Case Number, Matter of the Marriage, District Court, Judicial District, County, State and the proper Plan Name.

Section (1) Participant Information

Provide the full legal name, date of birth, Social Security number, and current mailing address of the Participant.

Section (2) Alternate Payee Information

Provide the full legal name, date of birth, Social Security number, and current mailing address of the Alternate Payee.

Section (3) Marital Dates

Provide the date of marriage and the date of divorce or separation.

Section (4) Assignment and Segregation of Benefits

The section will require a determination by the Interested Parties on the amount of the Participant's benefit to be assigned to the Alternate Payee. The section provides two options for determining the amount of the benefit to be assigned. The benefit may be valued as a percentage of the Participant's benefit as of the **Valuation Date** (i.e., a date agreed upon by the Interested Parties, usually the date of separation or divorce) or may be a specific dollar amount. Unless the order provides otherwise, investment gains and losses will be allocated to the Alternate Payee from the **Valuation Date** to the date of account segregation.

Section (5) Commencement and Form of Payment

This section states the Plan requirements that an Alternate Payee must take an immediate distribution from the Plan either in the form of a single sum distribution or as a direct rollover to another qualified plan or individual retirement account. The Alternate Payee must make an election within 30 days from the date he or she is notified of the account segregation.



Section (6) In the Event of Death

This section states that the death of the Participant will have no effect on the Alternate Payee's entitlement to receive his or her allocated portion following the Plan Administrator's receipt and favorable determination of a court-executed domestic relations order.

Section (7) Jurisdiction, Effect and Validity

This section provides specific stipulations concerning the jurisdiction, effect, and validity of the Order.

Section (8) Statutory Plan Protections

This section provides specific stipulations included to protect the Plan.

Section (9) Miscellaneous

This section contains general stipulations regarding the Plan's administration of the Order.



Sample Order

IN THE _____ COURT OF _____ COUNTY

STATE OF _____

_____	)	Civil No. _____
Plaintiff	)	
vs.	)	QUALIFIED DOMESTIC
	)	RELATIONS ORDER
_____	)	
Defendant	)	
_____	)	

This Order is intended to be a Qualified Domestic Relations Order (hereinafter referred to as a "QDRO") as that term is used under the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Retirement Equity Act of 1984, 29 U.S.C. section 1056(d), and section 414(p) of the Internal Revenue Code, as amended (Code).

This Order creates and recognizes the existence of an Alternate Payee's right to receive all or a portion of the Participant's vested account balance under a **defined contribution plan** sponsored by Sandia Corporation, the name of which is _____ and is entered pursuant to the authority granted under the applicable state domestic relations or community property laws of _____.

Section (1) Participant Information

Name, Date of Birth, and Social Security Number

Last Known Mailing Address (Street, City, State, and Postal ZIP Code)

The "Participant" is an employee or former employee who has a vested benefit under the Plan.



Section (2) Alternate Payee Information

Name, Date of Birth, and Social Security Number

Current Mailing Address (Street, City, State, and Postal ZIP Code)

An "Alternate Payee" as defined by Section 414(p)(8) of the Internal Revenue Code is a spouse, former spouse, child, or other dependent of the Participant.

Section (3) Marital Dates

The Participant and Alternate Payee were married on _____, _____ and were _____
[separated/divorced] on _____, _____.

Section (4) Assignment and Segregation of Benefits

This Order assigns to the Alternate Payee the right to receive all or a portion of the Participant's vested account balance as described in this section. The Alternate Payee's interest in the Plan is:

[Choose one of the following alternatives]

☐ The Alternate Payee's interest in the Plan is equal to _____% of the Participant's vested account balance as of _____ (**Valuation Date***).

OR

☐ The Alternate Payee's interest in the Plan is equal to \$_____ of the Participant's vested account balance as of _____ (**Valuation Date***).

Unless this Order states otherwise, investment experience (gains and losses) from the Valuation Date to the date of final distribution will be computed in determining the Alternate Payee's allocated portion of the Participant's account. Any outstanding loan balance will not be included when determining the Alternate Payee's allocated portion unless this Order states otherwise.

The amount assigned to the Alternate Payee will be taken proportionately from all investment funds in which the Participant has a vested balance on the date the account is segregated. The recordkeeper shall establish an account for the Alternate Payee under the Plan. The Alternate Payee's separate account will be invested in accordance with the investment selections the Participant had in effect for his or her account on the date of the account segregation. The Alternate Payee's account will remain invested in that manner until the Alternate Payee receives his or her distribution from the Plan.

In the event the amount specified above exceeds the actual value of the Participant's account on the valuation date, it is the intent of this Order to assign 100% of the vested account balance.



The Savings Plan distribution to the Alternate Payee will include earnings from date of valuation to date of distribution. It is understood that earnings may be positive or negative, and Sandia Corporation will not be liable for failing to meet the terms of the Order should the benefit distributed differ from the percentage or amount specified above.

****Please be certain to provide a specific date (or event) such as date of divorce or date of separation or any other date mutually agreed to by the parties.***

Section (5) Commencement and Form of Payment

The Alternate Payee must elect to receive his or her assigned portion of the account within 30 days following the Plan Administrator's notice of qualification of this Order on the forms provided by the Plan. If the Alternate Payee is the spouse or former spouse of the Participant, the Alternate Payee may choose between an immediate single sum distribution and a direct rollover to an individual retirement account or another employer's qualified plan.

If the Alternate Payee fails to make a timely election, the Plan will issue a single lump sum distribution in cash, less applicable taxes pursuant to federal and state income tax withholding requirements.

Section (6) In the Event of Death

The death of the Participant following the Plan's qualification of this Order will have no effect on the Alternate Payee's entitlement to receive the benefits assigned to him or her pursuant to this Order.

In the event of the Alternate Payee's death following the Plan's qualification of this Order but prior to the receipt of the benefits assigned to him or her pursuant to this Order, the Alternate Payee's allocated portion will be payable to his or her estate.

Section (7) Jurisdiction, Effect and Validity of Order

- (a) This Order shall become effective only after it is both entered with the court and qualified by the Plan Administrator or its designated agent.
- (b) In the event that the Order is deemed not qualified, each party shall cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan.
- (c) The Order shall remain in effect until the Alternate Payee has received the value of all benefits to which he or she is entitled pursuant to the terms of this Order or until the court issues a further order.
- (d) This Court retains jurisdiction to enforce, revise, modify, or amend this Order to the extent necessary to establish or maintain its qualification as a QDRO under ERISA and the Code.



Section (8) Statutory Plan Protections

- (a) The Plan will not pay any benefits to the Alternate Payee under this Order that are required to be paid to another alternate payee under another order previously determined to be a Qualified Domestic Relations Order.
- (b) The Plan will not provide the Alternate Payee with any type or form of benefit or any option not otherwise available under the Plan. The total benefits paid to the Alternate Payee and Participant under this Order shall not exceed the amount of benefits that would have been paid to the Participant in the absence of this Order.
- (c) The Plan is not required to make any payment or take any action which is inconsistent with any applicable law, rule, regulation, or judicial decision.

Section (9) Miscellaneous

- (a) The Plan shall not be responsible for any attorney's fees or other costs incurred by the Participant and the Alternate Payee in connection with obtaining and enforcing this Order.
- (b) To the extent the Participant receives any benefits that are payable to the Alternate Payee, the Participant shall be deemed to be a trustee holding the amount of such benefits in a constructive trust for the benefit of the Alternate Payee. The Participant is ordered to pay such amount to the Alternate Payee within thirty (30) days after the receipt of such amount.
- (c) To the extent the Alternate Payee receives any benefits that are payable to the Participant, the Alternate Payee shall be deemed to be a trustee holding the amount of such benefits in a constructive trust for the benefit of the Participant. The Alternate Payee is ordered to pay such amount to the Participant within thirty (30) days after the receipt of such amount.

The Participant and Alternate Payee are separately subject to tax on their respective portions of the benefits paid to each of them from the Plan. All payments issued under this Order are subject to applicable federal, state, and local tax withholding and reporting rules. If the Alternate Payee is the spouse or former spouse of the Participant, payment from the Plan to the Alternate Payee pursuant to this Order shall be included in the Alternate Payee's gross taxable income.

The Plan Administrator and/or the QDRO Processor may, in the event of conflict or at any other time, cease making payments under this Order or take any other action that it deems necessary to protect the interests of the Plan, Participant, or Alternate Payee.

- (d) This Order shall become effective only after it is both entered with the court and qualified by the Plan Administrator or its designated agent.
- (e) In the event that the Order is deemed not qualified, each party shall cooperate and do all things reasonably necessary to devise a form of order acceptable to the Plan.
- (f) The Order shall remain in effect until the Alternate Payee has received the value of all benefits to which he or she is entitled pursuant to the terms of this Order or until the court issues a further order.



IT IS SO ORDERED This _____ Day of _____, _____

Judge of the _____ Court

Attorney for Participant:

Attorney for Alternate Payee:

Signature

Signature

Date

Date

Print Name and Mailing Address:

Print Name and Mailing Address:

Telephone Number:

() _____

Telephone Number:

() _____

Note: If one or both parties are not represented by legal counsel, the Plan Administrator suggests the party (or parties) sign this Order in place of the legal representative(s).

Qualified Domestic Relations Order—Defined Benefit— Shared Interest

Sandia Corporation

February 2015

Sandia Corporation Retirement Income Plan

Sample Qualified Domestic Relations Order

This sample Qualified Domestic Relations Order (QDRO) is expressly provided for informational use only. Use of this sample QDRO is intended to facilitate more rapid approval of a QDRO. However, this sample is just one of many ways to draft QDROs. Provision of this sample is not intended as advice on which type or form of QDRO is most appropriate for any particular situation. The parties and their representatives should carefully review all substantive options available to them. Neither Sandia Corporation nor any of its affiliates, employees, agents, or counsel is authorized to give legal or tax advice to parties to a QDRO. They make no representation as to the sufficiency of this sample under applicable federal or state law or as to the sample's legal or tax consequences. Sandia Corporation assumes no responsibility or liability for any harm or damages, financial or otherwise, resulting from the use of this sample, and is not obligated to approve or qualify any proposed domestic relations order that conforms with this sample. Any inconsistencies between this sample and a proposed or court-signed domestic relations order will be determined by Sandia Corporation under the applicable Sandia Corporation pension plan provisions.

The parties are encouraged to submit a proposed domestic relations order for review and predetermination prior to submission to the court. All correspondence related to domestic relations matters should be sent to the Plan's designated agent for QDRO administration:

Sandia Qualified Order Team
P.O. Box 1433
Lincolnshire, IL 60069-1433

Instructions for the Completion of the Sample Qualified Domestic Relations Order for Defined Benefit Plans

The enclosed sample Qualified Domestic Relations Order (the "Order") is divided into several sections with each part representing specific information or decisions to be agreed upon by the Interested Parties. The following instructions are to assist the parties with the completion of this **stream of payment (shared interest)** sample Order. Should questions arise or if assistance is necessary, please contact a QDRO Specialist at **(866) 630-2256**. The initial section on the first page of the sample Order must be completed as provided by the court regarding Case Number, Matter of the Marriage, District court, Judicial District, County, State, and the proper Plan Name.

Section (1) Participant Information

Provide the full legal name, date of birth, Social Security number, and current mailing address of the Participant.

Section (2) Alternate Payee Information

Provide the full legal name, date of birth, Social Security number, and current mailing address of the Alternate Payee.

Section (3) Marital Dates

Provide the date of marriage and the date of divorce or separation.

Section (4) Assignment of Benefits

This section will require a determination by the Interested Parties on the amount of the Participant's benefit to be assigned to the Alternate Payee. The section provides three options for determining the amount of the benefit to be assigned. The benefit may be valued as a percentage of the Participant's benefit as of the **Valuation Date** (i.e., a date agreed upon by the Interested Parties, usually the date of separation or divorce) or as a specific dollar amount payable at commencement, or may be valued by using a fraction to isolate the marital portion of the Participant's benefit. Please designate which option will be used to divide the benefit. The parties may choose another method not described here for determining the Alternate Payee's allocated portion. However, it is strongly recommended that any such other method be confirmed with the QDRO processor prior to having the Order entered with the court.

Section (5) In the Event of Death

This section requires a selection by the Interested Parties regarding the Alternate Payee's potential designation as a surviving spouse for preretirement and/or postretirement death benefits in the event the Participant predeceases the Alternate Payee. If no selections are made (or if not addressed in any individually prepared Order), the Order shall be interpreted to mean that the intent of the court is to only provide a benefit payment to the Alternate Payee if, as, and when the Participant actually receives a benefit payment.

Section (6) Jurisdiction, Effect, and Validity

This section provides specific stipulations concerning the jurisdiction, effect, and validity of the Order.

Section (7) Statutory Plan Protections

This section provides specific stipulations included to protect the Plan.

Section (8) Miscellaneous

This section contains general stipulations regarding Plan administration of the Order.

Sample Order

IN THE _____ COURT OF _____ COUNTY

STATE OF

_____	)	Civil No. _____
Plaintiff	)	
	)	
vs.	)	QUALIFIED DOMESTIC
	)	RELATIONS ORDER
_____	)	
Defendant	)	
_____	)	

This Order is intended to be a Qualified Domestic Relations Order (hereinafter referred to as a "QDRO") as that term is used under the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Retirement Equity Act of 1984, 29 U.S.C. section 1056(d), and section 414(p) of the Internal Revenue Code, as amended (the "Code").

This Order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefit under a **defined benefit plan** sponsored by Sandia Corporation, the name of which is _____ and is entered pursuant to the authority granted under the applicable state domestic relations or community property laws of _____.

Section (1) Participant Information

Name, Date of Birth, and Social Security Number

Last Known Mailing Address (Street, City, State, and Postal ZIP Code)

The "Participant" is an employee or former employee who has a vested benefit under the Plan.

Section (2) Alternate Payee Information

Name, Date of Birth, and Social Security Number

Current Mailing Address (Street, City, State, and Postal ZIP Code)

An "Alternate Payee" as defined by Section 414(p)(8) of the Internal Revenue Code is a spouse, former spouse, child, or other dependent of the Participant.

Section (3) Marital Dates

The Participant and Alternate Payee were married on _____, _____ and were **[separated/divorced]** on _____, _____.

Section (4) Assignment of Benefits

This Order assigns to the Alternate Payee the right to receive all or a portion of the vested benefit provided by the Plan to the Participant. Benefits to the Alternate Payee will commence if and when payments commence to the Participant. The Alternate Payee's benefit will be paid in the same form as elected by the Participant unless the terms of this Order require a specific form of payment. Payments to the Alternate Payee shall become payable as soon as administratively feasible following the Participant's commencement of benefit payments under the Plan and the Alternate Payee's completion of all forms as may be required by the Plan or the Code.

[Choose one of the three following alternatives]

- ☐ The Alternate Payee's interest in the Plan is equal to _____% of the Participant's vested benefit as accrued through _____ (**Valuation Date***).

OR

- ☐ The Alternate Payee's interest in the Plan is equal to a fraction, the numerator of which is the number of months of credited service the Participant earned under the Plan during the marriage up to _____ (**insert date***); and

the denominator of which is the total number of months of credited service the Participant earned under the Plan up to and including _____ (**Valuation Date¹**), multiplied by _____%, and then multiplied by the Participant's vested benefit under the Plan as accrued to the **Valuation Date¹**.

¹ Please be certain to provide a specific date (or event) such as date of divorce or date of separation.

Sample resulting formula:

$$\frac{\text{Total number of months of Credited Service earned during the marriage while participating in the Plan}}{\text{Total number of months of Credited Service up to Valuation Date}} \times 50\% \times \text{Total benefit Accrued to Valuation Date} = \text{Alternate Payee's allocated portion}$$

OR

- ☐ The Alternate Payee's interest in the Plan is equal to \$_____ of each monthly payment that is otherwise payable to the Participant at his or her commencement date.
- ☐ If the Plan provides the Participant with a cost-of-living adjustment or ad hoc increase after payments have commenced, the Alternate Payee **will** OR **will not** receive a proportionate share of any future increase.

Section (5) In the Event of Death**[Choose one of the following alternatives]**

- ☐ The Alternate Payee **shall be** designated as the surviving spouse for preretirement and postretirement survivorship to the extent of the Alternate Payee's community interest stated in Section (4) of this Order. Should the Participant predecease the Alternate Payee, the Alternate Payee will be entitled to a preretirement and postretirement survivor benefit in lieu of, and in accordance with, the Plan's normal form of benefit for spousal survivorship. The Participant may choose another form of benefit pursuant to the terms of the Plan for the portion of the Participant's benefit, if any, that is not subject to this Order.

OR

- ☐ The Alternate Payee **shall not be** designated as the surviving spouse for preretirement and postretirement survivorship with respect to the Alternate Payee's community interest described in Section (4) of this Order. In the event the Participant predeceases the Alternate Payee after the commencement of benefit payments, the Alternate Payee's benefit payments pursuant to the terms of this Order will cease immediately following the Participant's death.

To address who is responsible for the cost of the postretirement survivor annuity benefit, the following options have been approved in the past. Please choose one of the following or provide alternative language.

- ☐ The **[choose one] Alternate Payee's OR Participant's** monthly pension will be reduced to pay for the cost of the Alternate Payee's portion of the postretirement survivor annuity.

OR

- ☐ Both the Alternate Payee's and the Participant's monthly pensions will be reduced **[choose one] equally OR by a stated percentage: (_____ % for the Alternate Payee and _____ % for the Participant totaling 100%)** to pay for the cost of the Alternate Payee's portion of the postretirement survivor annuity.

In the event the Alternate Payee predeceases the Participant, either before or after the commencement of benefit payments, the benefit amount assigned to the Alternate Payee by this Order will revert to the Participant.

Section (6) Jurisdiction, Effect, and Validity of Order

- (a) This Order shall become effective only after it is both entered with the court and qualified by the Plan Administrator or its designated agent.
- (b) In the event that the Order is deemed not qualified, each party shall cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan.
- (c) The Order shall remain in effect until the Alternate Payee has received the value of all benefits to which he or she is entitled pursuant to the terms of this Order or until the court issues a further order.
- (d) Subsequent remarriage by either party will not affect the terms of the Order.
- (e) This court retains jurisdiction to enforce, revise, modify, or amend this Order to the extent necessary to establish or maintain its qualification as a QDRO under the ERISA and the Code.

Section (7) Statutory Plan Protections

- (a) The Plan will not pay any benefits to the Alternate Payee under this Order that are required to be paid to another alternate payee under another order previously determined to be a Qualified Domestic Relations Order.
- (b) The Plan will not provide the Alternate Payee with any type or form of benefit or any option not otherwise available under the Plan. The total benefits paid to the Alternate Payee and Participant under this Order shall not exceed the amount of benefits that would have been paid to the Participant in the absence of this Order.
- (c) The Plan is not required to make any payment or take any action that is inconsistent with any applicable law, rule, regulation, or judicial decision.

Section (8) Miscellaneous

- (a) The Plan shall not be responsible for any attorney's fees or other costs incurred by the Participant and the Alternate Payee in connection with obtaining and enforcing this Order.
- (b) To the extent the Participant receives any benefits that are payable to the Alternate Payee, the Participant shall be deemed to be a trustee holding the amount of such benefits in a constructive trust for the benefit of the Alternate Payee. The Participant is ordered to pay such amount to the Alternate Payee within thirty (30) days after the receipt of such amount.
- (c) To the extent the Alternate Payee receives any benefits that are payable to the Participant, the Alternate Payee shall be deemed to be a trustee holding the amount of such benefits in a constructive trust for the benefit of the Participant. The Alternate Payee is ordered to pay such amount to the Participant within thirty (30) days after the receipt of such amount.

- (d) The Participant and Alternate Payee are separately subject to tax on their respective portions of the benefits paid to each of them from the Plan. All payments issued under this Order are subject to applicable federal, state, and local tax withholding and reporting rules. If the Alternate Payee is the spouse or former spouse of the Participant, payment from the Plan to the Alternate Payee pursuant to this Order shall be included in the Alternate Payee's gross taxable income.
- (e) The Plan Administrator and/or the QDRO processor may, in the event of conflict or at any other time, cease making payments under this Order or take any other action deemed necessary to protect the interests of the Plan, Participant, or Alternate Payee.
- (f) It is the responsibility of the Participant and the Alternate Payee to keep the Plan informed, in writing, as to any changes in his or her legal name and/or mailing address.

IT IS SO ORDERED This _____ Day of _____, _____

Judge of the _____ court

Attorney for Participant:

Attorney for Alternate Payee:

Signature

Signature

Date

Date

Print Name and Mailing Address:

Print Name and Mailing Address:

Telephone Number:

Telephone Number:

(_____) _____

(_____) _____

Note: If one or both parties are not represented by legal counsel, the Plan Administrator suggests the party (or parties) sign this Order in place of the legal representative(s).

Qualified Domestic Relations Order—Defined Benefit— Separate Interest

Sandia Corporation

February 2015

Sandia Corporation Retirement Income Plan

Sample Qualified Domestic Relations Order

This sample Qualified Domestic Relations Order (QDRO) is expressly provided for informational use only. Use of this sample QDRO is intended to facilitate more rapid approval of a QDRO. However, this sample is just one of many ways to draft QDROs. Provision of this sample is not intended as advice on which type or form of QDRO is most appropriate for any particular situation. The parties and their representatives should carefully review all substantive options available to them. Neither Sandia Corporation nor any of its affiliates, employees, agents or counsel is authorized to give legal or tax advice to parties to a QDRO. They make no representation as to the sufficiency of this sample under applicable federal or state law or as to the sample's legal or tax consequences. Sandia Corporation assumes no responsibility or liability for any harm or damages, financial or otherwise, resulting from the use of this sample, and is not obligated to approve or qualify any proposed domestic relations order that conforms with this sample. Any inconsistencies between this sample and a proposed or court-signed domestic relations order will be determined by Sandia Corporation under the applicable Sandia Corporation pension plan provisions.

The parties are encouraged to submit a proposed domestic relations order for review and predetermination prior to submission to the court. All correspondence related to domestic relations matters should be sent to the Plan's designated agent for QDRO administration:

Sandia Qualified Order Team
P.O. Box 1433
Lincolnshire, IL 60069-1433

Instructions for the Completion of the Sample Qualified Domestic Relations Order for the Defined Benefit Plan—Separate Interest

The enclosed sample Qualified Domestic Relations Order (the “Order”) is divided into several sections with each part representing specific information or decisions to be agreed upon by the Interested Parties. The following instructions are to assist the parties with the completion of this **separate interest** sample Order. Should questions arise or if assistance is necessary, please contact a QDRO Specialist at +1.866.630.2256. The initial section on the first page of the sample Order must be completed as provided by the court regarding Case Number, Matter of the Marriage, District Court, Judicial District, County, State, and the proper Plan Name.

Section (1) Participant Information

Provide the full legal name, date of birth, Social Security number, and current mailing address of the Participant.

Section (2) Alternate Payee Information

Provide the full legal name, date of birth, Social Security number, and current mailing address of the Alternate Payee.

Section (3) Marital Dates

Provide the date of marriage and the date of divorce or separation.

Section (4) Assignment of Benefits

This section will require a determination by the Interested Parties on the amount of the Participant’s benefit to be assigned to the Alternate Payee. The section provides two options for determining the amount of the benefit to be assigned. The benefit may be valued as a percentage of the Participant’s benefit as of the **Valuation Date** (i.e., a date agreed upon by the Interested Parties, usually the date of separation or divorce) or by using a fraction to isolate the marital portion of the Participant’s benefit. Please designate which option will be used to divide the benefit. The parties may choose another method not described here for determining the Alternate Payee’s allocated portion. However, it is strongly recommended that any such other method be confirmed with the QDRO processor prior to having the Order entered with the court.

Section (5) In the Event of Death

This section requires a selection by the Interested Parties regarding the Alternate Payee's potential designation as a surviving spouse for preretirement death benefits in the event the Participant predeceases the Alternate Payee. If no selection is made (or if not addressed in any individually prepared Order), the Order shall be interpreted to mean that the intent of the court is to only provide a benefit payment to the Alternate Payee if and when the Participant actually receives a benefit payment. In the event the Alternate Payee predeceases the Participant before the commencement of benefit payments, the benefit amount assigned to the Alternate Payee by this Order will be forfeited and will remain in the Plan Trust. In the event of the Alternate Payee's death following commencement of benefit payments, any death benefit due will be paid in accordance with the payment option chosen by the Alternate Payee at commencement.

Section (6) Jurisdiction, Effect, and Validity

This section provides specific stipulations concerning the jurisdiction, effect, and validity of the Order.

Section (7) Statutory Plan Protections

This section provides specific stipulations included to protect the Plan.

Section (8) Miscellaneous

This section contains general stipulations regarding Plan administration of the Order.

Sample Order

IN THE _____ COURT OF _____ COUNTY

STATE OF _____

_____	)	Civil No. _____
Plaintiff	)	
	)	
vs.	)	QUALIFIED DOMESTIC
	)	RELATIONS ORDER
_____	)	
Defendant	)	
_____	)	

This Order is intended to be a Qualified Domestic Relations Order (hereinafter referred to as a "QDRO") as that term is used under the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Retirement Equity Act of 1984, 29 U.S.C. section 1056(d), and section 414(p) of the Internal Revenue Code, as amended the ("Code").

This Order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefit under a **defined benefit plan** sponsored by Sandia Corporation, the name of which is **Sandia Corporation Retirement Income Plan** and is entered pursuant to the authority granted under the applicable state domestic relations or community property laws of _____.

Section (1) Participant Information

Name, Date of Birth, and Social Security Number

Last Known Mailing Address (Street, City, State, and Postal ZIP Code)

The "Participant" is an employee or former employee who has a vested benefit under the Plan.

Section (2) Alternate Payee Information

Name, Date of Birth, and Social Security Number

Current Mailing Address (Street, City, State, and Postal ZIP Code)

An "Alternate Payee" as defined by Section 414(p)(8) of the Internal Revenue Code is a spouse, former spouse, child, or other dependent of the Participant.

Section (3) Marital Dates

The Participant and Alternate Payee were married on _____, _____ and were **[separated/divorced]** on _____, _____.

Section (4) Assignment of Benefits

This Order assigns to the Alternate Payee the right to receive all or a portion of the vested benefit provided by the Plan to the Participant. The Alternate Payee may choose to commence benefit payments at the Participant's earliest retirement age (as defined by the Plan) but no later than when the Participant actually commences payment. The Alternate Payee may choose to receive their benefit in any form available under the terms of the Plan in effect at commencement except the Alternate Payee may not choose a joint and survivor annuity with a subsequent spouse. The Alternate Payee's benefit shall be determined based upon the Plan Participant's benefit as of the Valuation Date stated below. The Alternate Payee's benefit shall be actuarially adjusted to provide for a benefit payable over the Alternate Payee's lifetime.

[Choose one of the three following alternatives]

- ☐ The Alternate Payee's interest in the Plan is equal to _____% of the Participant's vested benefit as accrued through _____ (**Valuation Date***).

OR

- ☐ Alternate Payee's interest in the Plan is equal to a fraction, the numerator of which is the number of months of credited service the Participant earned under the Plan during the marriage up to _____ (**insert date***); and
- ☐ the denominator of which is the total number of months of credited service the Participant earned under the Plan up to and including _____ (**Valuation Date¹**), multiplied by _____%, and then multiplied by the Participant's vested benefit under the Plan as accrued to the **Valuation Date¹**.

¹ Please be certain to provide a specific date (or event) such as date of divorce or date of separation.

Sample resulting formula:

$$\frac{\text{Total number of months of Credited Service earned during the marriage while participating in the Plan}}{\text{Total number of months of Credited Service up to Valuation Date}} \times 50\% \times \text{Total benefit Accrued to Valuation Date} = \text{Alternate Payee's allocated portion}$$

If the Plan provides the Participant with a cost-of-living adjustment or ad hoc increase after payments have commenced, the Alternate Payee will OR will not receive a proportionate share of any future increase.

Section (5) In the Event of Participant's Death

[Choose one of the following preretirement alternatives]

PRERETIREMENT SURVIVOR OPTION: The only preretirement survivor option available in Sandia Corporation's Retirement Income Plan is the Joint and 100% Surviving Spouse Annuity. The preretirement survivor annuity ultimately paid must equal 100%, whether paid to one or more eligible recipients.

- ☐ The Alternate Payee shall be designated as the surviving spouse for preretirement survivorship to the extent of the Alternate Payee's community interest stated in Section (4) of this Order. The Alternate Payee's preretirement survivor benefit would be payable in lieu of any other benefits that may have been payable as a result of this Order.

OR

- ☐ The Alternate Payee **shall not be** designated as the surviving spouse for preretirement survivorship with respect to the vested benefit described in Section (4) of this Order. Should the Participant predecease the Alternate Payee prior to the commencement of benefit payments, the Alternate Payee's entitlement pursuant to the terms of this Order shall be forfeited and the Alternate Payee will receive no benefit payments from the Plan.

Section (6) In the Event of Alternate Payee's Death

In the event the Alternate Payee predeceases the Participant before the commencement of benefit payments, the benefit amount assigned to the Alternate Payee by this Order will be forfeited and will remain in the Plan Trust. In the event of the Alternate Payee's death following commencement of benefit payments, any death benefit due will be paid in accordance with the payment option chosen by the Alternate Payee at commencement.

Section (7) Jurisdiction, Effect, and Validity of Order

- (a) This Order shall become effective only after it is both entered with the court and qualified by the Plan Administrator or its designated agent.
- (b) In the event that the Order is deemed not qualified, each party shall cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan.
- (c) The Order shall remain in effect until the Alternate Payee has received the value of all benefits to which he or she is entitled pursuant to the terms of this Order or until the court issues a further order.
- (d) Subsequent remarriage by either party will not affect the terms of the Order.
- (e) This court retains jurisdiction to enforce, revise, modify, or amend this Order to the extent necessary to establish or maintain its qualification as a QDRO under the ERISA and the Code.

Section (8) Statutory Plan Protections

- (a) The Plan will not pay any benefits to the Alternate Payee under this Order that are required to be paid to another alternate payee under another order previously determined to be a Qualified Domestic Relations Order.
- (b) The Plan will not provide the Alternate Payee with any type or form of benefit or any option not otherwise available under the Plan. The total benefits paid to the Alternate Payee and Participant under this Order shall not exceed the amount of benefits that would have been paid to the Participant in the absence of this Order.
- (c) The Plan is not required to make any payment or take any action that is inconsistent with any applicable law, rule, regulation, or judicial decision.

Section (9) Miscellaneous

- (a) The Plan shall not be responsible for any attorney's fees or other costs incurred by the Participant and the Alternate Payee in connection with obtaining and enforcing this Order.
- (b) To the extent the Participant receives any benefits that are payable to the Alternate Payee, the Participant shall be deemed to be a trustee holding the amount of such benefits in a constructive trust for the benefit of the Alternate Payee. The Participant is ordered to pay such amount to the Alternate Payee within thirty (30) days after the receipt of such amount.
- (c) To the extent the Alternate Payee receives any benefits that are payable to the Participant, the Alternate Payee shall be deemed to be a trustee holding the amount of such benefits in a constructive trust for the benefit of the Participant. The Alternate Payee is ordered to pay such amount to the Participant within thirty (30) days after the receipt of such amount.

- (d) The Participant and Alternate Payee are separately subject to tax on their respective portions of the benefits paid to each of them from the Plan. All payments issued under this Order are subject to applicable federal, state, and local tax withholding and reporting rules. If the Alternate Payee is the spouse or former spouse of the Participant, payment from the Plan to the Alternate Payee pursuant to this Order shall be included in the Alternate Payee's gross taxable income.
- (e) The Plan Administrator and/or the QDRO processor may, in the event of conflict or at any other time, cease making payments under this Order or take any other action deemed necessary to protect the interests of the Plan, Participant, or Alternate Payee.
- (f) It is the responsibility of the Participant and the Alternate Payee to keep the Plan informed, in writing, as to any changes in his or her legal name and/or mailing address.

IT IS SO ORDERED This _____ Day of _____, _____

Judge of the _____ Court

Attorney for Participant:

Attorney for Alternate Payee:

Signature

Signature

Date

Date

Print Name and Mailing Address:

Print Name and Mailing Address:

Telephone Number:

Telephone Number:

(_____) _____

(_____) _____

Note: If one or both parties are not represented by legal counsel, the Plan Administrator suggests the party (or parties) sign this Order in place of the legal representative(s).

BIO

Raymond S. Dietrich

Raymond S. Dietrich manages a multi-jurisdictional law practice specializing in the drafting and litigation of Qualified Domestic Relations Orders (“QDROs”) and related issues. Mr. Dietrich has created a unique niche law practice that specializes in an area of law that is notoriously mishandled. Mr. Dietrich is licensed and actively practices law in Arizona, Nevada, Virginia, the District of Columbia, Florida, and New York. Mr. Dietrich is the author of *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney* (Copyright © 2015 Matthew Bender). The firm’s website is located at www.galleongroup.net. 602.252.7227.

Retirement Eligible on Date of Divorce

High 3 Average as of 12/31/2011
Pension Years of Service as of 12/31/2011
2011 Age Factor as of 10/01/2015 Date of Divorce

Cumulative Career Earnings After 12/31/2011
Post 2011 Age Factor as of 10/01/2015 Date of Divorce

Pre 2012 Benefit Amount
Post 2011 Benefit Amount
Total Benefit Amount as of 10/01/2015

Shared Interest Order with equation from template:

The Alternate Payee's interest in the Plan is equal to a fraction, the numerator of which is the number of months of credited service the Participant earned under the Plan during the marriage up to _____ (insert date*), and

The denominator of which is the total number of months of credited service the Participant earned under the Plan up to and including _____ (Valuation Date), multiplied by ____ % and then multiplied by the Participant's vested benefit under the Plan as accrued to the Valuation Date

Valuation Date = Date of Divorce

Numerator = Months earned during Marriage
Denominator = Months earned as of Valuation Date
Resulting Fraction
Multiplier set in the equation

Commencement Date

NRA	Age 62	Date of Divorce
360	360	360
360	360	360
1,000	1,000	1,000
50%	50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
5% reduction for 50% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$1,911.76	\$1,911.76	\$1,557.60
\$1,911.76	\$1,911.76	\$1,557.60
\$95.59	\$95.59	\$77.88
\$908.09	\$908.09	\$739.86

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
10% reduction for 100% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$1,911.76	\$1,911.76	\$1,557.60
\$1,911.76	\$1,911.76	\$1,557.60
\$191.18	\$191.18	\$155.76
\$1,720.59	\$1,720.59	\$1,401.84

*Cost of Survivor Coverage can be divided between parties or applied to one party

Valuation Date = Date of Commencement

Numerator = Months earned during Marriage
Denominator = Months earned as of Valuation Date
Resulting Fraction
Multiplier set in the equation

Commencement Date

NRA	Age 62	Date of Divorce
360	360	360
452	416	360
0.796	0.865	1,000
50%	50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
5% reduction for 50% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$3,097.49	\$2,724.38	\$1,557.60
\$2,049.81	\$2,077.92	\$1,557.60
\$102.49	\$103.90	\$77.88
\$973.66	\$987.01	\$739.86

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
10% reduction for 100% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$3,097.49	\$2,724.38	\$1,557.60
\$2,049.81	\$2,077.92	\$1,557.60
\$204.98	\$207.79	\$155.76
\$1,844.83	\$1,870.12	\$1,401.84

*Cost of Survivor Coverage can be divided between parties or applied to one party

Date of Divorce Value Retire @ NRA (Age 65)	Date of Divorce Value Retire @ Age 62	Date of Divorce Value Retire @ Date of Divorce	Date of Commencement Value Retire @ Age 62	Date of Commencement Value Retire @ NRA (Age 65)
\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33
26.5863	26.5863	26.5863	26.5863	26.5863
0.02	0.02	0.0163	0.02	0.02
\$3,234.66	\$3,234.66	\$2,636.25	\$3,234.66	\$3,234.66
\$314,060.40	\$314,060.40	\$314,060.40	\$836,068.40	\$1,020,068.40
0.0225	0.0225	0.0183	0.0225	0.0225
\$7,066.36	\$7,066.36	\$5,747.31	\$18,811.54	\$22,951.54
\$3,234.66	\$3,234.66	\$2,636.25	\$3,234.66	\$3,234.66
\$588.86	\$588.86	\$478.94	\$1,567.63	\$1,912.63
\$3,823.53	\$3,823.53	\$3,115.19	\$4,802.29	\$5,147.29

#2 Mid Range Marriage: Tony and Karen

Retirement Eligible on Date of Divorce

High 3 Average as of 12/31/2011

Pension Years of Service as of 12/31/2011

2011 Age Factor as of 10/01/2015 Date of Divorce

Date of Divorce Value Retire @ NRA (Age 65)	Date of Divorce Value Retire @30 yrs Age 55 / 4 mn	Date of Divorce Value Retire @ Date of Divorce	Date of Divorce Value Retire @ 30 yrs Age 55 / 4 mn	Date of Commence Value Retire @ NRA (Age 65)
\$4,305.56 21.5833 0.02	\$4,305.56 21.5833 0.0147	\$4,305.56 21.5833 0.0107	\$4,305.56 21.5833 0.0147	\$4,305.56 21.5833 0.02
\$1,858.56	\$1,366.04	\$994.33	\$1,366.04	\$1,858.56
\$205,000.20 0.0225	\$205,000.20 0.0165	\$205,000.20 0.012	\$505,002.00 0.0165	\$1,084,998.00 0.0225
\$4,617.50	\$3,382.50	\$2,460.00	\$8,332.53	\$24,412.46
\$1,858.56 \$384.38	\$1,366.04 \$281.88	\$994.33 \$205.00	\$1,366.04 \$694.38	\$1,858.56 \$2,034.37
\$2,242.94	\$1,647.92	\$1,199.33	\$2,060.42	\$3,892.94

Cumulative Career Earnings After 12/31/2011

Post 2011 Age Factor as of 10/01/2015 Date of Divorce

Pre 2012 Benefit Amount

Post 2011 Benefit Amount

Total Benefit Amount as of 10/01/2015

Shared Interest Order with equation from template:

The Alternate Payee's interest in the Plan is equal to a fraction, the numerator of which is the number of months of credited service the Participant earned under the Plan during the marriage up to _____ (insert date *), and

the denominator of which is the total number of months of credited service the Participant earned under the Plan up to and including _____ (Valuation Date), multiplied by _____ %, and then multiplied by the Participant's vested benefit under the Plan as accrued to the Valuation Date.

Valuation Date = Date of Divorce

	NRA	Commencement Date Age 55 + 4 mn	Date of Divorce	
Numerator = Months earned during Marriage	180	180	180	
Denominator = Months earned as of Valuation Date	300	300	300	
Resulting Fraction	0.600	0.600	0.600	
Multiplier set in the equation	50%	50%	50%	
~ 50% Surviving Spouse - Split Reduction Factors				
Participant	\$3,220.05	\$1,566.05	\$849.53	
Alternate Payee	\$672.88	\$494.38	\$359.80	
5% reduction for 50% Surviving Spouse option (Community Interest)	\$33.64	\$24.72	\$17.99	*Cost of Survivor Coverage can be divided between parties or applied to one party
Community Interest Survivor Benefit Alternate Payee	\$319.62	\$234.83	\$170.90	
~ 100% Surviving Spouse - Split Reduction Factors				
Participant	\$1,570.06	\$1,153.54	\$839.53	
Alternate Payee	\$672.88	\$494.38	\$359.80	
10% reduction for 100% Surviving Spouse option (Community Interest)	\$67.29	\$49.44	\$35.98	*Cost of Survivor Coverage can be divided between parties or applied to one party
Community Interest Survivor Benefit Alternate Payee	\$605.59	\$444.94	\$323.82	

Valuation Date = Date of Commencement

	NRA	Commencement Date Age 55 + 4 mn	Date of Divorce	
Numerator = Months earned during Marriage	180	180	180	
Denominator = Months earned as of Valuation Date	476	360	300	
Resulting Fraction	0.378	0.500	0.600	
Multiplier set in the equation	50%	50%	50%	
~ 50% Surviving Spouse - Split Reduction Factors				
Participant	\$3,156.88	\$1,545.32	\$839.53	
Alternate Payee	\$736.06	\$515.11	\$359.80	
5% reduction for 50% Surviving Spouse option (Community Interest)	\$36.80	\$25.76	\$17.99	*Cost of Survivor Coverage can be divided between parties or applied to one party
Community Interest Survivor Benefit Alternate Payee	\$349.63	\$244.68	\$170.90	
~ 100% Surviving Spouse - Split Reduction Factors				
Participant	\$3,156.88	\$1,545.32	\$839.53	
Alternate Payee	\$736.06	\$515.11	\$359.80	
10% reduction for 100% Surviving Spouse option (Community Interest)	\$73.61	\$51.51	\$35.98	*Cost of Survivor Coverage can be divided between parties or applied to one party
Community Interest Survivor Benefit Alternate Payee	\$662.45	\$463.59	\$323.82	

#3 Short Term Marriage: Andy and Mary

	Date of Divorce Value		Date of Divorce Value		Date of Divorce Value		Date of Divorce Value		Date of Divorce Value	
	Retire @ NRA (Age 65)	Age 60	Retire @ Age 60	Not Eligible	Retire @ Age 60	Not Eligible	Retire @ Age 60	Not Eligible	Retire @ Age 60	Not Eligible
High 3 Average as of 12/31/2011	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33	\$6,083.33
Pension Years of Service as of 12/31/2011	6.5863	6.5863	6.5863	6.5863	6.5863	6.5863	6.5863	6.5863	6.5863	6.5863
2011 Age Factor as of 10/01/2015 Date of Divorce	0.02	0.0184	0.0184	0.0184	0.0184	0.0184	0.0184	0.0184	0.0184	0.02
	\$801.33	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$801.33
Cumulative Career Earnings After 12/31/2011	\$249,200.10	\$249,200.10	\$249,200.10	\$249,200.10	\$249,200.10	\$249,200.10	\$249,200.10	\$249,200.10	\$249,200.10	\$1,691,001.20
Post 2011 Age Factor as of 10/01/2015 Date of Divorce	0.0225	0.0207	0.0207	0.0207	0.0207	0.0207	0.0207	0.0207	0.0207	0.0225
	\$5,607.00	\$5,158.44	\$5,158.44	\$5,158.44	\$5,158.44	\$5,158.44	\$5,158.44	\$5,158.44	\$5,158.44	\$38,047.53
Pre 2012 Benefit Amount	\$801.33	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$737.23	\$801.33
Post 2011 Benefit Amount	\$467.25	\$429.87	\$429.87	\$429.87	\$429.87	\$429.87	\$429.87	\$429.87	\$429.87	\$3,170.63
Total Benefit Amount as of 10/01/2015	\$1,268.58	\$1,167.10	\$1,167.10	\$1,167.10	\$1,167.10	\$1,167.10	\$1,167.10	\$1,167.10	\$1,167.10	\$3,571.96

Shared Interest Order with equation from template:

The Alternate Payee's interest in the Plan is equal to a fraction, the numerator of which is the number of months of credited service the Participant earned under the Plan during the marriage up to and including _____ (insert date *), and

The denominator of which is the total number of months of credited service the Participant earned under the Plan up to and including _____ (Valuation Date), multiplied by _____ %, and then multiplied by the Participant's vested benefit under the Plan as accrued to the Valuation Date

Valuation Date = Date of Divorce		Commencement Date	
NRA	Age 60	Age 60	Date of Divorce
120	120	120	120
120	120	120	120
1,000	1,000	1,000	1,000
50%	50%	50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant	\$634.29	\$0.00	\$0.00
Alternate Payee	\$634.29	\$0.00	\$0.00
Reduction for 50% Surviving Spouse option (Community Interest)	\$31.71	\$0.00	\$0.00
Community Interest Survivor Benefit Alternate Payee	\$301.29	\$0.00	\$0.00

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant	\$634.29	\$0.00	\$0.00
Alternate Payee	\$634.29	\$0.00	\$0.00
Reduction for 100% Surviving Spouse option (Community Interest)	\$63.43	\$0.00	\$0.00
Community Interest Survivor Benefit Alternate Payee	\$570.86	\$0.00	\$0.00

*Cost of Survivor Coverage can be divided between parties or applied to one party

Valuation Date = Date of Commencement		Commencement Date	
NRA	Age 60	Age 60	Date of Divorce
120	120	120	120
357	297	297	120
0.336	0.404	1,000	1,000
50%	50%	50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant	\$3,304.40	\$2,413.55	\$0.00
Alternate Payee	\$667.56	\$611.03	\$0.00
Reduction for 50% Surviving Spouse option (Community Interest)	\$33.38	\$30.55	\$0.00
Community Interest Survivor Benefit Alternate Payee	\$317.09	\$290.24	\$0.00

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant	\$3,304.40	\$2,413.55	\$0.00
Alternate Payee	\$667.56	\$611.03	\$0.00
Reduction for 100% Surviving Spouse option (Community Interest)	\$66.76	\$61.10	\$0.00
Community Interest Survivor Benefit Alternate Payee	\$600.80	\$549.92	\$0.00

*Cost of Survivor Coverage can be divided between parties or applied to one party

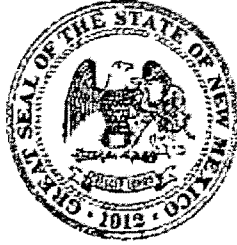
ERB

Pre – Retirement Model
Order and Instructions

Post – Retirement Model
Order and Instructions

NMSA 22-11-29

Calculations of Hypotheticals



STATE OF NEW MEXICO

Educational Retirement Board

PRE-RETIREMENT

MODEL ORDER AND INSTRUCTIONS FOR DIVIDING BENEFITS

Introduction

The New Mexico Educational Retirement Board, ("the ERB") has prepared this package to assist you in drafting an acceptable court order ("order") to divide retirement benefits due to a legal separation or divorce. Following these instructions, you will find a Model Order. If the member is already retired, please use the POST RETIREMENT Model Order and Instructions. If the member is to retain their retirement as their sole and separate property, please submit a Marital Settlement Agreement or an ERB Release of Claims form. All forms are on the ERB website, www.nmerb.org.

The Educational Retirement Act, NMSA 1978, §§ 22 -11-1, et seq., ("the Act") governs the ERB Plan ("the Plan"). The Plan is a defined benefit plan which means that members may receive retirement benefits when they reach certain eligibility requirements (a combination of age and service credits.)

The ERB is a "governmental plan" for the purposes of 29 USC § 1002, and is therefore exempt from the provisions of the federal Employees Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984. Thus an ERISA "Qualified Domestic Relations Order" (QDRO) **is not appropriate or acceptable** to divide the community interest in the ERB benefits. Rather, the order must be consistent with the Act.

As specified in the Act, there are four possible scenarios when a member or their beneficiary(ies) may be eligible to receive benefits.

- The member can receive a monthly pension when they meet the eligibility requirement for retirement and submit a complete retirement application package to the ERB.

- The member can receive a monthly disability benefit if they meet the disability requirements of the Plan.
- The member can request a refund of the member's contributions plus interest or roll them over to their IRA or other eligible plan if they have terminated employment with all ERB employers. Note: under the Plan, a member is entitled to a refund of their contributions plus interest, but are not entitled to a refund of any of the employer's contributions.
- The Act entitles the member's beneficiary(ies) to receive a death refund if the member dies prior to retirement.

Under the Plan, a retirement benefit continues for the duration of the member's life and does not end when they deplete their accumulated contributions plus interest. At retirement, the member has a one-time irrevocable choice to name a refund beneficiary under Option A or to choose a survivor annuitant under Option B (100% annuity) or C (50% annuity).¹ If the member chooses a refund beneficiary under Option A, that individual would receive the difference, if any, between the member's contributions plus interest at the time of their retirement minus the retirement benefits paid out. If the member chooses a survivor annuitant, that individual will receive a lifetime monthly benefit.

The ERB designed the attached Model Order and Instructions to help Plan members comply with the Act. The Model Order provides a number of acceptable alternatives for the parties to select under the Plan. If both spouses are ERB members, the ERB requires a separate order for each member regarding the division of their retirement benefits.

Please note that under the Educational Retirement Act, the co-payee cannot receive a benefit until the member is eligible to receive benefits. A member is eligible to receive a benefit if they reach retirement eligibility and complete an application for retirement, terminate employment and request a refund of contributions, apply and are eligible for a disability benefit or die prior to retirement.

Unless provided with an acceptable endorsed court order, ERB cannot divide a member's benefits. ERB's decision on the acceptability of court orders is final.

FOR THE ERB TO ACCEPT AN ORDER, THE ORDER MUST COMPLY WITH ERB STATUTES AND OTHER APPLICABLE LAWS, RULES AND REGULATIONS AND MUST NOT CONTAIN LANGUAGE OR PROVISIONS NOT FOUND IN THE MODEL ORDER. THE ERB WILL REJECT ANY ORDERS THAT DO NOT COMPLY WITH OR THAT DEVIATE FROM THE LANGUAGE OF THE MODEL ORDER AND ITS ALTERNATIVES.

¹ (Note: under Option A, the member may change the beneficiary at a later date but not the payment option chosen)

The ERB strongly advises parties to forward a draft order dividing ERB benefits to its Legal Department for informal pre-approval prior to submitting the order to the court for signature. To inquire further about these instructions and the model order, please contact the ERB's Legal Division at (505) 827-8030.

Instructions:

The following is an explanation of the various paragraphs and alternatives in the Model Order. Not all paragraphs are necessary, however since certain information is indispensable for an order to be acceptable, the ERB urges the parties to include all the paragraphs used in the Model Order. See page 7 for a checklist that follows these instructions setting forth the minimum requirements that an order must include.

Paragraph 1 - informs the ERB that this order divides retirement benefits under the Act. Parties must be divorced or legally separated for this order to be effective under ERB statutes.

Paragraph 2 - identifies the member spouse (hereinafter "the member") whose account is the subject of division by the court order. The ERB will not issue state warrants (checks) unless it is provided with the payee's name, Social Security number, date of birth and address.

Paragraph 3 - identifies the non-member spouse (hereinafter "the co-payee"). The ERB will not issue state warrants (checks) unless it is provided with the co-payee's name, Social Security number, date of birth and address.

In order to comply with Rule 1-079, only the parties' last four digits of their Social Security numbers are to appear on the Order. Failure to provide A SEPARATE COVER LETTER with the full Social Security numbers and dates of birth of BOTH the member and the co-payee WILL cause a delay in the processing of benefits.

Paragraph 4 – provides a method for the member and co-payee to update their demographic information without amending the order in a court proceeding. The member and co-payee **must** inform the ERB of any address change to insure that they will be able to receive their benefits. It is not the ERB's responsibility to search for payees who have moved without notifying the ERB. If the warrant is returned as undeliverable, the money will accumulate until the member or co-payee claims it and furnishes a current address. Members or co-payees will not be entitled to interest on the delayed payments if they failed to properly inform the ERB of their address change.

Paragraph 5 - identifies the dates of marriage and divorce. This information is necessary so the ERB can determine the community interest portion of the member's account.

Paragraph 6 – provides the ERB with the formula to determine the community interest in the member's account. This formula takes into account that service provided to an

ERB employer either before marriage or after divorce or legal separation is not included in the community property portion that is divided between the member and the co-payee. Please note that if the parties are contemplating a cash buyout or dollar for dollar trade in the divorce settlement, the property division methods included in this Model Order **do not** determine the actuarial present value of a member's retirement account. In a defined benefit plan like the ERB Plan, the member's contributions plus interest do not determine the present value of their account. Rather, years of service and final average salary at the time the member retires determine the amount of the retirement benefits which are paid for the life of the member or the named survivor annuitant, whoever lives longer. If the parties require an actuarial present value of an ERB account, they will need to hire a private actuary. **The ERB cannot provide actuarial evaluations.**

Paragraph 7 – divides the community interest in the retirement benefits or contributions as calculated by paragraph 6. "Benefits" refers to pensions paid at retirement and "contributions" refers to money paid into the fund by the member before retirement, plus applicable interest.

Alternative 1 defines each party's percentage interest of the **community portion** of the gross benefits and awards the remainder to the member.

Alternative 2 divides the community interest in the member's benefits by a percentage other than 50%, as agreed upon by the parties and/or their counsel. Please note that the Act does not allow an assignment of a member's benefit, but allows a division of the benefits due to a divorce or legal separation, so the maximum amount of the community property portion of a member's benefit that an order can award to the co-payee is 99%.

Alternative 3 divides the benefits by assigning a fixed monthly amount to one spouse (usually the non-member) and the remainder to the other. Note that this alternative precludes the one spouse (usually the non-member) from receiving any future cost of living increases that may be due from the member's account. Additionally, if the parties elect to use alternative 3, the ERB requires special language in the paragraphs referring to disability benefits, death benefits, and refunds or rollovers or retirement under Option A, so as to direct the ERB on the method of calculation of the property division in the event there is a lump sum payout.

Please note that the division of benefits cannot change throughout the course of the payment of benefits. If the parties wish to alter the division of the benefits in the future, they are to submit an amended court order to the ERB.

Paragraph 8 – identifies the form of payment of retirement benefits that the order directs the member to choose at the time they retire. Under the Act, this choice is irrevocable (with a few narrow exceptions). The choices include a straight life (Option A) in which the member receives a benefit for life with no survivor annuitant. (See NMSA 1978 §22-11-30) or Option B or C as described in NMSA 1978, §22-11-29. Option B (100% annuity) or C (50% annuity) provides the beneficiary with a lifetime benefit if the member predeceases them. If the member chooses Option B or C, an actuarially calculated amount, based upon the age and gender of the member and the chosen beneficiary will reduce the monthly benefit. The amount of this reduction in the

monthly benefit is divided between the member and the co-payee based upon the percentage split between the parties of the monthly benefit and cannot be shifted into a different formula.

This section offers eight alternatives regarding the selection of a retirement benefit form of payment. See the chart below for a further explanation of the manner in which the choice of benefits affects future payouts.

ERB strongly recommends that both parties and their attorneys consult with the ERB benefits office regarding the effects of each form of payment before choosing one of these alternatives.

Alternative 1 is for use if the member plans to choose Option A, naming the co-payee as the refund beneficiary.

Alternative 2 is similar, except it allows the member to choose someone other than the co-payee as the refund beneficiary.

Alternative 3 is for use when the member must choose either Option B or C under NMSA 1978, §22-11-29 and must choose the co-payee as the survivor beneficiary. **This option requires that the parties provide a copy of the co-payee's birth certificate at the time they provide the order to the ERB.**

Alternative 4 is similar to alternative 3, except that it allows the member to choose someone other than the co-payee as the survivor beneficiary.

Alternative 5 is similar to alternative 4, except that if the member chooses an Option B or C beneficiary other than the co-payee, and the named survivor beneficiary and the co-payee divide the Option B or C benefit.

Alternative 6 is similar to alternative 3 in that the co-payee is the Option B or C beneficiary. However, instead of the co-payee receiving entire survivor amount, they receive their portion and the member's share goes to the member's estate until the death of the co-payee. **This option also requires that the parties provide a copy of the co-payee's birth certificate at the time they provide the order to the ERB.**

Alternative 7 allows the member to choose any form of payment under the plan and name any survivor beneficiary.

Alternative 8 allows the member to choose any form of payment under the plan, but requires the member to choose the co-payee as the refund or survivor beneficiary.

Paragraph 8 Alternative benefit chart

Alt No.	Option Choice Allowed	Beneficiary Choice Allowed	When All Benefits Cease	Who Receives Benefits If Member Predeceases Co-Payee
1	A	Co-payee	At member's death	The co-payee would receive the undivided difference if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits
2	A	Anyone	At member's death	The difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits would be paid to the named beneficiary*
* For co-payee to receive his or her community portion when member selects Option A, the Order must include Paragraph 11.				
3	B or C	Co-payee	At co-payee's or member's death,	Co-payee receives an undivided monthly benefit for his or her life

			whichever comes later	
4	B or C	Anyone	At beneficiary's or member's death, whichever comes later	If member named an Option B or C ("B or C") beneficiary other than co-payee, beneficiary receives an undivided survivor benefit; co-payee benefit ceases at member's death
5	B or C	Anyone	At beneficiary's or member's death, whichever comes later	If member named a B or C beneficiary other than co-payee, co-payee will receive their community portion and the named beneficiary will receive remainder
6	B or C	Co-payee	At co-payee's or member's death whichever comes later	Co-payee receives community portion of benefits; Member's estate to receive remainder until all benefits cease
7	Any	Anyone	A – at death of member; B or C at beneficiary's or member's death, whichever comes later	If Option A ("A") is chosen, the named beneficiary, if other than the co-payee, would receive the undivided difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits.* If member chooses a B or C beneficiary other than co-payee, the named beneficiary receives a divided monthly benefit for life and the co-payee's benefit would cease upon the named beneficiary's death
8	Any	Co-payee	A – at death of member; B or C at beneficiary's or member's death, whichever comes later	If A is chosen, co-payee receives the difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits; If B or C is chosen, co-payee receives undivided B or C amount for their life

Paragraph 9 - determines what happens to the co-payee's share if the co-payee predeceases the member and/or the member's survivor pension beneficiary. **Alternative 1**, if the co-payee predeceases the member or the member's survivor pension beneficiary, the co-payee's benefit ceases and their part of the community interest returns to the member or the member's survivor pension beneficiary. **Alternative 2** if the co-payee predeceases the member or the member's survivor pension beneficiary, the EB will pay the co-payee's share to the co-payee's estate as long as the ERB pays benefits on the account.

NOTE: IF THE PARTIES LEAVE OUT THIS PARAGRAPH OR THE QDRO IS OTHERWISE SILENT ON THE ISSUE OF THE DIVISION OF BENEFITS IN THE EVENT THAT THE CO-PAYEE PREDECEASES THE MEMBER, THE ERB WILL ASSUME THAT THE CO-PAYEE'S SHARE WILL GO TO THE CO-PAYEE'S ESTATE UNTIL ALL BENEFITS CEASE.

Paragraph 10 – instructs the ERB to divide the benefits and pay each party separately. Because the ERB cannot divide benefits with separate payments without this paragraph included in the order, it will reject the order if the parties leave out this essential paragraph.

Paragraph 11 – for use **only** if the parties stipulate that the member may choose Option A upon retirement. The parties are not to use this paragraph if the order directs the member to select either Option B or C.

Paragraph 12 – prevents a member who has terminated ERB employment from withdrawing his or her contributions without the co-payee receiving their portion of the contributions.

Paragraph 13 – protects co-payee's interest in the member's retirement account in the event of the member's death before retirement. **Note:** An active member should make sure they update their beneficiary on the proper ERB form after the divorce to reflect any beneficiary changes. The ERB will not automatically remove ex-spouses as the beneficiary upon divorce or legal separation. No change is necessary if the parties agree that the ERB will pay the death refund in full to the ex-spouse.

Paragraph 14 – provides that the co-payee is to receive their portion of any disability benefits paid to the member.

Paragraph 15 – provides that each party will pay any taxes due on benefits or contributions paid by the ERB when the parties receive the benefit or contribution according to the withholding information on file with the ERB. Upon receipt of a "tax deduction" form, the ERB will withhold federal and state income taxes from pension payments. All members employed and contributing to the ERB before 1983 have contributions that were previously taxed.

Paragraphs 16 & 17 – are self-explanatory.

Paragraph 18 – reserves the court's jurisdiction to amend that portion of the order relating to retirement benefits or contributions.

CHECKLIST OF MINIMUM REQUIREMENTS: At a minimum, to be acceptable, the order **MUST include the following:**

- ❑ A statement that the Order divides retirement benefits under the Educational Retirement Act, NMSA 1978, §§ 22-11-1 et seq.;
- ❑ The name, last four digits of the Social Security number and current address of each party (The full Social Security numbers and dates of births **must** be submitted on a separate cover letter);
- ❑ Instructions on ERB notification in case of either party's address or name change. The ERB requires such notice, in writing and signed before a notary public;
- ❑ A declaration of a community interest in the member's retirement benefits and clear acceptable instructions to the ERB to divide the member's benefits;
- ❑ The percentage or dollar amount of each party's interest in the member's ERB account;
- ❑ A direct order to the ERB to issue separate warrants (checks) for each party; and,
- ❑ A statement of each party's federal tax liabilities.

Please call the ERB Legal Division at (505) 827- 8030 if you have any questions.

STATE OF *
COUNTY OF *
NAME OF COURT

NAME OF PARTY

Petitioner,
vs.

NAME OF PARTY

Case No. *

Respondent.

ORDER DIVIDING ERB RETIREMENT BENEFITS

1. Pursuant to NMSA 1978, §22-11-42, this Order adjudicates retirement benefits accrued under the Educational Retirement Act, NMSA 1978, §22-11-1, et seq. Any payments pursuant to this order shall only be made when contributions are refunded or a pension is payable in accordance with the Educational Retirement Act.
2. _____, last four digits of Social Security No. _____, is a member (hereinafter "the member") of the Educational Retirement Board (ERB). The member's current address is: _____.
3. _____, last four digits of Social Security No. _____, the non-member spouse is the co-payee (hereinafter "the co-payee") of the ERB retirement benefits. Co-payee's current address is: _____.
4. The information in paragraphs 2 and 3 above regarding the parties' addresses or names may be modified if a party changes his or her address or name by that party notifying the ERB in writing, with a notarized signature, of the change of address or name, or Social Security number, should that be necessary.
5. The parties were married on _____ and were divorced on _____.
6. A certain percentage of the retirement benefits or contributions accrued in the member's name are community property. The percentage is to be derived from a fraction, with the numerator being the number of quarters of the member's service during the marriage and the denominator the total number of quarters of ERB service. The percentage of community interest in retirement benefits or contributions will be determined when the member spouse either retires, receives a disability retirement, terminates public employment and requests a refund of contributions, or dies prior to retirement. "Benefit" shall be described as the "gross benefit" and is defined as the total benefit before any deductions are made for taxes. "Total years of

service” is defined as including actual time of employment, service time purchased for previous education experience and/or military service, or acquired by any other legal means.

7. This Order determines and divides the parties’ rights of the community interest in retirement benefits or contributions identified above as follows:

Alternative 1

Each party is entitled to 50% of the community interest in the benefits or contributions and the member spouse is entitled to the balance.

Alternative 2

The member is entitled to _____% and the co-payee is entitled to _____% of the community interest in the benefits or contributions accrued in the member’s name and the member spouse is entitled to the balance.

Alternative 3

_____ is entitled to \$_____per month, and _____ is entitled to the balance. (If the member dies prior to retirement OR refunds or rolls over the account OR if the member retires under Option A as specified under NMSA 1978, §22-11-30 and dies before there is paid an aggregate amount equal to his or her accumulated contributions at the time of retirement, the member is entitled to _____% and the co-payee is entitled to _____% of the community interest in the benefits or contributions accrued in the member’s name and the member spouse is entitled to the balance.)

8. **Alternative 1**

The member shall elect form of payment as specified in NMSA 1978, §22-11-30, at the time he/she retires, and shall designate the co-payee as the refund beneficiary in the event of member’s death before the accumulated contributions are paid out.

Alternative 2

The member shall elect form of payment as specified in NMSA 1978, §22-11-30, at the time he/she retires, and may designate anyone as refund beneficiary in the event of member’s death before the accumulated contributions are paid out.

Alternative 3

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and shall name the co-payee as survivor pension beneficiary.

Alternative 4

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and may designate anyone as survivor pension beneficiary. If the member chooses a beneficiary other than the co-payee, the co-payee’s benefit shall cease upon the death of the member.

Alternative 5

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and may designate anyone as survivor pension beneficiary. If the member predeceases the co-payee and has named a beneficiary other than the co-payee, the survivor benefit is to be divided between the named Option B or C beneficiary and the co-payee or co-payees estate until all benefits cease as calculated in paragraph 7.

Alternative 6

The member shall elect form of payment under Option B or C as specified in NMSA 1978, § 22-11-29, at the time he/she retires, and shall name the co-payee as survivor pension beneficiary. In the event that the member predeceases the co-payee, the survivor benefit shall be divided between the member's estate and the co-payee as calculated in paragraph 7.

Alternative 7

The member may choose any form of payment at the time he/she retires, and may name any person as the refund or survivor pension beneficiary.

Alternative 8

The member may choose any form of payment at the time he/she retires, and shall name the co-payee as the refund or survivor pension beneficiary.

9. **Alternative 1**

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall cease.

Alternative 2

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall be paid to the co-payee's estate. In all cases, payments made to the co-payee or any person designated by the co-payee to receive payments shall cease when benefits to the member or their survivor beneficiary cease.

10. The ERB is hereby ordered to divide the member's retirement benefit according to the percentages stated in paragraph 7, and issue separate warrants for the proper amounts to each party using the information stated in paragraphs 2-3, or the information as modified according to paragraph 4.

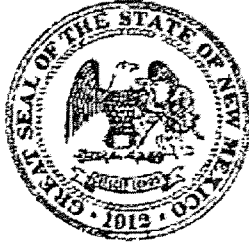
11. If the member retires under Option A as specified under NMSA 1978, §22-11-30 and dies before there is paid an aggregate amount equal to his or her accumulated contributions at the time of retirement, the difference between the amount of the accumulated contributions and the aggregate amount of pension paid shall be divided between the co-payee and the member's refund beneficiary or estate, as calculated in paragraph 7.

12. The ERB is hereby ordered to refrain from refunding the accumulated member contributions of the member, except according to the percentages stated in paragraph 7. Any such refund shall be made by issuing separate warrants for the proper amounts to each party using the information stated in paragraphs 2-3, or the information as modified according to paragraph 4.
13. If the member dies prior to retirement, the co-payee shall be entitled to the portion of any pension benefit payable as described in paragraph 7.
14. If the member should become eligible for any disability benefits under the Act, the co-payee shall be entitled to the portion of any such disability benefits as described in paragraph 7.
15. All retirement benefits or contributions except for non-taxable benefits or contributions paid to each party pursuant to this Order shall constitute individual gross income for taxation purposes and the ERB shall withhold the appropriate amounts as permitted or required. (All pre-1983 contributions shall be assigned according to the formula as described in paragraphs 6 and 7).
16. Copies of this Order shall be transmitted by counsel for the (member) (co-payee) to the ERB Plan Administrator. The ERB shall notify the parties within a reasonable time after receipt of the Order whether the Order conforms to the requirements of the applicable statutes and rules and is administratively feasible.
17. The co-payee shall be entitled to communicate with the ERB and receive the necessary information that concerns the member's interest in the plan.
18. The court reserves jurisdiction on the issue of the final qualification of this Order in order to correct, amend or enforce this Order. There is no just reason for delay for entry of a final order and decree containing the terms stated in this section, and for the other provisions of the decree and settlement.

Judge

Petitioner

Respondent



STATE OF NEW MEXICO

Educational Retirement Board

POST-RETIREMENT

MODEL ORDER

AND INSTRUCTIONS FOR DIVIDING ERB BENEFITS

Introduction

The New Mexico Educational Retirement Board ("ERB") has prepared this package to assist you in drafting an acceptable court order ("order") to divide retirement benefits due to a divorce. Following these instructions, you will find a Model Order. If the member has not yet retired, please use the PRE-RETIREMENT Model Order and Instructions for Dividing Benefits. If the member is to retain their retirement as their sole and separate property, please submit a Marital Settlement Agreement or an ERB Release of Claims Form. All forms can be found on the ERB website, www.nmerb.org.

The ERB is a defined benefit plan, governed by the Educational Retirement Act, NMSA 1978, §§ 22-11-1, *et seq.*, hereinafter "the Act." The member has retired under the Act and is entitled to monthly benefit for life.

The ERB is a "governmental plan" for the purposes of 29 USC § 1002, and is therefore exempt from the provisions of the federal Employees Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984. Thus an ERISA "Qualified Domestic Relations Order" (QDRO) is **not appropriate or acceptable** to divide the community interest in the ERB benefits. Rather, the order must be consistent with the Act.

The ERB designed the attached Model Order and Instructions to help Plan members comply with the Act. The Model Order provides a number of acceptable alternatives for the parties to select under the Plan. If both spouses are ERB members, the ERB requires a separate order for each member regarding the division of their retirement benefits.

Unless provided with an acceptable endorsed court order, ERB cannot divide a member's benefits. ERB's decision on the acceptability of court orders is final.

FOR THE ERB TO ACCEPT AN ORDER, THE ORDER MUST COMPLY WITH ERB STATUTES AND OTHER APPLICABLE LAWS, RULES AND REGULATIONS AND MUST NOT CONTAIN LANGUAGE OR PROVISIONS NOT FOUND IN THE MODEL ORDER. THE ERB WILL REJECT ANY ORDERS THAT DO NOT COMPLY WITH OR THAT DEVIATE FROM THE LANGUAGE OF THE MODEL ORDER AND ITS ALTERNATIVES.

The ERB strongly advises parties to forward a draft order dividing ERB benefits to its Legal Department for informal pre-approval prior to submitting the order to the court for signature. To inquire further about these instructions and the model order, please contact the ERB's Legal Division at (505) 827-8030.

Instructions:

The following is an explanation of the various paragraphs and alternatives in the Model Order. Not all paragraphs are necessary, however since certain information is indispensable for an order to be acceptable, the ERB urges the parties to include all the paragraphs used in the Model Order. See page 5 for a checklist that follows these instructions setting forth the minimum requirements that an order must include.

Paragraph 1 - informs the ERB that this order divides retirement benefits under the Act. Parties must be divorced or legally separated for this order to be effective under ERB statutes.

Paragraph 2 - identifies the member spouse (hereinafter "the member") whose account is the subject of division by the court order. The ERB will not issue state warrants (checks) unless it is provided with the payee's name, Social Security number, date of birth and address.

Paragraph 3 - identifies the non-member spouse (hereinafter "the co-payee"). The ERB will not issue state warrants (checks) unless it is provided with the co-payee's name, Social Security number, date of birth and address.

In order to comply with Rule 1-079, only the parties' last four digits of their Social Security numbers are to appear on the Order. Failure to provide A SEPARATE COVER LETTER with the full Social Security numbers and dates of birth of BOTH the member and the co-payee WILL cause a delay in the processing of benefits.

Paragraph 4 – provides a method for the member and co-payee to update their demographic information without amending the order in a court proceeding. The member and co-payee **must** inform the ERB of any address change to insure that they will be able to receive their benefits. It is not the ERB's responsibility to search for payees who have moved without notifying the ERB. If the warrant is returned as undeliverable, the money will accumulate until the member or co-payee claims it and furnishes a current address. Members or co-payees will not be entitled to interest on the delayed payments if they failed to properly inform the ERB of their address change.

Paragraph 5 - identifies the dates of marriage and divorce. This information is necessary so the ERB can determine the community interest portion of the member's account.

Paragraph 6 – provides the ERB with the formula to determine the community interest in the member's account. This formula takes into account that service provided to an ERB employer either before marriage or after divorce or legal separation is not included in the community property portion that is divided between the member and the co-payee. Please note that if the parties are contemplating a cash buyout or dollar for dollar trade in the divorce settlement, the property division methods included in this Model Order **do not** determine the actuarial present value of a member's retirement account. In a defined benefit plan like the ERB Plan, the member's contributions plus interest do not determine the present value of their account. Rather, years of service and final average salary at the time the member retires determine the amount of the retirement benefits which are paid for the life of the member or the named survivor annuitant, whoever lives longer. If the parties require an actuarial present value of an ERB account, they will need to hire a private actuary. **The ERB cannot provide actuarial evaluations.**

Paragraph 7 – divides the community interest in the retirement benefits or contributions as calculated by paragraph 6. "Benefits" refers to pensions paid at retirement and "contributions" refers to money paid into the fund by the member before retirement, plus applicable interest.

Alternative 1 defines each party's percentage interest of the **community portion** of the gross benefits and awards the remainder to the member.

Alternative 2 divides the community interest in the member's benefits by a percentage other than 50%, as agreed upon by the parties and/or their counsel. Please note that the Act does not allow an assignment of a member's benefit, but allows a division of the benefits due to a divorce or legal separation, so the maximum amount of the community property portion of a member's benefit that an order can award to the co-payee is 99%.

Alternative 3 divides the benefits by assigning a fixed monthly amount to one spouse (usually the non-member) and the remainder to the other. Note that this alternative precludes the one spouse (usually the non-member) from receiving any future cost of living increases that may be due from the member's account. Additionally, if the parties elect to use alternative 3, the ERB requires special language with regard to retirement under Option A, so as to direct the ERB on the method of calculation of the property division in the event there is a lump sum payout due to the member dying before the contributions are paid out on the retirement account.

Please note that the division of benefits cannot change throughout the course of the payment of benefits. If the parties wish to alter the division of the benefits in the future, they are to submit an amended court order to the ERB.

Paragraph 8 – When the member retired, they made an irrevocable choice regarding form of payment based upon a choice of beneficiary options. This section offers seven alternatives regarding allowable changes to the selection of form of payment and beneficiary selection. See the chart below for a further explanation of the manner in which the choice of alternative affects future payouts. **The ERB strongly recommends that both parties and their attorneys consult with the ERB benefits office regarding the effects of each form of payment before choosing one of these alternatives.**

Alternative 1 is for use if the member chose Option A (the straight life option) at retirement and named the ex-spouse as beneficiary. In this alternative, that selection is to remain the same.

Alternative 2 is similar, except a death refund, if any is to be divided between the co-payee and the member's new beneficiary.

Alternative 3 is similar, except it allows the member to choose someone other than the co-payee as the refund beneficiary.

Alternative 4 is for use if the member chose Option B or C at retirement and named the ex-spouse as the annuitant beneficiary. In this alternative, the selection is to remain the same.

Alternative 5 is for use if the member chose Option B or C at retirement and named the ex-spouse as the annuitant beneficiary. In this alternative, the ex-spouse remains as the survivor annuitant, but the ex-spouse and the member's estate with split the benefit.

Alternative 6 is for use when the member chose Option B or C at retirement and named the ex-spouse as the annuitant beneficiary. This alternative allows the member to change from Option B or C to Option A and remove the ex-spouse as the survivor annuitant. The member may then name anyone as the refund beneficiary under Option A only. A member cannot substitute a new beneficiary with Option B or C.

Alternative 7 is for use when the member chose Option B or C at retirement and named the ex-spouse as the annuitant beneficiary. This alternative allows the member to change from Option B or C to Option A and remove the ex-spouse as the survivor annuitant. However, the member must name the ex-spouse as the Option A refund beneficiary.

Paragraph 8 Alternative benefit chart:

Alt No.	Option Choice	Beneficiary Choice/Change	When All Benefits Cease	Who Receives Benefits If Member Predeceases Co-Payee
1	A was chosen-remains the same	Was co-payee – to remain the same	At member's death	Co-payee would receive the undivided difference if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits
2	A was chosen-remains the same	Was co-payee – Member names another beneficiary	At member's death	The difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits would be divided between the co-payee and the new beneficiary
3	A was chosen-remains the same	Was co-payee – Member names another beneficiary	At member's death	The difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits would be paid to the new beneficiary

4	B or C was chosen-remains the same	Was co-payee – remains the same	At Co-payee's or member's death, whichever comes later	Co-payee receives an undivided monthly benefit for his or her life
5	B or C was chosen-remains the same	Was co-payee - remains the same	At Co-payee's or member's death, whichever comes later	Co-payee receives a monthly benefit for their life that is divided with the member's estate
6	B or C was chosen-Changed to Option A	Was co-payee-changed to anyone under Option A	At member's death	The difference, if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits would be divided between the co-payee and the new beneficiary
7	B or C was chosen-Changed to Option A	Was co-payee - under Option B or C - changed to co-payee under Option A	At death of member	Co-payee would receive the undivided difference if any, between the member's contributions at the time of retirement minus the amount paid out in retirement benefits

Paragraph 9 - determines what happens to the co-payee's share if the co-payee predeceases the member and/or the member's survivor pension beneficiary.

Alternative 1, if the co-payee predeceases the member or the member's survivor pension beneficiary, the co-payee's benefit ceases and their part of the community interest returns to the member or the member's survivor pension beneficiary.

Alternative 2 if the co-payee predeceases the member or the member's survivor pension beneficiary, the ERB will pay the co-payee's share to the co-payee's estate as long as the ERB pays benefits on the account.

NOTE: IF THE PARTIES LEAVE OUT THIS PARAGRAPH OR THE QDRO IS OTHERWISE SILENT ON THE ISSUE OF THE DIVISION OF BENEFITS IN THE EVENT THAT THE CO-PAYEE PREDECEASES THE MEMBER, THE ERB WILL ASSUME THAT THE CO-PAYEE'S SHARE WILL GO TO THE CO-PAYEE'S ESTATE UNTIL ALL BENEFITS CEASE.

Paragraph 10 – instructs the **ERB to divide the benefits and pay each party separately**. Because the ERB cannot divide benefits with separate payments without this paragraph included in the order, it will reject the order if the parties leave out this essential paragraph.

Paragraph 11 – for use **only** if the member chose Option A at retirement (or changes to Option A in this divorce order). This language is not appropriate for any form of payment that calls for a survivor pension beneficiary.

Paragraph 12 – provides that each party to the divorce will pay any taxes due on benefits or contributions paid by the ERB when they receive the benefit or contribution according to the withholding information on file with the ERB. The ERB, upon receipt of a "tax deduction" form, will withhold federal and state income taxes from pension payments. All members employed and contributing to the ERB before 1983 have

contributions that were taxed. The order must assign the amounts of these contributions. The language of the model order assigns them in accordance with the formula that defines the community property share.

Paragraphs 13 & 14 – are self-explanatory.

Paragraph 18 – reserves the court's jurisdiction to amend that portion of the order relating to retirement benefits or contributions. It is not a general reservation of jurisdiction since such a reservation would affect the order's finality and, therefore, its appealability.

CHECKLIST OF MINIMUM REQUIREMENTS

At a minimum, to be acceptable, the order MUST include the following:

- ❑ A statement that the Order divides retirement benefits under the Educational Retirement Act, NMSA 1978, §§ 22-11-1 et seq.;
- ❑ The name, last four digits of the Social Security number and current address of each party (The full Social Security numbers, dates of births or addresses **must** be submitted on a separate cover letter);
- ❑ Instructions on ERB notification in case of either party's address or name change. The ERB requires such notice, in writing and signed before a notary public;
- ❑ A declaration of a community interest in the member's retirement benefits and clear acceptable instructions to the ERB to divide the member's benefits;
- ❑ The percentage or dollar amount of each party's interest in the member's ERB account;
- ❑ A direct order to the ERB to issue separate warrants (checks) for each party; and,
- ❑ A statement of each party's federal tax liabilities.

Please call the ERB Legal Division at (505) 827- 8030 if you have any questions.

STATE OF *
COUNTY OF *
NAME OF COURT

NAME OF PARTY

Petitioner,
vs.

NAME OF PARTY

Case No. *

Respondent.

ORDER DIVIDING ERB BENEFITS POST RETIREMENT

1. Pursuant to NMSA 1978, §22-11-42, this Order adjudicates retirement benefits accrued under the Educational Retirement Act, NMSA 1978, §22-11-1, et seq. Any payments pursuant to this order shall only be made when contributions are refunded or a pension is payable in accordance with the Educational Retirement Act.
2. _____, last four digits of Social Security No. _____, is a member (hereinafter "the member") of the Educational Retirement Board (ERB). The member's current address is: _____
_____.
3. _____, last four digits of Social Security No. _____, the non-member spouse is the co-payee (hereinafter "the co-payee") of the ERB retirement benefits. Co-payee's current address is: _____
_____.
4. The information in paragraphs 2 and 3 above regarding the parties' addresses or names may be modified if a party changes his or her address or name by that party notifying ERB in writing, with a notarized signature, of the change of address or name, or Social Security number, should that be necessary.
5. The parties were married on _____ and were divorced on _____.
6. The member spouse, who has already retired, had _____ months of service during the marriage and _____ months of total service at retirement. _____ % of the retirement benefits or contributions accrued in member spouse's name are community property.
7. This Order determines and divides the parties' rights of the community interest in retirement benefits or contributions identified above as follows:

Alternative 1

Each party is entitled to 50% of the community interest in the benefits or contributions and the member spouse is entitled to the balance.

Alternative 2

The member is entitled to _____% and the co-payee is entitled to _____% of the community interest in the benefits or contributions accrued in the member's name.

Alternative 3

_____ is entitled to \$_____per month, and _____ is entitled to the balance. (If the member retired under Option A as specified under NMSA 1978, §22-11-30 and dies before there is paid an aggregate amount equal to his or her accumulated contributions at the time of retirement, the member is entitled to _____% and the co-payee is entitled to _____% of the community interest in the benefits or contributions accrued in the member's name and the member spouse is entitled to the balance.)

8. **Alternative 1**

At retirement the member elected a form of payment under NMSA 1978, § 22-11-30 and designated *(name of ex-spouse) as the refund beneficiary in the event the member's death occurs before the accumulated contributions plus interest are paid out. This selection of beneficiary is to remain the same.

Alternative 2

At retirement the member elected a form of payment under NMSA 1978, § 22-11-30 and designated *(name of ex-spouse) as the refund beneficiary in the event the member's death occurs before the accumulated contributions plus interest are paid out. The member may name anyone as the refund beneficiary, however the refund, if any is to be divided between the co-payee and the named refund beneficiary as calculated in Paragraph 7.

Alternative 3

At retirement the member elected a form of payment under NMSA 1978, § 22-11-30 and designated *(name of ex-spouse) as the refund beneficiary in the event the member's death occurs before the accumulated contributions plus interest are paid out. The member may now name anyone as the refund beneficiary.

Alternative 4

At retirement, the member elected a form of payment under Option *(B or C) as specified in NMSA 1978, § 22-11-29 and designated *(name of ex-spouse) as survivor pension beneficiary. The selection of beneficiary is to remain the same.

Alternative 5

At retirement, the member elected a form of payment under Option *(B or C) as specified in NMSA 1978, § 22-11-29 and designated *(name of ex-spouse) as

survivor pension beneficiary. This selection of beneficiary is to remain the same; however the survivor pension benefit is to be divided between the co-payee and the member's estate as calculated in Paragraph 7.

Alternative 6

At retirement, the member elected a form of payment under Option *(B or C) as specified in NMSA 1978, § 22-11-29 and designated * (name of ex-spouse) as survivor pension beneficiary. *(name of ex-spouse) is to be removed as the survivor pension beneficiary and the form of payment is to be changed to Option A under NMSA 1978, § 22-11-30. The member may name anyone as the Option A refund beneficiary.

Alternative 7

At retirement, the member elected a form of payment under Option *(B or C) as specified in NMSA 1978, § 22-11-29 and designated * (name of ex-spouse) as survivor pension beneficiary. *(name of ex-spouse) is to be removed as the survivor pension beneficiary and the form of payment is to be changed to Option A under NMSA 1978, § 22-11-30. The member must name the co-payee as the Option A refund beneficiary.

9. Alternative 1

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall cease.

Alternative 2

If the co-payee predeceases the member and/or the member's survivor pension beneficiary, the co-payee's interest in the retirement benefit shall be paid to the co-payee's estate. In all cases, payments made to the co-payee or any person designated by the co-payee to receive payments shall cease when benefits to the member or their survivor beneficiary cease.

10. ERB is hereby ordered to divide the member's retirement benefit according to the percentages stated in paragraph 7, and issue separate warrants for the proper amounts to each party using the information stated in paragraphs 2-3, or the information as modified according to paragraph 4.
11. If the member has chosen Option A under NMSA 1978, § 22-11-30 at retirement and dies before there is paid an aggregate amount equal to his or her accumulated contributions at the time of retirement, the difference between the amount of the accumulated contributions and the aggregate amount of pension paid shall be divided between the co-payee and the member's refund beneficiary or estate, according to paragraph 7.
12. All retirement benefits or contributions except for non-taxable benefits or contributions paid to each party pursuant to this Order shall constitute individual gross income for taxation purposes and ERB shall withhold the appropriate amounts

as permitted or required. (All pre-1983 contributions shall be assigned according to the formula as described in paragraphs 6 and 7).

13. Copies of this Order shall be transmitted by counsel for the (member) (co-payee) to the Plan Administrator for the ERB. ERB shall notify the parties within a reasonable time after receipt of the Order whether the Order conforms to the requirements of the applicable statutes and rules and is administratively feasible.
14. The co-payee shall be entitled to communicate with the ERB and receive information from the Plan Administrator that concerns the member's interest in the plan.
15. The court reserves jurisdiction on the issue of the final qualification of this Order in order to correct, amend or enforce this Order. There is no just reason for delay for entry of a final order and decree containing the terms stated in this section, and for the other provisions of the decree and settlement.

Judge

Petitioner

Respondent

22-11-29. Retirement benefit options.

A. Upon retirement pursuant to the Educational Retirement Act, a member may elect, and, except as provided in Subsection D or E of this section, such election shall be irrevocable, to receive the actuarial equivalent of the member's retirement benefit, as provided in Section 22-11-30 NMSA 1978, to be effective on the member's retirement in any one of the following optional forms:

(1) OPTION B. A reduced annuity payable during the member's life with provision that upon the member's death the same annuity shall be continued during the life of and paid to the beneficiary designated by the member in writing at the time of electing this option; or

(2) OPTION C. A reduced annuity payable during the member's life with provision that upon the member's death one-half of this same annuity shall be continued during the life of and paid to the beneficiary designated by the member in writing at the time of electing this option.

B. In the case of Options B and C of Subsection A of this section, the actuarial equivalent of the member's retirement benefit shall be computed on the basis of the lives of both the member and the beneficiary.

C. In the event that the named beneficiary of a retired member who elected Option B or C of Subsection A of this section at the time of retirement predeceases the retired member, the annuity of the retired member shall be adjusted by adding an amount equal to the amount by which the annuity of the retired member was reduced at retirement as a result of the election of Option B or C. The adjustment authorized in this subsection shall be made as follows:

(1) beginning on the first month following the month in which the named beneficiary of a retiree dies applicable to an annuity received by a retiree who retires after June 30, 1987; or

(2) beginning on July 1, 1987 applicable to an annuity received by a retiree who retired prior to July 1, 1987 and otherwise qualifies for the adjustment; provided, however, no adjustment shall be made retroactively.

D. A retired member who is being paid an adjusted annuity pursuant to Subsection C of this section because of the death of the named beneficiary may exercise a one-time irrevocable option to designate another individual as the beneficiary and may select either Option B or Option C of Subsection A of this section; provided that:

(1) the amount of the annuity under the option selected shall be recalculated and have the same actuarial present value, computed on the effective date of the designation, as the annuity being paid to the retired member prior to the designation;

(2) the designation and the amount of the annuity shall be subject to a court order as provided for in Subsection B of Section 22-11-42 NMSA 1978; and

(3) the retired member shall pay one hundred dollars (\$100) to the board to defray the cost of determining the new annuity amount.

E. A retired member who is being paid an annuity under Option B or C of Subsection A of this section with a living designated beneficiary other than the retired member's spouse or former spouse may exercise a one-time irrevocable option to deselect the designated beneficiary and elect to:

(1) designate another beneficiary, provided that:

(a) the retired member shall not have an option to change from the current form of payment;

(b) the amount of the annuity under the form of payment shall be recalculated and shall have the same actuarial present value, computed as of the effective date of the designation, as the amount of annuity paid prior to the designation; and

(c) the retired member shall pay one hundred dollars (\$100) to the board to defray the cost of determining the new annuity amount; or

(2) have future annuity payments made without a reduction as a result of Option B or C.

F. In the event of the death of the member who has not retired and who has completed at least five years' earned service credit, the member shall be considered as retiring on the first day of the month following the date of death, and the benefits due the surviving beneficiary, computed as of that date, shall, except as provided in Subsection I of this section, be commenced effective on the first day of such month in accordance with the terms of Option B of Subsection A of this section. In lieu of the provisions of Option B, the surviving beneficiary may elect to receive payment of all the contributions made by the member, plus interest at the rate set by the board reduced by the sum of any disability benefits previously received by the member, or the surviving beneficiary may choose to defer receipt of the survivor's benefit to whatever age the beneficiary chooses up to the time the member would have attained age sixty. If the benefit is thus deferred, it shall be calculated as though the member had retired on the first day of the month in which the beneficiary elects to receive the benefit. In the event of the death of the beneficiary after the death of the member and prior to the date on which the beneficiary has elected to receive the beneficiary's benefit, the estate of the beneficiary shall be entitled to a refund of the member's contributions plus interest at the rate earned by the fund during the preceding fiscal year, reduced by the sum of any disability benefits previously received by the member.

G. In the case of death of a retired member who did not elect either Option B or C of Subsection A of this section and before the benefits paid to the member have equaled the sum of the member's accumulated contributions to the fund plus accumulated interest at the rate set by the board, the balance shall be paid to the beneficiary designated in writing to the director by the member or, if no beneficiary was designated, to the estate of the member.

H. No benefit shall be paid pursuant to this section if the member's contributions have been refunded pursuant to Section 22-11-15 NMSA 1978.

I. In the case of death of a member with less than five years' earned service credit or death of a member who has filed with the director a notice rejecting the provisions of Subsection F of this section, which notice shall be revocable by the member at any time prior to retirement, the member's contributions to the fund plus interest at the rate set by the board shall be paid to the beneficiary designated in writing to the director by the member or, if no beneficiary was designated, to the estate of the member.

J. Any elections of either Option B or C of Subsection A of this section on file with the director on June 30, 1984 by members who have not retired prior to June 30, 1984 are void.

History: 1953 Comp., § 77-9-28, enacted by Laws 1967, ch. 16, § 152; 1977, ch. 314, § 1; 1981, ch. 294, § 2; 1984, ch. 19, § 5; 1987, ch. 86, § 1; 1999, ch. 93, § 2; 2003, ch. 39, § 7; 2011, ch. 122, § 2.

Calculations #1

Monthly Benefit

Final Average Salary x .0235 factor x years of service
 $\$92,000 \times .0235 \times 35 \text{ years} = \$75,670$ or \$6,305.83 per month

Division of Community Property

Number of years of service during marriage/total number of years of service at retirement
 $30/35 = 85.71\%$ of the benefit is community property
 Co-payee is entitled to 42.86%
 Member is entitled to 57.14%

Option Factors

A=100% or \$6,305.83
 Co-payee is entitled to 42.86% or \$2,702.69
 Member is entitled to 57.14% or \$3,603.15
 No survivor annuity

B=84.12% of Option A benefit or \$5,304.46
 Co-payee is entitled to 42.86% or \$2,273.49
 Member is entitled to 57.14% or \$3,030.97
 Survivor Annuity = 100% or \$5,304.46

C=91.38% of Option A benefit or \$5,762.27
 Co-payee is entitled to 42.86% or \$2,469.71
 Member is entitled to 57.14% or \$3,292.56
 Survivor Annuity = 50% or \$2,881.14

Calculations #2

Monthly Benefit

Final Average Salary x .0235 factor x years of service
 $\$60,000 \times .0235 \times 30 \text{ years} = \$42,300$ or \$3,525.00 per month

Division of Community Property

Number of years of service during marriage/total number of years of service at retirement
 $15/30 = 50.00\%$ of the benefit is community property
 Co-payee is entitled to 25.00%
 Member is entitled to 75.00%

Option Factors

A=100% or \$3,525.00
 Co-payee is entitled to 25.00% or \$ 881.25
 Member is entitled to 75.00% or \$2,643.75

No survivor annuity

B=93.49% of Option A benefit or \$3,295.52
 Co-payee is entitled to 25.00% or \$ 823.88
 Member is entitled to 75.00% or \$2,471.64
 Survivor Annuity = 100% or \$3,295.52

C=96.64% of Option A benefit or \$3,406.56
 Co-payee is entitled to 25.00% or \$ 851.64
 Member is entitled to 75.00% or \$2,554.92
 Survivor Annuity = 50% or \$1,703.28

Calculations #3

Monthly Benefit

Final Average Salary x .0235 factor x years of service
 \$47,000 x .0235 x 25 years = \$27,612.50 or \$2,301.04 per month
 (note – scenario did not have a FAS, so one was supplied)

Division of Community Property

Number of years of service during marriage/total number of years of service at retirement
 10/25 =40.00% of the benefit is community property
 Co-payee is entitled to 20.00%
 Member is entitled to 80.00%

Option Factors

A=100% or \$2,301.04
 Co-payee is entitled to 20.00% or \$ 460.21
 Member is entitled to 80.00% or \$1,840.83
 No survivor annuity

B=89.06% of Option A benefit or \$2,049.31
 Co-payee is entitled to 20.00% or \$ 409.86
 Member is entitled to 80.00% or \$1,639.45
 Survivor Annuity = 100% or \$2,049.31

C=94.22% of Option A benefit or \$2,168.04.
 Co-payee is entitled to 20.00% or \$ 433.61
 Member is entitled to 80.00% or \$1,734.43
 Survivor Annuity = 50% or \$1,084.02

Calculations #4 (Refund scenario)

Member has contributions and interest that total \$135,000.00

Marriage was from 6/1/2007 through 12/31/2013

Service was from 9/2005 through 6/2014

Community property portion

Number of years of service during marriage/total years of service

6.5 years in marriage/8.75 total years = 74.28% community property

Co-payee is entitled to \$50,139.00

Member is entitled to 84,861.00

PERA

Attorney Instructions:
Order Dividing
Retirement Benefits

NMSA 10-11-116

NMSA 10-11-117

General Release for PERA
Member File

Calculations of Hypotheticals



PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO
PUBLIC EMPLOYEES RETIREMENT BOARD

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PATRICIA "PATTY" FRENCH, Chair
Municipal Member

WAYNE PROPST
Executive Director

ATTORNEY INSTRUCTIONS: ORDER DIVIDING PERA RETIREMENT BENEFITS

INTRODUCTION: Attached is a **Model Order Dividing PERA Retirement Benefits**. Before preparing an Order Dividing PERA Retirement Benefits in a divorce case, the following background information may be useful to understand why certain items must be included in the Order Dividing PERA Retirement Benefits. The statutory provision which allows for a division of PERA retirement benefits upon divorce is NMSA 1978, Section 10-11-136.¹

PERA is a defined benefit plan, governed by the Public Employees Retirement Act, NMSA 1978, Section 10-11-1, et seq. In a defined benefit plan, retirement benefits are paid when certain eligibility requirements (a combination of age and service credits) are met by the member, regardless of the amount of contributions paid into the plan. A public employer affiliated with PERA must deduct employee contributions each pay period from the employee-member's wages. These contributions are paid into the PERA member contributions fund. The employer also must remit employer contributions into the PERA employers' accumulation fund each pay period.

The primary PERA benefit is a pension (monthly payment) that may be paid to a member for normal or disability retirement. Another benefit is a pension that may be paid under certain circumstances to a beneficiary upon the member's death. Pension payments are made at the end of the month for which they are paid. They are usually received by the first week of the following month, e.g. May's payment is received in the first week of June.

Upon termination of employment with a PERA affiliated employer, a member **may** request a refund of contributions paid by the employee into the plan. A request for refund is not mandatory upon termination. In the case of career employees, PERA discourages requests for refunds, because **only the employee portion** of contributions can be withdrawn. The employer

¹ NMSA 1978, §§10-12(B)-7 and 10-12(C)-7 are the corresponding sections for the Judicial and Magistrate Retirement Acts. These Attorney Instructions and the Model Order also apply to Orders Dividing Judicial or Magistrate Retirement Benefits.

portion remains with PERA. Once withdrawn, the member also forfeits the service credit associated with the contributions.

The PERA retirement plan is a “governmental plan” for the purposes of 29 USC Section 1002, and is therefore exempt from the provisions of the federal Employee Retirement Income Security Act of 1974 and the Retirement Equity Act of 1984. Thus a “Qualified Domestic Relations Order” (QDRO) **is not appropriate** to divide the community interest in PERA benefits. Rather, the order must be consistent with the New Mexico Public Employees Retirement Act and PERA Rule, 2 NMAC 80.1600.

PERA can only divide the community interest in retirement benefits when the pension or refund is otherwise payable according to the terms of the PERA Act. If a member is not eligible to retire at the time of divorce, or has not terminated employment and requested a refund, PERA cannot pay the non-member his or her interest in the retirement account at that time. In addition, **PERA must be provided with a court order, which complies with the PERA Act and PERA Rule, 2 NMAC 80.1600**, to divide the community interest in retirement benefits and to directly pay an ex-spouse his or her share of the benefits. Upon receipt of such an order and a written determination by the Office of General Counsel that the order complies with PERA’s statutes and rules, PERA will then pay the ex-spouse his or her share at such time as benefits are otherwise distributed to the member under the plan.

Parties are strongly encouraged to prepare a proposed Order Dividing PERA Retirement Benefits for informal pre-approval as to form prior to submitting the Order to the court for signature. The Office of General Counsel of PERA is available to assist parties in preparing these orders prior to submission to the court. To inquire further about these instructions and the model order, contact PERA at the Office of General Counsel, (505) 476-9354 or 1-800-342-3422 (toll free in New Mexico).

INSTRUCTIONS FOR MODEL ORDER DIVIDING PERA RETIREMENT BENEFITS:

- **Paragraphs 1-2:** The parties must be divorced or legally separated for this order to be acceptable under the statute.
- **Paragraphs 3-4:** Paragraphs 3 and 4 provide information identifying the payees of retirement benefits. The State will not ordinarily issue a check without the payee's social security number and address.
- **Paragraph 5:** By including this paragraph, parties may update their names and addresses without amending the order. The parties must inform PERA **in writing** of any change of name or address so they may receive their share of the benefits when paid. PERA will not track down a payee who has moved or changed his or her name. If the warrant is returned as undeliverable, the money will accumulate in the account until PERA is furnished with the correct information, and no interest shall be paid on monies so accumulated.
- **Paragraph 6:** The order must contain a declaration that there is a community interest in retirement benefits. Paragraph 6 identifies the community interest, but does not divide it. The division of community property will be described in Paragraph 7.

PERA recognizes that there are many ways to define the community interest in the gross retirement benefits or contributions. Generally, it includes the portion of the PERA retirement benefit that was earned during marriage. PERA also recognizes that the parties in a divorce action may trade one community asset or a portion of a community asset for some other asset. Paragraph 6 must contain a statement that determines the community interest in the PERA account with certainty. Again, understanding that **the community interest may be determined in many different ways**, these instructions contain only two methods to define that interest. **Neither of these methods is required by PERA. It is up to the parties or the court to arrive at a method to be applied to the particular case. THESE METHODS DO NOT DETERMINE THE ACTUARIAL PRESENT VALUE OF ANY PENSION.** To determine the actuarial present value of a pension, a private actuary may need to be consulted. **PERA cannot provide actuarial valuations.** PERA can only provide public information contained in its records, or upon receipt of a release, other information in the member file.

Member contributions are posted to the member's account on the date contributions are paid, much like a personal savings account. Thus, the employee contributions paid between the dates of marriage and divorce are easily identified. A contribution history report for a member's account may be obtained for either party or their attorneys from PERA's Contribution Accounting Bureau. This figure, however, may not accurately reflect the community interest in accumulated contributions. A percentage of such contributions can be arrived at by use of the fractional formula used in Method 1, below.

Paragraph 6, Method 1:

A certain percentage of the gross retirement benefits or contributions accrued in [member]'s name are community property. The percentage is to be derived from a fraction, the numerator of which is the number of months of service credit acquired during the marriage and the denominator of which is the total number of months of service credit. The community interest in gross retirement benefits or contributions will be determined when the member spouse either retires, terminates public employment and requests a refund of contributions, or dies prior to retirement.

Method 1 may be used when the member has not yet retired and the community interest cannot yet be determined because the total months of service variable and gross benefit amount is unknown. **METHOD 1 IS NOT REQUIRED BY STATUTE, AND IS OFFERED ONLY AS AN EXAMPLE OF A COMMONLY USED METHOD OF DETERMINING THE COMMUNITY INTEREST IN THE GROSS AMOUNT OF PENSION OR CONTRIBUTIONS.** Method 1 does not require that actual numbers be used in the fractional formula or that such formula be reduced to a percentage. These calculations will be made by PERA when the member spouse either retires, terminates public employment and requests a refund of contributions, or dies prior to retirement.

Since Method 1 does not take into account the effect of changes in the member spouse's employment status after divorce which may affect the calculation of the pension, e.g. increases in the member's final average salary or increases in the pension factor, **IT IS NOT ADVISABLE TO USE METHOD 1 IF THE MARRIAGE WAS OF RELATIVELY SHORT DURATION, ESPECIALLY IF THE MARRIAGE AND DIVORCE OCCURRED VERY EARLY IN THE MEMBER'S CAREER.**

Paragraph 6, Method 2:

 % of the gross retirement benefits or contributions
accrued in [member]'s name are community property.

Method 2 is often used if the member is retired. Method 2 is also often used if the parties or the court determines the percentage of the total pension that will be designated as community property when the member retires.

- **Paragraph 7:** Paragraph 7 now divides the community interest already identified in Paragraph 6. This section contains two subparagraphs, 7(a) and 7(b). **IF THE MEMBER IS NOT RETIRED, USE BOTH PARAGRAPHS.**

7(a): Division of Employee Member Contributions: Following termination of employment with an affiliated public employer, a member may request a refund of employee

contributions which can then be divided between the parties when the refund is paid to the member.

Paragraph 7(a), Sample Language for Dividing Contributions:

7(a) Division of Employee Member Contributions. If [member] terminates [his] [her] public employment before retirement and requests a refund of contributions, each party shall be entitled to fifty percent (50%) of the community interest in gross member contributions, and [member] is entitled to the balance.

In some cases, if the member is already retired, there may be no need to include paragraph 7(a), division of employee member contributions, because the member may no longer be eligible for a refund.

7(b): Division of Pension Benefit: The pension benefit can be divided only at retirement or death. **PERA cannot divide a pension based on the dates of marriage and divorce,** because pension payments are not calculated by service dates or contributions made, but rather by the formula stated in the statutory coverage plan applicable to the member at the time of retirement. If a member is still actively employed, many variables affecting the amount of the pension are unresolved at the time of divorce. Those variables include years of employment, amount of salary, and whether the member will change coverage plans, become disabled or die.

In order to arrive at a division of pension benefits at such time as they are payable, the parties must make certain assumptions and agreements about the risks associated with payment of a pension at a future date. PERA will not advise the parties regarding those assumptions, or look behind the clear language of a court order. PERA's primary concern is that the amount of the pension which must be paid to the ex-spouse can be determined with certainty so that PERA's administrative obligation is clear.

Paragraph 7(b) Sample Language for Division of Pension Benefit:

7(b). Division of Pension Benefit. If [member] retires, each party shall be entitled to fifty percent (50%) of the community interest in the gross pension, and [member] is entitled to the balance.

or

7(b). Division of Pension Benefit. The co-payee is entitled to \$_____ per month, and [member] is entitled to the balance of the gross pension. [Note: This language does not allow for any cost of living increases for the ex-spouse, unless provided for elsewhere in the Order.]

or

7(b). Division of Pension Benefit. The co-payee is entitled to _____% and [member] is entitled to _____% of the gross pension.

- **Paragraph 8:** The PERA Act provides for election of the form of payment of a pension. Section 10-11-116 of the PERA Act. There are four forms of payment to choose from, found at Section 10-11-117. It can be useful, especially if the parties have been married most of the PERA member's career, to include a provision in the Order Dividing PERA Benefits which specifies the form of payment to be chosen by the member upon retirement, and which designates a survivor or refund beneficiary under that form of payment. However, paragraph 8, regarding future choice of form of payment and designation of a survivor beneficiary, is OPTIONAL.

Unless the order specifies otherwise, a member has four options upon his or her retirement. Under form of payment A, there is no survivor beneficiary, and all benefits cease upon the death of the member. This results in the maximum monthly pension that could be paid under any of the forms of payment. The member may name a refund beneficiary, who will be refunded the difference between the pension paid and the accumulated member contributions if the retired member dies before receiving in pension payments the amount of the accumulated member contributions. If the former spouse outlives the member, all pension payments would cease upon the death of the member, including the former spouse's (co-payee's) portion that had been allocated to the former spouse in the Order Dividing PERA Retirement Benefits.

Forms of payment B and C provide survivor pensions to one person designated by the member. Under B, the survivor beneficiary receives a monthly pension of the same amount as the member received during the member's lifetime. Under form of payment C, the beneficiary's monthly pension is 50% of the monthly amount paid to the member during the member's lifetime. The advantage of forms of payments B or C to the former spouse is that payments do not cease upon the death of the member, but continue until the survivor beneficiary also dies.

Form of payment D provides for temporary survivor benefits for children. The retired member is paid a reduced pension for life, and when the retired member dies, each declared eligible child is paid a share of the reduced pension until death or age twenty-five years, whichever occurs first.

An election of a form of payment may not be changed after the date the first pension payment is made. Section 10-11-116(A). Also, a named survivor pension beneficiary may not be changed after the date the first pension payment is made if form of payment B or C is elected, unless the retired member who is being paid a pension under form of payment B or C becomes divorced from the named beneficiary spouse, and a court order dividing PERA benefits is filed pursuant to Section 10-11-136. See Section 10-11-116(C).

Paragraph 8 of the Model Order is included if an election of form of payment is ordered. The following are sample provisions regarding selection of form of payment.

Paragraph 8, Alternative 1:

[Member] shall elect form of payment A from among the PERA retirement pension forms specified in NMSA 1978, Section 10-11-117 of the PERA Act, and shall designate _____ as the refund beneficiary in the event of [member's] death before the accumulated contributions are paid out. If [member] dies before there is paid in pension an aggregate amount equal to [his] [her] accumulated contributions at the time of retirement, the difference between the amount of the accumulated contributions and the aggregate amount of pension paid shall be divided as described in this order between the co-payee and [member]'s refund beneficiary.

Paragraph 8, Alternative 2:

[Member] shall select form of payment [B] or [C] from among the PERA retirement pension forms specified in Section 10-11-117 of the PERA Act, [and shall designate _____ as the survivor beneficiary] or [may name any person as survivor pension beneficiary, and [former spouse]'s interest shall continue until pension payments to [member] and [his][her] beneficiary cease].

Paragraph 8, Alternative 3:

[Member] shall elect form of payment D from among the PERA retirement pension forms specified in Section 10-11-117 of the PERA Act, and shall designate _____ as the declared eligible children.

Paragraph 8, Alternative 4:

[Member] may choose any form of payment at the time [he] [she] retires, and may name any person as survivor pension beneficiary, and [former spouse]'s interest shall continue until pension payments to [member] and [his][her] beneficiary cease. If

[member] has elected form of payment A and dies before there is paid an aggregate amount equal to [his] [her] accumulated contributions at the time of retirement, the difference between the amount of the accumulated contributions and the aggregate amount of pension paid shall be divided as described in this order between the co-payee and [member]'s refund beneficiary or estate.

- **Paragraph 9.** This paragraph **must be included** for PERA to divide the pension or contributions and pay the former spouse his or her share directly by separate warrant (check). PERA cannot do so without a direct court order.
- **Paragraph 10.** This paragraph restrains PERA from refunding the member's contributions except in accordance with the order dividing benefits. **This paragraph should always be included if the member spouse has not retired at the time of the divorce.** If the member spouse has already retired and no refund is payable, this paragraph is unnecessary.
- **Paragraph 11.** This paragraph preserves the former spouse's community interest in the retirement account in the event of the member spouse's death before retirement, and the member has not designated the former spouse as a survivor beneficiary, pursuant to NMSA 1978, Section 10-11-14.5 (PERA provisions regarding survivor benefits payable when a member dies before retirement). While Section 10-11-14.5 defines the "eligible surviving spouse" as "the spouse to whom the deceased member was married at the time of death," Section 10-11-14.5 allows members to designate someone else as a survivor beneficiary for payment of a pension. Thus, the parties may provide in the order that the member spouse will designate the ex-spouse as survivor beneficiary under this provision. However, the order will not operate to automatically change the member's designation; rather, the member must fill out the appropriate paperwork to designate a beneficiary as required by the court. If the member fails to make the designation, the member and not PERA will be in violation of the order. There is no statutory authority for PERA to be required to make the designation for the member.

Paragraph eleven also states that the former spouse's community property interest is preserved in the event the former spouse (co-payee) dies before a full distribution of co-payee's share of gross pension or contributions is paid. PERA must be informed if the former spouse dies, and must be given notice of the name and address of the personal representative of the estate. However, even the estate can receive no distribution of the former spouse's share until benefits are otherwise payable to the member under the provisions of the PERA Act.

- **Paragraph 12.** Paragraph twelve provides that any taxes owed on pensions or contributions paid by PERA is owed by each party when the pension or contributions are received, based upon the withholding information on file with PERA. PERA must withhold state and federal income taxes from contribution refunds and may withhold such taxes from pension payments.

- **Paragraph 13.** This paragraph sets forth a procedure for giving PERA notice of the order dividing benefits, and for assuring that the order complies with PERA statutes and rules. Once the Office of General Counsel has determined that the order complies, PERA can administer benefits in accordance with the order. It is not necessary to make PERA a party to the divorce proceedings to accomplish this; Section 10-11-136 provides authority for PERA to pay a community interest in benefits to an ex-spouse when so provided by court order. It is strongly suggested that the parties submit a proposed order to the Office of General Counsel for pre-approval as to form **before** obtaining the signature of the judge and filing the order. This may save the parties from having to obtain an amended order if the first order does not comply with PERA statutes and rules. To inquire further about these instructions and the model order, contact PERA at the Office of General Counsel, (505) 827-4768.
- **Paragraph 14.** Self-explanatory.

_____, JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF _____

_____,
Petitioner,

vs.

_____,
Respondent.

ORDER DIVIDING RETIREMENT BENEFITS

THE COURT, based upon the parties having agreed to the entry of this Order by stipulation, and having fully reviewed this matter,

FINDS, ORDERS AND DECREES:

1. This order determines and divides the community interest in retirement benefits or contributions pursuant to the Public Employees Retirement Act, NMSA 1978, Section 10-11-1 et seq. The order allows for the direct payment of a community interest in benefits or contributions by the Public Employees Retirement Association (PERA) to the ex-spouse of a PERA member. Payments pursuant to this order shall only be made when member contributions are refunded or a pension is payable in accordance with the Public Employees Retirement Act.

2. The Court has jurisdiction over the subject matter and the parties. The parties were married on _____, and [divorced] [legally separated] on _____.

3. _____, Social Security No. _____,
[Petitioner] [Respondent] herein, is a [retired] member of PERA. [His] [Her] current address is

_____.

4. _____, Social Security No. _____,
[Respondent] [Petitioner] herein, is the co-payee of retirement benefits. [His][Her] current address is

_____.

5. All payments pursuant to this order shall be mailed to the names and addresses set forth above unless and until PERA receives written notification from a party of any change in that party's name or address.

6. There is a community interest in the retirement benefits accrued in [member]'s name. The community interest is calculated as follows:

[This section must enable PERA to calculate with certainty the community interest in member contributions or of any pension that becomes payable at death or retirement. SEE ATTORNEY INSTRUCTIONS FOR EXAMPLES AND COMMENTS.]

7. The community interest in PERA retirement benefits is divided as follows:

[This section must enable PERA to divide the community interest and to calculate with certainty each party's share of (a) member contributions, or (b) pension that becomes payable at death or retirement. SEE ATTORNEY INSTRUCTIONS FOR EXAMPLES AND COMMENTS.]

8. [Member] shall elect form of payment [A, B, C, or D] from among the PERA retirement pension forms specified in NMSA 1978, Section 10-11-117 of the PERA Act.

[This section may be omitted, however, if the member spouse is required to select one of the four statutory forms of payment or designate a specific survivor or refund beneficiary, this section must be included - SEE ATTORNEY INSTRUCTIONS FOR EXAMPLES AND COMMENTS.]

9. At such time as contributions are refunded, a pension becomes payable to [member], or a survivor pension becomes payable in accordance with the Public Employees Retirement Act, PERA shall pay to the co-payee the co-payee's share of the community interest in retirement benefits by issuing a separate warrant for the proper amount. If a warrant is returned as undeliverable because of incorrect name or address, the money due will accumulate, without interest, until PERA is furnished with the correct information.

10. PERA is hereby ordered to refrain from refunding the accumulated member contributions of [member] except as described in this order. Any such refund shall be made by issuing separate warrants for the proper amounts to each party.

11. If [member] dies before normal retirement, the co-payee shall be entitled to [his] [her] portion of any survivor pension payable, or of the accumulated contributions in [member]'s account if no survivor pension is payable. If the co-payee dies before full distribution of co-payee's community property share of the gross pension or contributions, such interest shall be paid to co-payee's estate.

12. All retirement benefits or contributions, except for non-taxable benefits paid to each party pursuant to this order, shall constitute individual gross income for taxation purposes and PERA shall withhold the appropriate amounts as designated by the parties or required by law.

13. Copies of this order shall be transmitted by _____ to the Office of General Counsel for PERA. PERA shall notify the parties in writing within a reasonable time after receipt of the order whether the order conforms with applicable statutes and rules for dividing the community interest in benefits or contributions. PERA shall administer pension benefits in accordance with this order as provided in NMSA 1978, Section 10-11-136 upon written determination by PERA's Office of General Counsel that this order complies with PERA's statutes and rules.

14. The court reserves jurisdiction in order to correct, amend or enforce this order.

DISTRICT COURT JUDGE

Stipulated by:
[Signatures, names and addresses of attorneys and/or parties]

10-11-116. Election of form of payment of a pension.

A. Except as otherwise provided in Section 10-11-136 NMSA 1978, a member may elect to have pension payments made under any one of the forms of payment provided in Section 10-11-117 NMSA 1978. The election of form of payment and naming of survivor pension beneficiary shall be made on a form furnished by and filed with the association prior to the date the first pension payment is made. An election of form of payment may not be changed after the date the first pension payment is made. If the member is married, the association shall obtain the consent of the member's spouse to the election of the form of payment and any designation of survivor pension beneficiary before the election or designation is effective. Except as provided in Subsection C, D or E of this section, a named survivor pension beneficiary may not be changed after the date the first pension payment is made if form of payment B or C is elected. Except as otherwise provided in Section 10-11-136 NMSA 1978, payment shall be made:

(1) under form of payment A if the member is not married at the time of retirement and if there is not a timely election of another form of payment; or

(2) under form of payment C with the member's spouse as survivor pension beneficiary if the member is married at the time of retirement and there is not a timely election of another form of payment.

B. The amount of pension under forms of payment B, C and D shall have the same actuarial present value, computed as of the effective date of the pension, as the amount of pension under form of payment A.

C. A retired member who is being paid a pension under form of payment B or C with the member's spouse as the designated survivor pension beneficiary may, upon becoming divorced from the named spouse and subject to an order of a court as provided for in Section 10-11-136 NMSA 1978, elect to have future payments made under form of payment A.

D. A retired member who was previously being paid a pension under form of payment B or C but, because of the death of the designated survivor pension beneficiary, is currently receiving a pension under form of payment A may exercise a one-time irrevocable option to designate another individual as the survivor pension beneficiary and may select either form of payment B or form of payment C; provided that:

(1) the amount of the pension under the form of payment selected shall be recalculated and have the same actuarial present value, computed on the effective date of the designation, as the amount of pension under form of payment A;

(2) the designation and the amount of the pension shall be subject to a court order as provided for in Section 10-11-136 NMSA 1978; and

(3) the retired member shall pay one hundred dollars (\$100) to the retirement board to defray the cost of determining the new pension amount.

E. A retired member who is being paid a pension under form of payment B or C with a living designated survivor pension beneficiary other than the retired member's spouse or former spouse may exercise a one-time irrevocable option to deselect the designated beneficiary and elect to:

(1) designate another survivor pension beneficiary, provided that:

(a) the retired member shall not have an option to change from the current form of payment;

(b) the amount of the pension under the form of payment shall be recalculated and shall have the same actuarial present value, computed as of the effective date of the designation, as the amount of pension under form of payment A; and

(c) the retired member shall pay one hundred dollars (\$100) to the retirement board to defray the cost of determining the new pension amount; or

(2) have future payments made under form of payment A.

History: Laws 1987, ch. 253, § 116; 1991, ch. 149, § 1; 2010, ch. 19, § 1; 2011, ch. 122, § 1.

10-11-117. Forms of payment of a pension.

A. Straight life pension is form of payment A. The retired member is paid the pension for life under form of payment A. All payments stop upon the death of the retired member, except as provided by Subsection E of this section. The amount of pension is determined in accordance with the coverage plan applicable to the retired member.

B. Life payments with full continuation to one survivor beneficiary is form of payment B. The retired member is paid a reduced pension for life under form of payment B. When the retired member dies, the designated survivor beneficiary is paid the full amount of the reduced pension until death. Upon the association's receipt of proof of death of the designated survivor beneficiary, the amount of pension shall be changed to the amount that would have been payable had the retired member elected form of payment A.

C. Life payment with one-half continuation to one survivor beneficiary is form of payment C. The retired member is paid a reduced pension for life under form of payment C. When the retired member dies, the designated survivor beneficiary is paid one-half the amount of the reduced pension until death. If the designated survivor beneficiary predeceases the retired member, the amount of pension shall be changed to the amount that would have been payable had the retired member elected form of payment A.

D. Life payments with temporary survivor benefits for children is form of payment D. The retired member is paid a reduced pension for life under form of payment D. When the retired member dies, each declared eligible child is paid a share of the reduced pension until death or age twenty-five years, whichever occurs first. The share is the share specified in writing and filed with the association by the retired member. If shares are not specified in writing and filed with the association, each declared eligible child is paid an equal share of the reduced pension. A redetermination of shares shall be made when the pension of any child terminates. An eligible child is a natural or adopted child of the retired member who is under age twenty-five years. A declared eligible child is an eligible child whose name has been declared in writing and filed with the association by the retired member at the time of election of form of payment D. The amount of pension shall be changed to the amount of pension that would have been payable had the retired member elected form of payment A upon there ceasing to be a declared eligible child during the lifetime of the retired member.

E. If all pension payments permanently terminate before there is paid an aggregate amount equal to the retired member's accumulated member contributions at the time of retirement, the difference between the amount of accumulated member contributions and the aggregate amount of pension paid shall be paid to the retired member's refund beneficiary. If no refund beneficiary survives the retired member, the difference shall be paid to the estate of the retired member.

History: Laws 1987, ch. 253, § 117; 1992, ch. 116, § 7; 1997, ch. 189, § 7.

GENERAL RELEASE FOR PERA MEMBER FILE

I, _____, Social Security No. _____, hereby authorize the New Mexico Public Employees Retirement Association ("PERA"), and all its officers and employees, to release any and all records and information that PERA (or its officers or employees) has or maintains as a result of, or pertaining to, my PERA membership and PERA benefits to:

or the duly authorized agents of _____.

I also authorize all copies of all documents obtained pursuant to this authorization to be provided to _____ by the above-named person or organization, _____.

This Release includes all records that pertain to me and that are held by PERA, including but not limited to, records and calculations of my wage history and PERA service credit; records and calculations of my PERA contributions, including employer contributions on my behalf; records and calculations of withdrawn service credit, if any; records and calculations of the time eligible for (and the cost of) any service credit buy-backs, if any; any application for employment or retirement; personnel records; payroll documents; employment or personnel records; physical or medical records, if any; beneficiary designations; records pertaining to disability, workers' compensation or unemployment claims; address and phone number; divorce and child support orders; and any other records or information whatsoever in the possession of PERA (or its officers or employees) that relates to me, including computerized records

I hereby expressly waive any state or federal laws or regulations, and rules of ethics, including but not limited to NMSA 1978, Section 10-11-130(I) of the PERA Act, PERA Rule 2.80.1000.30 NMAC and the provisions of the New Mexico Inspection of Public Records Act, that might prevent PERA from releasing such records. A photo static copy of this Release, which contains my signature, shall be considered as effective and valid as the original and shall be honored by those to whom it is sent or provided

[Member's name]

STATE OF _____ ss
COUNTY OF _____

The above Release for PERA Member File was sworn and subscribed to before me this _____ day of _____, 20____.

Notary Public

My commission expires:

Retirement Benefit Division Pursuant to Divorce Scenarios*PERA Forms of Payment:**

- A) Option A/Straight Life Option = Highest monthly benefit amount for life of Retiree. No Survivor Benefit. All benefits cease upon Retiree's death;
- B) Option B/Joint Survivor (100%) = Reduced monthly benefit amount for life of Retiree. Upon Retiree's death, Survivor Beneficiary receives same monthly benefit amount for his/her lifetime; or
- C) Option C/Joint Survivor (50%) = Reduced monthly benefit amount for life of Retiree. Upon Retiree's death, Survivor Beneficiary receives one-half monthly benefit amount for his/her lifetime.

***Assumes all scenarios are for PERA Retirees under State General Member Coverage Plan 3 (3% Pension Factor).**

FORMULA = Years of Service x Pension Factor x Final Average Salary (FAS) = Option A, Monthly Benefit

#1: Long-term Marriage (30 years)

George & Sherry were married on June 1, 1985 and he started to work right after the honeymoon, on June 11, 1985. This is a 30-year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. George is age 57 and his DOB is 2/1/1958. He intends to retire at age 62. Sherry is age 50 and her DOB is 3/1/1965. When George first started to work, his income was \$18,000/year and after 5 years, on June 1, 1990, he got a promotion and was making \$35,000/yr. Starting on July 1, 2010, his salary was increased to \$92,000 with no raises since that date.

PERA ANALYSIS:

Member started working with the State on 6/11/1985 and will retire with close to 35 years. Plan maximum is 30 years with 90% of FAS. Using the highest consecutive 36-months of salary, member earns a salary of \$92,000.00/year with assumption of no future raises before he retires. We will consider him to retire once he reaches age 62 at retirement date 3/1/2020, at which time Sherry's age will be 55 and she will be considered the beneficiary.

FAS = \$92,000.00 x 3-years = \$276,000.00 / 36 months = \$7,666.67 FAS

Years of Service Credit = 30; 30 x 3% Pension Factor x \$7,666.67 = Option A \$6,900.00

Option B: (.81623) = Option A x reduction factor = \$6,900.00 x .81623 = \$5,631.99

Option C: (.90566) = Option A x reduction factor = \$6,900.00 x .90566 = \$6,249.05

*Order Dividing PERA Retirement Benefits provides that Community Interest is a percentage derived from a fraction = Months of Service Credit acquired during marriage / total months of Service Credit; co-payee/ex-spouse is awarded 50% of Community Interest (CI)

360 months of SC during marriage / 420 total months SC = .8570 x 50% = .4280; CI in Gross Pension Benefit = .857; Co-Payee's portion of CI = 50% or .4280 of Gross Pension Benefit.

Option A: \$6,900.00 x .4280 = \$2,953.20 for Co-payee/Ex-spouse; \$6,900.00 - 2,953.20 = \$3,946.80 for Retiree

Option B: \$5,631.99 x .4280 = \$2,410.49 for Co-payee/Ex-spouse; \$5,631.99 - 2,410.49 = \$3,221.50 for Retiree

Option C: \$6,249.05 x .4280 = \$2,674.59 for Co-payee/Ex-spouse; \$6,249.05 - 2,674.59 = \$3,574.46 for Retiree

#2: Mid-range Marriage (15 years)

Tony and Karen were married on June 1, 2000 but he started working June 18, 1990. This is a 15-year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. Tony is age 50 and his DOB is 2/1/1965. He intends to retire in another 5 years at age 55 with 30 years of service. Karen is age 55 now and her DOB is 3/1/1960. When Tony first started working, his income was \$20,000/yr. On June 1, 2000 he began earning \$35,000/yr. On July 1, 2010, his income went up to \$60,000/yr. and that has been his income for the past 5 years.

PERA ANALYSIS:

Member started working with the State on 6/18/1990 and will retire with 30 years. Plan maximum is 30 years with 90% of FAS. Using the highest consecutive 36-months of salary, member earns a salary of \$60,000/year with the assumption of no future raises before he retires. His retirement date will be 7/1/2020 with exactly 30 years SC. His age will be 55 and 4 months and Karen's age will be at 60 and 3 months and she will be considered the beneficiary.

FAS: $\$60,000 \times 3\text{-years} = \$180,000.00 / 36 \text{ months} = \$5,000.00 \text{ FAS}$

Years of Service Credit = 30; $30 \times 3\% \times \$5,000.00 = \text{Option A } \$4,500.00$

Option B: $(.90445) = \text{Option A} \times \text{reduction factor} = \$4,500.00 \times .90445 = \$4,070.03$

Option C: $(.95388) = \text{Option A} \times \text{reduction factor} = \$4,500.00 \times .95388 = \$4,292.46$

*Assumes Order Dividing PERA Retirement Benefits provides that Community Interest is a percentage derived from a fraction = Months of Service Credit acquired during marriage / total months of Service Credit; co-payee/ex-spouse is awarded 50% of Community Interest (CI)

$180 \text{ months SC during marriage} / 360 \text{ total months SC} = .5000$; CI in Gross Pensions Benefit = .5000; Co-payee's portion of CI = 50% or .25 of Gross Pensions Benefit.

Option A: $\$4,500.00 \times .2500 = \$1,125.00 \text{ for Co-payee/Ex-spouse; } \$4,500.00 - 1,125.00 = \$3,375.00 \text{ for Retiree}$

Option B: $\$4,070.03 \times .2500 = \$1,017.51 \text{ for Co-payee/Ex-spouse; } \$4,070.03 - 1,017.51 = \$3,052.52 \text{ for Retiree}$

Option C: $\$4,292.46 \times .2500 = \$1,073.12 \text{ for Co-payee/Ex-spouse; } \$4,292.46 - 1,073.12 = \$3,219.34 \text{ for Retiree}$

#3: Short-term Marriage (10 years)

Andy and Mary were married on June 1, 2005, and Mary started working on June 10, 2005, right after the honeymoon. This is a 10-year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. Both are 45 years old. Andy's DOB is 2/1/1970 and Mary's DOB is 3/1/1970. Mary would like to retire in 15 years when she is age 60. Mary has earned \$42,000 for the duration of her employment and will receive no future raises.

PERA ANALYSIS:

Member started working with the State on 6/10/2005, and will retire with 25 years of SC. Plan maximum is 30 years at 90% of FAS. She earns a salary of \$42,000/year with the assumption of no raises in the next 15 years. Her retirement date will be 6/1/2030 with exactly 25 years. Her age will be 60 and 2 months and Andy's age will be 60 and 3 months and he is considered her beneficiary.

FAS: $\$42,000 \times 3\text{years} = \$126,000.00/36 = \underline{\$3,500.00}$

$25 \times 3\% \times \$3,500.00 = \text{Option A } \$2,625.00$

Option B: $(.85922) = \text{Option A} \times \text{reduction factor} = \$2,625.00 \times .85922 = \$2,255.45$

Option C: $(.93002) = \text{Option A} \times \text{reduction factor} = \$2,625.00 \times .93002 = \$2,441.30$

*Order Dividing PERA Retirement Benefits provides that Community Interest is a percentage derived from a fraction = Months of Service Credit acquired during marriage / total months of Service Credit; co-payee/ex-spouse is awarded 50% of Community Interest (CI)

$120 \text{ months of SC during marriage} / 300 \text{ total months of SC} = .4000$; CI in Gross Pension Benefit = .4000; Co-payee's portion of CI = 50% or .2000 of Gross Pension Benefit.

Option A: $\$2,625.00 \times .2000 = \$525.00$ for Co-payee/Ex-spouse; $\$2,625.00 - 525.00 = \$2,100.00$ for Retiree

Option B: $\$2,255.45 \times .2000 = \$451.09$, for Co-payee/Ex-spouse; $\$2,255.45 - 451.09 = \$1,804.36$ for Retiree

Option C: $\$2,441.30 \times .2000 = \$488.26$ for Co-payee/Ex-spouse; $\$2,441.30 - 488.26 = \$1,953.04$ for Retiree

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Sandia National Labs Pension Analysis

Hypothetical #1 - Long-Term Marriage

	Normal Retirement Age	Commencement Date	Date of Divorce
Alternate Payee Monthly Payment*	2,049.81	2,077.92	1,557.60
Alternate Payee Monthly Payment - 50% Survivor*	973.66	987.01	739.86
Present Value @ 3% No Survivor Benefits	293,746	359,903	352,586
Present Value @ 5% No Survivor Benefits	211,868	269,703	281,335
Present Value @ 3% with 50% Survivor Benefits	345,384	412,249	391,824
Present Value @ 5% with 50% Survivor Benefits	238,474	296,673	301,553
Present Value of 50% Survivor Benefits @ 3%	51,638	52,346	39,238
Present Value of 50% Survivor Benefits @ 5%	26,606	26,970	20,218

* Per SNL Materials

NOTE - THE COMMUNITY INTEREST VALUE WOULD BE TWICE THE VALUE SHOWN SINCE THE PAYMENT STREAM BEING VALUED IS FOR THE ALTERNATE PAYEE.

Assumption - Husband lives until age 85 and wife until age 90

FAMILY LAW INSTITUTE
Valuation & Financial Issues
October 23, 2015

Sandia National Labs Pension Analysis

Hypothetical #2 - Mid-Range Marriage

	Normal Retirement Age	Commencement Date	Date of Divorce
Alternate Payee Monthly Payment*	736.06	515.11	359.80
Alternate Payee Monthly Payment - 50% Survivor*	349.63	244.68	170.90
Present Value @ 3%	85,523	104,899	93,345
Present Value @ 5%	53,651	74,809	71,399

Present Value @ 3% with 50% Survivor Benefits
 Present Value @ 5% with 50% Survivor Benefits
 Present Value of 50% Survivor Benefits @ 3%
 Present Value of 50% Survivor Benefits @ 5%

*Per SNL Materials

DISCUSS

NOTE - THE COMMUNITY INTEREST VALUE WOULD BE TWICE THE VALUE SHOWN SINCE THE PAYMENT STREAM BEING VALUED IS FOR THE ALTERNATE PAYEE.

Assumption - Husband lives until age 85 and wife until age 90

FAMILY LAW INSTITUTE

Valuation & Financial Issues

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Sandia National Labs Pension Analysis

Hypothetical #3 - Short-Term Marriage

	Normal Retirement Age	Commencement Date	Date of Divorce
Alternate Payee Monthly Payment*	667.56	611.03	0.00
Alternate Payee Monthly Payment - 50% Survivor*	317.09	290.24	0.00
Present Value @ 3%	66,773	83,031	0
Present Value @ 5%	37,915	50,279	0

Alternate Payee Monthly Payment*
 Alternate Payee Monthly Payment - 50% Survivor*
 Present Value @ 3%
 Present Value @ 5%
 Present Value @ 3% with 50% Survivor Benefits
 Present Value @ 5% with 50% Survivor Benefits
 Present Value of 50% Survivor Benefits @ 3%
 Present Value of 50% Survivor Benefits @ 5%

DISCUSS

*Per SNL Materials

NOTE - THE COMMUNITY INTEREST VALUE WOULD BE TWICE THE VALUE SHOWN SINCE THE PAYMENT STREAM BEING VALUED IS FOR THE ALTERNATE PAYEE.

Assumption - Husband lives until age 85 and wife until age 90

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PERA

Hypothetical #1 - Long-Term Marriage

	Retire Age 62	Retire Age 62 50% Survivor
Alternate Payee Monthly Payment*	2,953.20	2,674.59
Present Value @ 3% No Survivor Benefits	511,505	0
Present Value @ 5% No Survivor Benefits	383,309	0
Present Value @ 3% with 50% Survivor Benefits	0	605,096
Present Value @ 5% with 50% Survivor Benefits	0	420,233
Present Value of 50% Survivor Benefits @ 3%	0	93,591
Present Value of 50% Survivor Benefits @ 5%	0	36,924

*Per PERA Materials

NOTE - THE COMMUNITY INTEREST VALUE WOULD BE TWICE THE VALUE SHOWN SINCE THE PAYMENT STREAM BEING VALUED IS FOR THE ALTERNATE PAYEE.

Assumption - Husband lives until age 85 and wife until age 90

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Hypothetical #2 - Mid-Range Marriage

	Retire Age 55 & 4 Months	Retire Age 55 & 4 Months 50% Survivor
Alternate Payee Monthly Payment*	1,125.00	1,073.12
Present Value @ 3% No Survivor Benefits	228,527	0
Present Value @ 5% No Survivor Benefits	162,705	0
Present Value @ 3% with 50% Survivor Benefits		217,988
Present Value @ 5% with 50% Survivor Benefits		155,201
Present Value of 50% Survivor Benefits @ 3%		(10,539)
Present Value of 50% Survivor Benefits @ 5%		(7,504)

*Per PERA Materials

NOTE - THE COMMUNITY INTEREST VALUE WOULD BE TWICE THE VALUE SHOWN SINCE THE PAYMENT STREAM BEING VALUED IS FOR THE ALTERNATE PAYEE.

Assumption - Husband lives until age 85 and wife until age 90

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PERA

Hypothetical #3 - Short-Term Marriage

	Retire Age 60 & 2 Months	Retire Age 60 & 2 Months 50% Survivor
Alternate Payee Monthly Payment*	525.00	488.26
Present Value @ 3% No Survivor Benefits	70,331	0
Present Value @ 5% No Survivor Benefits	42,449	0
Present Value @ 3% with 50% Survivor Benefits		65,409
Present Value @ 5% with 50% Survivor Benefits		39,478
Present Value of 50% Survivor Benefits @ 3%		(4,922)
Present Value of 50% Survivor Benefits @ 5%		(2,971)

*Per PERA Materials

NOTE - THE COMMUNITY INTEREST VALUE WOULD BE TWICE THE VALUE SHOWN SINCE THE PAYMENT STREAM BEING VALUED IS FOR THE ALTERNATE PAYEE.

Assumption - Husband lives until age 85 and wife until age 90

Hypotheticals

FLI Hypotheticals:

#1: Long-term Marriage:

George & Sherry were married in June 1985 and he started to work right after the honeymoon (within 10 days). This is a 30 year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. George is 57 and his DOB is 2/1/1958. He intends to retire at age 62. She is age 50 and her DOB is 3/1/1965. When he first started to work, his income was \$18,000/year and after 5 years, he got a promotion and was making \$35,000/yr. Starting in 2010, his salary was \$92,000 with no raises.

#2: Mid-range Marriage:

Tony and Karen were married in June 2000 but he started working in June of 1990. This is a 15 year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015 (15 year marriage). Tony is 50 and his DOB is 2/1/1965. He intends to retire in another 5 years at age 55 with 30 years of service. Karen is 55 now and her DOB is 3/1/1960. When Tony first started working, his income was \$20,000/yr. When they got married, he began earning \$35,000/yr. In 2010, his income went up to \$60,000/yr. and that has been his income for the past 5 years.

#3: Short-term Marriage:

Andy and Mary were married in June 2005 and Mary started working right after the honeymoon. This is a 10 year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. Both are 45 years old. Andy's DOB is 2/1/1970 and Mary's DOB is 3/1/1970. Mary would like to retire in 15 years when she is 60.

Questions:

1. What is the estimated amount of monthly pension benefit for (a) full amount; (b) survivor beneficiary options(s); (c) if the plan has a separate interest, what would that estimated benefit be?
2. What is the formula or how did you calculate the amount?
3. Was there any reduction or penalty in the monthly benefit because of the age of the person retiring?
4. Do you have any suggestions to add to these hypotheticals that would help you with your presentation?

Could we possibly get your answers/calculations back by June 15th?

Presbyterian Calculations

#1 Long-Term Marriage/George and Sherry

Step 1: Calculate George's Average Annual Plan Compensation ("AAPC") and Average Monthly Plan Compensation ("AMPC").

2012	92,000
2011	92,000
2010	92,000
2009	35,000
2008	35,000
Total	346,000
AAPC	69,200
AMPC	5,766.66

Name:	George	Years Employed by PHS:	34
Retirement Date:	12/31/2020	Applicable Freeze Date:	12/31/2012
Age:	62	Years of Benefit Service until Applicable Freeze Date:	26.5
Average Annual Plan Compensation on Applicable Freeze Date:	\$69,200 (\$5,766.66 AMPC)	Years of Benefit Service before 1994:	8.5
Payment Form Elected:	Joint and 50% Survivor Annuity	Years of Benefit Service after 1993 until his Applicable Freeze Date:	18

To calculate George's monthly benefit:

Step 2: Multiply AMPC times 1.5% (.015) times the number of Years of Benefit Service before 1994.

$$\$5,766.66 \times .015 \times 8.5 = \$735.25$$

Step 3: Multiply AMPC 1.15% (.0115) times the number of Years of Benefit Service after 1993 until the Applicable Freeze Date. The part of the benefit formula for pay in excess of Covered Compensation does not apply because George's Average Annual Plan Compensation is less than that amount.

$$\$5,766.66 \times .0115 \times 18 = \$1,193.70$$

Subtotal: \$1,928.95

Step 4: Early Retirement Reduction Factor (SPD, p.14) 78.4% to age 62.

$$\$1,928.95 \times .784 = \$1,512.30$$

Step 5: Multiply the subtotal by the factor applicable to George's elected payment form, joint and 50% survivor annuity, 94% (.94). For the factors that apply to payment forms, see Forms of Payment in the **How Benefits Are Paid** section.

$$\$1,512.30 \times .94 =$$

\$1,421.56

George's monthly benefit

Step 6: Calculate Sherry's continuation after George's death (if she is awarded survivor benefit). Multiply by 50% (.50).

$$\$1,421.56 \times .50 =$$

\$710.78

Sherry's monthly benefit after
George's death

There is a separate interest payable immediately since George is 57 (older than 55). It is calculated based on George's current age, 57, which requires multiplying by 53.2% in Step 4. Then there is an actuarial reduction based on Sherry's age. The actuarial reduction can only be calculated by the Plan's actuary.

#2 Mid-Term Marriage/Tony and Karen

Step 1: Calculate Tony's Average Annual Plan Compensation ("AAPC") and Average Monthly Plan Compensation ("AMPC").

2012	60,000
2011	60,000
2010	60,000
2009	35,000
2008	35,000
Total	250,000
AAPC	50,000
AMPC	4,166.66

Name:	Tony	Years Employed by PHS:	30
Retirement Date:	12/31/2020	Applicable Freeze Date:	12/31/2012
Age:	55	Years of Benefit Service until Applicable Freeze Date:	21.5
Average Annual Plan Compensation on Applicable Freeze Date:	\$50,000 (\$4,166.66 AMPC)	Years of Benefit Service before 1994:	3.5
Payment Form Elected:	Joint and 50% Survivor Annuity	Years of Benefit Service after 1993 until his Applicable Freeze Date:	18

To calculate Tony's monthly benefit:

Step 2: Multiply AMPC times 1.5% (.015) times the number of Years of Benefit Service before 1994.

$$\$4,166.66 \times .015 \times 3.5 = \$218.75$$

Step 3: Multiply AMPC 1.15% (.0115) times the number of Years of Benefit Service after 1993 until the Applicable Freeze Date. The part of the benefit formula for pay in excess of Covered Compensation does not apply because Tony's Average Annual Plan Compensation is less than that amount.

$$\$4,166.66 \times .0115 \times 18 = \$862.50$$

Subtotal: \$1,081.25

Step 4: Early Retirement Reduction Factor (SPD, p.14) 46% to age 55.

$$\$1,081.25 \times 46 = \$497.37$$

Step 5: Multiply the subtotal by the factor applicable to Tony's elected payment form, joint and 50% survivor annuity, 94% (.94). For the factors that apply to payment forms, see Forms of Payment in the **How Benefits Are Paid** section.

$$\begin{array}{rcl} \$497.37 \times .94 = & \$467.53 & \\ & \text{Tony's monthly benefit} & \end{array}$$

Step 6: Calculate Karen's continuation after Tony's death (if she is awarded survivor benefit). Multiply by 50% (.50).

$$\begin{array}{rcl} \$467.53 \times .50 = & \$233.76 & \\ & \text{Karen's monthly benefit after} & \\ & \text{Tony's death} & \end{array}$$

There is a separate interest payable when Tony reaches age 55, it is calculated based on Tony's age, 55, then there is an actuarial reduction based on Karen's age. The actuarial reduction can only be calculated by the Plan's actuary.

#3 Short-Term Marriage/Andy and Mary

Step 1: Calculate Mary's Average Annual Plan Compensation ("AAPC") and Average Monthly Plan Compensation ("AMPC"). Compensation is assumed to be the same as Tony's.

2012	60,000
2011	60,000
2010	60,000
2009	35,000
2008	35,000
Total	250,000
AAPC	50,000
AMPC	4,166.66

Name:	Mary	Years Employed by PHS:	25.5
Retirement Date:	12/31/2030	Applicable Freeze Date:	12/31/2012
Age:	60	Years of Benefit Service until Applicable Freeze Date:	7.5
Average Annual Plan Compensation on Applicable Freeze Date:	\$50,000 (\$4,166.66 AMPC)	Years of Benefit Service before 1994:	0
Payment Form Elected:	Joint and 50% Survivor Annuity	Years of Benefit Service after 1993 until her Applicable Freeze Date:	7.5

To calculate Mary's monthly benefit:

Step 2: Multiply AMPC times 1.5% (.015) times the number of Years of Benefit Service before 1994. There are no years before 1994.

0

Step 3: Multiply AMPC 1.15% (.0115) times the number of Years of Benefit Service after 1993 until the Applicable Freeze Date. The part of the benefit formula for pay in excess of Covered Compensation does not apply because Mary's Average Annual Plan Compensation is less than that amount.

$$\$4,166.66 \times .0115 \times 7.5 = \$359.37$$

Subtotal: \$359.37

Step 4: Early Retirement Reduction Factor (SPD, p.14) 64% to age 60.

$$\$359.37 \times .64 = \$230.00$$

Step 5: Multiply the subtotal by the factor applicable to Mary's elected payment form, joint and 50% survivor annuity, 94% (.94). For the factors that apply to payment forms, see Forms of Payment in the **How Benefits Are Paid** section.

$$\$230.00 \times .94 =$$

\$216.20

Mary's monthly benefit

Step 6: Calculate Andy's continuation after Mary's death (if he is awarded survivor benefit). Multiply by 50% (.50).

$$\$216.20 \times .50 =$$

\$108.10

Andy's monthly benefit after
Mary's death

There is a separate interest payable in 10 years when Mary is 55. It is calculated based on Mary's age, 55, which requires multiplying by 46% in Step 4. Then there is an actuarial reduction based on Andy's age (but probably not much since he is only one month younger). The actuarial reduction can only be calculated by the Plan's actuary.

Sandia Calculations

Retirement Eligible on Date of Divorce

High 3 Average as of 12/31/2011
 Pension Years of Service as of 12/31/2011
 2011 Age Factor as of 10/01/2015 Date of Divorce

Cumulative Career Earnings After 12/31/2011
 Post 2011 Age Factor as of 10/01/2015 Date of Divorce

Pre 2012 Benefit Amount
 Post 2011 Benefit Amount
 Total Benefit Amount as of 10/01/2015

Date of Divorce Value Retire @ NRA (Age 65)	Date of Divorce Value Retire @ Age 62	Date of Divorce Value Retire @ Date of Divorce	Date of Commence Value Retire @ Age 62	Date of Commence Value Retire @ NRA (Age 65)
\$6,083.33 26,586.3 0.02	\$6,083.33 26,586.3 0.02	\$6,083.33 26,586.3 0.0163	\$6,083.33 26,586.3 0.02	\$6,083.33 26,586.3 0.02
\$3,234.66	\$3,234.66	\$2,636.25	\$3,234.66	\$3,234.66
\$314,060.40 0.0225	\$314,060.40 0.0225	\$314,060.40 0.0183	\$836,068.40 0.0225	\$1,020,068.40 0.0225
\$7,066.36	\$7,066.36	\$5,747.31	\$18,811.54	\$22,951.54
\$3,234.66 \$588.86	\$3,234.66 \$588.86	\$2,636.25 \$478.94	\$3,234.66 \$1,567.63	\$3,234.66 \$1,912.63
\$3,823.53	\$3,823.53	\$3,115.19	\$4,802.29	\$5,147.29

Shared Interest Order with equation from template:

The Alternate Payee's interest in the Plan is equal to a fraction, the numerator of which is the number of months of credited service the Participant earned under the Plan during the marriage up to _____ (insert date*), and

the denominator of which is the total number of months of credited service the Participant earned under the Plan up to and including _____ (Valuation Date), multiplied by _____ %, and then multiplied by the Participant's vested benefit under the Plan as accrued to the Valuation Date.

Valuation Date = Date of Divorce

Numerator = Months earned during Marriage
 Denominator = Months earned as of Valuation Date
 Resulting Fraction
 Multiplier set in the equation

Commencement Date Age 62	Date of Divorce
360	360
360	360
1,000	1,000
50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant
 Alternate Payee
 5% reduction for 50% Surviving Spouse option (Community Interest)
 Community Interest Survivor Benefit Alternate Payee

\$1,911.76	\$1,911.76	\$1,557.60
\$1,911.76	\$1,911.76	\$1,557.60
\$95.59	\$95.59	\$77.88
\$908.09	\$908.09	\$739.86

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant
 Alternate Payee
 10% reduction for 100% Surviving Spouse option (Community Interest)
 Community Interest Survivor Benefit Alternate Payee

\$1,911.76	\$1,911.76	\$1,557.60
\$1,911.76	\$1,911.76	\$1,557.60
\$191.18	\$191.18	\$155.76
\$1,720.59	\$1,720.59	\$1,401.84

*Cost of Survivor Coverage can be divided between parties or applied to one party

Valuation Date = Date of Commencement

Numerator = Months earned during Marriage
 Denominator = Months earned as of Valuation Date
 Resulting Fraction
 Multiplier set in the equation

Commencement Date Age 62	Date of Divorce
360	360
416	360
0.865	1,000
50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant
 Alternate Payee
 5% reduction for 50% Surviving Spouse option (Community Interest)
 Community Interest Survivor Benefit Alternate Payee

\$3,097.49	\$2,724.38	\$1,557.60
\$2,049.81	\$2,077.92	\$1,557.60
\$102.49	\$103.90	\$77.88
\$973.66	\$987.01	\$739.86

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant
 Alternate Payee
 10% reduction for 100% Surviving Spouse option (Community Interest)
 Community Interest Survivor Benefit Alternate Payee

\$3,097.49	\$2,724.38	\$1,557.60
\$2,049.81	\$2,077.92	\$1,557.60
\$204.98	\$207.79	\$155.76
\$1,844.83	\$1,870.12	\$1,401.84

*Cost of Survivor Coverage can be divided between parties or applied to one party

#12 Mid-Range Marriage: Tony and Karen

Retirement Eligible on Date of Divorce

High 3 Average as of 12/31/2011

Pension Years of Service as of 12/31/2011

2011 Age Factor as of 10/01/2015 Date of Divorce

Cumulative Career Earnings After 12/31/2011

Post 2011 Age Factor as of 10/01/2015 Date of Divorce

Pre 2012 Benefit Amount

Post 2011 Benefit Amount

Total Benefit Amount as of 10/01/2015

Date of Divorce Value	Date of Divorce Value	Date of Divorce Value	Date of Divorce Value	Date of Divorce Value	Date of Divorce Value
Retire @ NRA (Age 65)	Retire @30 Yrs Age 55 / 4 mn	Retire @ Date of Divorce	Retire @ 30 yrs Age 55 / 4 mn	Retire @ NRA (Age 65)	Date of Commence Value
\$4,305.56	\$4,305.56	\$4,305.56	\$4,305.56	\$4,305.56	\$4,305.56
21.5833	21.5833	21.5833	21.5833	21.5833	21.5833
0.02	0.0147	0.0147	0.0147	0.0147	0.02
\$1,858.56	\$1,366.04	\$994.33	\$1,366.04	\$1,858.56	\$1,858.56
\$205,000.20	\$205,000.20	\$205,000.20	\$505,002.00	\$1,084,998.00	\$1,084,998.00
0.0225	0.0165	0.012	0.0165	0.0225	0.0225
\$4,612.50	\$3,382.50	\$2,460.00	\$8,332.53	\$24,412.46	\$24,412.46
\$1,858.56	\$1,366.04	\$994.33	\$1,366.04	\$1,858.56	\$1,858.56
\$384.38	\$281.88	\$205.00	\$694.38	\$2,034.37	\$2,034.37
\$2,242.94	\$1,647.92	\$1,199.33	\$7,060.42	\$3,892.94	\$3,892.94

Shared Interest Order with equation from template:

The Alternate Payee's interest in the Plan is equal to a Fraction, the numerator of which is the number of months of credited service the Participant earned under the Plan during the marriage up to _____ (insert date*), and

the denominator of which is the total number of months of credited service the Participant earned under the Plan up to and including _____ (Valuation Date), multiplied by _____ %, and then multiplied by the Participant's vested benefit under the Plan as accrued to the Valuation Date.

Valuation Date = Date of Divorce

Numerator = Months earned during Marriage
Denominator = Months earned as of Valuation Date
Resulting Fraction
Multiplier set in the equation

Commencement Date	Date of Divorce
Age 55 + 4 mn	180
180	180
300	300
0.600	0.600
50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
5% reduction for 50% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$3,220.05	\$1,566.05	\$839.53
\$672.88	\$494.38	\$359.80
\$33.64	\$24.72	\$17.99
\$319.62	\$234.83	\$170.90

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
10% reduction for 100% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$1,570.06	\$1,153.54	\$839.53
\$672.88	\$494.38	\$359.80
\$67.29	\$49.44	\$35.98
\$605.59	\$444.94	\$323.82

*Cost of Survivor Coverage can be divided between parties or applied to one party

Valuation Date = Date of Commencement

Numerator = Months earned during Marriage
Denominator = Months earned as of Valuation Date
Resulting Fraction
Multiplier set in the equation

Commencement Date	Date of Divorce
Age 55 + 4 mn	180
180	180
360	360
0.378	0.600
50%	50%

~ 50% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
5% reduction for 50% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$3,156.88	\$1,545.32	\$839.53
\$736.06	\$515.11	\$359.80
\$36.80	\$25.76	\$17.99
\$549.63	\$244.68	\$170.90

*Cost of Survivor Coverage can be divided between parties or applied to one party

~ 100% Surviving Spouse - Split Reduction Factors

Participant
Alternate Payee
10% reduction for 100% Surviving Spouse option (Community Interest)
Community Interest Survivor Benefit Alternate Payee

\$3,156.88	\$1,545.32	\$839.53
\$736.06	\$515.11	\$359.80
\$73.61	\$51.51	\$35.98
\$662.45	\$463.59	\$323.82

*Cost of Survivor Coverage can be divided between parties or applied to one party

ERB Calculations

Calculations #1

Monthly Benefit

Final Average Salary x .0235 factor x years of service
 $\$92,000 \times .0235 \times 35 \text{ years} = \$75,670 \text{ or } \$6,305.83 \text{ per month}$

Division of Community Property

Number of years of service during marriage/total number of years of service at retirement
 $30/35 = 85.71\%$ of the benefit is community property
 Co-payee is entitled to 42.86%
 Member is entitled to 57.14%

Option Factors

A=100% or \$6,305.83
 Co-payee is entitled to 42.86% or \$2,702.69
 Member is entitled to 57.14% or \$3,603.15
 No survivor annuity

B=84.12% of Option A benefit or \$5,304.46
 Co-payee is entitled to 42.86% or \$2,273.49
 Member is entitled to 57.14% or \$3,030.97
 Survivor Annuity = 100% or \$5,304.46

C=91.38% of Option A benefit or \$5,762.27
 Co-payee is entitled to 42.86% or \$2,469.71
 Member is entitled to 57.14% or \$3,292.56
 Survivor Annuity = 50% or \$2,881.14

Calculations #2

Monthly Benefit

Final Average Salary x .0235 factor x years of service
 $\$60,000 \times .0235 \times 30 \text{ years} = \$42,300 \text{ or } \$3,525.00 \text{ per month}$

Division of Community Property

Number of years of service during marriage/total number of years of service at retirement
 $15/30 = 50.00\%$ of the benefit is community property
 Co-payee is entitled to 25.00%
 Member is entitled to 75.00%

Option Factors

A=100% or \$3,525.00
 Co-payee is entitled to 25.00% or \$ 881.25
 Member is entitled to 75.00% or \$2,643.75

No survivor annuity

B=93.49% of Option A benefit or \$3,295.52

Co-payee is entitled to 25.00% or \$ 823.88

Member is entitled to 75.00% or \$2,471.64

Survivor Annuity = 100% or \$3,295.52

C=96.64% of Option A benefit or \$3,406.56

Co-payee is entitled to 25.00% or \$ 851.64

Member is entitled to 75.00% or \$2,554.92

Survivor Annuity = 50% or \$1,703.28

Calculations #3

Monthly Benefit

Final Average Salary x .0235 factor x years of service

\$47,000 x .0235 x 25 years = \$27,612.50 or \$2,301.04 per month

(note – scenario did not have a FAS, so one was supplied)

Division of Community Property

Number of years of service during marriage/total number of years of service at retirement

10/25 =40.00% of the benefit is community property

Co-payee is entitled to 20.00%

Member is entitled to 80.00%

Option Factors

A=100% or \$2,301.04

Co-payee is entitled to 20.00% or \$ 460.21

Member is entitled to 80.00% or \$1,840.83

No survivor annuity

B=89.06% of Option A benefit or \$2,049.31

Co-payee is entitled to 20.00% or \$ 409.86

Member is entitled to 80.00% or \$1,639.45

Survivor Annuity = 100% or \$2,049.31

C=94.22% of Option A benefit or \$2,168.04.

Co-payee is entitled to 20.00% or \$ 433.61

Member is entitled to 80.00% or \$1,734.43

Survivor Annuity = 50% or \$1,084.02

Calculations #4 (Refund scenario)

ERB calculations

Member has contributions and interest that total \$135,000.00

Marriage was from 6/1/2007 through 12/31/2013

Service was from 9/2005 through 6/2014

Community property portion

Number of years of service during marriage/total years of service

6.5 years in marriage/8.75 total years = 74.28% community property

Co-payee is entitled to \$50,139.00

Member is entitled to 84,861.00

PERA Calculations

*Retirement Benefit Division Pursuant to Divorce ScenariosPERA Forms of Payment:

- A) Option A/Straight Life Option = Highest monthly benefit amount for life of Retiree. No Survivor Benefit. All benefits cease upon Retiree's death;
- B) Option B/Joint Survivor (100%) = Reduced monthly benefit amount for life of Retiree. Upon Retiree's death, Survivor Beneficiary receives same monthly benefit amount for his/her lifetime; or
- C) Option C/Joint Survivor (50%) = Reduced monthly benefit amount for life of Retiree. Upon Retiree's death, Survivor Beneficiary receives one-half monthly benefit amount for his/her lifetime.

*Assumes all scenarios are for PERA Retirees under State General Member Coverage Plan 3 (3% Pension Factor).

FORMULA = Years of Service x Pension Factor x Final Average Salary (FAS) = Option A, Monthly Benefit

#1: Long-term Marriage (30 years)

George & Sherry were married on June 1, 1985 and he started to work right after the honeymoon, on June 11, 1985. This is a 30-year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. George is age 57 and his DOB is 2/1/1958. He intends to retire at age 62. Sherry is age 50 and her DOB is 3/1/1965. When George first started to work, his income was \$18,000/year and after 5 years, on June 1, 1990, he got a promotion and was making \$35,000/yr. Starting on July 1, 2010, his salary was increased to \$92,000 with no raises since that date.

PERA ANALYSIS:

Member started working with the State on 6/11/1985 and will retire with close to 35 years. Plan maximum is 30 years with 90% of FAS. Using the highest consecutive 36-months of salary, member earns a salary of \$92,000.00/year with assumption of no future raises before he retires. We will consider him to retire once he reaches age 62 at retirement date 3/1/2020, at which time Sherry's age will be 55 and she will be considered the beneficiary.

$FAS = \$92,000.00 \times 3\text{-years} = \$276,000.00 / 36 \text{ months} = \$7,666.67 \text{ FAS}$

Years of Service Credit = 30; $30 \times 3\% \text{ Pension Factor} \times \$7,666.67 = \text{Option A } \$6,900.00$

Option B: $(.81623) = \text{Option A} \times \text{reduction factor} = \$6,900.00 \times .81623 = \$5,631.99$

Option C: $(.90566) = \text{Option A} \times \text{reduction factor} = \$6,900.00 \times .90566 = \$6,249.05$

*Order Dividing PERA Retirement Benefits provides that Community Interest is a percentage derived from a fraction = Months of Service Credit acquired during marriage / total months of Service Credit; co-payee/ex-spouse is awarded 50% of Community Interest (CI)

$360 \text{ months of SC during marriage} / 420 \text{ total months SC} = .8570 \times 50\% = .4280$; CI in Gross Pension Benefit = .857;
Co-Payee's portion of CI = 50% or .4280 of Gross Pension Benefit.

Option A: $\$6,900.00 \times .4280 = \$2,953.20$ for Co-payee/Ex-spouse; $\$6,900.00 - 2,953.20 = \$3,946.80$ for Retiree

Option B: $\$5,631.99 \times .4280 = \$2,410.49$ for Co-payee/Ex-spouse; $\$5,631.99 - 2,410.49 = \$3,221.50$ for Retiree

Option C: $\$6,249.05 \times .4280 = \$2,674.59$ for Co-payee/Ex-spouse; $\$6,249.05 - 2,674.59 = \$3,574.46$ for Retiree

#2: Mid-range Marriage (15 years)

Tony and Karen were married on June 1, 2000 but he started working June 18, 1990. This is a 15-year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. Tony is age 50 and his DOB is 2/1/1965. He intends to retire in another 5 years at age 55 with 30 years of service. Karen is age 55 now and her DOB is 3/1/1960. When Tony first started working, his income was \$20,000/yr. On June 1, 2000 he began earning \$35,000/yr. On July 1, 2010, his income went up to \$60,000/yr. and that has been his income for the past 5 years.

PERA ANALYSIS:

Member started working with the State on 6/18/1990 and will retire with 30 years. Plan maximum is 30 years with 90% of FAS. Using the highest consecutive 36-months of salary, member earns a salary of \$60,000/year with the assumption of no future raises before he retires. His retirement date will be 7/1/2020 with exactly 30 years SC. His age will be 55 and 4 months and Karen's age will be at 60 and 3 months and she will be considered the beneficiary.

FAS: $\$60,000 \times 3\text{-years} = \$180,000.00 / 36 \text{ months} = \$5,000.00 \text{ FAS}$

Years of Service Credit = 30; $30 \times 3\% \times \$5,000.00 = \text{Option A } \$4,500.00$

Option B: $(.90445) = \text{Option A} \times \text{reduction factor} = \$4,500.00 \times .90445 = \$4,070.03$

Option C: $(.95388) = \text{Option A} \times \text{reduction factor} = \$4,500.00 \times .95388 = \$4,292.46$

*Assumes Order Dividing PERA Retirement Benefits provides that Community Interest is a percentage derived from a fraction = Months of Service Credit acquired during marriage / total months of Service Credit; co-payee/ex-spouse is awarded 50% of Community Interest (CI)

180 months SC during marriage/360 total months SC = .5000; CI in Gross Pensions Benefit = .5000; Co-payee's portion of CI = 50% or .25 of Gross Pensions Benefit.

Option A: $\$4,500.00 \times .2500 = \$1,125.00 \text{ for Co-payee/Ex-spouse; } \$4,500.00 - 1,125.00 = \$3,375.00 \text{ for Retiree}$

Option B: $\$4,070.03 \times .2500 = \$1,017.51 \text{ for Co-payee/Ex-spouse; } \$4,070.03 - 1,017.51 = \$3,052.52 \text{ for Retiree}$

Option C: $\$4,292.46 \times .2500 = \$1,073.12 \text{ for Co-payee/Ex-spouse; } \$4,292.46 - 1,073.12 = \$3,219.34 \text{ for Retiree}$

#3: Short-term Marriage (10 years)

Andy and Mary were married on June 1, 2005, and Mary started working on June 10, 2005, right after the honeymoon. This is a 10-year marriage. They are getting divorced now. Estimated date of divorce is June 1, 2015. Both are 45 years old. Andy's DOB is 2/1/1970 and Mary's DOB is 3/1/1970. Mary would like to retire in 15 years when she is age 60. Mary has earned \$42,000 for the duration of her employment and will receive no future raises.

PERA ANALYSIS:

Member started working with the State on 6/10/2005, and will retire with 25 years of SC. Plan maximum is 30 years at 90% of FAS. She earns a salary of \$42,000/year with the assumption of no raises in the next 15 years. Her retirement date will be 6/1/2030 with exactly 25 years. Her age will be 60 and 2 months and Andy's age will be 60 and 3 months and he is considered her beneficiary.

FAS: $\$42,000 \times 3\text{years} = \$126,000.00/36 = \underline{\$3,500.00}$

$25 \times 3\% \times \$3,500.00 = \text{Option A } \$2,625.00$

Option B: $(.85922) = \text{Option A} \times \text{reduction factor} = \$2,625.00 \times .85922 = \$2,255.45$

Option C: $(.93002) = \text{Option A} \times \text{reduction factor} = \$2,625.00 \times .93002 = \$2,441.30$

*Order Dividing PERA Retirement Benefits provides that Community Interest is a percentage derived from a fraction = Months of Service Credit acquired during marriage / total months of Service Credit; co-payee/ex-spouse is awarded 50% of Community Interest (CI)

$120 \text{ months of SC during marriage} / 300 \text{ total months of SC} = .4000$; CI in Gross Pension Benefit = .4000; Co-payee's portion of CI = 50% or .2000 of Gross Pension Benefit.

Option A: $\$2,625.00 \times .2000 = \$525.00$ for Co-payee/Ex-spouse; $\$2,625.00 - 525.00 = \$2,100.00$ for Retiree

Option B: $\$2,255.45 \times .2000 = \$451.09$, for Co-payee/Ex-spouse; $\$2,255.45 - 451.09 = \$1,804.36$ for Retiree

Option C: $\$2,441.30 \times .2000 = \$488.26$ for Co-payee/Ex-spouse; $\$2,441.30 - 488.26 = \$1,953.04$ for Retiree

Panel Participants

Brain Shoemaker, Esq. Moderator

Danielle R. Panter, Esq.

Karen Janway, Director of Benefits at Presbyterian
Healthcare Service

Leah Barker, Pension Administrator, Sandia
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Robert J. Shulman, Esq.

Claudia Armijo, Esq.

Jerome Johnson, CPA

Honorable Gerard Lavelle

Honorable James J. Wechsler

Ruggles v. Ruggles, 1993-NMSC-043, 116 N.M. 52, 860
P.2d 182 (S. CT. 1993)

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227, P.3d 115

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P.3d 621

Irwin v. Irwin, 1996-NMCA-007, 121 N.M. 266, 910
P.2d 342 (Ct. App. 1995)

Salazar v. Salazar, 2012 WL 2308737 (N.M. App)

RUGGLES V. RUGGLES, 1993-NMSC-043, 116 N.M. 52, 860 P.2d 182 (S. Ct. 1993)

CASE HISTORY ALERT: see ¶3 - affects 1992-NMCA-059; see ¶3 - affects 1992-NMCA-031

Nancy E. RUGGLES, Petitioner,

vs.

**Joseph A. RUGGLES, Respondent. Norman E. MICK, Petitioner,
v. Hazel J. MICK, Respondent**

Nos. 20,547, 20,639

SUPREME COURT OF NEW MEXICO

1993-NMSC-043, 116 N.M. 52, 860 P.2d 182

August 16, 1993, Decided. As Corrected December 14, 1993

ORIGINAL PROCEEDING ON CERTIORARI. Robert L. Thompson, District Judge. ORIGINAL PROCEEDING ON CERTIORARI. Thomas C. Cornish, Jr., District Judge

COUNSEL

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Burroughs & Rhodes, Jefferson R. Rhodes, Alamogordo, for respondent Mick.

JUDGES

Montgomery, Justice. Ransom, C.J., and Franchini, J., concur.

AUTHOR: MONTGOMERY

OPINION

(*54) OPINION

{1} We granted certiorari in these cases, and consolidated them for decision, to revisit a subject of recurring concern in our case law: the proper treatment, in a proceeding to dissolve a marriage, of the spouses' community property interest in an employer-sponsored retirement plan. We deem this subject to involve an issue of substantial public interest, as contemplated by NMSA 1978, Section 34-5-14(B)(4) (Repl.Pamp.1990) (conferring certiorari jurisdiction on Supreme Court in cases involving issues of substantial public interest). This Court discussed the subject most recently in **Schweitzer v. Burch**, 103 N.M. 612, 711 P.2d 889 (1985), in which we said (in what we shall see below was essentially dictum): "[U]pon dissolution of marriage, unless both parties agree otherwise, the trial court **must** divide community property retirement benefits on a 'pay as it comes in' basis." **Id.** at 615, 711 P.2d at 892 (emphasis added).

{2} In the cases now under review, our Court of Appeals, in two 2-to-1 opinions by different

panels, faithfully followed the **Schweitzer** "pay as it comes in" rule and held in effect that a nonemployee spouse is entitled, on dissolution of the marriage, to no monetary benefits representing his or her community interest in a retirement plan when the employee spouse has not yet retired. The nonemployee spouse's only entitlement on dissolution, the Court of Appeals held, is to an order that he or she will eventually, when the employee spouse actually retires and begins to receive payment of the pension provided for under the plan, receive payments of his or her share as they "come in." This is true even though the employee spouse's interest at the time of dissolution is, as it was in **Ruggles**,¹ fully vested and matured. **Ruggles v. Ruggles**, 114 N.M. 63, 68-70, 834 P.2d 940, 945-47 (Ct.App.1992); **Mick v. Mick**, 114 N.M. 174, 175, 836 P.2d 93, 94 (Ct.App.1992). As phrased by Judge Apodaca for the **Ruggles** majority, "[I]n New Mexico, **unless the parties agree otherwise**, the trial court **must** reserve jurisdiction and divide any retirement benefits on a 'pay as it comes in' basis." 114 N.M. at 68, 834 P.2d at 945.

{3} We now withdraw **Schweitzer**'s rigid "pay as it comes in" mandate and return to the more flexible pre- **Schweitzer** formulations that permitted a trial court to award to a nonemployee spouse in a marital dissolution all or a portion of his or her community interest in a retirement plan. We hold that the preferred method of dealing with these community assets is to treat them as all other community assets are treated on dissolution -- namely, to value, divide, and distribute them (or other assets with equivalent value) to the divorcing spouses. We realize that in some cases, given the innumerable variations in pension plans and the infinite variety in the circumstances of individual divorcing couples, it will not be possible or practicable to achieve this preferred method of distribution and that other methods, including the "reserved jurisdiction" /*55/ or "pay as it comes in" method, will have to be utilized. In cases such as the two before us, in which the employee spouse's interest is vested and matured, the desirability and feasibility of an immediate distribution to the nonemployee spouse are at their zenith. Consequently, we hold that in such cases the trial court should adopt as its first priority the making of a "lump sum" or other equivalent distribution to the nonemployee spouse. The Court of Appeals having ruled otherwise in these cases, its decisions are reversed and each case is remanded to the respective trial court for further proceedings consistent with this opinion.

I. FACTS AND ISSUES

{4} The facts in the cases are relatively straightforward, although in **Ruggles** the parties executed a marital settlement agreement that may ultimately control the outcome of their dispute. We discuss the facts of each case, and the Court of Appeals' dispositions of the issues on appeal, in the order in which we granted certiorari and in which the cases are listed in the caption of this opinion.

A. Ruggles

{5} Joseph and Nancy Ruggles were married on April 4, 1959. At the time of their marriage, Joseph was employed by Sandia Corporation ("Sandia") in Albuquerque, New Mexico. He began employment with Sandia on May 26, 1958, and remained continuously employed there through

the time of trial. Sandia maintained a retirement plan for its employees, under which Joseph's interest was fully vested and matured at the time of trial;² he had become eligible to retire after thirty years' employment. The trial court found that as of the date of trial, June 28, 1988, Joseph would have been entitled to receive a pension of \$ 1,570.71 per month had he elected to retire on that date. However, as of the date of trial he had not decided to retire and did not know when he would retire; he speculated that he might retire at age 63. At the time of trial he was 50.

{6} The parties stipulated that as of June 28, 1988, Nancy owned a 48% interest in Joseph's Sandia pension benefits. Although they had entered into a comprehensive marital settlement agreement (discussed below), the agreement did not specifically provide when Nancy was to begin receiving her interest in the pension plan nor the specific dollar amount she was to receive, and these issues were disputed at trial. The court ruled that Nancy was entitled to receive 48% of \$ 1,570.71, or \$ 753.94, directly from Joseph, effective June 28, 1988, and continuing each month thereafter until Joseph's retirement from Sandia. At that time Nancy could receive her \$ 753.94 directly from Sandia pursuant to a qualified domestic relations order ("QDRO").³ The court also found that, if Joseph retired at the time of trial (at age 50), the then present value of the benefits he would receive / *56/ from Sandia was \$ 269,854.00; that if he retired at age 55, the present value of the benefits would be \$ 182,000.00; and that if he retired at age 65, the present value would be \$ 48,000.00. The court summed up these findings by declaring: "The present value of Joseph Ruggles's Sandia pension benefits drops every day that passes before retirement."

{7} As stated above, the Ruggles entered into a marital settlement agreement ("MSA") before trial. Article IV of the agreement purported to distribute the parties' community estate, including the community interest in each party's retirement benefits -- Nancy's with her employer, the Albuquerque Public Schools (concerning which there is no issue on this appeal), and Joseph's with Sandia -- in each case as earned from the date of marriage until February 1, 1988. The agreement did not specify when either spouse was to receive his or her community share of the other's benefits. Other provisions pertinent to the MSA will be noted later in this opinion.

{8} At trial, each party contended that the MSA, insofar as it related to disposition of Nancy's entitlement to her community share of Joseph's retirement benefits, was unambiguous. Each party renounces that contention on appeal, though Joseph also argued to the Court of Appeals that if the Court found the MSA ambiguous, it should be construed according to standard rules of construction governing ambiguous agreements. The trial court ruled that the agreement was not ambiguous and applied it in accordance with Nancy's contention: that she was entitled to receive \$ 753.94 per month from Joseph commencing June 28, 1988, representing her interest in the Sandia pension benefits that Joseph would receive if he elected to retire at that time.

{9} Joseph appealed to the Court of Appeals, arguing generally that the trial court's rulings contravened basic principles of community property law and misapplied the parties' MSA. The Court of Appeals agreed and reversed the trial court's judgment. In reaching its decision, the

Court of Appeals first considered the parties' MSA. Although the Court agreed with the trial court that the agreement was unambiguous, it disagreed with the trial court as to the meaning of the agreement and concluded that the parties had agreed that Nancy would not receive her share of Joseph's benefits until he actually retired. **Ruggles**, 114 N.M. at 66-67, 834 P.2d at 943-44. The Court then stated that, while the MSA was binding on the parties, the trial court had discretion to modify it to ensure "fairness." It identified the fairness in question as "the equalized division of community property upon divorce." **Id.** at 67, 834 P.2d at 944.

{10} The Court of Appeals then went on to discuss the trial court's order that Joseph pay Nancy her share of the retirement benefits before he actually retired. The Court gave three reasons for rejecting Nancy's argument that Joseph should not be able to time his retirement to deprive her of her share of their community property. First, the Court said that Nancy's position was contrary to **Schweitzer**, which requires distribution of retirement benefits on a "pay as it comes in basis." **Id.** at 69, 834 P.2d at 946. The Court's second reason was that delaying Nancy's receipt of benefits until Joseph actually retired did not deprive her of any rights because her rights derived from the community's rights; since the community's right to the benefits was always subject to Joseph's decision on when to retire, so too was her community interest upon dissolution of the marriage. **Id.** at 69-70, 834 P.2d at 946-47. Finally, as its third reason the Court said that Joseph's postponement of retirement did not wholly delay Nancy's receipt of benefits since Nancy could immediately begin to receive a portion of her share of benefits directly from Sandia through a QDRO, which the trial court had found would amount to \$ 182.98 per month. **Id.** at 70, 834 P.2d at 947. The Court remanded the case to the trial court with instructions to enter a QDRO for the amount Nancy could immediately begin receiving from Sandia.

{11} Upon Nancy's petition, we granted certiorari.

B. Mick

{12} Mick is less complicated. Following Norman Mick's petition for dissolution of his marriage to Hazel Mick, the district court (*57) held a bench trial in July 1990. The court considered how to divide the parties' community property, including Hazel's retirement benefits arising from her employment at Holloman Air Force Base in Alamogordo, New Mexico. At the time of trial, her federal civil service retirement benefits were vested but unmaturing. Hazel was to become eligible to retire and receive benefits in May 1992, but she testified at trial that she had no intention to retire when she became eligible to do so. Norman contended that he should receive his community property portion of Hazel's retirement benefits when the benefits matured even if she continued to work past the maturity date. The trial court disagreed, ordering that Norman could not receive his community property share of Hazel's retirement benefits until she actually retired.⁴ On appeal from this order, the Court of Appeals affirmed, stating that its ruling was controlled by **Ruggles**, which had been decided just two months earlier.⁵ **Mick**, 114 N.M. at 175, 836 P.2d at 94.

{13} Norman petitioned this Court for a writ of certiorari. We granted the petition and

consolidated the case with **Ruggles** to consider the issue of substantial public interest identified at the beginning of this opinion.

II. BASIC PRINCIPLES

A. New Mexico Case Law on Retirement Plan Benefits as Community Property Divisible at Divorce

{14} We begin our analysis with a review of significant New Mexico cases dealing with the subjects of valuation, division, and distribution of a community's interest in retirement benefits upon dissolution of the spouses' marriage. In **LeClert v. LeClert**, 80 N.M. 235, 236, 453 P.2d 755, 756 (1969), this Court first held that retirement benefits are a form of employee compensation and are community property to the extent they are attributable to employment during coverture. In that case we affirmed an order directing payment to the nonemployee spouse of one-half of the community share of the employee spouse's (the husband's) military retirement benefits **as received**. The husband had been ordered to retire from the military, so there was no issue over whether his benefits were vested or matured. We commented: "[The husband's] retirement pay to which he was to become entitled [on retirement] cannot be considered a mere expectancy. . . ." **Id.**⁶

{15} Several years after deciding **LeClert**, we issued our opinion in **Copeland v. Copeland**, 91 N.M. 409, 575 P.2d 99 (1978), which remained the leading case on the subject of this opinion until it was modified in **Schweitzer. Copeland** involved the division and distribution of vested but unmatured retirement benefits. We first concluded that unmatured benefits are community property subject to division **upon dissolution**, 91 N.M. at 412, 575 P.2d at 102, reasoning that it would be inequitable to consider such benefits to be a mere expectancy simply because they are subject to / *58/ divestment by death, **see id.** at 411-12, 575 P.2d at 101-02. We noted that "[t]he cases are in agreement that at the time of the divorce the court must place a value on the pension rights and include it in the entire assets, then make a distribution of the assets equitably." **Id.** at 413, 575 P.2d at 103. Relying on cases from other community property jurisdictions, we pointed out that a determination of the discounted present value of the benefits at dissolution depends on a variety of factors, including, in addition to the possibility of the employee spouse's death, the possibility of termination of employment, the length of time remaining before the employee becomes eligible to retire and his or her interest matures, and the community's investment, if any, in the pension plan. **Id.** (citing **Brown v. Brown (In re Marriage of Brown)**, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561, 567 (1976) (in bank); **Ramsey v. Ramsey**, 96 Idaho 672, 679, 535 P.2d 53, 60 (1975); and **Wilder v. Wilder**, 85 Wash.2d 364, 534 P.2d 1355, 1358 (1975) (en banc)). Quoting from **Wilder**, we recognized that "[t]here can be no set rule for determining every case and as in all other cases of property distribution, the trial court must exercise a wise and sound discretion." **Copeland**, 91 N.M. at 413, 575 P.2d at 103 (quoting **Wilder**, 534 P.2d at 1358).

{16} We continued in **Copeland**:

It would appear that a flexible approach to this problem is needed. The trial court should make a determination of the present value of the unmatured pension benefits with a division of assets which includes this amount, or divide the pension on a "pay as it comes in" system. This way, if the community has sufficient assets to cover the value of the pension, an immediate division would make a final disposition; but, if the pension is the only valuable asset of the community and the employee spouse could not afford to deliver either goods or property worth the other spouse's interest, then the trial court may award the non-employee spouse his/her portion as the benefits are paid.

Id. at 414, 575 P.2d at 104. However, quoting from **In re Marriage of Brown**, 544 P.2d at 567, we cautioned that the trial court should observe "the fundamental principle that property attributable to community earnings must be divided equally **when the community is dissolved.**" 91 N.M. at 411, 575 P.2d at 101 (emphasis added).

{17} In the years following **Copeland**, this Court issued several opinions applying or expanding on these principles. See (in chronological order) **Ridgway v. Ridgway**, 94 N.M. 345, 610 P.2d 749 (1980); **Hurley v. Hurley**, 94 N.M. 641, 615 P.2d 256 (1980), **overruled on other grounds by Ellsworth v. Ellsworth**, 97 N.M. 133, 637 P.2d 564 (1981); **Hughes v. Hughes**, 96 N.M. 719, 634 P.2d 1271 (1981); **Hertz v. Hertz**, 99 N.M. 320, 657 P.2d 1169 (1983). In **Ridgway**, we considered the proper valuation of a noncontributory profit sharing plan. We first noted that **Copeland** had held that, in dividing a pension plan which is vested but unmatured, a spouse is entitled to a community interest for such portion of the plan as was earned during coverture and that, in valuing the unmatured pension benefits for purposes of division of assets, a determination of the present value of such benefits should be made. 94 N.M. at 347, 610 P.2d at 751. We went on to hold, however, that there was insufficient evidence to enable the trial court to determine the present value of the spouses' interest in that plan, so the court had not erred in using the undiscounted current, actual value of the interest at the date of the divorce. **Id.**

{18} In **Hurley**, we simply reaffirmed the **Copeland** principle that a spouse is entitled to his or her community share of that portion of a retirement plan which is vested but unmatured as of the date of divorce. 94 N.M. at 645, 615 P.2d at 260. We also noted that **Ridgway** set forth alternative methods of valuation and payment that may be applied by the trial court in determining and distributing the community interest. **Id.** **Hughes** relied on **Copeland** to hold that a wife's interest in her husband's future federal civil service disability benefits was based on contributions made by [*59] the community during coverture, which was not related to when the husband's right to the disability benefits vested. We also said:

The significance of **Copeland** for this case is that the Court was willing to divide the husband's future retirement benefits at the time of the divorce even though the right to receive them had not yet actually vested completely. The possibility existed in **Copeland**

that the husband would never actually receive his full retirement benefits, yet the Court included those benefits among the community assets divisible **upon dissolution of marriage**.

96 N.M. at 723, 634 P.2d at 1275 (emphasis added).

{19} Hertz is the last Supreme Court case in **Copeland** 's progeny (before **Schweitzer**).⁷ That case, involving the proper valuation of a profit sharing plan, announced no new principles but followed **Ridgway** as holding that, "in order to determine a community interest in a profit sharing plan, a district court may use an undiscounted, current actual value on the date of the divorce, **if the present value of the plan cannot be ascertained by substantial evidence.**" 99 N.M. at 328, 657 P.2d at 1177 (emphasis added).

We feel that it is the district court's duty to try to determine a reasonable value of the community interest in a profit sharing plan. . . .

The correct approach . . . is to value the community interest in the profit sharing plan **as of the date of divorce**.

Id. (emphasis added).

{20} In 1985, this Court decided **Schweitzer** and in the process announced an abrupt departure from the principles of **Copeland** and its progeny. The issue was whether a beneficiary of the estate of a previously divorced nonemployee spouse, who upon her divorce had been awarded a share of her husband's monthly retirement benefit on a "pay as it comes in" basis, was entitled to continue to receive the benefits, which purportedly had been devised to the beneficiary by the decedent. In other words, was a deceased former spouse's right to receive her share of community property retirement benefits a devisable property right?

{21} We answered that it was not. We held that community property retirement benefits that are awarded on a "pay as it comes in" basis are only inheritable or devisable up to the amount of the community contributions, if any, to the plan. An order dividing benefits on a "pay as it comes in" basis terminates, we held, on the death of either spouse unless the amount contributed by the community, if any, has not yet been paid out in benefits. **Schweitzer**, 103 N.M. at 615, 711 P.2d at 892.

{22} There was thus no issue in **Schweitzer** about how a nonemployee spouse's community interest in a retirement plan should be distributed, or otherwise dealt with, upon divorce. Nevertheless, the Court stated: "We now modify **Copeland** prospectively to hold that upon

dissolution of marriage, unless both parties agree otherwise, the trial court must divide community property retirement benefits on a 'pay as it comes in' basis." *Id.*⁸ After stating the actual holding of the case -- that an / *60/ order dividing benefits on a "pay as it comes in" basis terminates upon the death of either spouse (unless any amount contributed by the community has not yet been paid out in benefits) -- the Court went on to explain the rationale for requiring distribution of all community retirement benefits on a "pay as it comes in" basis. We said that the reason for this requirement

is to assure equity and fairness. Otherwise, the court could award a "lump sum" benefit in one case which would grant to the non-employee spouse an amount that might not ever be received if either spouse died before the projected benefits had been paid out; and on a "pay as it comes in" basis in another case, which would operate to the benefit of the employee spouse whose retirement income would not have to be divided after the non-employee spouse's death. The inequality would be compounded if the employee spouse died first, having received only a portion of his or her divided share but having paid the ex-spouse the present value of all of his or her estimated lifetime share under the lump sum decree.

Id. We shall return to this rationale below.

B. Case Law in Other Community Property Jurisdictions

{23} Schweitzer firmly committed New Mexico to the "reserved jurisdiction" method of distributing the community interest in retirement benefits. The other principal method of distributing these benefits is the "lump sum" or "cash value" method. Under the lump sum method, retirement plan benefits are awarded to the employee spouse at the time of dissolution and assets of equivalent value are awarded to the nonemployee spouse. *See* L. Glenn Hardie, **Pay Now or Later: Alternatives in the Disposition of Retirement Benefits on Divorce**, 53 Cal.St.B.J. 106, 107 (1978). Under the reserved jurisdiction method, the court does not distribute the community interests at the time of dissolution, but reserves jurisdiction to distribute the benefits when the employee spouse actually receives them. *Id.*; *see also* Barbara A. DiFranza & Donald W. Parkyn, **Dividing Pensions on Marital Dissolution**, 55 Cal.St.B.J. 464, 466-68 (1980) (describing both methods and referring to lump sum method as "present cash value" method).

{24} With respect to the specific issue involved in this case -- whether a nonemployee spouse should receive her⁹ community interest in a retirement plan, or begin to receive it, upon dissolution when the employee spouse's interest is vested and matured, or should be required to wait until retirement benefits are actually paid before receiving, or beginning to receive, her share -- only three of the eight community property states appear to have expressly considered the issue. All three of those states have ruled that, when the employee spouse's interest is vested and

matured, the nonemployee spouse is entitled upon dissolution to immediate distribution of her share of retirement benefits: Arizona -- **Koelsch v. Koelsch**, 148 Ariz. 176, 713 P.2d 1234 (1986) (en banc); California -- **Gillmore v. Gillmore (In re Marriage of Gillmore)**, 29 Cal.3d 418, 174 Cal.Rptr. 493, 629 P.2d 1 (1981); and Nevada -- **Gemma v. Gemma**, 105 Nev. 458, 778 P.2d 429 (1989). Rulings in the other community property jurisdictions are somewhat ambivalent on whether courts should follow one method or the other, and in any event none appears to have addressed the precise issue considered in this case.¹⁰

{25} In re Marriage of Gillmore is a leading case. There, the California Supreme Court held that the nonemployee spouse can immediately receive her community interest in the benefits from the employee spouse. The court stated, "A unilateral choice to postpone retirement cannot be manipulated so as to impair a spouse's interest in . . . retirement benefits." **Gillmore**, 629 P.2d at 4. The court reasoned that the nonemployee spouse's interest would be impaired because she would be deprived of immediate enjoyment and management of her community property. **Id.** at 4 n. 4 (recognizing that "the timing of receipt and the control of an asset are important aspects of its value"). The court also said that the employee spouse cannot force the nonemployee spouse to share in the risk that the benefits could be forfeited if the employee spouse dies before retirement. **Id.** at 4.

{26} The Arizona Supreme Court followed **Gillmore**, to a considerable extent, in **Koelsch**. In an extensive discussion covering various aspects of the subject considered in this opinion, the Arizona court held that a nonemployee spouse's community interest in an employee spouse's matured retirement plan, when the employee wants to continue working, is to be valued and paid, or commenced to be paid, upon dissolution. The court recognized, however, that the trial court retains considerable discretion in selecting the appropriate method of payment. The court expressed a preference for the lump sum distribution method as providing a clean break between the parties and an unencumbered pension plan to the employee, as well as relieving the court of any further supervision over the parties' relationship. **Koelsch**, 148 Ariz. at 183, 713 P.2d at 1241. The court continued that the nonemployee spouse's lump sum interest in the plan can be satisfied in several ways: by an award of cash or property equal to the value of the interest or by an installment obligation, which may or may not correspond with the amount the nonemployee spouse would receive if the employee spouse were to retire, and which may be secured by a lien on some or all of the employee spouse's separate property and may bear interest. **Id.** at 183, 713 P.2d at 1241. Further, "[i]f the lump sum method would be impossible or inequitable, the court can order that the non-employee spouse be paid a monthly amount equal to his or her share of the benefit which would be received if the employee spouse were to retire." **Id.** at 185, 713 P.2d at 1243.

{27} For the reasons that appear below, we agree with **Koelsch** that the lump sum method is the preferable one for satisfying the nonemployee spouse's claim to her community interest in her spouse's retirement plan, and that the trial court should have discretion in implementing that method, alone or in combination with other methods, including in an appropriate case the

reserved jurisdiction method, in distributing / *62/ the nonemployee spouse's interest upon dissolution.

C. New Mexico (and Other) Case Law on Goals of Dividing Community Property at Dissolution

{28} Before applying the principles reviewed thus far in this opinion, we pause to remind ourselves of some equally important -- indeed, fundamental -- principles of community property law in New Mexico (and, so far as we are aware, in all other community property jurisdictions). First, it is axiomatic that each spouse in a marriage has a present, vested, one-half interest in the spouses' community property. This has been the law in this state at least since **Beals v. Ares**, 25 N.M. 459, 492-93, 185 P. 780, 790 (1919). The proposition has been reiterated countless times in our case law. *E.g.*, **Harper v. New Mexico Dep't of Human Servs.**, 95 N.M. 471, 473, 623 P.2d 985, 987 (1980); **Delph v. Potomac Ins. Co.**, 95 N.M. 257, 259, 620 P.2d 1282, 1284 (1980); **Miller v. Greathouse (In re Miller's Estate)**, 44 N.M. 214, 220-21, 100 P.2d 908, 912 (1940). In the seminal case of **McDonald v. Senn**, 53 N.M. 198, 204 P.2d 990 (1949) (per curiam), in which this Court repudiated the notion that a wife's interest in community property is a mere expectancy, *id.* at 204-06, 204 P.2d at 993-94, we reaffirmed the basic proposition: "That each spouse, **irrespective of survivorship**, at all times has an ever-present and existing vested interest in the community property equal unto each other. . . ." *Id.* at 209, 204 P.2d at 996 (quoting **Dillard v. New Mexico State Tax Comm'n**, 53 N.M. 12, 21, 201 P.2d 345, 351 (1948), itself quoting **In re Miller's Estate**, 44 N.M. at 220-21, 100 P.2d at 912) (alteration in original)).

{29} Second, as we very recently recognized in **Swink v. Fingado**, 115 N.M. 275, 277, 850 P.2d 978, 990 (1993) (citing **Michelson v. Michelson**, 86 N.M. 107, 110, 520 P.2d 263, 266 (1974), and **Otto v. Otto**, 80 N.M. 331, 332, 455 P.2d 642, 643 (1969)), one of the chief incidents of community property lies in the district court's duty on dissolution to divide the property equally. Other cases, of course, can be cited to the same effect. *E.g.*, **Ellsworth v. Ellsworth**, 97 N.M. 133, 135, 637 P.2d 564, 566 (1981); **Beals v. Ares**, 25 N.M. at 499-500, 185 P. at 793.

{30} Third, almost as a corollary to the rule requiring equal division of the community property on divorce, we have recognized the desirability of granting each spouse complete and immediate control over his or her share of the community property in order to ease the transition of the parties after dissolution. **Hertz v. Hertz**, 99 N.M. 320, 330, 657 P.2d 1169, 1179 (1983) (quoting **Cunningham v. Cunningham**, 96 N.M. 529, 531, 632 P.2d 1167, 1169 (1981)). In **Hertz** we reversed a trial court's order granting the divorcing spouses' residence to the husband and ordering him to pay the wife her community share of the residence through installments over a ten-year period. We held that the trial court erred in refusing to give the wife "'complete and immediate control' of her interest in the community property." *Id.* at 330, 657 P.2d at 1169. Similarly, in **Chrane v. Chrane**, 98 N.M. 471, 649 P.2d 1384 (1982), we reversed a trial court's award to the wife of a life estate in the divorcing parties' residence. We reasoned that the effect of

the court's award was to divest the husband of his equity in the property. **Id.** at 472, 649 P.2d at 1385. We accordingly directed the court on remand to order sale of the house and distribution of the proceeds to the parties within a reasonable time or to "make such other disposition of the home as will result in the husband receiving, within a reasonable time, his share of the value of the home." **Id.**

{31} Immediately distributing community property on dissolution is of signal importance, not only because it eases the parties' transition following dissolution, but also because it furthers the important goal of minimizing future contact and conflict between divorcing spouses. Any court order that postpones distribution, thereby financially linking the parties to one another following a judgment of dissolution, invites future strife when one of the parties seeks to enforce the order. In the context of distribution of retirement benefits, several ⁶³ courts and commentators have identified severance of the parties' interest as an advantage of the lump sum distribution method over the reserved jurisdiction method. **Koelsch**, 148 Ariz. at 183, 713 P.2d at 1241 ("provides a clean break between the parties"); **Shill**, 100 Idaho at 437, 599 P.2d at 1008 ("effects a complete severance of the spouses' interests"); **Gemma**, 778 P.2d at 431 ("end[s] the parties' involvement with each other and finaliz[es] the divorce immediately in all respects"); Sherry A. Fabina, Note, **The Retirement Equity Act: An Accommodation of Competing Interests**, 63 Ind.L.J. 131, 143 (1987) ("avoid[s] future confrontations about financial matters").

{32} With these principles in mind, we now apply them to the issues in these cases.

III. APPLICATION OF THE PRINCIPLES

A. Critique of Schweitzer

{33} We begin with a critical analysis of **Schweitzer**'s "equal sharing of the risk" rationale for adopting the "pay as it comes in" or reserved jurisdiction method of distribution. We note first that **Schweitzer** has been criticized by commentators, **see generally** Carter & Myers, **supra**, but we do not intend in this discussion to review those criticisms. Rather, we intend to provide our own analysis of the shortcomings of the rationale enunciated for the "pay as it comes in" method.

{34} As noted above, the Court's concern in **Schweitzer** over the lump sum method was twofold: First,

the court could award a "lump sum" benefit in one case which would grant to the non-employee spouse an amount that might not ever be received if either¹¹ spouse died before the projected benefits had been paid out; and on a "pay as it comes in" basis in another case, which would operate to the benefit of the employee spouse whose retirement income would not have to be divided after the non-employee spouse's death.

¹⁰³ N.M. at 615, 711 P.2d at 892. Second,

[t]he inequality would be compounded if the employee spouse died first, having received only a portion of his or her divided share but having paid the exspouse the present value of all of his or her estimated lifetime share under the lump sum decree.

Id.

{35} Thus, the Court focused its concern over the lump sum method on the potential inequality arising from the risk of forfeiture borne by the employee spouse: If he lived longer than his life expectancy, he would realize benefits in excess of those distributed to his ex-spouse on dissolution; if he died before retirement or before living out his life expectancy, with no ability to alienate or transmit at death the value of his pension rights, he would receive less than the value of the rights transferred to his former spouse at the time of divorce. As the Court of Appeals put it in **Ruggles** below, this Court in **Schweitzer** "was most concerned with the possibility of the employee spouse bearing all the risk of forfeiture and desired instead for both parties to bear the risk. . . . [The Supreme Court determined] that it is preferable for both spouses to bear the risk of forfeiture equally. . . ." 114 N.M. at 69, 834 P.2d at 946.¹²

{*64/} {36} But we think it impossible to devise a system that, in all cases, will result in both spouses bearing the risk of forfeiture equally. Although this is the professed goal of the reserved jurisdiction or "pay as it comes in" method, its achievement of that goal is illusory. For, while the nonemployee spouse risks losing everything if her husband dies prematurely (*i.e.*, before retirement), the employee spouse walks away from the marriage dissolution secure in the knowledge that, if he lives past retirement, he will eventually have a pension to protect him in his retirement years. In the meantime, he has a **job**. He has a source of income (probably amounting to considerably more than the amount he would receive as a retirement pension) and the relative comfort of knowing that his income will probably increase, his eventual pension will probably increase, and upon retirement he will receive a guaranteed lifetime annuity. The nonemployee spouse, to be sure, has some of the same expectations as her former husband; depending on how long he lives and when he chooses to retire, she will eventually share in his pension (to the extent, probably, determined years before at the time of divorce). In the meantime, she may lack employment, and her future security depends entirely on when her exspouse decides to retire. The goals of effecting a clean break between the parties and of disentangling them from one another financially have been subverted, and the court has the prospect of relitigating the parties' precise shares of the pension payments when the employee decides to retire.

{37} This is not an equal sharing of the risk.

B. The Problem of Estimating Present Value; Practical Problems with Reserved Jurisdiction

{38} In addition to the "equal sharing of the risk" theory, another advantage sometimes

mentioned for the reserved jurisdiction method is that it avoids the often difficult problems encountered in calculating the present value, at the time of dissolution, of the spouses' community interest in a defined-benefit pension plan. **E.g., Fabina, supra**, 63 Ind.L.J. at 144 ("Since [under the reserved jurisdiction method] only the formula for division is determined at the time of divorce, the complex calculation of valuation is avoided and speculation is eliminated."). Proponents of the reserved jurisdiction approach point out that calculating a present-value lump sum involves at least one, and possibly several, assumptions about such factors as the appropriate interest rate to use in performing a discounted present-value computation, as well as factors concerning mortality, probability of continued employment, probability of vesting, and the like. These assumptions are invariably somewhat speculative; and, say the proponents, such speculation, along with difficult mathematical computations built on them, can be avoided by simply opting to "wait and see."

{39} Joseph Ruggles makes this argument forcefully, urging that retirement plans are different from other community assets and that **Schweitzer** provides "the perfect different treatment retirement plans should be accorded in divorce actions" by avoiding speculation and by freeing the parties (and their attorneys) from the time-consuming and expensive task of litigating, with expert witnesses, over the various assumptions and appropriate methods of discounting in order to adduce evidence of present value.

{40} It cannot be denied that in many respects retirement plans are **sui generis** and are, as Joseph argues, different from other assets whose current values may be more easily fixed. The basic right in a retirement plan is the right to receive a stream of monthly payments at some time in the future. The right is not alienable (except to the extent provided by the REA), and it is subject to various contingencies. When a plan is vested and matured, the first contingency, obviously, is that the employee actually retire and begin receiving payments. However, as **Gillmore** and **Koelsch** observed, this condition is entirely within the employee spouse's unilateral control, so we believe that it should not be /⁶⁵/ considered in computing the present value of the employee's interest. Before actual retirement, the right to receive an income stream from the pension plan is also subject to the contingency that the employee's interest will become vested, then the contingency that it will mature, and all along the contingency that the employee will not die. This last contingency most definitely is not within the employee's control; and, as discussed more fully below, we believe it should be taken into account in estimating present value.¹³

{41} These contingencies can be evaluated and accounted for using accepted actuarial and statistical techniques. **See Johnson v. Johnson**, 131 Ariz. 38, 42, 638 P.2d 705, 709 (1981) (en banc) ("Various actuarial calculations are used to discount the present value of the retirement plan to reflect contingencies affecting the eventual payout, including discounts for mortality, interest, probability of vesting, and probability of continued employment." (footnotes omitted)); **Carter & Myers, supra**, at 112 & n. 130, 116-18 (discussing discounting for time value of money and "expected values," using standard statistical techniques to discount for probability

that given contingency will occur); Murray Projector, **Valuation of Retirement Benefits in Marriage Dissolutions**, 50 L.A.B.Bull. 229, 233-37 (1975) (discussing discounting for mortality (based on probability that employee of given age will survive to required age) and for plan vesting (based on probability that employee will continue employment for period required to become vested)).

{42} It is true that various assumptions must be made in arriving at the present value of a nonemployee spouse's community interest in a retirement plan. There **are** various contingencies which may affect that present value, the effect of which must be quantified, in many or most cases through the use of expert testimony. However, we do not believe that an expert's informed making of assumptions and evaluation of them based on accepted actuarial and statistical techniques render the outcome any more unacceptably "speculative" than, say, the computation of earning capacity to establish damages in a personal injury or wrongful death case. **See Carter & Myers, supra**, at 117 n. 167. In some cases (we give examples below), a trial court may have little choice but to defer distribution and enter a "pay as it comes in" order. In many other circumstances, however, we believe, for the reasons discussed above in connection with long-accepted community property principles, that an immediate and outright distribution will better serve the parties', and the court's, interests.

{43} Finally, we note that the reserved jurisdiction method "raises many problems not apparent from its deceptively simple formulation." DiFranza & Parkyn, **supra**, 55 Cal.St.B.J. at 469 (discussing several such problems, including potential tax consequences).¹⁴ As one commentator has observed:

[C]onsider the practical problems of such a long wait [between divorce and actual receipt of retirement benefits]. Her [the nonemployee spouse's] lawyer may die, { *66 } retire, or leave his firm. His files may be lost or accidentally destroyed, as may those of the court. The waiting spouse may move out of the Court's jurisdiction or simply forget about the distant pension rights.

....

Even when the husband has not yet retired, he has the ability to frustrate the wife's receipt of her as-yet-unpaid portion of the retirement benefits. He can change jobs, move across the country, or even, as in some instances, retire in a foreign land; the ensuing legal battle to acquire jurisdiction over the plan administrator and former husband, in order to compel compliance, can be a nightmare.

Hardie, *supra*, 53 Cal.St.B.J. at 110-11.

C. Our Holding

{44} Based on the foregoing, we decide the cases before us as follows:

{45} In **Ruggles**, for the reasons and subject to the principles discussed below, we reverse the Court of Appeals and remand the case to the trial court to decide the parties' dispute over their marital settlement agreement. If the court finds that the parties agreed on when and how Nancy's share of Joseph's retirement benefits was to be paid to her, then that agreement should, of course, be enforced. We agree with **Schweitzer** that the rule for distribution of a nonemployee spouse's interest in a retirement plan, whatever the rule is, should be applied only in the absence of an agreement between the spouses on the subject. However, if the parties did not agree one way or the other on when and how Nancy was to receive her interest in Joseph's retirement plan, the court should reinstate its judgment awarding Nancy \$ 753.94 per month as her community interest in Joseph's retirement plan. At the same time, we agree with the Court of Appeals that \$ 182.98 of this amount should be paid directly by Joseph's employer, Sandia, through a QDRO. The court should enter such a QDRO, reduce Joseph's monthly obligation accordingly, and provide for Nancy's full entitlement to be paid to her on Joseph's actual retirement through an increased QDRO.

{46} We acknowledge that this resolution of the parties' dispute does not comport with what we have described as the preferred method of satisfying a nonemployee spouse's community interest in an employee spouse's retirement plan -- namely, a lump sum distribution, through other assets (including an installment obligation secured by a lien on other assets and bearing interest) and utilizing a QDRO to the maximum extent available, equal to the present cash value of her interest in the plan. However, Nancy has raised no issue about the court's failure to make a lump sum distribution, and Joseph has at no point contended that such a distribution was preferable to the manner in which the trial court divided the pension benefits. In any event, the parties' other assets have been divided pursuant to their MSA, and it would seem unwise to attempt to unscramble the eggs at this point. On remand, however, either party may request the court to revisit the questions of presentvalue determination and distribution, and the court may exercise its sound discretion in deciding how to deal with any such request.¹⁵

{47} If revisited, the present value of the parties' community interest in Joseph's retirement plan as of the time of dissolution should be determined in accordance with the principles described in this opinion, supplemented by expert or other evidence. In particular, and in addition to discounting for the time value of money (interest or investment yield), the court should apply an { *67 } appropriate discount to the otherwise determined present value to account for the possibility that Joseph will die before he actually retires. *See Projector, supra*, 50 L.A.B.Bull. at 233-35.¹⁶ Such a discount can be determined using readily available mortality tables to derive the probability that Joseph will survive from the date of dissolution to the date he attains normal

retirement age under his employer's pension plan (which the trial court found was age 65). In this connection, we reiterate that the present value of an employee's interest in a retirement plan, even when the interest is fully vested and matured, is not the same as the employee's right to future pension payments for the rest of his life discounted only for the time value of money. Although we hold in this opinion that a nonemployee spouse is entitled to an immediate distribution when dissolution occurs after the employee spouse's interest is vested and matured, that distribution, if made in a lump sum, does not necessarily equal the present value, discounted only for interest, of the employee's future pension payments. All during the parties' marriage, the spouses' right to receive retirement benefits was contingent upon the employee's actual survival; that contingency survives the marital dissolution and should be recognized in assigning a present value to the community's interest.¹⁷

{48} Thus, when dissolution occurs after vesting and maturity, a present-value determination should be made, applying the principles outlined above, and the nonemployee spouse's interest should be distributed in a lump sum (or comparable distribution) using a QDRO to the greatest extent possible. If a lump sum distribution is not practical or feasible, for any or all of the reasons about to be mentioned, the court may award the nonemployee spouse an amount payable by the employee spouse (reduced by any QDRO amount, if available) equal to the share of the retirement benefit she would be entitled to receive if the employee spouse elected to retire.

{49} It must be recognized that any such periodic payment is a form of deferred distribution, even though commencing immediately, and as such is subject to all, or at least most, of the shortcomings of the reserved jurisdiction method of distribution. That is, it does not end the parties' association with one another, does not relieve the court of the necessity to supervise their relationship, and is subject to all of the practical problems inherent in the reserved jurisdiction method. Furthermore, and perhaps more importantly, the nonemployee spouse's right to receive payments from the employee spouse may terminate on the latter's death, is probably (at least as a practical matter) not alienable, and is probably not transmissible at death.

{50} Nevertheless, there undoubtedly will be some occasions when this or some other form of deferred distribution should be employed. One such occasion will arise when the court has no satisfactory evidence upon which to make a finding of present value. Another will relate to the parties' financial circumstances: If there are no other assets, or insufficient assets, or unsuitable assets, with which to satisfy (or secure) a lump sum distribution, the court may be forced to award the nonemployee spouse's share "as it comes in." A third, and very important, factor is the undesirability of forcing, however indirectly, the employee spouse to retire prematurely and remove himself from the workforce. There may well be other factors that will counsel against use of the lump sum method of distribution and in favor of the reserved jurisdiction method. As already indicated, we leave the choice of method, as well as its implementation, to the sound discretion of the trial court -- subject, however, to the preference we have expressed in favor of / *68/ the lump sum, present value, cash-out method of distribution.

{51} In **Mick**, we similarly reverse the Court of Appeals and remand to the trial court with instructions to vacate its judgment, to the extent that judgment dealt with Norman Mick's interest in his ex-wife Hazel's federal civil service retirement benefits, and to enter a new judgment awarding Norman, effective as of the date Hazel's interest in her retirement matured,¹⁸ a lump sum distribution or, if the factors discussed above in connection with **Ruggles** indicate otherwise, a periodic payment from Hazel in accordance with the formula already determined by the trial court. As in **Ruggles**, it may be impracticable at this point to award Norman a lump sum payment of the present value of his community interest in Hazel's retirement plan. In fairness, since the trial court awarded Hazel a portion of Norman's retirement benefits under the state Public Employees Retirement Association system "when and if benefits are paid," the court may permit that portion of the judgment to be reopened as well to provide an offset to Hazel's obligation to pay to Norman his share of her retirement plan. In all events, the trial court should equitably adjust the rights of the parties in each other's retirement plans, based on the principles announced in this opinion.

IV. THE RUGGLES' MARITAL SETTLEMENT AGREEMENT

{52} We deal only briefly with the Ruggles' MSA, which involves an issue that did not precipitate our grant of certiorari and that is adequately covered by existing New Mexico case law. The issue is whether, as the trial court concluded, Mr. and Mrs. Ruggles agreed in their MSA that Joseph would immediately commence paying Nancy her community share of his retirement benefit even though he had not retired, or whether they agreed that Nancy would not receive any portion of Joseph's retirement until he actually retired and began receiving benefits. The Court of Appeals reversed and held that the agreement embodied the latter understanding. Both the trial court and the Court of Appeals characterized the agreement as unambiguous.

{53} The trial court based its conclusion on a provision in the MSA that Nancy would receive as her separate property "[o]ne-half of the community retirement benefits earned" by Joseph from the date of marriage to February 1, 1988. The agreement did not specify when or how or in what amount this share would be paid. The Court of Appeals relied on other provisions of the agreement to hold that the parties contemplated Joseph's continued employment and that therefore, since the agreement was to be governed by New Mexico law (which included, the Court of Appeals held, **Schweitzer v. Burch**), the parties must have intended that Joseph would not make payments to Nancy of portions of his retirement benefits until, and as, he received them. **Ruggles**, 114 N.M. at 65-66, 834 P.2d at 942-43. The Court pointed to provisions in the agreement obligating Joseph to make varying child support payments depending on whether or not the parties' unemancipated child was living with him, which could only have occurred after he had retired; to provisions requiring him to maintain medical and dental insurance coverage for the child for as long as he could keep the child as a dependent on his employer's group insurance; and to other provisions that satisfied the Court that the parties expected that Joseph would continue working after the date he was eligible to retire. **Id.** at 66-67, 834 P.2d at 943-44.

{54} We agree with the Court of Appeals that the MSA, fairly construed, reflects the parties' understanding that Joseph would continue working until well after the divorce. We further agree that the parties did not provide in their MSA, expressly or by implication, that Joseph would pay Nancy \$ 753.94 per month from and after the dissolution of their marriage. However, we do not agree that the absence of such a provision from their written agreement necessarily means that the parties agreed that Nancy would not begin to receive any portion of her community share of Joseph's retirement plan until he actually retired. Unlike both the trial court and the Court of Appeals, we believe the MSA is ambiguous on this point and that further proceedings are necessary to resolve the ambiguity. If it cannot be resolved as an evidentiary or factual matter, then it follows that the parties made no agreement on the issue -- their agreement simply failed to cover the point, and Nancy's entitlement to her share of Joseph's retirement benefits must be decided under the principles outlined previously in this opinion.

{55} Although "[t]he mere fact that the parties are in disagreement on construction to be given to the contract does not necessarily establish an ambiguity[.]" **Levenson v. Mobley**, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987), when a district court and an appellate court both agree that a contract is unambiguous but reach diametrically opposite conclusions as to its meaning, the claimed lack of ambiguity is highly suspect, to say the least. But we need not rely on these differing interpretations of the Ruggles' MSA to conclude that the agreement is ambiguous; that conclusion fairly leaps from the terms of the agreement itself. A contract is ambiguous "if it is reasonably and fairly susceptible of different constructions." **Id.** In addition to the provision relied on by the trial court -- that Nancy would receive as her separate property one-half of the community retirement benefits in Joseph's plan with Sandia -- Nancy emphasizes another provision stating that "[e]ach party shall immediately allow the other to take possession of the property transferred to that party by this Agreement." Joseph, on the other hand, stresses those parts of the agreement relating to child support, provision of insurance, and the other matters on which the Court of Appeals focused in determining that the agreement did not contemplate Joseph's imminent retirement.

{56} As we have said, we believe the Court of Appeals correctly construed the agreement as reflecting the assumption that Joseph would continue working, but this does not mean that the parties did not agree that Joseph would immediately take steps to implement the provision calling for Nancy's receipt of her portion of his retirement benefits. The agreement is fairly susceptible of the constructions that he would and that he would not take such steps; therefore, it is ambiguous.

{57} Because of this ambiguity, extrinsic evidence of the parties' intent may be considered to aid in interpreting its terms. **C.R. Anthony Co. v. Loretto Mall Partners**, 112 N.M. 504, 508, 817 P.2d 238, 242 (1991). This is true even though the agreement contains an integration clause, stating that there are no other agreements between the parties. While extrinsic evidence is inadmissible to contradict, and perhaps even to supplement, the terms of an integrated agreement, it is admissible to **explain** the terms of the agreement. **See id.** at 509, 817 P.2d at 243;

Restatement (Second) of Contracts § 212 & cmt. c (1979) (statements of intention admissible to show meaning of integrated agreement), § 213 (parol evidence rule bars prior inconsistent statements), § 216 (consistent additional terms inadmissible to supplement completely integrated agreement); 3 Arthur L. Corbin, **Corbin on Contracts** § 539, at 84 (Supp.1992) (process of interpretation is divorced from notions of integration).

{58} We therefore remand **Ruggles** to the trial court with directions to consider extrinsic evidence of the parties' intent as to distribution of Nancy's community share of the Sandia benefits. Any discussions between the parties on this issue are admissible to explain the terms of the agreement. Such evidence cannot be said to contradict the /*70/ agreement when its meaning is not yet known. **C.R. Anthony**, 112 N.M. at 509, 817 P.2d at 243. The trial court might determine that the parties reached no agreement on this issue -- that is, that they did not consider it and therefore did not agree on how to resolve it. A search for their intent would then be "fruitless." See Restatement (Second) of Contracts § 204 cmt. b. The court should then utilize the lump sum method to the extent feasible, as previously discussed, except that the court should not apply the lump sum method arbitrarily and without regard for the equities of the situation obtaining at that time. It is the burden of the party contesting the lump sum method to adduce a sufficient basis for denying a lump sum award. In the absence of findings to justify such a denial, the denial might well constitute an abuse of the trial court's discretion. With appropriate findings, the trial court may, as we have discussed, utilize other methods, in combination with or apart from the lump sum method.

{59} Finally, we wish to comment on the Court of Appeals' statement in **Ruggles** that "the trial court had discretion to modify the terms of the agreement to assure fairness." 114 N.M. at 67, 834 P.2d at 944. The Court cited **Brister v. Brister**, 92 N.M. 711, 594 P.2d 1167 (1979), and **Wolcott v. Wolcott**, 101 N.M. 665, 687 P.2d 100 (Ct.App.1984), as support for this statement. Neither case supports the proposition that a court dividing community property in a dissolution proceeding has authority to modify the parties' agreed-upon division to assure "fairness." **Brister** involved modification of an award of alimony, as expressly permitted by statute. **Brister**, 92 N.M. at 713-14, 594 P.2d at 1169-70 (relying on NMSA 1978, § 40-4-7(B)(2)). **Wolcott** perhaps does provide inferential support for the proposition, but any such support is weak because the case involved unique facts (a prior court decree that the husband apparently sought to evade by entering into a subsequent separation agreement) and cited no authority itself except **Brister** and **Scanlon v. Scanlon**, 60 N.M. 43, 287 P.2d 238 (1955), which, like **Brister**, involved modification of an alimony or support agreement. **Id.** at 46, 54, 287 P.2d at 240, 246.

{60} While this issue is not directly before us in this certiorari proceeding, we cannot let pass a remark that we believe is of questionable validity. Even Joseph Ruggles, the prevailing party in the Court of Appeals, asks us to disapprove the Court's dictum. We are inclined to agree with Joseph that a voluntary property settlement between divorcing spouses, dividing their community property as they see fit, is sacrosanct and cannot be upset by the court granting the divorce, absent fraud, duress, mistake, breach of fiduciary duty, or other similar equitable ground for

invalidating an agreement. **See, e.g., Miller v. Miller**, 33 N.M. 132, 134, 262 P. 1007, 1007-08 (1928) (trial court that approved divorcing spouses' property settlement agreement could hardly have ruled otherwise "in the face of the voluntary property settlement made by the parties themselves . . . which was not attacked for fraud, duress, or mistake."). **See also** NMSA 1978, § 40-2-2 (Repl.Pamp.1989) (Either spouse may enter into any transaction with the other which either might if unmarried, "subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.").

V. DISPOSITION

{61} The decisions of the Court of Appeals in these cases are reversed, and each case is remanded to the district court where it arose for further proceedings consistent with this opinion.

{62} IT IS SO ORDERED.

OPINION FOOTNOTES

1 In **Mick**, the employee spouse's interest was due to mature a little less than two years after the date of trial.

2 An employee's interest is "vested" when he or she has the right to receive retirement benefits at normal or early retirement, whether or not the employee continues to work for the employer until retirement. Steven R. Brown, **Berry v. Berry and the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions**, 13 Community Prop.J., April 1986, at 30, 34. An employee generally becomes 100% vested after some minimum number of years of employment, but the vesting rate varies greatly among retirement plans. An employee's interest has "matured" when the employee is actually eligible to retire and receive benefits. **See id.** at 33. The maturity date is generally determined by the employee's age and years of employment. Phoebe Carter & John Myers, **Division and Distribution of the Community Interest in Defined Benefit Pensions: Schweitzer Reconsidered**, 18 N.M. L.Rev. 95, 100-01 (1988).

3 A QDRO is a mechanism by which a nonemployee spouse can receive his or her community share of an employee spouse's retirement benefits directly from the employer. QDRO's were created by the Retirement Equity Act of 1984, Pub.L. No. 98-397, 98 Stat. 1426 ("REA"). The REA created a limited exception to the broad antiassignment provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1954 ("I.R.C.") to allow state courts, by order, to assign plan benefits if the state court order is a "qualified domestic relations order," or QDRO. Section 104, 98 Stat. at 1433 (amendment to ERISA) (codified as amended at 29 U.S.C. § 1056(d) (1988 & Supp. III 1991)); § 204, 98 Stat. at 1445 (amendment to I.R.C.) (codified as amended at I.R.C. §§ 401(a)(13), 414(p) (1988 & Supp. III 1991)).

4 The trial court made a similar order concerning Hazel's interest in Norman's federal civil service retirement benefits, which, as a retired employee, Norman was then receiving, and concerning his participation in the state Public Employees Retirement Association, under which his interest had not yet vested. No issue was raised in the Court of Appeals, and none has been raised here, concerning the trial court's treatment of Norman's retirement benefits.

5 Use of a QDRO did not arise in **Mick** because Hazel's retirement plan is a federal civil service plan,

which is not subject to the REA. See Howard A. Massler, **Qualified Domestic Relations Orders: A Statutory Analysis**, 19 Seton Hall L.Rev. 224, 229 (1989).

6 **LeClert** was overruled temporarily, insofar as it held that military retirement pay was part of the community property subject to division upon divorce, in **Espinda v. Espinda**, 96 N.M. 712, 713, 634 P.2d 1264, 1265 (1981), after the United States Supreme Court's decision in **McCarty v. McCarty**, 453 U.S. 210, 220-36, 101 S. Ct. 2728, 2735-43, 69 L. Ed. 2d 589 (1981), which held that federal law precluded a state court from dividing military retirement pay pursuant to state community property laws. In 1982, however, Congress passed the Uniformed Services Former Spouses' Protection Act, Pub.L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408 (1988 & Supp. III 1991)), which had the effect of reversing the **McCarty** decision. This Court then reinstated **LeClert** in **Walentowski v. Walentowski**, 100 N.M. 484, 486, 672 P.2d 657, 659 (1983).

7 Our Court of Appeals has issued at least three significant opinions concerning the division, distribution, and valuation of retirement benefits upon dissolution. See (in chronological order) **Madrid v. Madrid**, 101 N.M. 504, 684 P.2d 1169 (Ct.App.1984) (relying on **Copeland** and **Hurley** to hold that retirement plan must be valued at date of dissolution and concluding that increases in plan's value occurring after dissolution are separate property of employee spouse); **Berry v. Meadows**, 103 N.M. 761, 713 P.2d 1017 (Ct.App.1986) (relying on **Hughes** and California case law to hold that unvested, unmatured retirement benefits are community property divisible upon dissolution); **Mattox v. Mattox**, 105 N.M. 479, 734 P.2d 259 (Ct.App.1987) (relying on **Copeland**, **Hughes**, **Ridgway**, **Hurley**, and other authorities to address various issues of valuation of a husband's vested but unmatured pension plan; "New Mexico cases state clearly that a spouse is entitled to a community share of the portion of retirement that is vested but unmatured at the date of divorce." 105 N.M. at 481, 734 P.2d at 261).

8 It is obvious that this statement, since it was unnecessary to decision of the issue before the Court, was dictum, no matter how deliberately or emphatically phrased. See **Rocky Mountain Life Ins. Co. v. Reidy**, 69 N.M. 36, 40, 363 P.2d 1031, 1035 (1961) (language unnecessary to decision of issues is dictum and not binding as a rule of law); see also **Black's Law Dictionary** 454 (6th ed. 1990) (defining "dictum" as an abbreviated form of **obiter dictum** and defining "**obiter dicta**" as: "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand . . . , [which] lack the force of an adjudication.").

9 From this point on in this opinion, we shall use the feminine pronoun to refer to the nonemployee spouse and the masculine to refer to the employee spouse. We do this, despite our preference for gender neutrality in our opinions, for three reasons: (1) To avoid the incessant and sometimes awkward repetition of phrases such as "he or she," "her or his," "him/her," etc.; (2) because those are the roles of the spouses in **Ruggles**, which is the primary case triggering our review of this question on certiorari; and (3) because those will be the roles of the spouses in the majority of cases in today's society. Of course, the roles can be reversed, as **Mick** illustrates.

10 The Texas Supreme Court has announced a clear preference for the "if, as, and when received" method of distributing retirement benefits, reasoning that it avoids the difficulties of computing present value. **Cearley v. Cearley**, 544 S.W.2d 661, 666 (Tex.1976). However, the court apparently has never **required** use of that method, and at least one appellate court has affirmed a trial court's lump sum distribution of retirement benefits. See **May v. May**, 716 S.W.2d 705, 711-12 (Tex.Ct.App.1986). Both Idaho and Washington recognize discretion in their trial courts to make either a lump sum or a deferred distribution. As to Idaho, see **Shill v. Shill**, 100 Idaho 433, 439, 599 P.2d 1004, 1010 (1979); see also **Shill v. Shill**, 115 Idaho 115, 120, 765 P.2d 140, 145 (1988) (recognizing the issue presented in **Ruggles** and **Mick**, but declining to rule on it). As to Washington, compare **Bulicek v. Bulicek**, 59 Wash.App. 630, 800 P.2d 394, 398-99 (1990) (recognizing trial court's discretion and affirming award of benefits to a nonemployee spouse on an "as received" basis) with **Wilder v. Wilder**, 85 Wash.2d 364, 534 P.2d 1355,

1359 (1975) (en banc) (upholding trial court's order requiring employee spouse to pay nonemployee spouse her community property share of retirement benefits that were vested and matured upon dissolution). In Louisiana, trial courts similarly have flexibility to select an equitable method for distributing retirement benefits. **See Hare v. Hodgins**, 586 So.2d 118, 126-27 (La.1991) (stating that fixed percentage method, previously ordered in another case, was not the only permissible method of distributing retirement benefits).

11 So in the original. It is difficult to see how, if the nonemployee spouse has been awarded a lump sum distribution on dissolution, she might not ever receive it if the employee spouse died prematurely. However, this situation could produce an inequality of sorts: The nonemployee spouse would receive property or other assets that could be converted into still other assets and that presumably would be transmissible upon her death, whereas the employee spouse would continue to hold only the promise of a lifetime annuity, which could not be alienated nor transmitted on his death to his heirs or devisees unless the particular plan pays a death benefit to a named beneficiary upon the employee's death. **See generally Marvin Snyder, Value of Pensions in Divorce** 21-24, 44-45 (2d ed. 1992) (describing forms of death benefits available in different plans).

12 The majority in **Ruggles** also stated: "[A]t all times, the community only had a prospective property right in receiving the pension, and so does wife now based on our holding." 114 N.M. at 70, 834 P.2d at 947. This comes perilously close to adopting the "mere expectancy" approach to a wife's interest in community property rejected by this Court in **McDonald v. Senn** and other cases.

13 As explained above in footnote 11, some pension plans pay a death benefit to a named beneficiary upon the employee's death before or after retirement. Under such plans, the right to receive **some** benefits does not depend on the employee's survival, although the extent to which a particular death benefit will affect the present value of the employee's pension rights will vary, depending on the nature of the benefit and on various other factors. As with other contingencies affecting the present value of an employee's interest in a retirement plan, expert testimony on the effect of any death benefit in a particular case will often be necessary or desirable.

14 A very recent case from our Court of Appeals illustrates the difficulties that can arise under the reserved jurisdiction method when it becomes necessary to determine, sometimes long after the date of divorce, the amount of the nonemployee spouse's interest in benefits when the employee spouse actually retires. **See Franklin v. Franklin**, 116 N.M. 11, 859 P.2d 479 (Ct.App.), **cert. denied**, 115 N.M. 795, 858 P.2d 1274 (1993). Such difficulties include determining whether the nonemployee spouse may share in increases in the amount of the pension due to postdivorce increases in the employee spouse's salary, resulting either from ordinary promotions and cost of living increases or from the employee's increased effort and achievement at work. **See id.**

15 If the court elects not to revisit these questions and reinstates its former judgment, it should enforce Nancy's stipulation, made in her brief to the Court of Appeals, to pay income taxes on the benefits she receives from Joseph. Further, regardless of how the trial court ultimately distributes Nancy's interest in Joseph's benefits, it should, pursuant to Nancy's other stipulation before the Court of Appeals, reopen its judgment relating to Joseph's interest in Nancy's retirement benefits. These latter benefits may be used to offset Joseph's obligation to Nancy or they may be otherwise distributed in a manner consistent with the principles set forth in this opinion.

16 The probability of mortality is not the same as life expectancy, and a life expectancy table cannot be used to calculate the probability of survival to a given age. **See id.** at 233 n. 8 ("The life expectancies are incidental to probabilities, and are of no value in calculating actuarial values.").

17 However, as indicated above in footnote 13, the court should consider the effect of any death benefit on the present value of the plan.

18 As noted above in footnote 1, Hazel's interest did not mature until a little less than two years after the date of trial. Norman does not argue that he was entitled to his share of benefits as of the time of trial (or dissolution), before the benefits matured. Similarly, Hazel does not argue that, if we award benefits to Norman, those benefits should be valued as of the date of dissolution rather than the date of maturity. Accordingly, we do not consider that issue. We do, however, again emphasize our preference for a distribution **upon dissolution** of the community interest in a retirement plan, regardless of whether the benefits have vested or matured at the time of dissolution.

GILMORE V. GILMORE, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115

**BENAE FRANCINE GILMORE, n/k/a/ BENAE FRANCINE ROCHIN,
Petitioner-Appellee,**

v.

EDWIN JAMES GILMORE, Respondent-Appellant.

Docket No. 28,486
COURT OF APPEALS OF NEW MEXICO
2010-NMCA-013, 147 N.M. 625, 227 P.3d 115
December 15, 2009, Filed

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY, James T. Martin, District Judge.
Released for Publication February 9, 2010.

COUNSEL

Atkinson & Kelsey, P.A., Patrick L. McDaniel, Albuquerque, NM 87190, for Appellee.
Kretek Law Office, LLC, Charles C. Kretek, Deming, NM, for Appellant.

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, ROBERT E. ROBLES,
Judge.

AUTHOR: JONATHAN B. SUTIN.

OPINION

SUTIN, Judge.

{1} This case involves the division of retirement benefits between Benae Francine Gilmore (Wife) and Edwin James Gilmore (Husband) under a State of New Mexico defined benefits plan. A California court granted the parties' divorce through a default judgment in 1994 and issued a qualified domestic relations order (the QDRO) in 2006 awarding Wife a portion of the benefits under a formula that was based on the time-rule method of calculating Wife's community share. After the California court set aside its 1994 judgment as to all its provisions except the portion dissolving the marriage and also set aside the QDRO in its entirety for lack of personal jurisdiction, Wife sought to divide the retirement benefits in New Mexico pursuant to NMSA 1978, Section 40-4-20 (1993), which allows post-divorce division of undivided community assets. Under the impression that New Mexico required the use of the time rule and therefore using that formula, the district court divided the benefits and rejected Husband's various affirmative defenses. We hold that the district court did not err in rejecting Husband's affirmative defenses. Because New Mexico does not require or automatically use the time rule as a default method to divide retirement benefits when the parties do not agree to a specific method,

we reverse the court's use of the time rule and remand for further proceedings consistent with this opinion.

BACKGROUND

{2} The parties were married on October 6, 1981. In October 1984, Husband began employment as a police officer with the City of Deming, New Mexico, and remained in this position through the duration of the marriage. As a state employee, Husband was eligible to participate in the state's defined benefit retirement plan administered by the Public Employees Retirement Association of New Mexico (the PERA administrator) under the Public Employees Retirement Act (the PERA). NMSA 1978, §§ 10-11-1 to -142 (1987, as amended through 2009). Husband filed for divorce in New Mexico sometime in 1994, but on June 9, 1994, the Superior Court of California, County of Yuba, where Wife had filed for divorce in 1991, granted Wife a divorce through a default judgment. It appears that when the New Mexico court was notified of the California divorce, Husband's divorce action was dismissed.

{3} In January 1999, Husband was hired by the Luna County, New Mexico, Sheriff's Department as an undersheriff, where he received an increase in salary. In 2000 Husband became the director of the Luna County Detention Center, which resulted in a significant increase in salary and in the value of Husband's retirement benefits under the PERA (PERA benefits). Husband remarried in 2001 and divorced in January 2005 by a decree that included a \$15,000 lump-sum payment to that wife for her share of the community interest in Husband's PERA benefits. Husband retired in March 2005 and began receiving PERA benefits on April 1, 2005.

{4} Wife obtained the QDRO in June 2006 from the Superior Court of California dividing Husband's PERA benefits. However, in October 2006, upon Husband's motion, that same California court set aside its 1994 judgment as to all its provisions except the portion dissolving the marriage and also set aside the QDRO in its entirety for lack of personal jurisdiction over Husband. In February and March 2007, Wife filed a motion and an amended motion in the Luna County District Court to divide the PERA benefits under Section 40-4-20.¹ Section 40-4-20(A) provides:

The failure to divide or distribute property on the entry of a decree of dissolution of marriage or of separation shall not affect the property rights of either the husband or wife, and either may subsequently institute and prosecute a suit for division and distribution or with reference to any other matter pertaining thereto that could have been litigated in the original proceeding for dissolution of marriage or separation.

{5} In his September 2007 response to Wife's motions, Husband challenged subject matter jurisdiction and raised the affirmative defenses of res judicata, laches, statute of limitations, estoppel, waiver, forfeiture, federal preemption, and public policy. Husband also counterclaimed that the QDRO was obtained under false allegations and requested the court to order Wife to pay him back the money she received under the QDRO and also to pay Husband's attorney fees. The

district court heard the matter on October 2, 2007.

{6} At the October 2007 hearing, Wife testified about the prior legal proceedings in California that (1) Husband was mailed a copy of the divorce decree, (2) even when she had rejected Husband's lump-sum settlement offers it was never her intent to waive her rights to the retirement, and (3) she had worked and helped Husband get started. Husband testified that he had offered Wife a lump-sum payment and that, although he could pay it over time, he did not have the ability to pay a lump sum at the time of the October 2007 hearing. He also testified that Wife was entitled to benefits based on what Husband was earning at the time of the divorce and that he was entitled to benefits based on his post-divorce earnings increases.

{7} On December 13, 2007, the district court entered orders denying Husband's affirmative defenses and counterclaims and dividing the PERA benefits. The court determined that it had subject matter jurisdiction to divide the PERA benefits under Section 40-4-20. Further, the court found, for the purpose of calculating arrearages due, that Wife had an interest in Husband's PERA benefits "based on the . . . number of years credited service during the marriage, the total number of years of credited service, and the qualifying salary levels under the PERA statute." Accordingly, the court calculated that Wife was entitled to a community share of \$1025.90 per month based on one half of Husband's gross monthly pension payments of \$4351.66 times the ratio of time of credited service during the marriage (9.66 years) divided by the total time of credited service (20.5 years). The court granted Wife a judgment for "arrearages for twenty-nine months . . . through December[] 2007, with the monthly amount of the arrearages to be determined by [the] PERA in conformity with their policies and formulas" and ordered Husband, commencing October 1, 2007, to pay the arrearage payments directly to Wife by the first of each month "in the amount to be determined by [the] PERA, with the monthly amount of the arrearage payments to be determined by [the] PERA in conformity with their policies and formulas."

{8} The district court rejected Husband's affirmative defenses of laches, estoppel, waiver, and forfeiture because Wife "pursued her claim in California and New Mexico and [Husband] has not been prejudiced." With respect to Husband's res judicata defense, the court found that "no valid order from California or any other state has divided the PERA retirement." With regard to Husband's statute of limitations defense, the court found that Wife's "claim lies within the statute of limitations period required by New Mexico law." The court denied Husband's public policy argument because the public policy of New Mexico is that "community assets should be divided." Finally, the court denied Husband's counterclaims for the amounts paid to Wife under the QDRO and for attorney fees. Husband filed a motion to reconsider and a brief in support of that motion. On March 6, 2008, the court set the motion for hearing, and on March 11, 2008, after the motion to reconsider was automatically denied by operation of law, Husband appealed. On appeal, Husband argues that the district court erred by concluding it had subject matter jurisdiction and failing to apply the statute of limitations to bar Wife's claim; by not allowing him to make a lump-sum payment to Wife; by denying Husband's affirmative defenses of laches, equitable estoppel, and waiver by acquiescence; and by not valuing his retirement benefits as of

the time of the divorce, thereby improperly apportioning to Wife post-divorce benefits increases that he contends were his separate property.

DISCUSSION

A. Subject Matter Jurisdiction

{9} Husband contends that the district court lacked subject matter jurisdiction for two reasons. First, Husband argues that Section 40-4-20 applies to undivided assets and, therefore, the statute cannot confer jurisdiction in the present case because the PERA benefits were previously divided in the California divorce and were actually distributed based on the QDRO. Second, Husband relies on *Lewis v. Lewis*, 106 N.M. 105, 111, 739 P.2d 974, 980 (Ct. App. 1987), and argues that it holds that undivided community property divided pursuant to Section 40-4-20 must be divided in an action other than the original divorce action. Husband further argues that because he had initiated a divorce action seeking division of assets in New Mexico in 1994, Wife's present action "cannot be considered independent." We view these arguments as raising pure legal issues that we review de novo. *Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 24, 136 N.M. 630, 103 P.3d 554.

{10} Husband specifically shows that the California decree of divorce of 1994 included a provision that divided the PERA benefits and awarded Wife one half of Husband's PERA benefits with the City of Deming. Furthermore, Husband shows that the same California court later issued the QDRO. Even though the provision of the California decree dividing the retirement and the QDRO were subsequently set aside, Husband reasons that Wife "sought to and did divide [Husband's] PERA retirement benefit." Husband also points to his earlier New Mexico proceeding in which he sought to divide assets and debts. Thus, Husband argues, the district court in the present case erred in determining that it had subject matter jurisdiction because the PERA benefits were already divided. We are not persuaded and conclude that the district court had subject matter jurisdiction to hear this case under Section 40-4-20.

{11} As to Husband's argument that the PERA benefits were not an undivided asset, the California court recognized its own lack of personal jurisdiction to divide the benefits and set aside all the provisions of its 1994 default judgment, except the portion dissolving the marriage. It also set aside the QDRO in its entirety. The California court order dividing the PERA benefits was without force or effect since that court lacked jurisdiction to make any division. *See Ortiz v. Shaw*, 2008-NMCA-136, ¶ 17, 145 N.M. 58, 193 P.3d 605 (stating that a default judgment where a district court lacks personal jurisdiction in an in personam action is void). The PERA benefits were therefore an undivided asset when Wife sought to divide them in the 2007 New Mexico action.

{12} Husband's argument that Wife's action is not an independent action is also without merit. Citing *Zarges v. Zarges*, 79 N.M. 494, 445 P.2d 97 (1968), the *Lewis* Court concluded that "property divided pursuant to Section 40-4-20 must be divided in an independent

action.” *Lewis*, 106 N.M. at 111, 739 P.2d at 980 (emphasis omitted). In *Zarges*, our Supreme Court dealt with a situation in which the wife, instead of filing a complaint to start a different lawsuit under the equivalent of Section 40-4-20, sought to reopen the divorce action to divide community property twenty months after the action was finalized. *Zarges*, 79 N.M. at 494-97, 445 P.2d at 97-100. In reversing the district court’s decision to divide the community property under these circumstances, the Court noted that to allow the wife to “breathe new life into” the divorce action where the district court had exhausted its jurisdiction would require “that we either relax our holdings concerning termination of jurisdiction . . . or that we disregard the rules and statutes applicable to commencement of actions.” *Id.* at 496-97, 445 at 99-100. We determine that the present case is an independent action under Section 40-4-20. This matter is an altogether different case than the California divorce and Husband’s 1994 New Mexico divorce proceeding.

B. Statute of Limitations

{13} Husband contends that the district court erred in concluding that Wife’s action was not barred by the four-year statute of limitations in NMSA 1978, Section 37-1-4 (1880). Where facts relevant to a statute of limitations are undisputed, the standard of review is whether the court correctly applied the law to the undisputed facts. *State v. Kerby*, 2007-NMSC-014, ¶ 11, 141 N.M. 413, 156 P.3d 704; *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 8, 132 N.M. 459, 50 P.3d 554 (noting that “[w]e review de novo whether a particular statute of limitations applies”). We review questions of law de novo. *Kerby*, 2007-NMSC-014, ¶ 11.

{14} Husband argues that the relevant date to commence a lawsuit to divide retirement benefits for statute of limitation purposes is the date of divorce regardless of vesting or maturation because, as stated in several New Mexico cases, the right to divide retirement benefits arises at the time of divorce. *See, e.g., Copeland v. Copeland*, 91 N.M. 409, 412-13, 575 P.2d 99, 102-03 (1978) (holding that vested retirement rights earned during the marriage are a community asset subject to division at time of divorce, even though the husband has not yet retired); *see also Ruggles v. Ruggles*, 116 N.M. 52, 58, 860 P.2d 182, 188 (1993) (“In *Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980), *overruled on other grounds by Ellsworth v. Ellsworth*, 97 N.M. 133, 637 P.2d 564 (1981),] we simply reaffirmed the *Copeland* principle that a spouse is entitled to his or her community share of that portion of a retirement plan which is vested but unmaturing as of the date of divorce.”). We reject Husband’s argument.

{15} There are two types of divorces. A unified divorce is where “property division judgments [are] simultaneous with the divorce decree.” *Lewis*, 106 N.M. at 109-10, 739 P.2d at 978-79. A bifurcated divorce is “where a partial decree of divorce is entered before the division of community property.” *Id.* at 110, 739 P.2d at 979. The cases that Husband cites to support his argument that community property is to be divided according to its value on the date of divorce involve unified divorce situations. *See id.* at 109-10, 739 P.2d at 978-79. Upon entry of a partial decree in a bifurcated divorce, the undivided community property automatically changes from community property to property that the parties hold as tenants in common. *See id.* at 109, 739

P.2d at 978; *see also Jones v. Tate*, 68 N.M. 258, 262, 360 P.2d 920, 923 (1961) (“Upon the divorce of the parties[,] all community property not divided between them did not remain community property but became property which they held as tenants in common.”); *In re Miller’s Estate*, 44 N.M. 214, 220, 100 P.2d 908, 912 (1940) (recognizing that marital status ends simultaneously upon the signing of a divorce decree and stating that “[t]he community property becomes their property as though it had been held by them as tenants in common”). Under *Plaatje v. Plaatje*, the four-year statute of limitations in Section 37-1-4 applies to actions seeking to divide undivided community property after the divorce. *Plaatje*, 95 N.M. 789, 790, 626 P.2d 1286, 1287 (1981) (holding that the four-year statute of limitations of Section 37-1-4 applies to suits to divide personal property brought under Section 40-4-20). However, we have identified two circumstances in which the four-year statute of limitations will not apply to a division of undivided assets under Section 40-4-20, namely, when the asset consists of retirement benefits and when the asset is real property. *See Plaatje*, 95 N.M. at 790-91, 626 P.2d at 1287-88 (concluding that the wife was not barred by the four-year statute of limitations from maintaining an action against the husband for her share of retirement benefits); *Martinez v. Martinez*, 2004-NMCA-007, ¶ 18, 135 N.M. 11, 83 P.3d 298 (filed 2003) (concluding that the four-year statute of limitations does not apply to divisions of undivided real property under Section 40-4-20).

{16} The reason these two types of property held by the parties as tenants in common are not subject to the four-year statute of limitations in Section 37-1-4 is because the parties have special protections under the law with regard to these types of property. In regard to real property, the *Martinez* Court noted that “[s]ince a cause of action for partition is a continuing one while the cotenancy exists, there generally is no limitations period for bringing a petition for partition.” 2004-NMCA-007, ¶ 18 (alteration in original) (internal quotation marks and citation omitted). The *Martinez* Court concluded that because “[t]here is nothing about the bare holding of title that should equate to the accrual of a cause of action that triggers a time limitation on the right to seek partition[,] . . . [and the wife] would be subject to a limitations period only if her cotenant did ‘something which amounts to an ouster,’” the four-year statute of limitations did not apply to the wife’s action seeking accounting and partition of real property. *Id.* ¶ 19 (citation omitted). In regard to retirement benefit plans, this type of property is different than other types of personal property because the employee spouse receives the benefits in monthly installments. *Plaatje*, 95 N.M. at 790-91, 626 P.2d at 1287-88. The *Plaatje* Court concluded that a cause of action accrues when the installment becomes due and thus the statutory time limitation upon the non-employee spouse’s “right to sue for her portion of each installment commences to run from the time each installment comes due.” *Id.*

{17} Husband argues that *Plaatje* is distinguishable because in that case the husband’s retirement benefits were not divided in the original divorce action, and the first time the wife asserted any claim was five years later. In the case at hand, as Husband points out, Wife asserted her claim in her California dissolution action. Husband argues that the California court having set aside the portions of the decree dividing the retirement and the QDRO is irrelevant to a

determination regarding the statute of limitations. Husband's argument is unclear, but it appears to be that Wife had four years to domesticate the decree in New Mexico or send it to the PERA administrator to secure her claim. We are not persuaded.

{18} Because the California division was void, it did not effectively divide the PERA benefits. *See Ortiz*, 2008-NMCA-136, ¶ 17 (recognizing that a default judgment where a district court lacks personal jurisdiction in an in personam action is void). Wife's action under Section 40-4-20 to divide the undivided retirement is the proper way to seek division of the benefits in this bifurcated divorce. Because the action was instituted when Husband received the monthly installments, the cause of action accrued when each installment became due. *See Berry v. Meadows*, 103 N.M. 761, 769-70, 713 P.2d 1017, 1025-26 (Ct. App. 1986) (citing *Plaatje* to conclude that "[t]he right to receive each monthly installment accrued when each installment became due; thus, [the] wife's right to recover her portion of each installment commences to run from the time each installment is payable"). Following the reasoning of *Plaatje*, we conclude that because Husband's PERA benefits are paid in monthly installments, Wife's right to bring an action under Section 40-4-20 to divide the undivided PERA benefits received by Husband accrued, for statute of limitations purposes, with each installment when that installment was due, rather than at the time of the divorce. Thus, Wife's action was not barred by the statute of limitations.

C. Equitable Division of Other Assets

{19} Next, Husband claims that the district court erred in not rendering an equitable division of the entire marital estate. However, Husband never moved the court for a division of undivided community property and debts under Section 40-4-20 for either real or personal property. The basis for Husband's argument appears to arise from exchanges in the October 2007 hearing. At the hearing, Husband's attorney asked Wife if she had filed bankruptcy, and Wife's attorney objected as to the relevancy of the question. In his brief in chief, Husband argues that his attorney's response to that objection was that the question was relevant because "the avoidance or discharge of marital debts by [Wife] in any bankruptcy proceeding is relevant and material to a determination of the marital estate and in determining the property kept by and debts assumed by the parties and in the absence of such evidence, no equitable division of the marital estate, including an equitable division of the community interest in [Husband's] PERA retirement benefits could be rendered by the [d]istrict [c]ourt." Thus, Husband concludes, the court's sustaining of the objection "further prohibited [him] from pursuing questions regarding the community debts and assets of the parties." A review of the October 2007 hearing reveals that the exchange went specifically as follows.

Mr. Krettek: Okay. Have you ever filed a bankruptcy, Ms. Rochin?

Wife: Yes, I did

Mr. McDaniel: Objection, relevance.

Mr. Kretek: Your honor it's relevant, she didn't claim [the retirement] as an asset and now she is claiming it is something she never intended to give up.

Mr. McDaniel: That would not constitute waiver under law in any case your honor.

....

Mr. McDaniel: Your honor that, that's irrelevant it wouldn't count, it . . . definitely relates to any of these so called affirmative defenses, it wouldn't as a matter of law constitute a waiver in any case.

Court: Objection sustained.

Mr. Kretek: Okay. That's all I have your honor.

This exchange came up in a "waiver of rights" context as suggested by Husband's counsel's response to Wife's counsel's objection. Husband's counsel is essentially indicating that Wife's answer would show she intended to give up the retirement since it was not claimed as an asset in the bankruptcy.

{20} We see nothing to indicate that Husband was seeking equitable division of other undivided community assets during this exchange. We conclude that Husband did not seek a division of undivided assets at the October 2007 hearing and cannot now complain that the district court's ruling erroneously denied Husband the right to have the undivided assets divided. Thus, the only issue properly before the district court was the division of the PERA benefits requested by Wife.

D. Lump Sum Versus Pay As It Comes In

{21} Husband argues that once the district court determined the value of Wife's interest in the PERA benefits, the proper way to have divided the benefits was a lump-sum payment. Whether the correct law has been applied and whether the district court accurately applied the law to the facts are reviewed *de novo*. *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 6, 140 N.M. 879, 149 P.3d 976 (filed 2006).

{22} Husband contends that under *Ruggles*, the proper manner of dividing the community interest in a party's retirement benefits is to value, divide, and distribute the interest through a lump-sum payment. In *Ruggles*, our Supreme Court indicated that the preferred method to distribute retirement benefits upon divorce is to "value, divide, and distribute them (or other assets with equivalent value) to the divorcing spouses" as a lump-sum payment. 116 N.M. at 54-55, 860 P.2d at 184-85. The Court also discussed some of the disadvantages of the pay-as-it-comes-in method of distribution; nevertheless, the Court acknowledged that under some circumstances, when the lump-sum method is not possible or practicable, other methods, including the pay-as-it-comes-in method, may be utilized. *Id.* "One such occasion will arise

when the court has no satisfactory evidence upon which to make a finding of present value. Another will relate to the parties' financial circumstances: If there are no other assets, or insufficient assets, or unsuitable assets, with which to satisfy (or secure) a lump[-]sum distribution, the court may be forced to award the non[-] employee spouse's share as it comes in." *Id.* at 67, 860 P.2d at 197 (internal quotation marks omitted).

{23} In the instant case, the only evidence before the district court was that Husband had offered to buy out Wife through a \$5000 lump-sum payment, but that he did not have the ability to pay a lump sum at the time of the October 2007 hearing and would have to pay it over time. Under these circumstances, the district court did not abuse its discretion by awarding Wife her share of the PERA benefits under a pay-as-it-comes-in method.

E. Laches, Equitable Estoppel, and Waiver by Acquiescence

{24} Husband argues on appeal that the district court erred by denying his laches, equitable estoppel, and waiver-by-acquiescence defenses. He argues that there was sufficient evidence to support these affirmative defenses. The district court rejected these affirmative defenses because Wife "pursued her claim in California and New Mexico and [Husband] has not been prejudiced." Husband had the burden of proof on these defenses. *See J.A. Silversmith, Inc. v. Marchiondo*, 75 N.M. 290, 294, 404 P.2d 122, 124 (1965) ("[I]t is well settled that the party alleging the affirmative has the burden of proof."). "We review a trial court's decision to grant or deny equitable relief for abuse of discretion. Where the court's discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence." *Vigil v. Fogerson*, 2006-NMCA-010, ¶ 56, 138 N.M. 822, 126 P.3d 1186 (filed 2005) (internal quotation marks and citations omitted). "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. The evidence is viewed in the light most favorable to the ruling of the district court. *See Berry*, 103 N.M. at 769, 713 P.2d at 1025.

{25} The elements of laches are:

- (1) conduct on the part of another which forms the basis for the litigation in question;
- (2) delay in the assertion of the complaining party's rights; (3) lack of knowledge or notice on the part of the defendant that the complaining party would assert such rights; and (4) injury or prejudice to the defendant in the event relief is accorded to the complaining party or the suit is not barred.

Vill. of Wagon Mound v. Mora Trust, 2003-NMCA-035, ¶ 35, 133 N.M. 373, 62 P.3d 1255 (filed 2002) (internal quotation marks and citation omitted).

{26} To establish equitable estoppel, Husband was required to show:

- (1) [c]onduct which amounts to a false representation or concealment of material

facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.

Mannick v. Wakeland, 2005-NMCA-098, ¶ 29, 138 N.M. 113, 117 P.3d 919 (filed 2004) (alteration in original) (internal quotation marks and citation omitted), *aff'd but criticized by Coppler & Mannick, P.C. v. Wakeland*, 2005-NMSC-022, 138 N.M. 108, 117 P.3d 914.

{27} Waiver by acquiescence may arise “where the evidence shows the existence of an agreement . . . supported by consideration, and where the agreement has been acquiesced in over a period of time under circumstances giving rise to estoppel.” *Sisneroz v. Polanco*, 1999-NMCA-039, ¶ 12, 126 N.M. 779, 975 P.2d 392 (omission in original) (internal quotation marks and citation omitted). Furthermore, an enforceable waiver cannot be inferred absent proof of an express agreement except where there are unequivocal acts or conduct showing an intent to waive. *Id.* ¶ 13. “[I]n no case will a waiver be presumed or implied . . . unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.” *Id.* (internal quotation marks and citation omitted).

{28} We will discuss each of these defenses separately; however, we note that the following evidence is relevant with regard to each of the defenses. At the October 2007 hearing, Husband testified that on one occasion, around the time of his subsequent divorce, Wife was angry and told him that “she didn’t want any money of that damn retirement.” To show his unawareness that Wife would assert a claim for a share of the PERA benefits after Wife’s alleged statement, Husband relies on his decision to pay a lump sum of \$15,000 to his subsequent wife for her share of the community interest based on the full value of the pension. Husband also testified that after Wife had told him she did not want any of the retirement, he attempted further settlement negotiations with Wife before his retirement. Finally, Husband asserts he was prejudiced by being “forced” to choose Option A under the PERA, which paid the maximum monthly payments, due to Wife’s “failure to perfect her claim.” Alternatively, Husband could have selected Options B or C, which pay less but allow the member to designate a survivor beneficiary and are only available to members with spouses or former spouses. Husband also asserts prejudice due to his paying his subsequent wife for her share of the community interest based on the full value of the pension without accounting for a subsequent claim by Wife.

{29} On the other hand, Wife testified that she pursued her interest in the retirement as soon as she thought she could when Husband retired. She testified that between 2005 and 2007 she rejected Husband’s offers to settle for a lump-sum payment of \$5000 or \$200 per month. Wife also testified that she never engaged in negotiations with Husband or his attorney in terms of waiving her interest in the PERA benefits, that she did not sign anything waiving her interest, and that it was never her intent to waive her marital interest in the PERA benefits.

1. Laches

{30} Based on Wife's testimony that she asserted her rights as soon as Husband retired, there was sufficient evidence for the district court to find that delay in the assertion, the second element of laches, was not met. Moreover, Husband does not cite any New Mexico or any other authority indicating that Wife was required to send a copy of the California decree to the PERA administrator or domesticate the California divorce in New Mexico within a certain amount of time in order "to secure her interest." Also, Wife testified that she rejected Husband's offers to settle for a lump sum or \$200 per month, and Husband testified that he continued to try to settle with Wife even after her alleged statement giving up her right to the retirement around the time of Husband's subsequent divorce, which would allow the district court to reasonably find that Husband did not lack knowledge that Wife would pursue her interest in the retirement at the time Husband retired. The court could conclude that Husband did not show lack of knowledge or notice on his part that Wife would assert her rights to meet the third element of laches. We do not reach whether there was sufficient evidence for the district court's finding that there was no prejudice because Husband failed to prove the second and third elements of laches. *See Thomas v. Pigman*, 77 N.M. 521, 522-23, 424 P.2d 799, 800 (1967) (affirming the district court's denial of a laches defense because the defendant failed to prove two out of the four elements of laches); *see also Letson v. Liberty Mut. Ins. Co.*, 523 F. Supp. 1221, 1225 n.5 (D.C. Ga. 1981) ("Since there was no delay, the issue of prejudice to the defendant is moot.").

2. Equitable Estoppel

{31} As to the first element of equitable estoppel, conduct that amounts to a false representation or concealment of material facts, Husband argues that because Wife stated she did not want any of his retirement and she ignored Husband's attempts to negotiate a settlement, Wife "falsely represented [her] secret intent to assert her claim." Wife having obtained the QDRO without giving him proper notice, Husband argues, is further evidence of Wife's undisclosed intent to assert her claim to the PERA benefits despite her alleged statement and actions that she did not want any of the benefits.

{32} With regard to the second element of estoppel, intention or at least expectation that such conduct shall be acted upon by the other party, Husband argues that not only did Wife have exclusive knowledge of her intent to pursue a claim, but "she went to great lengths to hide that knowledge from [Husband]." Husband further argues that the QDRO, without proper service, notice, or his advance knowledge, supports this point. Finally, as to the third element of estoppel, knowledge, actual or constructive, of the real facts, Husband contends that Wife not only should have known but in fact knew that Husband was relying on her statement. Husband notes that Wife knew about his subsequent divorce and that he was going to have to buy his subsequent wife out of his retirement. Because Wife had already told him that she did not want any of the retirement, Husband argues, she should have known that he would rely on that when paying out a lump sum to his subsequent wife. Husband also argues that Wife was informed, shortly after his subsequent divorce, that he would be retiring and she did not assert her claim until after she obtained the QDRO.

{33} The district court concluded that Wife had pursued her claim in California and New Mexico and that Husband had not been prejudiced. Based on the evidence before the court that Wife did not intend to give up her rights, that she asserted her rights as soon as she thought she was allowed to do so, that she rejected Husband's settlement offers, and that she received payments only after Husband had already begun receiving his installments, there was sufficient evidence for the court to find that estoppel did not bar Wife from asserting her claim.

3. Waiver by Acquiescence

{34} Husband argues that because Wife took no action to assert her claim to the retirement from 1994 until 2006, made statements that she would not be asserting her claim, and ignored or rejected all of Husband's settlement offers, she waived her rights to the retirement. An enforceable waiver cannot be inferred absent proof of an express agreement except when unequivocal acts or conduct showing an intent to waive are shown. *Sisneroz*, 1999-NMCA-039, ¶ 13. In no case will a waiver be presumed or implied unless Wife's actions misled Husband "to his prejudice, into the honest belief that such waiver was intended or consented to." *Id.* (internal quotation marks and citation omitted).

{35} Here, there was sufficient evidence to support the district court's conclusion that Wife did not waive her rights to the PERA benefits. Wife testified that she rejected Husband's offers to settle for a lump-sum payment of \$5000 or \$200 per month. As mentioned earlier in this opinion, Wife also testified that she never engaged in negotiations with Husband or his attorney in terms of waiving her interest in the PERA benefits, that she did not sign anything waiving her interest, and that it was never her intent to waive her marital interest in the PERA benefits. Moreover, the district court was free to disbelieve that Husband honestly relied on Wife giving up her interest under the circumstances in which she stated that "she didn't want any money of that damn retirement," when Husband continued his attempts to settle with her even after the alleged statement. *See Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 33, 143 N.M. 215, 175 P.3d 309 (holding that questions of credibility are reserved for the district court as fact finder). We conclude that the district court did not err in its conclusion that Wife did not waive her rights to the PERA benefits.

F. The Issue of How to Calculate Retirement Benefits

{36} Husband argues that the district court's determination that Wife was entitled to a share of Husband's PERA benefits based on his 2005 salary and benefit level rather than on his 1994 salary and benefit level was erroneous because it unfairly awarded Wife a portion of Husband's separate post-divorce increases. Because in New Mexico, absent an agreement regarding calculation of benefits, there is no set rule for determining every case involving the division of retirement benefits, it appears that the district court is to exercise its wisdom, sound reasoning, and sound discretion to divide this asset. *See Copeland*, 91 N.M. at 413, 575 P.2d at 103 (recognizing that "[t]here can be no set rule for determining every case and as in all other

cases of property distribution, the trial court must exercise a wise and sound discretion” (internal quotation marks and citation omitted)). We may characterize a discretionary decision “premised on a misapprehension of the law” as an abuse of discretion. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citation omitted). “[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo.” *Id.* (internal quotation marks and citation omitted).

{37} The record reflects that the district court was evidently under the impression that the PERA required the use of what is known as the time rule. When Wife rested her case in the October 2007 hearing, Husband’s counsel requested that Wife’s motion be dismissed, but the court denied the request and added, “I think there is sufficient evidence in the record to establish during the course of the marriage he worked for the Deming Police Department and accumulated a retirement, PERA, as to the value of that retirement it is to be subject to a mathematical calculation under the PERA rules, which is number of years of the marriage, and number of years total worked, or total years of contributions.” In its findings at the end of the October 2007 hearing, the court ordered a qualified domestic relations order to be entered “in accordance with the rules established by [the] PERA, which established that the retirement will be divided by formulation taking into account the number of years of marriage between the parties, and the total number of years served by [Husband] under the state retirement plan, and that [Wife] would be entitled to fifty percent of that formulated percentage.” The court’s impression is understandable given Wife’s counsel’s representations that the PERA required the time rule to be used.

{38} In his opening statement, Wife’s counsel mentions that the California “PERA order was entered consistent with New Mexico law.” He told the court that the California default judgment was “in accordance with New Mexico law, and it would have been in accordance with California law had there been jurisdiction.” He stated that he worked with the PERA to “make sure that this was an appropriate order,” which he based on the one that had previously been entered; that “the calculation was actually performed using the time rule, that is the formula in use in [the] PERA”; and that when the QDRO “was approved and entered by [the] PERA, they calculated based on their formula, and this is a statutory formula.” In closing, Wife’s counsel stated that his draft of a PERA order was actually approved by the PERA administrator and that he “double checked with them and they did want the formula approach in there rather than calculation.”

{39} When Wife’s counsel told the court that Wife’s share of Husband’s monthly payments should be \$1025.90, Husband’s counsel protested by asking, “That’s the time calculation . . . correct?” He also asked, “there are two approaches, and you are saying [the] PERA preferred the time approach?” Wife’s counsel replied, “That’s their calculation using the time rule.” Wife’s counsel further stated that “it would come out to the same thing, but this is their calculation.” After this exchange, the court simply stated, “I’m using the time rule.”

During the hearing, there was no discussion about the fact that the PERA has no rule and there is no law requiring use of the time rule, or that pursuant to the PERA, there existed instructions for lawyers to use in drafting benefits division-related documents and that those instructions merely indicated that the time rule was a possible formula or methodology that could be considered. See PERA, *Attorney Instructions: Model Order Dividing PERA Retirement Benefits*, at 3-4, available at <http://www.pera.state.nm.us/forms/AttyInstOrderDivPERABen.pdf>.²

{40} The time rule is a method for calculating a non-employee spouse's share of a retirement plan. "The time-rule calculation first takes the number of months that [the employee spouse] was participating in the plan during marriage and divides that number by the number of total months of employment during which [the employee spouse] was covered under the plan. The result of that calculation is then multiplied by the total amount of retirement benefits and then that number is divided by two." *English v. English*, 118 N.M. 170, 176, 879 P.2d 802, 808 (Ct. App. 1994). The "ratio of community service years to total service years is multiplied against the amount of benefit the participant receives at retirement . . . even though that date may be after the divorce." Thomas C. Montoya, *N.M. Domestic Relations Law and Forms* (1st ed., Lexis Law Publishing 1997) (1996) at § 7.114 (emphasis omitted).

{41} Jurisdictions that follow the time rule reason that post-divorce increases are built on the marital foundation. See *Gemma v. Gemma*, 778 P.2d 429, 431 (Nev. 1989) (stating that courts that follow the time rule reason that "early contributions to the pension plan, while smaller, are invested and earned more interest, that the emphasis should be on the qualitative nature of the community interest as opposed to the quantitative interest, and that the early working periods are the building blocks to upward mobility and hopefully an increased salary"). Application of the time rule "appears to work appropriately in a limited situation" where: "(1) the benefit holder was married at the inception of the benefit plan participation, and (2) the benefit holder experiences only standard inflation raises and promotions throughout the benefit plan participation." Michelle Adams Thuillier, Comment, *Divorce and Defined Benefit Plans: Retiring Twenty-Five Years of Unjust Division in Berry v. Berry*, 49 S. Tex. L. Rev. 753, 770 (2008). The following hypothetical illustrates the unfairness of applying the time rule in certain situations.

[A]ssume a benefit holder begins his or her professional career as a single person, then, after several years, marries for a couple of years before divorcing and remaining single until retirement. Under the time rule, this short marital period of a couple of years will count as a marital foundation for the future success of the benefit holder and the value of the benefit plan. In reality, the benefit holder's foundation was built as a single person. The time rule's disregard for this fact results in an infringement on the benefit holder's separate property because it allows the non-benefit holder to share in a fraction of the benefit holder's inflated, post-divorce, separate property success.

Id. at 770-71 (footnotes omitted). Along the same lines, attorney instructions provided along with the PERA model order note that "[i]t is not advisable to use [the time-rule method] if the

marriage was of relatively short duration, especially if the marriage and divorce occurred very early in the member's career." PERA, *supra*, at 4 (emphasis omitted).

{42} However, contrary to what appears to have been the district court's impression, the PERA does not mandate that any specific formula must be used. Rather, the PERA merely indicates that a formula determined by a court may be submitted as part of a court order. Section 10-11-136 states, in part:

A court of competent jurisdiction, solely for the purposes of effecting a division of community property in a divorce or legal separation proceeding, may provide by appropriate order for a determination and division of a community interest in the pensions or other benefits provided for in the [PERA]. In so doing, the court shall fix the manner in which warrants shall be issued, may order direct payments to a person with a community interest in the pensions or other benefits, may require the election of a specific form of payment and designation of a specific survivor pension beneficiary, refund beneficiary or survivor pension beneficiary.

Attorneys drafting orders for division of PERA benefits can request a model order with instructions. *See* 2.80.1600.10(C) NMAC (2001). The instructions indicate in bold typeface that the two sample division methods set out in the instructions are not required by the PERA, that "[i]t is up to the parties or the court to arrive at a method to be applied to the particular case," and, also in bold typeface and in all capital letters, that the time-rule method "is not required by statute, and is offered only as an example of a commonly used method of determining the community interest in the gross amount of pension or contributions." PERA, *supra*, at 3-4 (emphasis omitted).

{43} The time rule used by the PERA administrator when Wife obtained the California QDRO came from the California court; it was not required under the PERA. Although it appears that California courts have judicial discretion in selecting a method to divide retirement benefits absent an agreement by the parties, their most commonly used method is the time rule. *See In re Marriage of Adams*, 64 Cal. App. 3d 181, 187 (1976); *see also In re Marriage of Lehman*, 18 Cal. 4th 169, 187 (1998) (stating that the time rule is the most frequently employed method to apportion retirement benefits). The reasoning underlying the district court's use of the time rule in the instant case was faulty and because of that we cannot affirm the court's use of the time rule.

{44} Courts that use the time rule seem to be careful to attribute to the employee spouse post-divorce increases that are the result of the employee spouse's separate singular effort. *See, e.g., Adams*, 64 Cal. App. 3d at 187 n.8 ("[W]e can envision an increase in benefits after separation that might be caused solely by the employee spouse's earnings. In such a case[,] it would be an abuse of discretion to give a portion of the increase to the community."). To accomplish a more equitable division under the time rule, Nevada courts afford the employee spouse an opportunity to show whether extraordinary post-divorce increases are due to his or her

sole separate effort in order to determine whether the non-employee spouse is entitled to a share of those assets. See *Fondi v. Fondi*, 802 P.2d 1264, 1266 (Nev. 1990) (“[A] substantial increase in retirement benefits might be almost completely due to work or achievement after the marriage. . . . [S]uch an extraordinary increase in benefits might occur where the employee spouse attains a significantly higher-paying position while remaining within the coverage of the same pension plan, either through earning a post-divorce degree, or transfer within the company to an unrelated area of service. Such a situation . . . stood in sharp contrast to the usual one, where the employee’s wage increases were simply due to a rise in the cost of living, or a gradual movement up the corporate ladder.” (citations omitted)). When a Nevada district court finds that the employee spouse’s post-divorce increases are due to extraordinary separate effort, the court calculates a hypothetical gross monthly retirement payment that the employee spouse would have received in the absence of the extraordinary post-divorce increases. *Id.* at 1266-67. To determine this hypothetical gross monthly retirement payment, instead of using the employee spouse’s actual final average salary, the court uses a hypothetical “highest income the employee spouse would have received under the normal course of events, this being ordinary promotions and cost increases.” *Id.* (internal quotation marks and citation omitted). It is from this supposed gross monthly retirement payment that would have resulted if the employee spouse had only received ordinary promotions and cost increases that the court ascertains and apportions to the non-employee spouse his or her share of the benefits using the time rule. *Id.* Thus, under this Nevada approach the variable is not the fraction or ratio portion of the time rule but what average salary the court can use to determine a hypothetical monthly benefit payment.

{45} The *Adams* court mentions a different method to divide retirement benefits known as the “insurance apportionment rule,” where the plan is divided applying “a percentage based upon the amounts paid into the fund during marriage as a percentage of total amounts paid.” See *Adams*, 64 Cal. App. 3d at 186 n.6. A similar approach also appears to be suggested in the PERA model order where the non-employee spouse may receive a “[percentage] of the gross retirement benefits or contributions accrued in [the employee spouse’s] name [as] community property.” See PERA, *supra*, at 4 (stating that this method is often used if the employee spouse is retired and also “if the parties or the court determines the percentage of the total pension that will be designated as community property when the [employee spouse] retires”).

{46} There is yet another method used by Texas courts that includes a formula that calculates the community interest by using the date of divorce as opposed to the date of retirement. See *Berry v. Berry*, 647 S.W.2d 945, 946-47 (Tex. 1983). We refer to this as the *Berry* method. Under the *Berry* method, the court is to value the interest as if the employee spouse would have retired on the date of divorce. *Thuillier, supra*, at 759-60. In order to calculate the amount of retirement benefits that the employee spouse would have received at divorce, the court uses the employee’s average salary at the time of divorce. See *id.* at 760-62; see also *Berry*, 647 S.W.2d at 946-47 (concluding that “the employee’s interest in [the] plan[] was community property, and that as of the date of the divorce, [the wife was] entitled to one[]half of the value” (internal quotation marks and citation omitted)). The court then

calculates the non-employee spouse's share as one half of:

$$\text{Benefits as if retired at divorce} \times \frac{\text{time of service during marriage}}{\text{time of service credit up to divorce}}$$

See Thuillier, *supra*, at 760-62.

{47} Use of different approaches can significantly change the non-employee spouse's share of retirement benefits. For instance, assuming without deciding that Husband's testimony was accurate, Husband's monthly salary at the time of divorce was \$1868, which would have generated monthly retirement benefit payments of \$631.38. Since the entire number of years Husband participated in the plan while married and the number of years of participation until the divorce are both 9.6 years, the ratio equals one or one hundred percent. In other words, all of the benefits up until the divorce were community property. Wife would be entitled to one half of the \$631.38, which equals \$315.69. In contrast, because Husband earned significantly more money after divorce and to the point of his retirement, using the time rule would result in a \$1025.90 monthly share for Wife.

{48} The issue of what formula or method of calculation to default to in a situation where, like here, there was a default divorce and the parties never agreed to a division of retirement benefits has not been decided in New Mexico. Unlike our recent opinion in *Garcia v. Garcia*, 2009-NMCA-____, ____N.M.____, ____P.3d____ (No. 28,106, Oct. 30, 2009), the district court in the present case did not even have an ambiguous agreement to interpret to attempt to arrive at an appropriate calculation of benefits. The divorce in the present case was granted through a default judgment, and the California court set aside its time-rule-based division of the PERA benefits.

{49} Husband relies on *Franklin v. Franklin*, 116 N.M. 11, 17, 859 P.2d 479, 485 (Ct. App. 1993), to support his position that the court should have used the date of divorce to calculate Wife's share of the PERA benefits. We have described in *Garcia* why we limit *Franklin* to its peculiar circumstances and why we did not consider it controlling in that case. See *Garcia*, 2009-NMCA-____, ¶¶ 45-48. For the same reasons, we do not think *Franklin* controls our analysis or decision in the present case.

{50} *Franklin* does not provide any one particular rule or formula or methodology that must be followed in instances in which the parties have not agreed to a formula or method for calculating the community share of retirement benefits. Nevertheless because of how *Franklin* resolved the calculation issue, one might argue that, at the very least, *Franklin* can be read to indicate that, absent any agreed-upon method or formula for dividing retirement benefits, the default for the court is solely to rely on evidence presented by the parties as to community and separate efforts in order to attempt to determine the non-employee spouse's community share of the employee-spouse's retirement benefits. See 116 N.M. at 15-19, 859 P.2d at 483-87. While to read that into *Franklin* might too severely limit the court's discretion in reaching an equitable

division, *Franklin* does demonstrate that when the parties have not satisfactorily agreed to a division methodology, the court's resolution may be reached by defaulting to a division based on evidence presented by the parties from which the court can ascertain a demarcation between periods and calculations of ordinary cost of living increases and periods and calculations based on extraordinary promotions and salary increases. *See id.*

{51} In addition to *Franklin*, Husband also relies on *Madrid v. Madrid*, 101 N.M. 504, 506, 684 P.2d 1169, 1171 (Ct. App. 1984). However, Husband fails to develop his reliance on *Madrid* through any analytic detail or argument. Moreover, as we indicate in *Garcia*, *Franklin* did not see *Madrid* as controlling in pay-as-it-comes-in cases. *See Garcia*, 2009-NMCA-____, ¶ 52. Furthermore, it is noteworthy that, unlike in *Garcia* and the present case, in *Madrid* the increases in benefits came long after the husband began receiving benefits and occurred only as a result of post-divorce company-union negotiations over entitlement to retirement benefits. *See Madrid*, 101 N.M. at 505-06, 684 P.2d at 1170-71. *Madrid* does not require the court in pay-as-it-comes-in cases to limit the non-employee spouse's community share in the employee spouse's retirement benefits to an amount based on the employee spouse's average salaries and the level of benefits at divorce.

{52} As indicated earlier in this opinion, in *Copeland*, the Court stated that “[t]here can be no set rule for determining every case and as in all other cases of property distribution, the trial court must exercise a wise and sound discretion.” 91 N.M. at 413, 575 P.2d at 103 (internal quotation marks and citation omitted). *Ruggles* repeated and confirmed this *Copeland* approach. *Ruggles*, 116 N.M. at 58, 860 P.2d at 188. In addition, in *Ruggles*, the Court stated that “the rule for distribution of a non[-]employee spouse's interest in a retirement plan, whatever the rule is, should be applied only in the absence of an agreement between the spouses on the subject.” *Id.* at 66, 860 P.2d at 196. *Ruggles* also noted that *Franklin* “illustrates the difficulties that can arise under the reserved jurisdiction method when it becomes necessary to determine, sometimes long after the date of divorce, the amount of the non[-]employee spouse's interest in benefits when the employee spouse actually retires.” *Ruggles*, 116 N.M. at 65 n.14, 860 P.2d at 195 n.14. We will not in this case attempt to provide definite guidelines by which district courts in their mandated purpose to achieve an equitable result might determine which formula or method of calculation to use in dividing benefits when the parties have not agreed to a particular formula or methodology.

{53} In the present case, we believe that the district court thought that the time rule was required under the PERA. It does not appear that the court engaged in analysis and exercised discretion but, instead, felt bound by what it believed was a statutory mandate. Neither statute nor case precedent in New Mexico requires or permits the time rule or, for that matter, any particular rule or method of calculation to be applied as an across-the-board or automatic-default formula or method of calculation when the parties have no agreement on how to calculate retirement benefits. It is obvious to us that when there has been no agreement of the parties and the issue is contested, unless and until our Supreme Court or Legislature decides that district

courts are to default to a particular rule, formula, or methodology, it is essential for effective appellate review on the issues that the court explain why it has chosen the formula or method of calculation that it uses. It is also important that the court explain how it believes that the choice is an equitable and fair one for the parties. We therefore reverse the district court's use of the time rule and remand for the court to reassess how to calculate Wife's community interest in Husband's PERA benefits.

CONCLUSION

{54} We affirm the district court's rulings against Husband on all of Husband's affirmative defenses. We affirm the court's adoption of a pay-as-it-comes-in method of distribution instead of a lump-sum method. We reverse the district court's determination in regard to the calculation of Wife's community interest in Husband's PERA benefits and remand for further proceedings consistent with this opinion.

{55} **IT IS SO ORDERED.**

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

ROBERT E. ROBLES, Judge

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AE APPEAL AND ERROR

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OPINION FOOTNOTES

¹ The parties and the district court in this case treat these motions as instituting a suit as indicated in Section 40-4-20. For this reason, we refer to this process as "Wife's action" in this opinion even though it was initiated by a motion.

² On June 11, 2009, this model order with instructions was available on-line at <http://www.pera.state.nm.us>.

GARCIA V. GARCIA, 2010-NMCA-014, 147 N.M. 652, 227 P.3d 621

LINDA JOYCE GARCIA, Petitioner-Appellee,

v.

JERRY M. GARCIA, Respondent-Appellant.

Docket No. 28,106
COURT OF APPEALS OF NEW MEXICO
2010-NMCA-014, 147 N.M. 652, 227 P.3d 621
October 30, 2009, Filed

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Ernesto J. Romero, District Judge.
Certiorari Granted, February 2, 2010, No. 32,162. Certiorari Quashed, July 27, 2010, No. 32,162.
Released for Publication February 16, 2010.

COUNSEL

Mary E. Chappelle, Albuquerque, NM, L. Helen Bennett, P.C., L. Helen Bennett, Albuquerque, NM, for Appellee.

Atkinson & Kelsey, P.A., Thomas C. Montoya, Albuquerque, NM, for Appellant.

JUDGES

JONATHAN B. SUTIN, Judge. I CONCUR: JAMES J. WECHSLER, Judge. ROBERT E. ROBLES, Judge (concurring in part, dissenting in part).

AUTHOR: JONATHAN B. SUTIN.

OPINION

SUTIN, Judge.

{1} This case involves enforcement of a 1994 marital settlement agreement and a 1995 domestic relations order relating to a wife's entitlement to a husband's retirement benefits. We are mainly concerned with two issues, namely, (1) when the wife was entitled to begin receiving benefits, and (2) how to calculate the amount of benefits to be paid to the wife. Based on its interpretations of the documents, the district court determined that the wife was entitled to receive benefits starting at the husband's first retirement eligibility as opposed to his actual retirement. The court also determined that the benefits should be calculated based on the husband's average salaries at the time of retirement eligibility as opposed to at the time of the divorce. We hold that the court did not err, and we affirm.

INTRODUCTION TO THE CASE

{2} By way of introduction, we note the circumstances underlying the issues before us. The parties did not talk to each other about calculation of retirement benefits when they signed their

marital settlement agreement. The agreement passed between their attorneys, and there is no indication that the attorneys specifically discussed with their clients how each share would be calculated or specifically discussed the point in time when the non-employee recipient would begin receiving the monthly distribution of her share of the benefits. There is no evidence that either spouse formed any particular intention at the time of the marital settlement agreement with respect to the when and the how-much aspects of the distributions. The attorneys prepared and the parties agreed to retirement benefits provisions that were ambiguous—both as to when the non-employee spouse was to begin receiving her monthly distribution of her community share and as to how her community share of the employee-spouse’s benefits was to be calculated.

{3} These unfortunate circumstances became significant hurdles when, years after the divorce occurred, the non-employee spouse raised issues as to when she should have begun to receive payments and how much she should receive. In the district court, the case became a procedural morass and this complicated resolution of the issues. Ultimately, the parties argued for their respective, differing view of language in the documents. The district court chose the non-employee-spouse’s view. In wrestling with an unsatisfactory history, we have treated the appeal narrowly as one involving whether the district court erred in its interpretation of ambiguous language in controlling documents. With the foregoing introduction in mind, we now turn to the background and specific issues in the present case.

BACKGROUND

{4} Linda Joyce Garcia (Wife) and Jerry M. Garcia (Husband) were married in August 1978. They entered into a marital settlement agreement (MSA) on September 20, 1994. The MSA was incorporated by reference into and approved by a judgment and final decree of dissolution of marriage filed October 20, 1994. When we refer to “the MSA” in this opinion, we mean both the MSA and the judgment and final decree. Husband was first eligible to retire after December 11, 2005, when he reached thirty years of service with the United States Postal Service and age fifty-five. The thirty years of service were a combination of Husband’s service before marriage and after divorce, and community service during marriage.

Provisions of the MSA and Domestic Relations Order

{5} In Section II(A)(5) of the MSA, as part of the parties’ compromised distribution of the community property, Wife was to receive the following as her separate property.

One-half of the community interest in Husband’s retirement plan with [the] United States Postal Service through the date of August 31, 1994, to be determined in accord with the following formula:

$$d = \frac{ab}{2c}$$

where: a = Husband’s gross monthly retirement benefits;

b = Months of credited service from August 9, 1978, through the date of August 31, 1994, a total of 192 months[;]

c = total number of months of credited service at retirement (unknown at this time);

d = Wife's interest.

In Section II(B)(4) of the MSA, Husband was to receive "[o]ne-half of the community interest in his retirement plan . . . and all of the interest he accrued in his retirement plan prior to the marriage and subsequent to August 31, 1994."

{6} The domestic relations order filed in March 1995 dividing Husband's civil service retirement benefits provided that the retirement benefits accrued by Husband during the marriage to the date of the divorce were community property. The order also provided that Wife was entitled to receive her share of the benefits directly from the plan administrator. The order further provided that Wife was entitled to her portion of Husband's retirement benefits based on a formula set out in the order that was similar to that in Section II(A)(5) of the MSA. The formula stated:

$$D = 50\% \text{ of } A \times \frac{B}{C} \text{ where}$$

A = [Husband's] gross monthly retirement benefits[]

B = 192 months

C = Total number of months of creditable service employment of [Husband] at his retirement[]

D = [Wife's] share

Wife's Motion to Enforce the MSA and Husband's First Appeal

{7} In March 2006, Wife asked the court to enforce her interest in Husband's retirement and to award accrued pre-retirement amounts. At a July 19, 2006, hearing on enforcement of the MSA, Wife appeared with counsel and Husband appeared pro se. Wife sought \$590 in monthly payments as of December 11, 2005, which was the first eligibility date of Husband's interest in his retirement, and she also sought arrearages totaling \$4425. Wife's counsel presented a benefits calculation that was, in counsel's view, "pretty standard because typically . . . if you think of the numerator being the months of the marriage, the denominator being the entire time that the person earns the retirement, times one-half, then that's the community interest." Wife's counsel explained the following to the court:

[W]hat happens actually, in practice is . . . over time . . . the percentage that the

former non-employee spouse receives gets lower because the fraction, since the numerator stays the same and the denominator gets bigger, her, it's usually the wife, her fraction of share actually gets smaller and smaller, the percentage goes down over time, but . . . the reason people negotiate this is, one they don't have a choice because there isn't enough money at the time they divorce and, and the second reason is typically the income goes up, as people receive promotions, hopefully in grade cost of living and so it's a smaller percentage times a higher monthly benefit amount.

Wife's counsel also indicated that the formula used "typically . . . included in most cases . . . , not only the marital settlement agreement, but it's also in the qualified domestic relations order, if there is one" and that the formula "was negotiated, it's in the [MSA]." In addition, Wife's counsel explained:

[W]e wrote in, in the formula, that the marital months were 192, according to my math [Husband] spent a total of 824 months earning this retirement. . . . [S]o that with my math, came out to be 23.2 percent is [Wife's] share of the gross monthly annuity which would be \$2533. That's what he would have started receiving December 11 of 2005. So, I calculated that [Husband] would be required to pay . . . [Wife] \$590 per month. That's 23.2 times 2533, . . . he should have been paying it since December. [S]o he has accrued an arrearage of, for seven and a half months of retirement, . . . [Wife] should have received commencing December 11. [A]nd . . . seven and a half months times the \$590 is \$4425.

{8} During this July 19, 2006, hearing, the court inquired of Husband if he was going to have an attorney, to which Husband replied that he could not afford one but was in the process of coming up with the money to obtain one. The court then inquired regarding the MSA, and Husband stated that he "agreed with the formula that they came up with." When asked if he understood what that meant, Husband said, "I thought that was upon retirement." In response to a statement by the court to Husband that under the current law, as represented by Wife's counsel, Wife was entitled to her benefits when Husband became eligible for retirement, Husband responded, "Okay." In response to a statement by the court to Husband that under the case of *Ruggles v. Ruggles*, 116 N.M. 52, 860 P.2d 182 (1993), as it was represented by Wife's attorney, Wife was entitled to receive the amounts that Wife's attorney had represented earlier, and to a follow-up inquiry whether he understood that, Husband replied, "I understand that." "[S]ympathetic to a degree" that Husband did not have an attorney, the court indicated that if Husband chose to get legal counsel "to dispute that amount," Husband would have to have his attorney file a motion in that regard, suggesting that the court would not "go back and redo" the formula, but that perhaps "the figures that [Wife would] receive . . . would change."

{9} In calculating what Wife was entitled to receive, the court used the figures presented by Wife's attorney. Following the hearing, also on July 19, 2006, the court issued a minute order requiring Husband to pay Wife \$590 per month as her share of the retirement benefit commencing August 1, 2006. This amount was calculated based on what Husband would have

received had he retired on December 11, 2005. Using the monthly \$590 amount, the court also entered a judgment of \$4425 for arrearages based on seven and one-half months of benefits that Wife was entitled to receive beginning December 11, 2005.

{10} Husband obtained an attorney and filed a motion for rehearing on August 2, 2006, asserting that the court erred (1) because the MSA did not provide that Wife would receive any payment prior to Husband's actual retirement, and (2) because the \$590 per month calculation violated Sections II(A)(5) and II(B)(4) of the MSA and the case of *Madrid v. Madrid*, 101 N.M. 504, 684 P.2d 1169 (Ct. App. 1984), by granting Wife a portion of Husband's retirement benefits earned after divorce.

{11} The court set this motion for rehearing to be heard on October 5, 2006. On August 28, 2006, Husband filed a motion requesting the court to enter an order determining that the July 19, 2006, minute order was a temporary order until the court entered an order disposing of Husband's August 2, 2006, motion for rehearing. Husband expressed the concern that under Rule 1-059 NMRA the motion would be denied by operation of law on September 1, 2006, rendering the October 5, 2006, hearing moot. Husband filed a notice of appeal on October 2, 2006.

{12} The court nevertheless held a hearing on October 5, 2006, on Husband's motion for rehearing. No record of this hearing is before this Court. In a July 25, 2007, hearing in the district court, Husband's counsel stated that in the October 5, 2006, hearing the court did not think it had jurisdiction, and it therefore declined to consider any aspect of Husband's motion for rehearing, including Husband's offer of proof on the appropriate calculation of benefits.

{13} In Husband's October 2, 2006, appeal to this Court, he contended in his docketing statement that the district court incorrectly determined that Wife was entitled to benefits before his actual retirement and that the calculation of Wife's benefits was erroneous because the court did not determine the community interest in the retirement benefits as of August 31, 1994. Husband quoted portions of an exchange at the July 19, 2006, hearing between the court and Husband and portions of statements made by Wife's counsel. We issued a calendar notice proposing to reverse and remand for an evidentiary hearing on the issue of when Wife should begin receiving benefits and proposing to affirm on the issue regarding the calculation of Wife's benefits. Husband filed a memorandum in support of our proposed remand and in opposition to our proposed disposition with regard to the calculation. Wife did not file any memorandum. In his memorandum, Husband clarified his calculation argument by stating that the district court improperly included Husband's post-divorce pay increases in Wife's entitlement by applying Husband's gross monthly salary as if he had retired in December 2005 instead of the gross monthly salary he was receiving at the time of the divorce in August 1994, thereby giving a portion of Husband's separate property to Wife.

{14} This Court issued a memorandum opinion in February 2007. Based on silence in the MSA and upon *Ruggles*, and on our determination that the district court did not conduct a

proper evidentiary hearing, we reversed the district court's July 19, 2006, minute order and remanded for an evidentiary hearing "to determine the intent of the parties as to when Wife is to begin receiving her portion of Husband's retirement benefits."

{15} Although we had proposed in our calendar notice to affirm the district court's calculation of the benefits, in the memorandum opinion we did not expressly state that we affirmed the district court's benefit calculation. Instead, this Court stated the following:

We decline to address Husband's arguments as to benefit computation because they were not raised in the district court. . . . The lack of analysis contained in the motion for rehearing and the failure of the district court to act upon the motion lead[s] us to conclude that the district court never considered the arguments set forth in Husband's motion for reconsideration and clarified in his memorandum filed with this Court. As a result, Husband's arguments are not properly before us on appeal.

We expressed "no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires."

Remand From First Appeal

{16} On remand, the district court held an evidentiary hearing on July 25, 2007. The court received testimony on the issue of intent of the parties as to when Wife was to receive her share. The court found that Wife had a right that she did not waive to receive her benefits at Husband's earliest eligibility for retirement, which was in December 2005. The court also addressed the calculation issue and adopted Wife's view of the appropriate calculation. We separately discuss the court's handling of the two issues in more detail later in this opinion.

Standard of Review

{17} "The question of interpretation of language and conduct (the question of the meaning to be given the words of the contract) is a question of fact where that meaning depends on reasonable but conflicting inferences to be drawn from events occurring or circumstances existing before, during, or after negotiation of the contract." *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991). We review district court determinations for substantial evidence. See *Salazar v. D.W.B.H., Inc.*, 2008-NMSC-054, ¶ 6, 144 N.M. 828, 192 P.3d 1205 ("On review, we will uphold the trial court's judgment if it is supported by substantial evidence."); *Landavazo v. Sanchez*, 111 N.M. 137, 138-39, 802 P.2d 1283, 1284-85 (1990) (stating that "[i]f substantial evidence supports a trial court's conclusion it will not be disturbed on appeal" and that the Court "examin[es] the record only to determine if there is substantial evidence to support the district court's ruling" (internal quotation marks and citation omitted)); *Britton v. Britton*, 100 N.M. 424, 430, 671 P.2d 1135, 1141 (1983) (stating that "[t]he standard [of] review on appeal is whether substantial evidence reasonably supports the factual determinations of the trial court"). We resolve factual disputes and indulge reasonable inferences in favor of the prevailing party. *Las Cruces Prof'l Firefighters v. City of Las Cruces*,

1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177 (filed 1996). We review de novo the court's resolution of an ambiguity in documents. *See Bd. of Educ. v. James Hamilton Constr. Co.*, 119 N.M. 415, 418, 891 P.2d 556, 559 (Ct. App. 1994) (“[A]n appellate court is not bound by a trial court's [legal] interpretation of a written document, where the interpretation rests solely upon the wording of the document.” (second alteration in original) (internal quotation marks and citation omitted)); *see also State v. Duran*, 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836 (stating that the Court conducts review de novo “along with our review of any inferences the district court may have drawn from its factual findings” (internal quotation marks and citation omitted)). “The interpretation of a contract is an issue of law that we review de novo.” *Mueller v. Sample*, 2004-NMCA-075, ¶ 8, 135 N.M. 748, 93 P.3d 769. We review the application of the law to the facts de novo. *Paz v. Tijerina*, 2007-NMCA-109, ¶ 8, 142 N.M. 391, 165 P.3d 1167.

DISCUSSION

I. The Issue of When Wife Was Entitled to Receive Benefits

A. The July 25, 2007, Hearing

{18} In the July 25, 2007, hearing on remand on the issue of when Wife was entitled to receive benefits, Wife argued that Husband had the burden to show evidence of an agreement that would override the New Mexico law of community property and the application of *Ruggles*. The district court agreed. Husband could not recall whether he discussed his retirement with Wife. Husband testified that it was his understanding that Wife would receive her community share of his retirement benefits when he actually retired.

{19} While not disputing that he was eligible for retirement in December 2005 because he had thirty years of service and had reached age fifty-five, Husband testified and argued that no specific time or date of retirement had been set out in the MSA because at that time, under 5 U.S.C. § 8336 (1966, as amended through 2007), which was the applicable federal retirement law, retirement with benefits could have occurred either after becoming age fifty-five with thirty years of service or after becoming age sixty with twenty years of service. *See* 5 U.S.C. § 8336(a), (b). Husband argued that because of the applicable federal retirement law, the MSA stated “at retirement.” Thus, he argued, the parties intentionally did not specify a time, the words “at retirement” meant exactly what they said, under *Ruggles* the MSA language controlled, and Wife was to receive her benefits beginning when Husband actually retired. Further, Husband indicated that the parties and their counsel knew at the time of the divorce that Husband could retire either at age fifty-five with thirty years of service or at age sixty with twenty years of service, and that this was why the MSA stated the date of retirement was “unknown at this time.” Husband also argued that the MSA was “not negotiated around the table where everyone was present,” that it was signed after “drafts were circulated,” and that, therefore, there was no “meeting of the minds” as to when Wife would receive retirement benefits.

{20} The attorney who represented Wife in the 1994 dissolution proceeding testified

that, at the time she drafted the MSA, she was aware of *Ruggles* and would not have allowed her client to sign a settlement that provided her with retirement benefits “if and when [Husband] chose to retire[.]” The attorney also testified that she used boilerplate language in drafting the MSA when stating that the MSA was drafted “pursuant to the laws of the State of New Mexico.” Wife testified that her expectation was that she would receive her share of the retirement benefits when Husband turned fifty-five and that Husband could not delay when she would receive her share based on his decision alone.

{21} The district court entered the following findings of fact related to the issue of when Wife was entitled to receive her share of the retirement benefits.

6. At the time of divorce and the entry of the MSA[,] both parties knew and anticipated that if [H]usband continued his employment under the civil service system he would be eligible for retirement when he reached age [fifty-five] on December 11, 2005.

7. During the marriage[,] Wife understood that at age [fifty-five] [H]usband would have sufficient age and years to retire from the Postal Service.

8. The division formula states that the total number of months of credited service were “unknown at this time[.]” In fact the number of credited service months could have been impacted by any number of factors, including early retirement, vacation and leave credit, dismissal prior to age [fifty-five], and thus could not have been known with certainty. (See Husband’s own statement in his initial [r]equested [f]indings of [f]act that Husband would be eligible at age [fifty-five] “assuming he continued his employment under the civil service system. . . [.]”[.]) [(Emphasis omitted.)]

9. The [d]omestic [r]elations [o]rder [d]ividing [r]etirement [s]ystem [b]enefits entered March 28, 1995, specifically states at paragraph 4, page 3[] that the division is “pursuant to the community property law of New Mexico.”

10. If Husband waits to pay Wife her retirement benefit until he actually retires, then he is in absolute control of when [W]ife receives her share of the community property.

11. Husband has failed to show by a preponderance of the evidence that there was any discussion, negotiation[,], or agreement that [W]ife would be paid her retirement only when he actually retired.

The court also entered the following conclusions of law.

3. The [c]ourt finds that [Wife] did not waive her right to receive her portion of . . . [H]usband’s retirement benefit at [H]usband’s earliest eligibility for retirement.

4. The parties did not expressly agree on the precise date that [H]usband would retire. However, the [c]ourt finds, through the testimony of the parties and other evidence presented on remand, that the parties anticipated and expected that [H]usband's retirement benefit would be distributed upon . . . [H]usband's earliest date of retirement eligibility, not necessarily whenever [H]usband chose to retire. Not only does the [c]ourt find that the parties intended for [H]usband to retire on his earliest eligibility date, but that given the negotiations regarding division of [H]usband's retirement benefits were conducted during the anticipated divorce of the parties, to find otherwise would be unlikely, unfair[,] and unjust under the circumstances.

5. Consistent with this ruling [H]usband should commence payment of the expected retirement benefits effective December[] 2005.

{22} In holding in Wife's favor, the court had before it the federal law relating to Husband's retirement requirements, the testimony and argument at the hearing, and *Ruggles*, which indicated that a marital settlement agreement should be enforced as written and also that when the agreement is unclear as to when a non-employee spouse is to begin receiving retirement benefits, the court should order distribution upon maturity of the retirement plan. 116 N.M. at 67-68, 70, 860 P.2d at 197-98, 200.

B. The Present Appeal

{23} In the present appeal, on the issue of when Wife was entitled to receive benefits, Husband argues that, unlike in the present case, the marital settlement agreement in *Ruggles* did not use the term "at retirement," whereas the MSA here plainly sets the time "at retirement." Therefore, according to Husband, *Ruggles* required the court in the present case to enforce the MSA as written. We must reject this argument on the ground that the issue was settled in this Court's memorandum opinion in the prior appeal. We determined that, as in *Ruggles*, the MSA was silent, if not ambiguous, as to when Wife was to begin receiving her share of the retirement benefits, and we therefore remanded for the district court to fill in a critical gap by conducting an evidentiary hearing as to when the parties intended that Wife would begin receiving her share of the retirement benefits. We will not revisit our previous ruling on that question.

{24} Based on the July 25, 2007, hearing, the district court decided that Husband failed to carry his burden to show "that there was any discussion, negotiation[,] or agreement that [W]ife would be paid her retirement only when he actually retired." The court did not make an express finding of intent of the parties. However, the court found that if Wife were to wait until Husband actually retired to receive her benefits, Husband would be in absolute control of when she would receive her benefits. The court therefore concluded that the parties anticipated and expected that the retirement benefits would be distributed at first retirement eligibility and that "to find otherwise would be unlikely, unfair[,] and unjust under the circumstances."

{25} As discussed in *Ruggles*, a unilateral choice not to retire would impair the non-employee- spouse's interest in the retirement "because she would be deprived of immediate enjoyment and management of her community property." *Id.* at 61, 860 P.2d at 191 (commenting on *Gillmore v. Gillmore*, 629 P.2d 1, 4 & n.4 (Cal. 1981), where the court held that a non-employee spouse should begin receiving benefits at the date of retirement maturity rather than actual retirement and recognizing that "the timing of receipt and the control of an asset are important aspects of its value" (internal quotation marks omitted)). We conclude that the district court's determinations based on the MSA are supported by substantial evidence and are appropriate under the circumstances and under *Ruggles* to support the court's conclusion that Wife was entitled to receive her benefits beginning December 11, 2005.

{26} Husband nevertheless argues that language in the domestic relations order must be read to evidence an intent that Wife was to receive benefits only upon Husband's actual retirement because, pursuant to the domestic relations order, Wife was to receive her share of the benefits directly from the plan administrator and not from Husband. Therefore, according to Husband, because he has not yet retired, Wife's payment from the plan administrator can only occur when he actually retires. Husband does not indicate in his briefs, and in our review of the record we have not located, where he argued this rationale to the district court. We therefore do not address the rationale. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) ("To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."). Although, because of the possibility of further review proceedings, we suggest that were we to address the issue we would likely disagree with it. The court could have concluded that the language in the domestic relations order was standard pre- *Ruggles* language that, if interpreted as Husband suggests, was inconsistent with the *Ruggles* policy against provisions that leave the employee spouse in control of when the non-employee spouse begins to receive his or her community share. Furthermore, there exists no indication in the record that this language in the domestic relations order was intended to impact Wife's right to receive benefits at first retirement eligibility. If anything, this language contributed ambiguity, and it was up to the district court to decide what the parties intended. Under these circumstances, "the court may award the non[-]employee spouse an amount payable by the employee spouse . . . equal to the share of the retirement benefit she would be entitled to receive if the employee spouse elected to retire." *Ruggles*, 116 N.M. at 67, 860 P.2d at 197.

II. The Issue of Calculation of Wife's Retirement Benefits

A. Preliminary Issue of Jurisdiction on Remand

{27} We address at the outset Wife's argument that Husband cannot raise the calculation issue in this appeal because the district court lacked jurisdiction and authority on remand to change the calculation as Husband requested. We review this issue de novo, as it involves a legal issue. *See Fed. Express Corp. v. Abeyta*, 2004-NMCA-011, ¶ 2, 135 N.M. 37,

84 P.3d 85 (filed 2003). Wife bases her position on her view that, in Husband's prior appeal, this Court did not consider Husband's calculation argument and that we remanded solely for the purpose of developing the intent of the parties on the issue of when Wife was to begin receiving retirement benefits. Wife relies on law-of-the-case and jurisdiction-on-remand doctrines. *See Hughes v. Hughes*, 101 N.M. 74, 75, 678 P.2d 702, 703 (1984) ("The . . . opinion in the prior appeal constitutes the law of the case. It is binding on the district court, and is to be referred to if there is any doubt or ambiguity regarding the mandate. Our mandate and opinion in the prior appeal set forth the full extent of the jurisdiction of the district court on remand." (citations omitted)); *State v. Gage*, 2002-NMCA-018, ¶ 21, 131 N.M. 581, 40 P.3d 1025 (filed 2001) (noting the "hard-and-fast rule that the law of the case established on appeal binds the district court on remand under the appellate court mandate"). *But see Reese v. State*, 106 N.M. 505, 507, 745 P.2d 1153, 1155 (1987) (stating the majority understanding of the law-of-the-case doctrine is that the doctrine "is merely one of practice or court policy, and not of inflexible law" and "that appellate courts are not absolutely bound thereby, but may exercise a certain degree of discretion in applying it" (internal quotation marks and citation omitted)). This issue requires a look not only at our memorandum opinion in the prior appeal but at the proceedings in the district court and this Court leading up to issuance of that memorandum opinion.

{28} It is clear that Husband failed to raise any error in the July 19, 2006, hearing in regard to the court's calculation of Wife's share of retirement benefits. Yet it is equally clear that the district court offered to reconsider the calculation issue if Husband obtained an attorney and filed a motion in that regard. Husband argues the issue was preserved in the district court for review in his first appeal because it was raised in his August 2, 2006, motion for rehearing. He argues that the fact the motion was denied by operation of law thirty days after being filed does not affect preservation, citing *Montgomery Ward v. Larragoite*, 81 N.M. 383, 467 P.2d 399 (1970), in which our Supreme Court reviewed a damages award that the appellant argued was excessive for the first time in a motion for a new trial that was automatically denied by operation of law thirty days after filing. *Id.* at 386, 467 P.2d at 402. While we do not agree that *Montgomery Ward* is applicable to the circumstances here, in that it was not presented with, nor did it decide the issue here, we agree with Husband that the issue was sufficiently preserved in the district court for review by this Court in Husband's first appeal. Husband's motion for rehearing and attempts to get it heard, and his docketing statement and memorandum in opposition filed in the calendaring process in the prior appeal, indicate that Husband sufficiently alerted the district court as well as this Court in the calendaring process to the point of error he was asserting in regard to the calculation of Wife's retirement benefits. We also agree with Husband that we should entertain the calculation issue in the present appeal.

{29} The memorandum opinion of this Court on summary calendar in the prior appeal is not as clear on the calculation issue as it should have been. *See Scanlon v. Las Cruces Pub. Sch.*, 2007-NMCA-150, ¶ 7, 143 N.M. 48, 172 P.3d 185 (holding the law-of-the-case doctrine would not be applied where this Court's calendar notice was ambiguous). This Court stated in the memorandum opinion that it declined to consider Husband's calculation arguments because

they were not raised in the district court. However, we acknowledged that it appeared “that Husband did raise [the] issue in his motion for rehearing,” we noted that the motion was denied by operation of law, and we expressed concern that the district court never considered the issue raised in the motion for hearing. We did not expressly affirm the calculation in the district court’s minute order, nor did we expressly reverse that calculation or remand that issue. We held that Husband’s arguments were “not properly before us on appeal.” Yet, without explaining the purpose for the statement, we stated that we expressed no comment as to what amount of benefits Wife should receive if the district court determined that she was entitled to benefits before Husband retired, a statement Husband construes to apply to the calculation issue. Husband essentially argues that we reversed the entire minute order, meaning the reversal included not only the issue as to when Wife was to begin receiving her benefits, but also the amount she was to receive.

{30} On remand, the district court’s position on whether the calculation issue was properly before the court was also unclear. The district court stated on more than one occasion its view that the calculation issue was not before the court on remand. However, at Husband’s request, the court permitted Husband to “make a record” on the issue. Then, after further argument and Husband’s counsel’s statement that he was “prepared to go forward with evidence as to the appropriate amount of the calculation,” the court stated, “OK, we’ll do that That’s fine” and further stated, “That might be just . . . fine, so we can make a good record, and now . . . what I’ll do is listen to it.” Husband proceeded to testify, and the court admitted in evidence a document that showed Husband’s version of the appropriate calculation.

{31} Following the hearing, both Husband and Wife submitted requested findings of fact and conclusions of law relating to the appropriate calculation. One of Husband’s requested findings of fact stated that the proper calculation of the community interest was that contained in his admitted exhibit. The exhibit was based on an average salary during the three years ending August 31, 1994, on days of service during the marriage of 5866 (or 192 months), and on days of service at the time of valuation at divorce of 8404 (or 276 months), resulting in a community percentage of 69.8% and an accrued community benefit of \$749.07 with Wife’s one-half interest at \$374.53. In her requested findings of fact, Wife stated that the court had improperly allowed Husband’s evidence on the calculation issue and that she submitted her findings without waiving her trial objection in that regard. Wife pointed out in her requested findings how, in her view, Husband had “misconstrued and misapplied the formula.”

{32} The court entered findings of fact and conclusions of law on the issue repeating verbatim or almost verbatim the following two findings of fact and one conclusion of law requested by Wife.

Husband’s interpretation of limiting . . . [W]ife’s calculation of retirement [benefits] at the time of the divorce would deprive [W]ife of the natural and expected increase in the value of the pension over the years following the divorce.

[] The “time rule” theory of division of retirement is applicable and equitable here, and was intended by the parties as reflected by the entire formula for division of the postal service retirement. See *In re Marriage of Lehman*, 18 Cal[.] 4[th] 169, 955 P.2d 451 (1998), and *In re Marriage of Judd*, 68 Cal. App[.] 3d 515, 137 Cal[.] Rptr[.] [318] (1977). Under the time rule[,] the community is allocated a fraction of the benefits, the numerator representing length of service during marriage but before separation and the denominator representing the total length of service by the employee spouse. The ratio is then applied to the *final* plan benefit. See *In Re Marriage of Gowan*, 54 Cal[.] App[.] 4[th] 80, 62 Cal. Rptr[.] 2d 453 (1997).

....

The [c]ourt finds that there is sufficient information/evidence to determine that the benefit due and owing to [W]ife from [H]usband is \$590[] per month commencing from December[] 2005. Based on the monthly amount of \$590[], [H]usband owes [W]ife \$12,390 from December 2005 through August[] 2007 (21 months) less any amounts previously paid by [H]usband to [W]ife.

We conclude that the district court on remand reconsidered the question of which formula and calculations should prevail and determined that the MSA and domestic relations order supported Wife’s calculation.

{33} Husband nevertheless asserts that the court did not have evidence before it on which it could make such a determination because Wife’s counsel’s statements at the July 19, 2006, hearing, did not constitute evidence. Thus, Husband argues, Wife failed to present any evidence at the July 25, 2007, hearing to prove what particular calculation should prevail. It is reasonable to conclude that at the July 25, 2007, hearing, in considering what formula and calculation to adopt, the court chose that presented by Wife, through her counsel, at the July 19, 2006, hearing rather than the formula and calculation presented by Husband at the July 25, 2007, hearing. Except perhaps to determine salaries on a particular date for valuation purposes, there was no evidence required—only proposed formulas with calculations that flowed from those formulas. Wife’s counsel’s discussion was unchallenged. While the unchallenged explanation at the July 19, 2006, hearing was not taken under oath as testimony, we see no reasonable basis on which to deny the district court the discretion to consider it at the July 25, 2007, hearing. Husband did not contest the formula or calculation or the manner in which it was presented at the July 19, 2006, hearing. Nor did he raise in his motion for rehearing the particular issue of the manner in which it was presented. Not until the July 25, 2007, hearing did Husband argue that the court should not consider the formula it had earlier adopted because Wife’s counsel’s statements did not constitute competent evidence.

{34} The district court’s findings and conclusions reflect that at the time of the July 25, 2007, hearing, the court viewed the formula in the MSA and the domestic relations order and

Wife's calculation as consistent with application of the time-rule method of determining the community interest as it was developed in the California cases the court cited in its findings. *See Lehman*, 955 P.2d 451; *Gowan*, 62 Cal. Rptr. 2d 453; *In re Marriage of Judd*, 137 Cal. Rptr. 318. The court's stated view was that Wife was entitled to the natural and expected increase in value of the pension. While Wife did not present evidence other than the formula in the MSA and calculations based on the formula to show specific community effort that entitled her to base benefits on average salaries at the time of retirement eligibility, Husband did not present any evidence showing his own specific separate and singular effort that entitled him to base benefits on average salaries at the time of divorce. The court rejected Husband's offered calculation that was based solely on Husband's contrary view of the MSA and domestic relations order in determining the community interest.

{35} The court applied a method that can be applied in New Mexico when the parties agree to use it. *See Ruggles*, 116 N.M. at 66, 860 P.2d at 196 (stating that "the rule for distribution of a non[-]employee[-]spouse's interest in a retirement plan, whatever the rule is, should be applied only in the absence of an agreement between the spouses on the subject"). The time rule is a known formula and has been applied in one form or another in other jurisdictions. *See, e.g., Lehman*, 955 P.2d at 461 (holding that the superior court did not err in apportioning retirement benefits "as enhanced between community and separate property interests through its application of the time rule"); *Gowan*, 62 Cal. Rptr. 2d at 457 (determining that the district court did not abuse its discretion in applying the time rule and setting out that the ratio derived from the fraction in the rule is "multiplied by the final plan benefit to determine the community interest"); *Fondi v. Fondi*, 802 P.2d 1264, 1266, 1267 (Nev. 1990) (recognizing that the initial calculation must always comply with the time- rule concept and with the concept called the "wait and see" approach that "the community gains an interest in the pension *ultimately received by the employee spouse*, not simply the pension that would be recovered were the spouse to retire at the time of divorce," but acknowledging that "because occasionally this determination would be unfair," the employee spouse should be allowed to show that a pension increase was due to extraordinary post-divorce effort); *Gemma v. Gemma*, 778 P.2d 429, 431 (Nev. 1989) (stating that the time rule is one of two approaches used by courts in dividing retirement benefits and that the advantages of the rule "clearly outweigh any other method of pension division").

{36} It seems indisputable from the proceedings that occurred before the present appeal, despite the evident and unfortunate ambiguity and lack of clarity throughout the proceedings, that the district court determined on remand what it considered was the appropriate calculation of Wife's share of Husband's retirement benefits based on the MSA. We will therefore address the calculation issue in this appeal.

{37} Before doing so, however, we note the concern expressed in the dissent in this case about a determination pitting Wife's counsel's statements of the formula, with numbers and math, to use in arriving at the gross monthly benefits, against Husband's exhibit showing how he arrived at the gross monthly benefits using numbers and math. We remain unconcerned. The

only conceivable fact before the court that might be considered “evidence” which would be needed to complete the calculation of gross monthly benefits based on the different formula denominators would be Husband’s salary information at divorce and his salary information at retirement eligibility. All else was solely formulaic, Wife choosing the time-rule formula with the figures that necessarily flowed from the nature of the formula, particularly including a denominator in the fraction favoring valuation of the gross monthly benefits at the time of retirement eligibility; and Husband choosing the same formula but changing the denominator of the fraction so that the formula favored valuation of the gross monthly benefits at the time of divorce.

{38} Further, Husband expressly agreed at the July 19, 2006, hearing to the formula presented by Wife’s counsel and did not disagree with the calculation of gross monthly benefits using the denominator that flowed from the time-rule formula. The calculation represented a benefits valuation at the time of retirement eligibility and that valuation in turn was or would necessarily be derived based on Husband’s salaries then, salaries of which Husband was presumably aware. Husband did not present any evidence at the hearing. The most that might be thought, and it would be surmise, is that at the hearing Husband thought that the formula should be different. But the conflict, were it to have existed, would have been in the formula to be used, not in conflicting evidence. Once the formula issue was or would be decided, determining which salaries to use would flow from the formula. Determination of salaries at this time on remand will not be required or needed or serve a useful purpose.

{39} Last, we see no inconsistency in determining that Husband preserved the right to challenge the district court’s ultimate choice of Wife’s proposed formula, on the one hand, and also in determining that once the issue of which formula and calculation to use was before the court, the court could choose Wife’s version and not the version presented by Husband.

B. The Calculation Issue Before Us on Appeal

1. The Ambiguity

{40} The formula in the MSA implements a pay-as-it-comes-in or reserved-jurisdiction approach to distribution. *See Ruggles*, 116 N.M. at 54-55, 58, 60, 860 P.2d at 184-85, 188, 190 (discussing the lump-sum and pay-as-it-comes-in or reserved-jurisdiction methods of dividing vested, but unmatured, benefits and explaining that under the reserved-jurisdiction method, the non-employee spouse receives his or her portion of the benefits when the benefits are paid). But the MSA contains mixed signals as to the point in time that the benefits were to be valued for the purpose of arriving at Wife’s community share.

{41} The formula in Section II(A)(5) of the MSA and in the domestic relations order can support Wife’s and the district court’s views of the gross monthly benefits since the fraction’s denominator is to be the total number of months of credited service at Husband’s retirement, instead of the total number of months of credited service as of the date of divorce.

That formula is consistent with the time rule as it is customarily applied for distribution of benefits in a manner that calls for benefits valuation at the time of retirement or at first retirement eligibility. In the present case, this would translate into use of Husband's salaries at the time of retirement eligibility in determining the gross monthly retirement benefits in the formula.

{42} However, in the same Section II(A)(5), before setting out the formula, the MSA states that Wife will receive "[o]ne-half of the community interest in Husband's retirement plan with [the] United States Postal Service through the date of August 31, 1994." Also, Section II(B)(4) states that Husband will receive "[o]ne-half of the community interest in his retirement plan . . . and all of the interest he accrued in his retirement plan prior to the marriage and subsequent to August 31, 1994." These provisions, by specifying the date of August 31, 1994, provide support for Husband's view that under the MSA the benefits were to be valued at the time of divorce even though the distribution was to be made at first retirement eligibility or at retirement. Also supportive is the statement in the domestic relations order that the retirement benefits that accrued to Husband during the marriage up to the date of the divorce were community property.

{43} Dividing the benefits under different interpretations leads to significant valuation differences in this case. Under Wife's approach, her monthly benefits would be \$590, calculated as follows: $\$2,533 \times (192/412) \times (1/2) = \$590$, where (1) \$2,533 is Husband's gross monthly annuity calculated using his average three-year-high salary as of first retirement eligibility in December 2005, (2) 192 is the number of months of marriage and participating in the plan, (3) 412 is the total number of months Husband participated in the plan up to first retirement eligibility, and (4) one-half is Wife's share of the community retirement benefits, which would be \$590. In addition to her arguments relating to the documents, Wife argues that because she was not "cashed out" of the plan with a lump sum at the time of the divorce, and she therefore lacked the ability to control and invest her funds over the years, this Court should hold that the time rule was properly applied. She asserts that the time-rule calculation of benefits, which determines her share of benefits based on the gross amount of Husband's monthly annuity at first retirement eligibility, would compensate her for the time-accrued value of her share. To do otherwise, Wife argues, is inequitable, and neither the MSA nor any other evidence indicates that Wife intended the inequity that would result from Husband's calculation and position.

{44} Under Husband's approach, Wife's monthly share would be approximately \$373, calculated as follows: $\$1,073 \times (192/276) \times (1/2) = \$373$, where (1) \$1,073 is Husband's gross monthly annuity calculated using his average three-year-high salary as of September 1994, which was the approximate time of divorce, (2) 192 is the number of months of marriage and participating in the plan, (3) 276 is the total number of months Husband had participated in the plan up to the date of divorce, and (4) one-half is Wife's share of the community retirement benefits, which would be \$373. In oral argument, Husband contended that a smaller denominator figure, i.e., the total number of months Husband had participated in the plan up to the date of divorce, should be used because its use was more fair to Wife when the gross monthly annuity

was based on Husband's three-year-high salary at the time of divorce. Husband claims that the district court erred in utilizing "a 'high 3' salary factor, using [Husband's] post[-]divorce earnings as of December 11, 2005, rather than the 'high 3' factor as of the August 31, 1994[,] determination date." Pointing to MSA Sections II(A)(5) and II(B)(4) and the domestic relations order, Husband contends that the MSA is clear on the issue, in that it expressly limits Wife's entitlement to the date of August 31, 1994, or the date of divorce and expressly entitles Husband to the benefits after that date as his separate property.

2. Husband's Reliance on *Franklin*

{45} In an apparent attempt to show that his view of how the MSA reads should prevail, Husband argues that in *Franklin v. Franklin*, 116 N.M. 11, 859 P.2d 479 (Ct. App. 1993), this Court definitively "rejected [the w]ife's argument that the average salary figures to be utilized are those at the time of retirement, rather than [at] the time of divorce." *Franklin* does not assist Husband. It is not clear whether the formula in *Franklin* sets out the fraction that appears in the formula in the present case. The divorce decree did not specify a formula to be used in calculating the value and did not set a value on the benefits. *Id.* at 16, 859 P.2d at 484. This Court specifically wanted it known that the parties' arguments regarding the formulas and the wife's argument regarding the court's use of salary at the time of divorce were unclear. *Id.* at 15, 16, 859 P.2d at 483, 484. The parties argued for different formulas and calculations to determine the wife's share of the husband's benefits, with the husband's formula explained by his expert witness. *Id.* at 13-14, 859 P.2d at 481-82. The district court adopted the formula and calculation of the expert witness that were based, among other income adjustments, on the husband's average monthly compensation at the time of divorce. *Id.* at 14-15, 859 P.2d at 482-83.

{46} On appeal in *Franklin*, the wife argued that the district court should have applied the husband's final average monthly salary at the time of actual retirement; the husband argued that the district court correctly applied the salary figure as of the time of divorce. *Id.* at 15, 859 P.2d at 483. The wife's argument was based on the time-rule cases of *Fondi*, 802 P.2d at 1266, and *In re Marriage of Bulicek*, 800 P.2d 394, 399 (Wash. Ct. App. 1990), for the view that the benefits payable at retirement are based on a presumed foundation of community effort and the employee spouse had the burden to show otherwise. *Franklin*, 116 N.M. at 16-17, 859 P.2d at 484-85. The husband's argument was that his post-divorce higher salaries and bonuses were his separate property and that the court's income adjustments were necessary to safeguard his interests and to prevent an invasion of his separate property. *Id.* at 17, 859 P.2d at 485.

{47} As we discussed earlier in this opinion, this Court in *Franklin* did not address the question of first impression of what portion of the benefit was due to community effort and what portion was attributable to the husband as his sole and separate property. *Id.* We now clarify that decision to mean that we were not adopting any hard-fast rule as to demarcation of entitlement or as to what salaries to use in valuing the wife's community interest in the husband's retirement account. Nor in *Franklin* did we adopt the wife's view of the law based on *Fondi* and *Bulicek*.

Franklin, 116 N.M. at 17-18, 859 P.2d at 485-86. We stated that even were we to do so, the wife would lose on the question of which salary figures to use as part of the formula. *Id.* We concluded this because the wife did not present any evidence to support her contention that the salaries and bonuses were due to community effort and not separate effort, and because the husband presented the only evidence on the issue and that evidence showed that his post-divorce salary increases were due to his separate efforts. *Id.* It was on the particular circumstances of the case that we could not “say that the trial court erred in using the amount of [the h]usband’s average compensation as of the date of divorce in calculating [the w]ife’s share of the pension.” *Id.* at 19, 859 P.2d at 487.

{48} *Franklin* is limited to its particular circumstances. It does not support Husband’s position in this appeal. That in *Franklin* we expressly did not adopt and apply the wife’s view of the law and thereby reject the district court’s method of calculation does not require the conclusion that, under circumstances in the present case where the parties’ MSA sets out a formula customarily found in time-rule application, the district court was precluded from interpreting the MSA as calling for a calculation consistent with the time rule.

3. Husband’s Reliance on *Ruggles*

{49} Husband also attempts to support his position by relying on a footnote in *Ruggles* that refers to *Madrid*, 101 N.M. 504, 684 P.2d 1169, and *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987). See *Ruggles*, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7. Husband does not develop an argument as to how the footnote or either *Madrid* or *Mattox* applies here to support his position. Husband simply declares that *Ruggles* “[made] it clear that the community retirement benefits *must be valued as of the date of divorce*,” that the increases in his retirement benefits after divorce were his separate property, and that therefore the district court’s calculation was erroneous as a matter of law. Husband does not discuss the facts in *Madrid* or *Mattox*, does not discuss the manner in which this Court in *Franklin* dealt with *Madrid* and *Mattox*, does not discuss the context in which *Ruggles* footnoted *Madrid* and *Mattox*, and does not discuss *Ruggles*’ reference to *Franklin* and acknowledgment of the difficulty in determining whether a non-employee spouse can share in the increase in value of an employee-spouse’s benefits. We first set out important analytic aspects of those cases that Husband has omitted. We then discuss why we reject Husband’s attempt to support his position with the *Ruggles* footnote.

{50} In *Madrid*, the parties’ thirty-year marriage was dissolved two years before the husband died. 101 N.M. at 505, 684 P.2d at 1170. At death, the husband had been receiving retirement benefits for eleven years. *Id.* On remand from a prior appeal, the district court determined the discounted present value of the husband’s pension. *Id.* This Court followed our Supreme Court precedent that a pension is to be valued at the time of divorce. *Id.* We further stated that the increases after divorce were the husband’s separate property. *Id.* at 506, 684 P.2d at 1171.

{51} In *Mattox*, when the parties divorced after thirty-one years of marriage the

husband's pension plan was vested but not matured. 105 N.M. at 480-81, 734 P.2d at 260-61. The district court ordered a lump-sum payment to the wife that was to be valued at the time of trial, discounted to present value. *Id.* at 481-82, 734 P.2d at 261-62. In dicta, citing *Madrid*, we indicated that if the district court had divided the benefits on a pay-as-it-comes-in basis, the additional value from divorce to maturity date would be the husband's separate property. *Id.* at 483, 734 P.2d at 263.

{52} *Franklin* involved a formula for dividing periodic benefits payments that were distributed on a pay-as-it-comes-in basis. 116 N.M. at 12, 859 P.2d at 480. The parties were divorced after thirty-three years of marriage, and the husband retired five years after the divorce. *Id.* This Court stated that the issue of "which part of the [p]lan is due to community effort and which part of the [p]lan is attributable to [the employee spouse] as his sole and separate property" was a matter of first impression in New Mexico, and although it was determined that we did not need to decide the issue, at the same time, we determined that the issue "was not directly raised in either *Mattox* or *Madrid*." *Franklin*, 116 N.M. at 17, 859 P.2d at 485 (citations omitted). We indicated in our parenthetical description of *Madrid* that *Madrid* determined that "when [a] pension is given a discounted value for the purpose of division, it should be calculated as of the time of divorce." *Franklin*, 116 N.M. at 17, 859 P.2d at 485. We indicated in our parenthetical description of *Mattox* that the "substantial evidence requirement was met when the trial court's valuation of the pension fell within the range of figures offered by the parties' experts and both experts testified that their calculations of the present value of the pension did not take into consideration [the] husband's earnings between the date of trial and date of maturity of the pension." *Id.* We read our decision in *Franklin* to say that neither *Madrid* nor *Mattox* dictates in cases with pay-as-it-comes-in retirement distribution orders that the non-employee spouse can have no community interest in the employee-spouse's post-divorce benefits increases because those increases are separate property. This view is supported in *Ruggles*.

{53} In *Ruggles*, in the context of discussion of its prior cases involving division of future retirement benefits at the time of divorce, and in the footnote upon which Husband in the instant case relies, our Supreme Court referred to *Madrid* and *Mattox* as "significant opinions concerning the division, distribution, and valuation of retirement benefits upon dissolution." *Ruggles*, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7. Our Supreme Court indicated in the parenthetical to its *Madrid* citation that *Madrid* relied "on [two earlier Supreme Court cases] to hold that [the] retirement plan must be valued at [the] date of dissolution and conclud[ed] that increases in [the] plan's value occurring after dissolution are separate property of [the] employee spouse." *Ruggles*, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7. The Court indicated in the parenthetical to its *Mattox* citation that *Mattox* relied on four earlier Supreme Court cases in addressing various issues of valuation of a vested, unmatured plan when the *Mattox* Court stated, "New Mexico cases state clearly that a spouse is entitled to a community share of the portion of retirement that is vested but unmatured at the date of divorce." *Ruggles*, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7 (internal quotation marks and citation omitted).

{54} It is noteworthy that the Supreme Court denied certiorari in *Franklin* just four days before it issued its opinion in *Ruggles*. See *Franklin*, 116 N.M. 11, 859 P.2d 479; *Ruggles*, 116 N.M. 52, 860 P.2d 182. The Court in *Ruggles* stated that *Franklin* illustrated the difficulties that can arise in having to make determinations long after the date of divorce in pay-as-it-comes-in cases. *Ruggles*, 116 N.M. at 65 n.14, 860 P.2d at 195 n.14. Significantly, the Court stated that those difficulties included “determining whether the non[-]employee spouse may share in increases in the amount of the pension due to post[-]divorce increases in the employee[-]spouse’s salary, resulting either from ordinary promotions and cost of living increases or from the employee’s increased effort and achievement at work.” *Id.* We read these comments in *Ruggles* as indicating, as we indicated in *Franklin*, that a non-employee spouse may have a right to share in increases in the value of the employee-spouse’s retirement benefits.

{55} We cannot accept Husband’s arguments based on *Ruggles* for several reasons. First, Husband shows his own lack of faith in his references by failing to adequately develop them through analysis and argument. Second, we are dealing in the present case with written, agreed on, albeit ambiguous, language, and we see no reasonable basis on which to scuttle the district court’s interpretation of the language based on an argument that the *Ruggles* footnote somehow requires a contrary interpretation. Even were the footnote or *Madrid* or *Mattox* to state what Husband contends they stand for, these authorities would not supplant what the parties agreed upon as interpreted by the court. Third, the context to which the *Ruggles* footnote relates is sufficiently far afield from the context of calculation of benefits in a pay-as-it-comes-in circumstance as to give no support to Husband. Fourth, as we stated earlier in this opinion, we read *Franklin* and *Ruggles* to recognize that, absent an agreement covering division of benefits, a non-employee spouse may be allowed to share in the employee-spouse’s increased retirement benefits value.

{56} Thus, based on the foregoing discussion of *Madrid* and *Mattox* and the references to them in *Franklin* and *Ruggles*, based on *Ruggles*’ discussion relating to *Franklin*, and based on the foregoing reasons for rejecting Husband’s attempt to inject the *Ruggles* footnote, *Madrid*, and *Mattox* into the mix, we determine that Husband can gain no support from *Franklin* and *Ruggles*.

III. The District Court Did Not Err

{57} In the case at hand, it is apparent that the parties and their counsel handled the divorce without first achieving a clear, written understanding or, it appears, even an oral understanding. Ambiguity resulted. This case is one in which the proceedings leading up to this appeal were not adequately handled by courts and the parties. Further, this case is one in which there exists no specific evidence from which community effort or Husband’s singular, separate effort can be derived. The parties do not request that we consider whether such evidence is necessary or should be obtained on remand. We see little choice but to narrow the issue we review to the district court’s resolution of ambiguity in the MSA and the domestic relations order.

{58} The district court resolved the ambiguity in Wife's favor after considering the language in the documents, the nature of the formula, and the parties' calculations. One aspect of the MSA that supports the court's resolution is that the formula itself has every indicia of being the time rule. The time rule contemplates payment of benefits based on the value of the benefits at the time of retirement eligibility.

{59} A compelling aspect of how to determine what figures to use in the formula is the notion that the larger the denominator in the fraction, the smaller Wife's community share will be. The formula in this case expressly calls for the largest denominator, total years of credited service. In fairness to the non-employee spouse, use of this larger number as the denominator under application of the time rule customarily calls for determination of gross monthly benefits to be calculated based on a valuation of the benefits at first retirement eligibility, instead of a valuation of benefits at the time of divorce. It is telling that Husband's proffered calculation purposefully employed a denominator reflecting total credited service only up to divorce, a significantly lower figure than that expressly called for in the formula. His apparent, if not obvious purpose in using the lower denominator figure was to be able to use a valuation of the benefits based on his average salaries at the time of divorce, thereby matching a lower denominator to a lower valuation in fairness to Wife. To adopt Husband's way of calculating the monthly benefit would be to change the denominator specifically called for in the formula.

{60} We determine that the circumstances considered by the district court permit an interpretation of the MSA and domestic relations order favorable to Wife's position. Thus, under the circumstances in this case, we cannot say that the court's determinations were unsupported by substantial evidence, that the court's interpretation of the documents and ultimate calculation ruling were erroneous, or that the court erred in its application of the law to the facts.

CONCLUSION

{61} We affirm the district court's determination that Wife was entitled to begin receiving her share of Husband's retirement benefits when Husband first became eligible to retire. We also affirm the district court's calculation of Wife's share of retirement benefits.

{62} **IT IS SO ORDERED.**

JONATHAN B. SUTIN, Judge

I CONCUR:

JAMES J. WECHSLER, Judge

ROBERT E. ROBLES, Judge (concurring in part, dissenting in part).

CONCURRING IN PART AND DISSENTING IN PART OPINION

ROBLES, Judge (concurring in part and dissenting in part).

{63} I concur with the majority's analysis on the issue of when Wife was entitled to receive benefits. While I generally agree with the majority's legal analysis regarding calculation of retirement benefits, there must be a different conclusion under the facts of this case. My focus is on procedure and evidence surrounding the calculation issue. Because evidence is lacking in this case and under our standard of review we are unable to affirm, I would remand this case for further proceedings. I therefore must respectfully dissent.

{64} I agree with the majority that Husband preserved his argument concerning the formula to be used. However, this Court's lack of clarity on the first appeal led to the confusion surrounding the issue, and the conclusions regarding the calculation issue that this Court holds today are an adherence to the earlier, faulty process.

{65} In addition to what the majority has already noted at the initial hearing in 2006 where Husband appeared pro se, the following interactions occurred:

COURT: Okay. Alright. Well, [Husband], I mean, part of the representation is, and I know this is, you folks have been divorced for some long time, but you remember back in . . . actually, let me see if I can get a more specific date, back in 1994. Actually, September of 1994, that you signed a marital settlement agreement?

[HUSBAND]: Yes

COURT: Pursuant to your divorce, you remember that? Just listen to my question.

[HUSBAND]: Yes, sir. I agreed with the formula they came up with.

{66} Several minutes later, the court stated:

COURT: So, so what we're going to do is, is set out . . . getting that done, now if you need to get legal counsel, and herein lies one of the problems, and I understand, I'm sympathetic to a degree, [Husband], that, that you don't have legal counsel representing you, Ms. Spieldman is legal counsel just representing [Wife], and so you don't have legal counsel representing you, you're not a lawyer. . . . *If you want to get legal counsel and . . . run this information by your legal counsel if you can afford to do that, you're certainly welcome to do that and I'll listen to any argument that they want to make.* (Emphasis added).

You need to start that immediately and we'll find out, and I think probably August 15 would be a good target date for you to start looking at getting . . . that to be your first payment of \$590 and it will be \$590 from that point forward. Now if you get legal counsel and you're going to dispute that amount and those kinds of things, well you'll have to have your legal counsel file a motion in that regard but it sounds pretty reasonable to me . . . based upon the formula that you both have agreed to, which we're not going to go back and redo. The only thing I can think of that would, might make that a little bit different is . . . whether or not the figures that Ms. Speildman is going to receive from you with regard to your . . . salary and your employment . . . would change that number some degree . . . otherwise, I'm expecting that that's going to be the amount.

{67} As the majority notes, Husband did hire an attorney and file a motion for rehearing as the district court suggested he do. On the first appeal to this Court, we initially proposed to affirm the district court on the calculation issue. Husband filed a motion in opposition to summary affirmance on that point, and we retracted our initial proposed holding. In our memorandum opinion filed in February 2007, we implied that the issue was not preserved, and we remanded the case.

{68} This Court stated:

We decline to address Husband's arguments as to benefit computation because they were not raised in the district court. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.").

{69} We then went on to note that:

"[W]e have not been provided with a copy of the transcript from the hearing on Wife's motion The lack of analysis contained in the motion for rehearing and the failure of the district court to act upon the motion lead us to conclude that the district court never considered the arguments set forth in Husband's motion for reconsideration and clarified in his memorandum filed with this Court. As a result, Husband's arguments are not properly before us on appeal.

. . . .

We express no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before

Husband retires.

{70} The lack of clarity from this Court on the first appeal was, in part, due to the fact that we provided a ruling on the formula issue without a copy of the transcript from the hearing. The confusion on remand was compounded by the less than clear memorandum opinion generated by this Court. At the hearing on remand, Husband testified and entered into evidence an exhibit with his income information, his formula, and his calculations. Wife objected to the district court addressing the formula issue, arguing that it was beyond the scope of the remand, and that law of the case prevented the district court, and now this Court, from reviewing the issue. The majority correctly notes that the law of the case does not prevent us from examining this issue. The law of the case doctrine is discretionary and flexible, not a doctrine of inflexible law. *State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶ 21, 145 N.M. 769, 205 P.3d 816. When a former decision is erroneous and the opportunity remains for us to correct earlier mistakes, we should apply the law of the land as opposed to the law of the case. *Reese v. State*, 106 N.M. 505, 506, 745 P.2d 1153, 1154 (1987).

{71} After determining that the issue can be reached, the majority, ultimately, concludes “that the district court on remand reconsidered the question of which formula and calculations should prevail and determined that the MSA and domestic relations order supported Wife’s calculation.” Majority Op. ¶ 32. On examination of the record, however, I reach a different conclusion.

{72} At the initial 2006 hearing, Wife’s counsel asserted:

[W]e wrote in, in the formula, that the marital months were 192, according to my math [Husband] spent a total of 824 months earning this retirement. . . . [S]o that with my math, came out to be 23.2 percent is [Wife’s] share of the gross monthly annuity which would be \$2533. That’s what he would have started receiving December 11 of 2005. So, I calculated that [Husband] would be required to pay . . . [Wife] \$590 per month. That’s 23.2 times 2533, . . . he should have been paying it since December. [S]o he has accrued an arrearage of, for seven and a half months of retirement, . . . [Wife] should have received commencing December 11. [A]nd . . . seven and a half months times the \$590 is \$4425.

{73} This oral assertion of Wife’s counsel in 2006 is the only source in the record before this Court of the numbers that are being affirmed. The majority holds that it is reasonable to conclude that the district court relied on Wife’s counsel’s arguments from 2006, rather than the calculation presented by Husband in 2007, and that “[e]xcept perhaps to determine salaries on a particular date for valuation purposes, there was no evidence required.” Majority Op. ¶ 33. Further, the majority explains that “Husband did not contest the formula or calculation or the manner in which it was presented at the July 19, 2006, hearing,” and that it was not until 2007 that Husband argued that Wife’s formula had no support in evidence. *Id.* I must disagree with the majority.

{74} First, as the above excerpts of the transcript demonstrate, the court assured Husband that if he chose to revisit any issue, he could hire an attorney and be heard. The district court completely and fully adopted Wife's mere assertions in a minute order with the caveat that Husband could litigate those issues if he chose. However unorthodox and ill-advised the district court's actions may have been, the majority is correct that, in the immediate case, Husband's arguments were preserved. Majority Op. ¶ 28. However, it is inconsistent for this Court to hold that the issue was preserved by Husband when he hired an attorney and filed a motion for rehearing, which alerted the district court, as well as this Court, in the first appeal to his claim of error and, at the same time, state that Wife's counsel's explanation was unchallenged. Majority Op. ¶ 33. If we are to hold that the issue was and is preserved, and Husband wishes to litigate it, there is a challenge.

{75} Secondly, as this Court has consistently expressed, "[t]he mere assertions and arguments of counsel are not evidence." *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (filed 2008); *see also Henning v. Rounds*, 2007-NMCA-139, ¶ 2, 142 N.M. 803, 171 P.3d 317 ("We observe, [h]owever, arguments of counsel are not evidence." (alteration in original) (internal quotation marks and citation omitted)); *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 51, 128 N.M. 434, 993 P.2d 751 (filed 1999) ("[A]rguments of counsel are not evidence."); *Fitzsimmons v. Fitzsimmons*, 104 N.M. 420, 427, 722 P.2d 671, 678 (Ct. App. 1986) ("[C]ounsel's beliefs and statements cannot be considered as evidence."). Wife's counsel was not under oath, she was not giving testimony subject to cross-examination, and no documents were admitted into evidence before the district court. Husband had no duty nor opportunity to object to Wife's counsel's assertions and arguments regarding the calculation. Every single number that this Court affirms today came from either assertions or argument, not evidence. While Husband stated at the 2006 hearing that he agreed with the formula "that they came up with" in 1994, it does not follow that the numbers argued by Wife's counsel were the correct numbers to use. In the 2007 hearing on remand, Husband presented his income information, which was admitted into evidence, and which remains the only income evidence in the record. While the district court and the majority may disagree with Husband's numbers because they were based on income from the time of divorce instead of the time of eligibility, there is nothing in the record that would allow them to apply Wife's counsel's numbers from 2006, which were mere assertions of counsel when those assertions are competing with actual income information that has been admitted into evidence.

{76} Finally, under our standard of review, we simply cannot uphold the district court's determination. The proper lens through which to view our standard of review should be for substantial evidence. "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Concerned Residents of Santa Fe N., Inc. v. Santa Fe Estates, Inc.*, 2008-NMCA-042, ¶ 68, 143 N.M. 811, 182 P.3d 794 (internal quotation marks and citation omitted). Here, the evidence in the record simply does not support Wife's position. The district court's conclusion of law that "[t]he Court finds that there is sufficient

information/evidence to determine that the benefit due and owing to [W]ife from [H]usband is \$590[] per month” simply has no basis for support when the only numbers in evidence and in the record belong to Husband.

{77} In writing today, I recognize the need for finality and the security that comes with it. I acknowledge that the parties have already expended considerable time, effort, and money in this matter and deserve a prompt and equitable outcome. However, failing to address procedural difficulties is not justice, it is not in the parties’ interest, and it is not in the interest of this Court. Because of the confusion surrounding this case, Wife never submitted evidence. Were we to resolve this issue today, we would have to conclude that Husband is entitled to application of his numbers because they are the only ones in the record. This matter should be remanded for admission of evidence and a decision which is supported by more than mere assertions. Holding otherwise implies that one party or the other has not had their day in court. We should endeavor to resolve issues on their merits whenever possible. I therefore cannot agree with the majority on this particular issue, and I must dissent.

ROBERT E. ROBLES, Judge

Topic Index for *Garcia v. Garcia*, No. 28,106

AE APPEAL AND ERROR

AE-AJ	Appellate Jurisdiction
AE-LC	Law of the Case
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CN CONTRACTS

CN-AM	Ambiguous Contracts
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DR DOMESTIC RELATIONS

DR-MS	Marital Settlement Agreement
DR-RB	Retirement Benefits and Pensions

IRWIN V. IRWIN, 1996-NMCA-007, 121 N.M. 266, 910 P.2d 342 (Ct. App. 1995)

BARBARA A. IRWIN, Petitioner-Appellee,

vs.

CHARLES DOUGLAS IRWIN, Respondent-Appellant.

No. 14,216

COURT OF APPEALS OF NEW MEXICO
1996-NMCA-007, 121 N.M. 266, 910 P.2d 342

December 21, 1995, FILED

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY. ALVIN F. JONES, District Judge.

Certiorari not Applied for. Released for Publication January 24, 1996.

COUNSEL

Steven L. Tucker, Tucker Law Firm, P.C., Santa Fe, New Mexico, Attorney for Respondent-Appellant.
David F. Richards, Van Soelen, Greig & Richards, P.A., Clovis, New Mexico, Cynthia A. Fry, Albuquerque, New Mexico, Attorneys for Petitioner-Appellee.

JUDGES

THOMAS A. DONNELLY, Judge. RUDY S. APODACA, Chief Judge, HARRIS L. HARTZ, Judge, concur. HARRIS L. HARTZ, Judge, concurring.

AUTHOR: THOMAS A. DONNELLY

OPINION

{*267} OPINION

DONNELLY, Judge.

{1} Respondent (Husband) appeals from the trial court's division of community property and allocation of community debts in a divorce action. We address Husband's claims that (1) the trial court failed to apportion the community property equally between the parties, and (2) the trial court erred in failing to value and apportion properly the survivor's benefit provisions of Husband's state educational retirement plan. For the reasons discussed herein, we reverse.

FACTS

{2} In August 1988 Husband and Petitioner (Wife) permanently separated after a marriage of almost thirty years. Wife filed for divorce from Husband on January 31, 1989. Upon motion of Husband, the trial court entered an interim order on April 25, 1991, dissolving the marriage of the parties but expressly reserving jurisdiction to decide all other issues, including the division of community property, division of community indebtedness, and Wife's request for an award of alimony.

{3} At the time of the divorce, Husband was a retired professor from Eastern New Mexico University (ENMU), aged fifty-six, and Wife was a real estate agent, aged fifty-four. On February 20, 1992, the New Mexico Educational Retirement Board (Board) moved to intervene in the divorce proceedings, alleging that the Board "has an interest relating to the division, disposition, alteration and distribution of educational retirement benefits" of Husband and that the Board's interest was not "adequately represented by [the] existing parties." Thereafter, an order allowing intervention was entered by the trial court.

{4} Following a hearing on July 16, 1991, the trial court entered findings of fact and conclusions of law, an order, and a supplemental order apportioning the community property and community debts between the parties. The trial court found, among other things, that Husband was employed at ENMU from August 1963 through May 13, 1988; that he earned 26.92 years educational retirement credit with the Board during his marriage; that the retirement benefits were entirely community property; and that such benefits should be equally divided between the parties. The trial court also found:

12. On or about March, 1989, [Husband] falsely and without the consent of [Wife] represented himself to be a single man to the New Mexico Educational Retirement Board and made an election of benefit that pays him alone a monthly benefit of \$ 2,499.49 until his death with nothing payable to [Husband's] Beneficiary, his son . . . , except the residual of his last { *268 } monthly benefit or the balance of contributions if any, whichever is greater.

13. Since July 1, 1988, through August 1, 1991 [Husband] has received retirement income in his name alone in the total amount of \$ 94,984.62.

14. [Husband] has paid to [Wife] from the retirement benefits he has received, a total of \$ 25,714.16 which leaves a sum withheld from [Wife] in the amount of \$ 21,776.15 which would represent the balance of her 50% interest in [Husband's] retirement income.

15. Under Option "B" of the Retirement Benefit Plan . . . [Husband] would receive a benefit of \$ 1,932.61 with a like benefit to [Husband's] survivor. Had [Wife] an opportunity to participate in the selection of the Retirement Benefit as required by the . . . Board and of which she was fraudulently deprived by [Husband], [Wife] would have selected Option "B".

{5} The trial court ordered that both Husband and Wife receive fifty percent of the

gross benefits or contributions accrued in Husband's name and that Husband should be ordered to refund to the Board approximately \$ 14,000, representing the difference between the option "B" retirement benefit amount and the straight-life benefit amount Husband received since the date of his retirement.

{6} Based on its finding, the trial court ordered that Husband re-elect retirement benefit option "B," so that Husband would receive a monthly retirement benefit of \$ 2,169.31 with a like monthly benefit payable as survivor benefits to Wife. In accordance with the trial court's order, the Board began dividing payments of Husband's monthly retirement benefits so that fifty percent of the gross benefits are payable to each party.

{7} In making its allocation of community assets, the trial court also found that the parties earned the following amounts during the years listed:

	1988	1989	1990	1991
Wife	\$ 6,244.27	\$ 9,842.39	\$ 6,000.00	\$ 4,000.00
Husband	\$ 33,787.09	\$ 46,257.15	\$ 44,347.92	\$ 29,567.36

Based in part on the above finding, the trial court ordered that Wife should be awarded \$ 69,696.08 as a fifty-percent community interest in Husband's earnings for the period of August 1988 to the date of divorce in 1991.

I. APPORTIONMENT OF COMMUNITY PROPERTY

{8} Husband contends that the trial court erred in awarding Wife fifty percent of his earnings during the period of their separation and covering the time period from August 1988 to April 25, 1991, when their marriage was dissolved. Husband argues that earnings spent by either spouse prior to dissolution of their marriage, and which are no longer in existence, may not be categorized as community assets subject to distribution between the parties. The trial court found, and Husband does not dispute, that he earned \$ 139,392.16, and Wife earned \$ 26,086.66 during the period in question. It is also undisputed that each party spent his or her own earnings during the separation, and that no portion of such income remains either in the form of unexpended funds or other assets.

{9} The parties gave conflicting testimony concerning how they spent their respective earnings during the period of their separation. Husband testified that he spent approximately \$ 95,500 of his earnings on the payment of various community debts and the balance on living expenses, and that no part of the funds are currently remaining. Husband argues that both he and Wife had the unrestricted use of their respective incomes after their separation and continuing until the time their marriage was dissolved. He asserts that they paid their living expenses and had community debts consisting of, among other things, expenses in connection with community rental property. Husband also contends he used his earnings to pay taxes, to make payments on the residence occupied by Wife, to make monthly payments on rental property owned by the

community, to pay utility bills, and to pay gasoline and auto insurance for Wife's car. Wife disputes Husband's claims concerning the amounts expended by him on behalf of the community following their separation and testified that Husband spent only approximately \$ 51,900 of his total earnings for the payment of community debts, including income taxes.

{*269} {10} Under New Mexico law the trial courts are required in divorce proceedings to divide the community property equally. **Foutz v. Foutz**, 110 N.M. 642, 644, 798 P.2d 592, 594 (Ct. App. 1990). The division of property, however, need not be computed with mathematical exactness. See **Ridgway v. Ridgway**, 94 N.M. 345, 346, 610 P.2d 749, 750 (1980); **Bustos v. Gilroy**, 106 N.M. 808, 813, 751 P.2d 188, 193 (Ct. App. 1988). In order to apportion the community property equitably between the parties, the trial court must determine the extent and value of the community property and then deduct the amount of any community indebtedness. NMSA 1978, § 40-3-11 (Repl. Pamph. 1994). In performing this function, the community property, including personalty, should be valued according to its fair market value at the time of the dissolution of marriage. **Madrid v. Madrid**, 101 N.M. 504, 505, 684 P.2d 1169, 1170 (Ct. App. 1984).

{11} The trial court, in dividing the community property, assigned to Husband as an award of property the sum of one-half of \$ 139,392.16 (or \$ 69,696.08) as representing "Wife's community interest in Husband's earnings 1988-1991 (50%)," covering the period of their separation prior to the dissolution of their marriage. Husband argues that the trial court, in making its distribution of community property, erred in awarding \$ 69,696.08 of nonexistent funds to him and then awarding Wife an equal amount of existing community property in an attempt to equalize the distribution between the parties. Husband also notes that the trial court did not similarly award Wife the amount of her expended community earnings during the same period and then award him community property of equal value. Neither party argues on appeal that Husband's income during the period of their separation was utilized to acquire other assets which were actually available for distribution at the time of divorce, nor that Husband's disposition of such earnings was contrary to a court order. Nor did the trial court find that Husband violated any fiduciary responsibility to Wife concerning the disposition of his earnings during the separation of the parties.

{12} Wife asserts that the trial court's allocation of community assets and the award of Husband's earnings to him during their separation, with a corresponding award of other assets to her, was correct because during coverture each spouse has a present vested interest in half of all the community property, including community income, and she was deprived of the use of one-half of this income. See **DeTevis v. Aragon**, 104 N.M. 793, 798, 727 P.2d 558, 563 (Ct. App. 1986) (earnings attributable to labor and talent of spouses during marriage are community property); **Hakkila v. Hakkila**, 112 N.M. 172, 182, 812 P.2d 1320, 1330 (Ct. App.), cert. denied, 112 N.M. 77, 811 P.2d 575 (1991).

{13} Wife is correct that under New Mexico community property law each spouse has a one-half ownership interest in all community income or community assets acquired during the

marriage. Under NMSA 1978, Section 40-3-14(A) (Repl. Pam. 1994), either spouse has the power "to manage, control, dispose of and encumber the entire community personal property." See also **Herrera v. Health & Social Servs.**, 92 N.M. 331, 335, 587 P.2d 1342, 1346 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978). But once community personal property or earnings are expended, rather than being converted into an asset, there is no community asset to be shared or managed, and the spouse making the expenditure has no duty to reimburse the community absent some special circumstance such as violation of a court order or breach of a fiduciary duty to the other spouse. See **Dorbin v. Dorbin**, 105 N.M. 263, 268, 731 P.2d 959, 964 (Ct. App. 1986); **Roselli v. Rio Communities Serv. Station, Inc.**, 109 N.M. 509, 514, 787 P.2d 428, 433 (1990) (each party has power to manage and dispose of community's personal property, subject to fiduciary duty to other); **Lohbeck v. Lohbeck**, 72 N.M. 78, 79, 380 P.2d 825, 825 (1963) (entry of restraining order limits a spouse's authority to dispose of community property during pendency of divorce).

{14} Once the monies have been expended, such funds no longer constitute community assets subject to distribution on dissolution of the marriage. Here, there was no showing that the disposition of either spouse's {270} earnings or the monies withdrawn from the credit union account during the period of their separation was contrary to any court order or violated a fiduciary duty owed by one party to the other. Indeed, it is undisputed that a substantial portion of Husband's earnings and other funds was applied to the payment of community debts and obligations. Hence, we conclude that the trial court erred in making its apportionment of community assets by awarding Husband funds which no longer existed and then allowing Wife an offsetting award out of other existing community property.

II. TREATMENT OF SURVIVOR'S PENSION BENEFITS

{15} Husband also argues that the trial court erred in denying his request to apportion the distribution of Husband's pension in order to take into consideration the difference in the parties' respective life expectancies and the value of the survivor's benefit provision in the state educational retirement plan awarded to Wife. No New Mexico appellate decision has squarely addressed this issue.

{16} Husband asserts that because his pension is fully vested and matured, and Wife, at the time of divorce, had a greater life expectancy (twenty-one years) than his (seventeen years), the trial court erred in awarding each party one-half of the monthly distribution of such pension. He reasons that instead of giving each party one-half of the monthly pension payment, the amount awarded to Wife should have been adjusted in order to take into consideration the fact that according to statistical probabilities, Wife has a greater life expectancy than he, and because the trial court ordered him to give Wife the survivor's benefit option under the retirement plan, this will result in Wife receiving during her lifetime a greater portion of such pension benefits than Husband.

{17} Husband contends that the survivor's benefit provision under the retirement plan is a valuable feature of the plan and the value of the survivor's benefits must be factored into the

trial court's community property distribution formula. Stated another way, he argues that because of the differences in their ages, according to the mortality tables, there is a mathematical probability that Wife will outlive him, and, because the trial court ordered Husband to designate Wife as his beneficiary in the event of his death, Wife will continue to receive a portion of Husband's pension for the remainder of her life and will receive a greater portion of the total earned community pension benefits. *See* NMSA 1978, § 22-11-29(A)(1) (Repl. Pam. 1993).

{18} Wife's response to Husband's claim relies in part on this Court's decision in **Ruggles v. Ruggles**, 114 N.M. 63, 834 P.2d 940 (Ct. App. 1992) (**Ruggles I**), *rev'd*, 116 N.M. 52, 860 P.2d 182 (1995). **Ruggles I**, in accord with our Supreme Court's decision in **Schweitzer v. Burch**, 103 N.M. 612, 711 P.2d 889 (1985), held, *inter alia*, that unless the parties agree otherwise, the trial court in a divorce proceeding must apportion the community interest in a spouse's retirement plan on a "pay as it comes in" basis." **Ruggles I**, 114 N.M. at 68, 834 P.2d at 945. We note, however, that **Ruggles I** was subsequently reversed by our Supreme Court. Under the latter decision the trial court in dividing community assets, including a community pension, should award the nonemployee-spouse a lump-sum of cash or other property equal to the value of the nonemployee's interest in the plan, or in exceptional circumstances the court may order that the nonemployee-spouse be paid a monthly amount equal to his or her share of the pension as it is received. **Ruggles v. Ruggles**, 116 N.M. 52, 67, 860 P.2d 182, 197 (1993) (**Ruggles II**). The trial court here chose the latter method of distribution. As observed in **Ruggles II**, the preferred method of dealing with community interests in a retirement plan, when such benefits are vested or matured at the time of dissolution of marriage, is to value, divide, and distribute them in lump sum or other equivalent distribution at the time of dissolution. *Id.* at 54, 860 P.2d at 184. However, if this method of division is not practicable, the trial court may utilize other methods of distribution. *Id.* Neither **Ruggles II** nor the cases discussed therein, however, specifically addressed the issue of the community interest in a survivor's benefit provision as presented here.

{*271} {19} As observed by the intervenor Board, the effect of the trial court's order directing Husband to name Wife as the person entitled to the survivor's benefit option under the retirement plan will result in a lowering of the monthly retirement benefits which are payable during Husband's lifetime, but, assuming that Wife survives him, will result in her receiving a monthly pension payment during the remainder of her lifetime. Section 22-11-29(A)(1).

{20} A community interest in a pension plan containing a survivor's benefit provision constitutes a valuable portion of the community assets, and the survivor's benefit provision should be considered in valuing and distributing the community interest in the retirement plan. **Ruggles II**, 116 N.M. at 65 n.13, 67 n.17, 860 P.2d at 195 n.13, 197 n.17 (court should consider the effect of any death benefit on the present value of the retirement plan). *See generally* **Copeland v. Copeland**, 91 N.M. 409, 413, 575 P.2d 99, 103 (1978) (value of community interest in retirement benefit plan is property subject to division).

{21} Wife also argues that the trial court's distribution and apportionment of the

pension rights should be upheld because the trial court found that Husband improperly represented to the Board that he was a single man so as to deprive her of the survivor's benefit option. Wife is correct that where an employee-spouse has a choice of pension options, he or she should not be permitted by the choice of such options to defeat or reduce the interest of the nonemployee-spouse. **See In re Marriage of Stenquist**, 21 Cal. 3d 779, 582 P.2d 96, 100, 148 Cal. Rptr. 9 (Cal. 1978) (en banc) (spouse should not, by invoking condition within his or her control, be permitted to defeat community interest of other spouse). Here, the trial court ordered Husband to revoke his prior exercise of a retirement option which would have eliminated Wife's right to survivor's benefits. Husband was ordered to name Wife as his survivor under the retirement plan, and he was ordered to repay the Board out of his share of the community property the amount necessary to implement Wife's right to receive survivor's benefits under the plan. The record indicates that Husband subsequently complied with this order. In order to properly allocate the community assets of the parties, the trial court is required to fully determine the value of the retirement plan, including the value of the survivor's benefit provision, and to consider such value in apportioning each party's share of the total retirement benefits.

{22} In sum, we hold that in situations such as those existing here where the community interest in the pension is fully vested and matured, the trial court should value the retirement benefits as a whole, including the value of the survivor's benefit provision of the retirement plan, in order to fully and fairly apportion each party's share of the retirement benefits. **Ruggles II**, 116 N.M. at 67 n.17, 860 P.2d at 197 n.17. **See generally** Murray Projector, **Valuation of Retirement Benefits in Marriage Dissolutions**, 50 L.A. B. Bull. 229, 233-34 (Apr. 1975).

CONCLUSION

{23} The cause is remanded and the trial court is directed to modify its division of community property and allocation of the community indebtedness consistent with the principles discussed herein. The parties shall bear their own costs and attorney's fees on appeal.

{24} IT IS SO ORDERED.

THOMAS A. DONNELLY, Judge

WE CONCUR:

RUDY S. APODACA, Chief Judge

HARRIS L. HARTZ, Judge

CONCURRENCE

HARTZ, Judge (concurring).

{25} I join fully in Judge Donnelly's opinion. I write only to point out that under

Ruggles II it would often not be necessary to require the spouse who earned the pension to choose any particular method of receiving benefits. When one spouse has a vested, matured interest in a pension fund, the court would ordinarily award the nonemployee-spouse a lump sum of cash or other property equal to the value of the nonemployee's interest in the fund. In that event, it would not matter whether the employee-spouse elected an option that included a survivor's benefit.

HARRIS L HARTZ, Judge

Not Reported in P.3d, 2012 WL 2308737 (N.M.App.)
(Cite as: 2012 WL 2308737 (N.M.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of New Mexico.
Hope Liberty SALAZAR, Petitioner–Appellee,
v.
Anthony John SALAZAR, Respondent–Appellant.

No. 30,079.
May 23, 2012.

Appeal from the District Court of Bernalillo
County, Angela J. Jewell, District Judge.
Johnson Family Law, P.C., Barbara V. Johnson, Al-
buquerque, NM, for Appellee.

Hunter Law Firm, Colin Hunter, Albuquerque, NM,
for Appellant.

MEMORANDUM OPINION

VIGIL, Judge.

I. INTRODUCTION

*1 Husband appeals from an order of the dis-
trict court determining Wife's interest in Husband's
PERA retirement account. We reverse and remand
for further proceedings.

II. BACKGROUND

The judgment and final decree of dissolution of
marriage and custody was filed on October 24,
2008, with the district court reserving jurisdiction
to determine Wife's interest in Husband's PERA re-
tirement account at a status hearing in May 2009.
Following the status conference, the district court
entered its order finding that Wife's interest in Hus-
band's PERA benefits “needs to be valued and re-
duced to present cash value,” and the district court
appointed Dr. John Myers as its expert pursuant to
Rule 11–706 NMRA to assist the court on this is-
sue. After Dr. Myers submitted his report, a hearing

was held.

At the hearing, Husband presented testimony
from a PERA representative that PERA does not
conduct present day valuations of retirement bene-
fits, and the earliest PERA can prepare an estima-
tion of an employee's benefits is three years before
the employee's eligibility for retirement. She also
testified that PERA requires an order from the court
identifying the community interest and an identifi-
cation of the division of that interest between the
parties in order to divide retirement benefits
between the parties.

Husband testified that he was forty-two years
old, had completed fourteen years of service, and
that he believed he would be eligible to retire in
September 2020. The PERA representative testified
that a person is eligible for retirement under the
state general plan 3 when he has completed twenty-
five years of service with the state at any age, or on
a sliding scale of service of years upon reaching the
age of sixty.

Following the hearing, the district court filed
its findings of fact and conclusions of law (order).
In pertinent part, the district court made the follow-
ing findings of fact:

5. In the case of *Ruggles v. Ruggles*, 116 N.M.
52, 860 P.2d 182 [(1993)], the Supreme Court
stated: We hold that the preferred method of deal-
ing with these community assets is to treat them
as all other community assets are treated on dis-
solution—namely, to value, divide, and distribute
them (or other assets of equivalent value) to the
divorcing spouses. We realize that in some cases,
given the innumerable variations in pension plans
and the infinite variety in the circumstances of in-
dividual divorcing couples, it will not be possible
or practicable to achieve this preferred method of
distribution and that other methods, including the
reserved jurisdiction [or] pay as it comes in meth-
od, will have to be utilized.

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....

7. Dr. Myers found that the present value of the community interest in [Husband's] PERA benefits as of the end of the community, is about \$200,000.00, making each party's interest at \$100,000.00.

8. *Ruggles*, quoting from *Copeland v. Copeland*, 91 N.M. 409, 575 P.2d 99 [(1978)], states: It would appear that a flexible approach to this problem is needed. The trial court should make a determination of the present value of the unmatured pension benefits with a division of assets which includes this amount, or divide the pension on a pay as it comes in system. This way, if the community has sufficient assets to cover the value of the pension, an immediate division would make a final disposition; but, if the pension is the only valuable asset of the community and the employee spouse could not afford to deliver either goods or property worth the other spouse's interest, then the trial court may award the non-employee spouse his/her portion as the benefits are paid.

*2

17. The community has no assets to pay [Wife] her present cash value of [Husband's] PERA benefits.

18. When the youngest child is school age, the work related day care expense will terminate or be substantially reduced, and [Husband] will have the means to pay to [Wife] her then interest in his PERA benefits, whether he has elected to retire or not.

19. Once [Husband] retires, a QDRO can be entered to pay directly to [Wife], her then community interest.

(Internal quotation marks omitted.) The district court then entered the following pertinent conclusions of law:

2. The [c]ourt finds that based on the individual

circumstances of this divorcing couple, it is not possible or practicable to exercise the preferred method of distribution, that being to order [Husband] to pay at the time of divorce, the present cash value of [Wife's half] interest in his PERA benefits.

3. The [c]ourt chooses to exercise the reserved jurisdiction method.

4. The [c]ourt hereby reserves jurisdiction over the issue of distribution of [Wife's] interest in [Husband's] PERA benefits, until [the parties' youngest child], ... reaches the age of six (6), that being [in] November ... 2011.

5. If [Husband] does not elect to retire by November ... 2011, then in that event, he shall commence to pay directly to [Wife], her then valued interest in his PERA retirement account. This shall be effective November 15, 2011, and each and every month thereafter[.]

6. The PERA Administration Agency shall be contacted in August of 2011, to determine [Wife's] community interest in [Husband's] PERA benefits. Contact shall be made by [Husband].

7. When [Husband] elects to retire, then in that event, counsel shall execute a QDRO, to be submitted to the PERA Plan Account Administrator.

III. ANALYSIS

Husband appeals from the district court order, arguing that the district court erred in (1) making a determination that Wife's share of the his retirement benefits should be distributed before it is paid to Husband by PERA, and (2) in ordering PERA to perform a present value calculation of his benefits before he is eligible to retire. Wife also requests on appeal that we remand for the entry of an "Order Dividing PERA Retirement Benefits."

While the district court has wide discretion under *Ruggles* in crafting a remedy for the distribution of retirement benefits when the marital assets are

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insufficient to support immediate division of the value of the pension, the district court's remedy must be clearly expressed in its findings of fact, conclusions of law, and order. *See Ruggles*, 116 N.M. at 61–62, 860 P.2d at 191–92 (“[T]he trial court should have discretion in implementing [the lump sum] method, alone or in combination with other methods, including in an appropriate case the reserved jurisdiction method, in distributing the nonemployee spouse's interest upon dissolution.”); Rule 1–052 NMRA (requiring the district court to make findings of fact and conclusions of law when requested by a party in a non-jury trial).

***3** The parties disagree as to the meaning of the district court order regarding the requirements of Husband paying retirement benefits to Wife. Moreover, the district court's oral statements from the bench appear to be different from the remedy directed in its written order. *See San Pedro Neighborhood Ass'n v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 2009–NMCA–045, ¶ 8, 146 N.M. 106, 206 P.3d 1011 (“We do not consider the oral ruling as a final order, but simply as instructive in determining the court's intent where an ambiguity exists in the court's decision.” (internal quotation marks and citation omitted)). We conclude that the order contains material contradictions, inconsistencies, and vague and unworkable provisions that preclude effective review of the issues.

The unchallenged findings of fact establish that the lump sum distribution as advised under *Ruggles* is not a feasible method of distribution in this case. *See Ruggles*, 116 N.M. at 61–62, 860 P.2d at 191–92; *Stueber v. Pickard*, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991) (stating that unchallenged findings of fact are binding on appeal). Thus, the district court was entitled in its discretion to fashion another method of payment of Wife's share in the retirement benefits. *See Ruggles*, 116 N.M. at 61–62, 860 P.2d at 191–92. This being said, we are at a loss to understand exactly what the district court ordered and why. The evidence is uncontradicted that Husband cannot retire by Novem-

ber 2011; however, the order speaks in terms of what may occur if Husband “elects” not to retire by November 2011. Moreover, what is supposed to happen in November 2011, if Husband “elects” not to retire is at best ambiguous. While it appears that the order contemplates monthly payments, it fails to specify the amount of the monthly payment, whether the monthly payments remain the same, or how long the payments are to continue. Moreover, and critical to our conclusion, the order makes no determination of the value of Husband's retirement, reduced to present value as of the date of the divorce, or what Wife's actual interest in the retirement account is.

Thus, the district court's failure to clearly state its findings and conclusions precludes our ability to engage in meaningful review of this issue. *See Foutz v. Foutz*, 110 N.M. 642, 645, 798 P.2d 592, 595 (Ct.App.1990). We therefore remand for the district court to enter findings of fact, conclusions of law, and a final order regarding the court's decision pertaining to the method of distribution of benefits that clearly and effectively determines the issue for review in any further appeal. *See State ex rel. Human Servs. Dep't v. Coleman*, 104 N.M. 500, 505, 723 P.2d 971, 976 (Ct.App.1986) (“Where doubt or ambiguity exists as to whether the [district] court considered relevant evidence, or where other findings are required, the ends of justice require that the cause be remanded to the district court for the entry of additional findings and conclusions of law.”), *abrogated on other grounds by State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993).

***4** In addition, the district court order requires Husband to contact PERA in August of 2011 “to determine [Wife's] community interest in [Husband's] PERA benefits.” Husband contends this was error because the undisputed evidence before the district court is that PERA will not perform present day valuations. Alternatively, Wife asserts that this provision of the order should be ignored as harmless error because, she contends, the district

Not Reported in P.3d, 2012 WL 2308737 (N.M.App.)
(Cite as: 2012 WL 2308737 (N.M.App.))

court adopted Dr. Myers' finding that the present value of Wife's interest is \$100,000, making this directive by the district court merely "superfluous." We conclude that the district court ordered PERA to value the benefits and that it was error to do so.

Although the order takes note of Dr. Myers' calculation of the present value, it does not adopt that calculation as the court's own finding of the present value of the pension. Instead, the order directs Husband to contact PERA in August 2011 to determine Wife's interest in the retirement benefits. No logical reading of the order leads to a conclusion other than that the district court intends to rely on PERA's valuation to establish Wife's interest in Husband's retirement benefits. However, the undisputed testimony at the hearing was that PERA does not perform present value calculations on retirement benefits. Thus, the district court erred in ordering Husband to obtain a present value calculation of the value of Wife's share of his retirement benefits from PERA.

Upon remand, the district court must adopt a clear and definite method of valuation of the benefits accrued during the marriage. See *Gilmore v. Gilmore*, 2010–NMCA–013, ¶ 53, 147 N.M. 625, 227 P.3d 115 (“[U]nless and until our Supreme Court or Legislature decides that district courts are to default to a particular rule, formula, or methodology [for calculating division of retirement benefits between divorcing spouses], it is essential for effective appellate review on the issues that the court explain why it has chosen the formula or method of calculation that it uses.”). The district court must first attempt to assign a present day valuation of the benefits as of the date of the divorce. See *Ruggles*, 116 N.M. at 67–68, 860 P.2d at 197–98; *Mattox v. Mattox*, 105 N.M. 479, 481, 734 P.2d 259, 261 (Ct.App.1987) (“To value unmatured pension benefits, the trial court must determine their present value.”); *Copeland*, 91 N.M. at 413–14, 575 P.2d at 103–04 (“The cases are in agreement that at the time of the divorce the court must place a value on the pension rights and include it in the entire assets,

then make a distribution of the assets equitably.... The trial court should make a determination of the present value of the unmatured pension benefits with a division of assets which includes this amount, or divide the pension on a ‘pay as it comes in’ system.”).

If the district court concludes that insufficient evidence exists to assign a present value under these circumstances, it must make a clear and supported finding for its determination, and in its discretion determine and clearly support its decision for the appropriate course of action for valuation and distribution under a “reserved jurisdiction” method. *Palmer v. Palmer*, 2006–NMCA–112, ¶ 15, 140 N.M. 383, 142 P.3d 971 (stating that under the “reserved jurisdiction” method, “only the formula for division is determined at the time of divorce” (internal quotation marks and citations omitted)); *Ruggles*, 116 N.M. at 67, 860 P.2d at 197 (“One such occasion [where deferred distribution should be employed] will arise when the court has no satisfactory evidence upon which to make a finding of present value.”); 2.80.1600.10(A)(3) NMAC (12/28/2001) (providing that the court order must “divide[] the community interest in PERA retirement pensions or contributions ... [including] the percentage or dollar amount of each party’s interest in the gross pension as calculated at the time of retirement”).

*5 In making the foregoing determinations, the district court is entitled in its discretion to rely upon evidence previously presented of the present day value of the pension or, within its authority, request additional evidence to aid in its conclusion. See *Gilmore*, 2010–NMCA–013, ¶ 52 (“We will not in this case attempt to provide definite guidelines by which district courts in their mandated purpose to achieve an equitable result might determine which formula or method of calculation to use in dividing benefits when the parties have not agreed to a particular formula or methodology.”).

Finally, we note that the district court ordered that the parties execute a QDRO when Husband

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elects to retire. However, a QDRO is not applicable to retirement benefits distributed by PERA. *See* Attorney Instructions, Order Dividing PERA Retirement Benefits, available at <http://www.pera.state.nm.us/forms/AttyInstOrderDivPERABen.pdf>. Rather, the appropriate order to be entered pursuant to a division of PERA benefits in a divorce proceeding is an “Order Dividing PERA Retirement Benefits” as authorized by NMSA 1978, Sections 10–11–116 (1991) (amended 2010 and 2011), –130 (2005) (amended 2011), –136 (1995) of the New Mexico Public Employees Retirement Act and PERA Regulations 2.80.1600.1 to .50 NMAC (10/15/97) (amended 12/28/2001). *See* 2.80.1600.10 NMAC (providing requirements for orders dividing retirement benefits).

IV. CONCLUSION

The order of the district court is reversed and the case is remanded to the district court for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

WE CONCUR: CELIA FOY CASTILLO, Chief Judge and JONATHAN B. SUTIN, Judge.

N.M.App., 2012.

Salazar v. Salazar

Not Reported in P.3d, 2012 WL 2308737
(N.M.App.)

END OF DOCUMENT

FERS/TSP

Federal Retirement Plan Strategy

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**QUALIFIED DOMESTIC RELATIONS ORDERS:
AVOIDING MALPRACTICE**

Legal Malpractice

Legal malpractice involving a QDRO typically occurs when the matrimonial attorney fails to recognize one or both of the following issues:

- Timing
- Notice

Overview of Qualified Domestic Relations Orders (“QDROs”): A QDRO is a court order created by federal law (“ERISA”) that assigns retirement benefits or provides support to a *spouse, former spouse, child, or other dependent* (“Alternate Payee”) in connection with a state’s marital property laws. Congress enacted the QDRO provisions in 1984 under the Retirement Equity Act (“REAct”) to protect the rights of an Alternate Payee. Although created by federal law, state law determines the *substance* of the award.

Discovery Rule for Legal Malpractice in New Mexico

A malpractice claim against a family law attorney in New Mexico may sound in tort or contract.

I. Operation of Law

Strategic Point: Operation of Law - Following a divorce a former spouse loses his or her ERISA-based retirement benefits, in connection with the marriage, by operation of law. ERISA § 206.

Practice Tip: A QDRO should be filed *concurrently* with the divorce decree. Failure to do so may result in attorney *malpractice* if the client is later denied benefits.

A. Exception: Vesting of Survivor Benefits

Strategic Point: Vesting - Survivor Benefits “ordinarily” irrevocably vest in the current spouse upon the participant’s retirement. *Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008). *See Carmona* Casenote, attached; *see also Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997).

Carmona Timeline of Events- Atypical

Marriage.....Retirement.....*Divorce*.....Remarriage.....QDRO (current wife)

Hopkins Timeline of Events: Typical

Marriage.....*Divorce*.....Remarriage.....Retirement.....QDRO (former spouse)

B. Exception: Plan Documents Rule

Strategic Point: Plan Documents Rule - The United States Supreme Court recently held that an ERISA plan administrator is required to act in accordance with plan documents when determining beneficiary status. Accordingly, a plan administrator should disregard a waiver of benefits by a former spouse if that waiver conflicts with plan documents. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 128 S. Ct. 1225 (U.S. 2009). See *Kennedy* Lexis Expert Commentary.

ERISA's plan documents rule also preempts state law. See *Boggs v. Boggs*, 520 U.S. 833 (1997); see also *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

Practice Tip: Kennedy reinforces the importance of estate planning following a divorce. Advise the plan participant that he or she should contact the pension plan administrator immediately to make the appropriate beneficiary designation.

II. Notice

A. Risk of Loss is the Issue: Your client must be advised of the *Risk of Loss* of not entering the QDRO concurrently with the Dissolution of Marriage

B. Develop layers of Notice

1. Fee Agreement
2. Decree
3. Closing Letter
4. Notice of Adverse Interest

Practice Tip: File your QDRO concurrently with your divorce decree OR at the minimum provide notice to your client about the *risk of loss*; along with notice to the plan.

Attachment 1

NOTICE OF ADVERSE INTEREST

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

DONALD TRUMP

Petitioner,

v.

No. D-307-DM-\$\$\$\$

IVANKA TRUMP

COURT ORDER ASSIGNING
BENEFITS UNDER TSP

Respondent.

_____ /

NOTICE OF ADVERSE INTEREST IN THE [PLAN NAME]

Respondent, [NAME], has retained the undersigned counsel for the entry of a Qualified Domestic Relations Order ("QDRO") in Connection with Participant [NAME] and the above identified qualified retirement plan. See attached separate addendum for social security numbers.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via US mail to [plan name and address] and [attorney name and address] on [date].

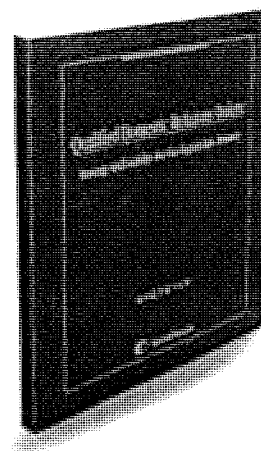
[attorney signature]

Expert Guidance on Settlement of Interests in Retirement Benefits

When it comes to retirement benefits, one of the most common and important assets in marital dissolution proceedings, family law attorneys need guidance on how to best protect a client's interests. In *Qualified Domestic Relations Orders*, author Raymond S. Dietrich provides the necessary information, a tightly focused analysis, and the strategies critical to properly positioning a case.

This gap-filling practice guide for handling and protecting retirement benefits in marital dissolutions stresses proper representation and negotiation techniques. Effective strategies in negotiating settlement of interests in retirement benefits are poorly understood partly because many family law attorneys often send the task out to a specialist, use a form book to draft a QDRO, or accept the pension plan administrator's offer of the "standard provisions." This book provides a succinct education regarding the structure of many pension plans, alerts the practitioner to unknown contingencies, empowers the attorney with negotiating strategies and warns of potential attorney liability.

This top-of-the-line coverage is a necessary addition for all family law attorneys handling significant asset cases—as well as forensic CPAs and pension plan administrators.



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About the Author

Raymond S. Dietrich manages a multi-jurisdictional law practice specializing in the drafting and litigation of Qualified Domestic Relations Orders ("QDROs") and related issues. Mr. Dietrich has created a unique niche law practice that specializes in an area of law that is notoriously mishandled. Mr. Dietrich is licensed and actively practices law in Virginia, the District of Columbia, Florida, Arizona, Nevada, and New York. The firm's website is located at www.galleongroup.net.

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FEDERAL RETIREMENT PLAN STRATEGY

The federal retirement system is comprised of two primary retirement systems:

- Federal Employee Retirement System (“FERS”)
- Civil Service Retirement System (“CSRS”)

The Office of Personnel Management (“OPM”) oversees the administration of benefits for both systems. FERS and CSRS are governmental defined benefit plans. Therefore, both plans are expressly exempt from ERISA. *See* ERISA § 4(b)(1). Remember, non-ERISA Plans are governed by their own set of rules. The most pervasive issue under the federal retirement system is survivor benefits.

Governing Law

The United States Code governs the benefits available under the federal retirement system. Specifically, CSRS is governed by 5 U.S.C. § 8301, *et seq.* FERS is governed by 5 U.S.C. § 8401, *et seq.* The federal code expressly authorizes state courts to award a former spouse retirement benefits. *See* 5 U.S.C. § 8345(j), § 8467.

The Code of Federal Regulations regulates the Office of Personnel Management’s handling of court orders affecting federal retirement. *See* 5 CFR 838, *et seq.* In executing court orders, OPM must honor the clear instructions of the court. The instructions, however, must be *express* and *unambiguous*. OPM will not interpret ambiguous language. Rather, OPM’s duties are purely ministerial. Therefore, it is crucial to expressly assign the appropriate benefits in the divorce decree. Otherwise, your client may be denied benefits at a later date.

Warning: Take note that the United States Code and the Code of Federal Regulations govern the ***procedural requirements*** for the assignment of federal retirement plan benefits, not state law. State law provides the substance of the award. Accordingly, your client will be denied benefits if you fail to follow federal law procedures. *See* *Palmer v. Palmer*, 142 P.3d 971 (N.M. Ct. App. 2006). In *Palmer*, the Court affirmed an award of survivor benefits in a post-decree assignment order even though the benefit was not addressed in the divorce decree. The Court’s ruling, however, had *little effect* since OPM rejected the wife’s claim for survivor benefits due to her failure to follow the applicable federal regulations. The *Palmer* case highlights the importance of retaining competent counsel familiar with federal retirement regulations.

Benefits

OPM has coined the term Court Order Acceptable for Processing (“COAP”) to describe a court order required to assign benefits under the federal retirement system.

To assign benefits to a former spouse, OPM also requires an “application letter.” No particular form is required. Thus, a cover letter accompanying the COAP will suffice. The letter should identify the parties’ social security numbers along with a statement that the enclosed court order is still in effect and has not been set aside or superseded. OPM also requires a certified copy of the divorce decree. OPM will compare the decree to the court order if survivor benefits become an issue, *below*.

§ 19.03[1] Three Core Benefits. The federal retirement system offers three core benefits to a participant. The benefits are also assignable to a former spouse. Importantly, each benefit must be expressly assigned in the COAP.

Core benefits available under the federal retirement system:

- 1) **Employee Annuity;**
- 2) **Refund of Employee Contributions;**
- 3) **Survivor Benefits.**

Employee Annuity

The employee annuity is the accrued benefit that is payable to the employee upon retirement. It is the stream of payments the employee receives at retirement. If there is no assignment of a survivor annuity to a spouse or former spouse, then the regulations refer to the annuity as the self-only annuity.

Refund of Employee Contributions

The employee is also permitted to take a cash-lump sum payout at retirement of his or her contributions in lieu of receiving a monthly pension benefit. A former spouse may also be assigned a share of the contributions that accrued during the marriage.

It is better practice, however, to *prohibit* the employee from taking a refund of contributions. The prohibition is permitted as long as the former spouse is awarded a share of the employee annuity or survivor benefit. Note that a refund of employee contributions is not equivalent to an accrued retirement benefit or present value of the pension. Some employees have elected a refund of their contributions just to prevent a former spouse from receiving a share of their accrued benefit.

Strategic Point: Prohibition of Refund of Employee Contributions—A state court may prohibit an employee from taking a refund of his employee contributions under FER/CSRS. See 5 U.S.C. § 8342(j)(1)(B).

Survivor Annuity

A survivor annuity provides a former spouse with a lifetime benefit in the event the participant predeceases the former spouse. Survivor benefits are assignable to a former spouse. *See* 5 U.S.C. § 8341. The maximum combined total of all current and former spouse annuities (not including any benefits based on an election of an insurable interest annuity) equals 55% of the self-only annuity. 5 C.F.R. § 831.641. Importantly, and unlike military retired pay, a survivor annuity may be split pro rata between a spouse and a former spouse. 5 C.F.R. § 838.922. Pro rata is a term that you should be familiar with. Under the federal regulations, it is defined as the number of months of service during the marriage as the numerator divided by the total number of months of service. Pro rata share is equivalent to the time-rule and coverture as discussed in Chapter 11. Keep in mind, that some states, such as Florida, prohibit the use of coverture.

Timing issues relating to retirement, death of the employee, and remarriage of the former spouse are critical when assigning federal retirement benefits. Importantly, the timing issues are dependent upon the “initial” assignment of benefits. The divorce decree is considered the first court order that divides federal benefits. *See* 5 CFR 838.06. Therefore, it is imperative that you address all three core benefits in the divorce decree. In other words, get it right the first time.

Timing: Survivor Benefits—Modification of a decree, order, agreement, or election is ineffective if made *after* the retirement or death of the employee. *See* 5 U.S.C. § 8341(h)(4); *Jackson v. Office of Personnel Management*, 2007 MSPB LEXIS 2397 (2007). A **modification** occurs when a subsequent court order awards a survivor annuity that was not previously awarded in the divorce decree. *Vaccaro v. Office of Personnel Management*, 262 F.3d 1280, 1287 (Fed. Cir. 2001).

In *Jackson*, the Merit System Protection Board denied a former spouse survivor benefits. The administrative judge held that the post-decree COAP was a modification of the divorce decree since it awarded the former spouse a survivor annuity not previously assigned in the decree. Since the “modifying” order was entered *after* the employee’s retirement, the subsequent order was void as to the assignment of survivor benefits.

Warning: Operation of Law—A pre-divorce retirement election automatically terminates upon divorce. 5 U.S.C. § 8339(j)(5). The survivor annuity may be reinstated by divorce decree, COAP, or subsequent election by the employee. The subsequent employee election must be made within two years of the decree.

The election may also be implied in cases where the employee dies within the two-year period and there is evidence that the employee intended for the annuity to continue to his former spouse. *Brush v. Office of Personnel Management*, 982 F.2d 1554 (Fed. Cir. 1992)

OPM must provide the employee with proper **notice** of the termination. *See Simpson v. Office of Personnel Management*, 347 F.3d 1361, 1365 (Fed. Cir. 2003). In *Simpson*, the appellate court found OPM’s notice of termination to be deficient. According to the

Court, the notice failed to explain that the employee must make a “re-election” for the survivor annuity to continue. The *Simpson* Court also affirmed the implied election rule under *Brush*.

Strategic Point: Remarriage—A former spouse will lose her survivor benefits if she remarries before reaching age of 55. 5 U.S.C. § 8341(h)(3). Advise your client in *writing* that his or her remarriage before the age of 55 will automatically terminate the survivor annuity.

Timing of Benefits

OPM only uses the “shared” method when assigning benefits to a former spouse. Thus, the former spouse may only commence his or her award at the *same time* of the participant. Therefore, if you desire to have former spouse benefits commence at the “normal” retirement age under the plan, you should include such language in the settlement agreement or decree.

Thrift Savings Plan

The federal retirement system also offers a supplemental defined contribution plan referred to as the Thrift Savings Plan (“TSP”). FERS employers make automatic contributions for their employees. Therefore, a FERS employee will have both a FERS pension and a TSP account. The TSP program is optional for CSRS employees.

As with any defined contribution plan, gains/losses and loans are the primary issue.

For employees who have also accrued military retired pay, note that there are two distinct TSP accounts. One is for the FERS/CSRS service or civilian account and the other is referred to as a military TSP account. The accounts are independent of each other. Therefore, the proper account must be identified for equitable distribution.

Over the past few years, TSP has undergone some procedural changes in regards to court orders. Recently, TSP has declined to calculate losses under the plan even when directed to do so by a court order. Fortunately, and after receiving a multitude of complaints, TSP has changed that practice and they are currently calculating both gains and losses on the account to be divided. Over all the TSP staff is easy to work with and approval of an order takes approximately four (4) weeks. In contrast, OPM can take as long as eighteen (18) months to approve a COAP. TSP contact information is as follows. Facsimile is their preferred method of communication.

TSP Legal Processing Unit
Fairfax Post Office
CODIS—P.O. Box 4390
Fairfax, VA 22038-9998
877-968-3778
703-592-0151 (facsimile)

OPM Model Language

OPM's role in the administration is ministerial in nature. OPM recommends that specific "model" language be used when making an assignment of benefits. Therefore, you should be familiar with OPM's "model" language prior to the resolution of your divorce case. OPM's model language is not mandatory, but it will assist you with a quicker approval of your case. OPM's contact information is as follows:

Office of Personnel Management

Garnishment Unit
PO Box 17
Washington, DC 20044
(202).606-0222
(202) 606-7958 (facsimile)

Social Security

Social Security Planning

Maximizing your Social Security Benefits (Oct. 16, 2013)

Social Security Planning

Course Outline

- I Social Security Overview, the Magnitude of the Decision
- II 5 Things that we will cover in the course today
 - Will Social Security be there for me?
 - How much can I expect to collect?
 - When should I apply for Social Security?
 - How can I maximize benefits?
 - Will Social Security be enough to live on in retirement?
- III Understanding the value of Social Security
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 - Value of COLA's
 - Survivorship benefits
- IV Will Social Security be there for me?
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 - Cost vs. Benefits through 2085
 - Social Security Reform Proposals
- V How much can I expect to collect?
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 - * AIME – PIA – FRA – COLA
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 - * What if you apply after Full Retirement Age?
 - * How to estimate your benefits
- VI Calculations of Spousal/Divorce Benefits
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 - Death of a spouse
 - Divorced Spouse Rules
 - Survivor Benefits
 - Rules for survivor benefits
- VII When should I apply for benefits?
 - Considerations (Health, Longevity, Need, Work, Survivor)
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 - Breakeven point
 - COLA's magnify postponement
- VIII How do I maximize my benefits?
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 - Apply at optimal time
 - Coordinate spousal/divorce benefits

- File and Suspend
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IX Will Social Security be enough?

X Consider Social Security in context

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- * Work

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- Having younger children when collecting
- Grandparent adopting grandchildren
- Remarrying after a divorce
- Remarrying after the death of a spouse

XII Open Discussion



Maximizing *your Social Security benefits*

October 16, 2013



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Now that you're getting close to retirement, we'd advise you to start thinking about when and how to begin receiving your Social Security benefits. Even though you're financially comfortable, you need to consider how this income will fit into your overall financial plan and decide which Social Security options make the most sense for you. A lot of things are changing with Social Security, so we thought you might appreciate this information.

First, the basics. Social Security has long provided Americans with a source of retirement income intended to last a lifetime. Frequent cost-of-living adjustments (COLA) help ensure that this income will keep pace with inflation. While few high net worth clients intend to rely on Social Security benefits as a meaningful source of retirement income, lifetime benefits can be larger than they might expect: nearly \$600,000 on average for a couple who turned 65 in 2010, and significantly more for high earners with longevity.¹

Social Security typically replaces about 40% of an individual's earned income.² That percentage generally is less—about 28%—for those with higher preretirement income.³ But, as a guaranteed benefit, Social Security can play a role in any retirement income plan, particularly given today's volatile investment climate and global economic uncertainty.

Given widespread concerns about the Social Security program's future solvency, it may seem ironic to refer to it as the "guaranteed" portion of your retirement income picture. But Social Security actually is on track to meet its obligations to retirees through 2037, after which, unless action is taken to significantly cut costs, benefits will be reduced by about 25%⁴—and only if no action is taken before then to strengthen the Social Security trust fund.

Your Social Security strategy: making choices

So, what's the best way to receive your Social Security benefits? Compared with other retirement planning decisions, choosing how to take Social Security may seem like an easy one. In fact, it can be surprisingly complex—and highly personal. The key is selecting the strategy that maximizes benefits for you and for your spouse, if you're married. You'll also need to consider how you and your spouse can coordinate strategies given your relative ages and incomes. If you're single, the main considerations are when you plan to retire and your life expectancy. Here's a quick look at some of the choices available.

¹Urban Institute. "Social Security and Medicare Taxes and Benefits Over a Lifetime," June 2011.

²Social Security Administration. "Understanding the Benefits," February 2013.

³National Academy of Social Insurance. "Social Security Benefits, Finances, and Policy Options: A Primer," April 2012. Based on estimates from the 2012 Annual Report of the Board of Trustees, SSA.

⁴SSA Office of Retirement and Disability Policy. "The Future Financial Status of the Social Security Administration," 2010.

When to start benefits

• Age 62

About 74% of today's retirees start benefits at the earliest possible age, locking in a major reduction compared with benefits at full retirement age.⁵ Starting this early may be necessary if you're in poor health or need the income. But with life expectancies now reaching into the 90s, delaying benefits can be preferable for many retirees.

• Full retirement age (FRA)

This is when Social Security will provide you with full benefits. The FRA is used to calculate any reduction in benefits (if taken earlier) or increase (if taken later). FRAs vary based on date of birth; visit ssa.gov to determine your FRA.

• Age 70

For each year you delay benefits between FRA and age 70, Social Security adds 7-8% to future benefits, plus the COLA adjustment. That guaranteed annual return can make this alternative very attractive, provided you have longevity. Delaying benefits until age 70 can also provide more income just when you may need it to help cover healthcare expenses.

• Break-even age

You may want to hedge your decision by identifying the age at which the cumulative benefits from delaying your start date will surpass the cumulative benefits from starting earlier. We can assist you in making this type of calculation.

How to take benefits

• Choosing spousal benefits

A lower-earning spouse may select his or her own benefits; spousal benefits (even those of an ex-spouse) of up to 50% of the higher earner's full benefit (once that spouse files); or a combination equal to the higher amount. Spousal benefits are reduced if the lower earner takes them before reaching FRA.

• Combining "step up" and "file-and-suspend" strategies

This alternative is increasingly popular because it can maximize benefits for both spouses. The lower-earning spouse takes reduced benefits early, then "steps up" to 50% of the higher earner's full benefit once that spouse reaches FRA and files for benefits. If the higher earner

then suspends benefits until a future date—or as late as age 70—he or she potentially can realize up to a 30% increase in lifetime benefits.

• Survivor benefits

A spouse can receive reduced survivor benefits at age 60 (or age 50 if disabled). When that spouse reaches FRA, he or she can step up to the higher of full survivor benefits or his or her full benefits. Note that survivor benefits increase if the higher-earning spouse delays taking benefits.

Other considerations

• Earning income

If you work after starting benefits, your monthly payment may be reduced. Before the year you reach FRA, benefits will be reduced \$1 for every \$2 earned above \$15,120 a year. In your FRA year (up until your FRA month), benefits will be reduced \$1 for every \$3 earned over \$40,080.⁶ After FRA, working will not reduce benefits. In fact, your benefits will be recalculated to include amounts previously withheld.

• Taxes

It's very likely that a portion of your Social Security benefits will be taxable. We can work with your tax advisor to review your situation and plan accordingly.

• A fresh start

Generally, the decisions you make about taking Social Security benefits are irrevocable. But if you change your mind after starting to receive benefits, it's possible to pay back all benefits received to date and reapply at a later age.

Believe it or not, this is just an overview of Social Security. There are a number of sophisticated Social Security strategies you may want to explore. An excellent starting point are calculators on the Social Security Administration website (ssa.gov) that let you and your spouse estimate different benefit amounts at age 62, at full retirement age and at age 70.

We'd like to help you take a closer look at your situation and compare strategies side by side, as well as help you integrate your future Social Security strategy into your broader wealth management plan. Please feel free to contact us at your convenience if you would like to discuss this important matter.

⁵Social Security Administration, "Annual Statistical Supplement, 2011," February 2012.

⁶Social Security Administration, "How Work Affects Your Benefits," January 2013.

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DIVIDING PENSIONS IN DIVORCE: NEGOTIATING AND DRAFTING SAFE SETTLEMENTS WITH QDROs AND PRESENT VALUES

Third Edition

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Daniel E. Kelley

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- New insights and case law into how to fight the double-dipping of pensions (see Chapter 11).
- New § 22.25 that presents a discussion on the topic of administrators' placing holds on participants' accounts upon receipt of "Draft" QDROs.
- Revised model QDROs for defined contribution plans, addressing the commencement of benefits for the alternate payee. Also, the outstanding plan loan language has been removed from Exhibit 2, which provides a fixed-dollar amount to the alternate payee (see Chapter 17).
- New tax tables that will enable you to determine the tax implications of dividing a defined benefit or defined contribution plan (see Chapter 15).
- A revised discussion on dividing railroad retirement plans to show attorneys how to guarantee payments to the former spouse for her entire lifetime, even after the death of the participant. Also included are warnings to be sure that the participant's benefits are segregated on a timely basis pending distribution to the former spouse, a new model Order for equitably dividing a railroad retirement plan pension, and excerpts from the recently revised Railroad Retirement Board's Guide to Dividing Railroad Pensions (see Chapter 25).
- A revised discussion on using QDROs to Obtain Past-Due Child Support, to encompass the "gross-up" of benefits for the alternate payee (see Chapter 28).

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CHAPTER 18

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§ 18.01 INTRODUCTION

Attorneys throughout the country have thousands of time bombs ticking away in their files. They consist of QDROs that were never prepared; QDROs that were prepared, but never approved by the company; QDROs that were prepared and approved, but that exclude the requisite survivorship coverage to secure their client's share of the pension; QDROs that bear no relationship to the actual intent of the parties or the court.

The liability exposure of attorneys drafting their own QDROs has increased greatly over the last decade. After all, QDROs have been around for over 26 years. It is imperative that attorneys gain general insights into potential QDRO pitfalls. Remember, your malpractice starts with the *separation agreement*. You should review chapter 16 carefully. That chapter outlines QDRO criteria that you should address in the separation agreement if you do *not* prepare the QDRO contemporaneously with the divorce — although that approach is not recommended.

This chapter is broken into four separate sections. Section 18.02 contains QDRO issues to which you should pay careful attention. Mistakes detailed in this section could very easily rise to the level of a malpractice lawsuit. You may want to read and reread these issues several times over. While beneficiary designations do not fit exactly into this chapter, the authors felt it most appropriate to include a discussion here because the Supreme Court case on the subject focused on what QDROs can and cannot do. The U.S. Supreme Court's decision in the case of *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*,¹ is now essential reading for domestic relations practitioners. Because it ruled that a waiver signed by the nonparticipant spouse of her interest in a defined contribution plan was not binding on the plan and that the plan was correct in making a distribution based on an old beneficiary designation that it had in its files, it is now imperative that an attorney warn her or his clients that they contact all current and previous employers/plan administrators to review all previous beneficiary designations to see if they are still appropriate. Section 18.03 contains issues that may not result in a sure-fire malpractice case, but could give you some sleepless nights along with some phone calls from your old client. Section 18.04 contains some QDRO issues that if not adhered to, could easily cost you some aggravation and your client some lost dollars down the road. Finally, Section 18.05 contains some esoteric QDRO issues that are not common knowledge among family law practitioners, even those with some QDRO experience. You may pick up some tips here that could help secure your client's full benefit entitlements.

Section 18.06 contains a sample termination letter fashioned by an acknowledged expert attorney in the field, Randall A. Lowry, that we believe you should incorporate into your practice. A well-drafted termination letter will reduce an

¹ 555 U.S. 285, 129 S. Ct. 865 (2009).

attorney's liability in at least three ways. Besides presenting the final bill and perhaps "selling" future services, it will:

- (1) Start the clock running for the statute of limitations by officially terminating the relationship, i.e. thus the moniker "Termination Letter."
- (2) Clearly apportion responsibility for carrying out necessary tasks to the appropriate party.
- (3) Clarify the judgment entry so less confusion (and liability) exists.

§ 18.02 SURE-FIRE WAYS TO END UP IN A MALPRACTICE LAWSUIT

[A] Failure to Draft the QDRO at the Time of Divorce

It is very important for any divorce lawyer to remember to draft the QDRO at the time of the parties' divorce. The incidence of disgruntled former spouses who realize after the divorce that no QDRO was ever prepared in their case is on the rise. In some cases, the situation can be rectified by drafting the QDRO as soon as the omission is realized. In others, however, it is too late: perhaps the participant has died, or the participant has already retired and elected his new spouse as the survivor. In one case, the participant had retired six years previously, unbeknownst to the former spouse, and no QDRO had ever been prepared. The former spouse's divorce decree stated that she was entitled to 35 percent of the participant's pension benefits when he retired and that he was required to elect a joint and survivor annuity for her protection upon retirement. Not only was a QDRO never prepared, but when the participant retired, he elected his girlfriend as a beneficiary under a five-year certain and continuous option.

These scenarios are becoming more common as the baby-boomer generation moves closer to early retirement age. Because "*QDRO*" is not a household word, many former spouses rely on the terms of their judgment entry of divorce, believing that a pension check will simply appear in their mailbox one day. Attorneys can avoid this growing malpractice trap by drafting the QDRO when the parties get divorced. An attorney who does not know how to draft one should call an expert who does. While it is not necessarily desirable to use a company's own model QDRO language, it certainly can serve as a good starting point. Call the company and ask them if they have sample QDROs.

Incorporate the QDRO by Reference: When the QDRO is drafted, it should be incorporated by reference directly into the judgment entry as "Attachment A." All it takes is one sentence in the judgment entry to make the attached QDRO a part of the judgment entry itself. Unfortunately, many attorneys who do incorporate the QDRO by reference try to repeat many of the provisions of the QDRO in

the decree itself. This often leads to confusion and future wasted legal fees for the attorney's client as opposing counsel notices subtle differences in the judgment entry language and the attached QDRO. Just let the QDRO do the talking. Do not restate some or all of the provisions of the QDRO in the judgment entry when they have already been incorporated entirely by reference.

Warning. This is an important and real cautionary tale of a just-concluded (June 2011) attorney malpractice trial. We make the point that failure to draft the QDRO or court order appropriate for the plan being divided in a timely manner can harm the attorney in another, less expected way. Even if the order gets in before the death or the retirement of the participant, the delay can have other disastrous effects. The prominence of this warning stems from the authors attendance at a recent malpractice trial in which the jury made an award of nearly \$150,000 to a former client whose order on his wife's pension was not filed for nearly three years and who did not obtain life insurance to protect his interests in her teacher pension before her death. This case is interesting because the uncontroverted testimony in the case from the two attorneys testifying (plaintiff's and defendant's) as to the standard of care agreed that the failure to get the order approved in a timely fashion *caused no financial damage to the plaintiff*. Because the order was placed on the plan before the death of the participant, it clearly was not failure to file the QDRO-like vehicle dividing the Ohio pension that caused financial injury. Instead, because Ohio government plans do not have pre-retirement survivorship protection for former spouses, just a potential refund of a portion of contributions, it is imperative to obtain life insurance on the participant to protect the property rights of former spouses. In fact, the separation agreement drafted by the attorney for the nonparticipant (who he was now suing) was clear as to the necessity for life insurance. But the damage to the defendant attorney's reputation with the jury was significant each time the three-year delay was discussed. In this specific case, testimony was offered that the nonparticipant was told at least three times to obtain life insurance to protect his share of the teacher pension. How then was the absence of life insurance the fault of the attorney who clearly informed the client of its importance as evidenced in the separation agreement/judgment entry? While we are simplifying the case, it is the opinion of the authors that the constant repetition of the three-year failure to file the order (which — you remember — was not a proximate cause of the pension loss) so tainted the defendant attorney in the eyes of the jurors that more specific evidence exonerating the attorney was overlooked or ignored. In other words, we believe the failure to get timely approval of an order made the attorney in the malpractice case look guilty to the jurors in a way that was difficult to dismiss with even the most cogent of arguments. Thus, an attorney needs to recognize that failure to meet standard of care guidelines on the timely filing of orders opens him or her up to other charges that are more likely to stick because the jurors have already categorized how you conduct your practice.

[B] Failure to Draft the QDRO and the Participant Quit His Job

It doesn't just take a participant's untimely death to cause problems. If you do not draft the QDRO at the time of the parties' divorce, the alternate payee could lose everything if the participant simply terminates his employment. This is especially true for 401(k) plans and other types of defined contribution plans. A plan termination can trigger a participant's eligibility to receive a distribution under the plan. Once the distribution is made, it is, of course, too late to draft a QDRO. The money is no longer in the plan. You and your client are about to burn up thousands of dollars and many hours going after the participant to reclaim the money your client could have already received had the QDRO been drafted on a timely basis; and that's if the participant still has the money.

If you are involved in a case where the participant has terminated his employment before the QDRO was drafted, don't panic right away. First, subpoena the company to see if the funds are still in the plan. Some participants do not take their money immediately—they leave it in the plan, if permitted, to avoid immediate taxation and to accrue further investment gains. If he did take the money and run, now you can start panicking. However, all other legal avenues are still open to you—other than a QDRO. Clearly, there are issues of unjust enrichment that may be raised by those who have lost assets.

[Next page is 18-5.]

[C] Failure to Draft the QDRO and the Participant Retired

This is a rather common scenario in cases where the QDRO is not drafted at the time of divorce. As time flies by, the participant is getting closer to his retirement. Then the unthinkable happens. The participant retires, unbeknownst to the former client, and elects to receive his benefits in the form of a single life annuity (with no survivor protection). When your client calls you with the news, your first action should be to draft the QDRO so that she can begin receiving her monthly assigned share of the benefits *going forward*. Any lost payments to the alternate payee can be made up “on a prospective basis” by providing her with an additional amount for a temporary period of time. In other words, if your client lost \$5,000 because you failed to draft the QDRO a year ago when the participant retired, your QDRO can include language that provides the alternate payee with an additional, say \$250 per month for 20 months, along with her regular assignment.

The alternate payee can still run into a problem when it comes to guaranteeing her a lifetime stream of pension income. If the participant dies first, the alternate payee’s benefits will stop. This is due to the fact that the participant elected a single life annuity when he retired. Under ERISA, once the election is made, it is cast in stone. Your client (and you) should hope the participant lives a very, very long time.

[D] Failure to Draft the QDRO and the Participant Died

This is every attorney’s worst nightmare. I am not going into great detail here, because this topic is covered under Chapter 7, but suffice it to say, that most plan administrators will not currently honor a QDRO after the death of the plan participant. However, all may not be lost if:

1. The original separation agreement was comprehensive enough to be deemed a QDRO in its own right. If the separation agreement contained survivorship language along with other pertinent QDRO criteria (including the official name of the plan), then perhaps the plan administrator would honor the separation agreement as a QDRO and provide the alternate payee with a lifetime survivor annuity; or
2. The plan in question permits the use of *nunc pro tunc* QDROs. These, of course, are QDROs that are drafted after the participant’s death, but executed by the court (on a retroactive basis) as if it was prepared and signed before his death. More plan administrators every day are starting to accept *nunc pro tunc* QDROs. Again, see Chapter 7 for a detailed discussion of this issue.

[E] The QDRO Does Not Include Appropriate Survivorship Protection

If you are drafting a QDRO for a defined benefit pension plan, it is vital that the attorney includes survivorship rights for the alternate payee. In order to know what kind of survivorship protection to include in the QDRO, you must understand the distinctions between a separate interest QDRO and a shared payment QDRO. Under a separate interest QDRO, the alternate payee's benefits are actuarially adjusted to her own lifetime. This means that once they start, she'll get them for life. As a result, it is not necessary to include postretirement survivor protection in the QDRO. But you still need to include "preretirement" survivor protection for the alternate payee to secure her benefits in the event of the participant's death *before* retirement. You must also include the amount of survivor benefits that would be payable to the alternate payee. Do not simply include a blanket survivorship clause. Your QDRO should typically include language that limits the preretirement survivor protection *to the extent of her assigned interest*.

If you accidentally include postretirement survivor language in your separate interest QDRO, many plan administrators will alert you to this inconsistency. However, it is entirely possible that the plan administrator will accept your language. This could certainly have unintended results for the parties. Not only will the alternate payee receive her regular assigned separate interest, but she will also receive additional postretirement survivor benefits should the participant predecease her after the alternate payee's benefit commencement date. This will result in a "windfall" for the alternate payee — she'll get two separate benefits at the same time, and the participant's new spouse if any, will be locked out of any survivor benefits. In other words, the potential for malpractice doesn't only reside for the alternate payee's attorney (who forgets to include appropriate survivor protection in the QDRO), but it also exists for the participant's attorney who recklessly permitted the alternate payee's attorney to include postretirement survivor protection under a separate interest QDRO.

If you are utilizing the shared payment approach, where the alternate payee's benefits remain based on the participant's life expectancy, then your QDRO should include both pre and postretirement survivorship protection. Here too, you must limit each type of survivor coverage to the extent of the alternate payee's assigned interest.

[F] Failure to Use a Coverture Formula

Virtually every state in the country espouses the use of the coverture approach as the only equitable means of dividing benefits under a defined benefit pension plan. That's the good news. In drafting and reviewing over 100,000 QDROs for family law attorneys across the U.S., We are also happy to report that most attorneys we deal with are familiar with this approach and include coverture language in the separation agreement. If you are new to QDROs, then you should read Chapter 5 carefully. It spells out the methodology and logic behind the coverture formula.

And most judges are now familiar with the coverture approach also, so it is getting harder for participants' lawyers to sneak in a "frozen" assignment in the QDRO. Not using a coverture-based formula in your defined benefit QDRO can easily lead to a malpractice case in states where coverture is king.

Again, the authors suggest you read Chapter 5 carefully, because even if you are familiar with the coverture approach, it is still possible to get confused with some of the faulty, look-alike coverture language found in many company model QDROs.

[G] Failure to Include Early Retirement Subsidy Language in the QDRO

When Mary's attorney was preparing the separation agreement in her case, he was very careful to include a coverture formula that would provide her with 50 percent of the marital portion of the pension. He also included appropriate survivorship protection for Mary in the event of the participant's death. However, the separation agreement remained silent on the issue of the early retirement subsidy. What does this mean? Well, it could mean that Mary will only get \$300 per month for life instead of \$1,000 per month for life. That's over \$8,000 less in pension benefits each year for the rest of her life. She could easily lose over a quarter-million dollars over her lifetime. All this, because her divorce lawyer forgot to include a sentence in the separation agreement that should nowadays be automatic. The funny part is, opposing counsel would have agreed to include the subsidy language had it only been there. But now, it is too late to put the subsidy language in the QDRO, because the judge said "If it's not in the separation agreement, it's not going to be in the QDRO."

Virtually every pension plan includes early retirement incentives for plan participants in order to encourage them to retire before their 65th birthday. In laymen's terms, the early retirement subsidy simply means that the participant's pension benefits will not be actuarially reduced if he retires early and commences his pension before his normal retirement age. If a pension plan includes a full early retirement subsidy for participants who retire early at age 60 rather than age 65, the participant's pension will not be reduced at all even though he's starting his pension a full five years before his normal retirement age. Instead of receiving an actuarially reduced pension of, say \$1,000 per month, he'll get \$1,700 per month starting at age 60. This \$700 difference represents the early retirement subsidy. In one year, the subsidy is providing the participant with an extra \$8,400 in pension benefits. If you extrapolate this over his entire life expectancy, the value of the early retirement subsidy is huge. And as a co-owner of the pension, an alternate payee under a QDRO should also receive a portion of the subsidy should the participant retire early. It is only fair that her marital share of the pension remain unreduced if the participant's marital share is payable on an unreduced basis.

Therefore, if you represent the alternate payee under a defined benefit pension plan, you should "automatically" include language providing her with

a prorata share of any early retirement subsidy and supplements that may become payable under the plan in the event of the participant's early retirement. The following should become a mantra — "defined benefit pension plan means coverage, early retirement subsidies and survivor protection." Don't forget it.

[H] Failure to Follow Through with the Plan Administrator to Be Sure the QDRO Was Approved

This simple step can save a lot of heartache years later if the QDRO is initially rejected by the plan administrator. Thousands of QDROs are rejected *after* attorneys have already closed their files. Some companies take up to six months or more to review QDROs. It is critical that you follow through with the plan administrator until you receive an official approval letter from the plan administrator. They are required by law to let you know when the order is approved. If you do not follow through to be sure that the QDRO in your case was approved, bad things can happen, especially if the participant quits, retires or dies before the QDRO is officially approved. Also, if you forget to amend a rejected order in a timely fashion, the plan administrator may release any holds that have been placed on the participant's accounts. This means that the participant may elect a distribution (and receive it) before your amended QDRO is resubmitted for approval.

Once the QDRO is approved, you should read the approval letter carefully. The plan administrator may approve and interpret the QDRO in a manner not intended by the parties or the court. This could be due to an error in their interpretation or to substantive omissions in the QDRO. The QDRO approval letter often contains a detailed description of the rights and entitlements of the alternate payee.

[I] Failure to Audit Old QDRO Files

Do you have any ticking time bombs in your files? Is time running out on any QDROs that may have been inadequately drafted to secure your clients' rights? When your phone rings, and it is a former client telling you her ex-spouse has died and now, suddenly, there are questions about the pension plan they divided at divorce, are you completely confident that the QDRO you submitted was accepted by the plan administrator and that it fully secured your client's future benefit entitlements? Are you even sure that you prepared the QDRO for your former client in the first place?

During the infancy of QDROs, attorneys generally were not aware of, or did not concern themselves about, adverse consequences that could arise as the result of a breakdown in the QDRO process, especially when the client's retirement was years away. Now, many divorce lawyers wasted countless dollars and hours dealing with malpractice cases surrounding old QDROs that were either not

filed or not properly prepared. To avoid potential and costly liability exposure, all divorce attorneys should periodically review the QDROs in their files to determine whether any such documents were not officially approved by plan administrators. When reviewing old files, the attorney may find that a QDRO is deficient with respect to one or more substantive issues that could result in a significant loss for an alternate payee.

Among the critical issues that an attorney should review in old QDROs are the following:

1. Did you include appropriate “survivorship” protection for your client in the event of the participant’s death? Remember, if you did not include appropriate survivor language in the QDRO, your client may lose her entitlement to a lifetime pension annuity when the participant dies.
2. If your client was awarded a “marital portion” of the pension, did you use a coverture formula based on the participant’s final pension rather than freezing the alternate payee’s share at the time of divorce? By freezing your client’s share of the pension at divorce, you could cost your client thousands of dollars of lost monthly pension income that is rightfully hers.
3. Unless expressly prohibited by the divorce decree, did your QDRO provide the alternate payee with a proportionate share of the plan’s early retirement subsidies and/or supplements that are otherwise provided to early retirees under the plan? Not doing so could cut your client’s monthly pension income by more than half.

If any of the above omissions were made in the QDROs you prepared, you may want to consider reopening the cases under a Section 60(b) motion and submitting an amended QDRO to the plan administrator. The phone call you make to your client now will be a lot less painful than the one your client makes to you later.

[J] The Client Didn’t Want to Pay for a QDRO

Most family law attorneys are somewhat intimidated, and rightfully so, by the federal pension law known as the Retirement Income Security Act of 1974 (ERISA). ERISA makes the Internal Revenue Code seem almost readable. Before getting involved with ERISA and the intricacies of QDROs, attorneys should do their homework with their client, especially if the client is the alternate payee. An exercise in simple due diligence early on may prevent a malpractice case down the road. As little as the attorney may know about QDROs, the client knows even less — but clients will likely become quick studies in the future if the attorney fails to secure their benefits today.

There are some simple and routine steps to take in order to help limit liability exposure when dividing the participant's pension benefits. The following steps should become second nature to attorneys representing the nonparticipant spouse:

Written Disclosure Statement: Obtain a disclosure statement, in writing, from the participant regarding his pension benefits. It is common for employees to be covered under more than one plan. They may participate in a defined benefit pension plan and a 401(k) plan. They may have a deferred vested pension with a previous employer. Even submitting appropriate discovery to the current employer will not disclose benefits accrued with a predecessor employer. If they are executives, they probably participate in one or more nonqualified deferred compensation plans or stock option plans in addition to their regular ERISA-governed plans. If they are members of a union, they may participate simultaneously in the union's local pension plan and the national plan. Obtaining a written disclosure statement may make it easier to reopen the case later, if necessary, by showing that the participant purposely concealed his participation under one or more retirement programs.

Releases: Obtain a written authorization or release from the participant authorizing the company to release relevant pension information to assist in preparing an actuarial present value report and/or QDRO. Many companies will not even disclose the name of the plan without an appropriate release or subpoena.

Hire an Expert: An attorney involved in a medical malpractice case would certainly hire a medical expert. The same should be true for pension present value and QDRO issues. The family law attorney is the most underrated of all attorneys. A good divorce lawyer blends together skills that go beyond a comprehensive knowledge of family laws. At times, they are called upon to be a psychologist, tax lawyer, business lawyer, bankruptcy lawyer, a trial lawyer, and now, an ERISA pension lawyer. For present value issues, always hire an expert to value the participant's pension benefits. This is a prudent move even if the attorney intends to go the QDRO route. The attorney may also need an expert to assist in drafting the QDRO. Do not fall into the trap of constantly filling in the blanks of a company model QDRO. Company models are not intended as a means of obtaining and securing the best results for specific clients. Model QDROs rarely include early retirement subsidy language, postretirement cost-of-living adjustment (COLA) protection, coverture-based formulas, and so forth.

Written Disclaimer: Some clients do not want to spend the additional money on a pension present value or QDRO expert. If this is the case, the attorney should obtain a written disclaimer from them right away for protection years later when the client realizes just how much (or how little) they will actually receive from the participant's pension benefits. Producing a statement showing that the client declined the attorney's strong suggestion to obtain a pension valuation and QDRO expert during the divorce negotiations can help to avoid a malpractice case.

Explain Risks of Forfeiture: Did you explain the potential exposure to your client of losing and/or forfeiting certain pension rights? For example, the client may lose any rights to her former spouse's interest under a state plan should the participant die before retirement. Because state plans are exempt from ERISA's QDRO provisions, the nonparticipant spouse may have no standing as an eligible dependent for survivorship purposes. Also, the client's remarriage before age 55 may end her rights to survivorship benefits under such plans as the federal Civil Service Retirement System and military pension plan.

**[K] Failure to Revoke Previous Beneficiary Designations
with Employer/Plan Administrators**

Failure to warn a client that they need to contact all previous and current employers/plan administrators to change beneficiary designations for retirement plans and life insurance is a serious problem because of the Supreme Court's 9-0 decision in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*.²

The court ruled in *Kennedy* that a beneficiary designation signed by the plan participant William Kennedy in 1974 was the controlling document for the plan administrators and not the 1994 divorce decree where Liv Kennedy "is divested of all right, title, interest and claim in and to . . . [a]ny and sums . . . the proceeds [from] and any other rights relating to any . . . retirement plan, pension plan, or like benefit program existing by reason of [William's] past or present or future employment."³ Because William failed to change the beneficiary designation and had no contingent beneficiaries named, DuPont awarded the \$402,000 savings plan to his former spouse after his death in 2001. His estate (daughter) sued claiming the waiver trumped the beneficiary designation while the plan administrator argued that the plan was duty bound not to fritter away plan assets by looking beyond their records for waivers and judgment entries which might likely give rise to even more litigation as the quality of those waivers was questioned. The plan logic prevailed. However, the Fifth Circuit's (and the plan administrator's) reasoning that QDROs were the only "sole exception to the anti-alienation provisions" of ERISA was rejected by the Supreme Court. The plan administrator argued that a QDRO was the only way that Liv Kennedy could have waived her beneficiary designation.

This argument was rejected by the Court which said:

The Fifth Circuit found "significant support" for its contrary holding in the QDRO subsections, reasoning that "[i]n the marital-dissolution context, the QDRO provisions supply the *sole* exception to the anti-alienation provision."

² 555 U.S. 285, 129 S. Ct. 865 (2009).

³ Appl to Pet. For Cert. 64-65.

497 F.3d, at 430, a point that echoes in DuPont's argument here. But the negative implication of the QDRO language is not that simple. If a QDRO provided a way for a former spouse like Liv merely to waive benefits, this would be powerful evidence that the antialienation provision was meant to deny any effect to a waiver within a divorce decree but not a QDRO, else there would have been no need for the QDRO exception. But this is not so, and DuPont's argument rests on a false premise. In fact, a beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO, for a QDRO by definition requires that it be the "creat[ion] or recogni[tion of] the existence of an alternate payee's right to, or assign[ment] to an alternate payee [of] the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B)(i)(I). There is no QDRO for a simple waiver; there must be some succeeding designation of an alternate payee.^[8] Not being a mechanism for simply renouncing a claim to benefits, then, the QDRO provisions shed no light on whether a beneficiary may waive by a non-QDRO.⁴

Of course, the Court is correct that a QDRO is not the vehicle for changing a beneficiary designation. It is a way of securing a property right (including survivorship) for an alternate payee. In other words, DuPont did the right thing, but for some of the wrong reasons. The Court instead said that the plan administrator need only "look at the plan documents and records conforming to them" to determine beneficiary designations.

Please note, however, that the Supreme Court only addressed whether the actions by the plan administrator were proper. It did not say whether Liv Kennedy will get to keep the savings plan. It is the opinion of the authors and many others in the field that once DuPont made the payment to the former spouse that legal action by the estate was then possible. In that action the unjust enrichment of Liv and the efficacy of the waiver might then be especially germane.

One must wonder if the U.S. Supreme Court has now engineered a new, second exception to ERISA's antialienation and anti-assignment provisions. As everyone knows, the first exception is the *Qualified Domestic Relations Order (QDRO)*, which can provide benefits and survivorship rights to a former spouse. The new, second exception is a forgetful employee who does not understand the myriad of complexities associated with the ERISA-governed plans that are sponsored by his employer. The Supreme Court properly recognizes that "*The plan provided an easy way for William to change the designation, but for whatever reason he did not.*" Keep in mind that William did go into the plan administrator four days after his 1994 divorce to sign his DuPont Pension and Retirement Plan over to his daughter, Kari Kennedy. Is it unreasonable to think that he thought his one signature revoked all beneficiary designations including for the savings plan and evidenced his desire to do so, especially in light of the clear divorce decree waiver?

⁴ *Kennedy*, 129 S. Ct. at 873.

But the lesson for every domestic relations attorney is clear: Warn every client in writing that beneficiary designations with all retirement plans, savings plans and insurance must be changed upon divorce.

[L] Failure to Understand the Time Demands of Dormancy Rules or Statutes of Repose for Drafting the QDRO

Attorneys who take too much time to draft the QDRO can lose in less conventional ways than the untimely death of the plan participant. These less common dangers attributable to slow QDRO-drafting include issues of dormancy and repose. They will be discussed after a quick review of the most common cause of QDRO malpractice and disciplinary action by the bar: missed deadlines caused by the unexpected death of the plan participant, which causes a client to lose property rights.

[1] Death of the Plan Participant

The authors stress that drafting a QDRO contemporaneously with the divorce is prudent practice to avoid *the likelihood that the nonparticipant spouse will lose all rights to retirement benefits the court has granted if the plan participant dies either before or after retirement without a QDRO in place*. While this is a clear problem with defined benefit plans, it can also crop up with defined contribution plans where—because of multiple marriages and divorces—the plan may have dated—and inaccurate—beneficiary designations typically giving spouse number one all the benefits.

If the participant dies before retirement, the former spouse may lose all survivorship rights along with her entire property interest under a defined benefit plan unless she was named in the QDRO as a surviving spouse for purposes of the Qualified Preretirement Survivor Annuity (QPSA). With a defined contribution plan, the controlling documents in the absence of a QDRO are the beneficiary designation forms residing in the plan's files. With some plans it is possible that a Separate Interest QDRO without QPSA may still secure the alternate payee's benefits in the event of the death of the participant—these are typically referred to as Severed Interest QDROs, where the plan administrator effectively treats the alternate payee as if she is a plan participant, and she will receive her benefits no matter what (even if the participant predeceases her). Unfortunately, the Severed Interest Approach is not very common. With most Separate Interest QDROs, QPSA language is a necessity and the only way to secure the alternate payee's benefits in the event of the death of the participant before retirement. As a rule of thumb, the authors suggest that you always include QPSA protection for the alternate payee in your Separate Interest QDRO, unless you are sure that they administer their QDROs utilizing the Severed Interest Approach. You should also recognize that a very small number of plans that utilize the Severed Interest

Approach will interpret a Separate Interest QDRO with QPSA as conferring *both* the alternate payee's regular assigned portion of the benefits *and* the QPSA survivor benefits in the event of the participant's death — strange but true. This is not the pressing concern of this chapter, but is merely mentioned as a reminder that different plans can interpret virtually identical QDROs in very different ways. Thus, the trusty defined benefit QDRO that resides on your word processor and that you have come to rely on may not do exactly what you expect and reviewing (or demanding) a plan interpretation letter after the QDRO is qualified is still necessary.

Survivorship benefits under defined contribution plans like a 401(k) are governed by the beneficiary forms on file with the plan. Review that lead sentence again carefully: the judgment entry does not provide the plan directions, the plan's beneficiary designation does. Thus, if a plan participant remarries and does not change the old beneficiary designation, it remains in place! If the participant remarries and then dies, the former spouse gets the account balance. If the participant remarries and divorces again with the court awarding spouse number two a share of the benefit, spouse number one will collect the entire benefit if the participant has not changed that beneficiary form. As a result of the Supreme Court decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*,^{4.1} the disenfranchised former spouse will find little success trooping into court to assert that the plan change its beneficiary award to include the current spouse.

■ **Practice Tip:** In *Kennedy* and the cases that follow, where the plan makes awards that do not comport with the decisions of the domestic relations courts, the current (or former) spouse should go directly after the recipient of the benefit, typically for unjust enrichment. In fact, many of the courts explicitly point to that remedy. Courts have merely shielded plans from the administrative burden of worrying about anything other than what is in their files. That leads to a practice pointer. If the QDRO is not ready, a prudent practice for the attorney for the nonparticipant would be to send a certified copy of the judgment entry to the plan with a cover letter asserting the property rights of the second spouse. It would also be useful to prod the plan into contacting the participant to make the necessary beneficiary change designation. They may not do so but, at the very least, they become more malleable if the unfortunate happens. This may perform a function similar to a restraining order and the attorney will have a far stronger *nunc pro tunc* argument with the judge's signed order in the plan files. It is also possible that the signed judgment entry may be deemed a QDRO by the plan in the event of the untimely death of the plan participant. This practice pointer holds especially true in cases of

^{4.1} 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009).

multiple marriages where a plan participant has been married and divorced several times while accruing benefits under a plan.

To recap: If the participant elected a Qualified Joint & Survivor Annuity (QJSA) at retirement, it becomes payable upon his death. The pension dies with him and a survivor annuity commences for the elected beneficiary or beneficiaries. Because a married plan participant must obtain a written waiver from his current spouse to waive her mandated 50 percent Joint & Survivor Annuity, securing survivorship is typically not a problem for the current spouse. The former spouse, however, who received a portion of the defined benefit plan in the divorce, can lose everything if a QDRO is not on file naming her as surviving spouse for the QPSA if her former spouse dies before retirement or after retirement after not naming her in his survivorship election. Failure to draft the QDRO on a timely basis is the most common grounds for QDRO malpractice suits.

[2] Dormancy and Repose

When is it too late to submit a QDRO because of these artificially constructed deadlines as contrasted with the death of the plan participant? For dormancy, see *Marriage of Smith v. Smith*,^{4.2} and for statutes of repose see *Marriage of Johnson v. Masters*.^{4.3}

In *Smith*, a case from Kansas, the wife lost a large payment and half of a 401(k) plan because she did not draft the QDRO within five years nor effectuate the collection of the lump sum. In *Marriage of Johnson v. Masters*, the Wisconsin Court of Appeals certified an appeal to the Wisconsin Supreme Court after the circuit court had agreed with the plan participant that the nonparticipant's efforts to draft a QDRO 20 years and seven months after the divorce and a year after retirement were a violation of the state's 20-year statute of repose.^{4.4}

The authors have a different perspective. It is somewhat analogous to our view on the efficacy of *nunc pro tunc* orders. There are clear issues of property rights and equity involved with pensions and 401(k) plans. We see the dormancy and repose cases as specious attempts to confuse courts with an emotional appeal to the effect of: "Look how lazy and dilatory this person was in following your directions! He should be punished. Stupid, lazy people who do not do what you told them to do deserve nothing." It throws people who have been granted property into a legal lottery in which their counsel must act in a timely manner or they lose their property. "Good attorney, you win. Bad attorney, you lose."

It is the authors' opinion that such courts miss the clear concept of property "awards," which take place in state domestic relations courts. They are not contingent property grants; they are property awards. When the divorce court

^{4.2} 275 P.3d 931 (Kan. Ct. App. 2012).

^{4.3} 2012 WL 1109134 (Wis. Ct. App. Apr. 4, 2012).

^{4.4} Wis. Stat., § 893.40.

awards property to a former spouse (say one-half of the 401(k)), that portion is no longer considered the property of the former owner. In fact, the former owner should not even have standing in court to object to any actions the asset owner engages in with that property because it is no longer his property even if he continues to receive annual statements indicating how much is in the 401(k) account.

In the authors' view, this concept needs to be reinforced because it is so basic: The former property owner does not retain any property rights in assets given to the other party. While the person or group holding the asset may not know who the new owner is (because a QDRO has not yet been filed), the court certainly does know who that asset belongs to, and so do the parties. A QDRO is merely an order used to *effectuate* the re-titling of the asset into the name of the former spouse. While it is sound legal practice for a myriad of reasons to draft the orders in a timely fashion to avoid difficulties like the death of the plan participant or the untoward actions of the plan participant (or the stock market), the owner of the asset should never be blocked from exercising her property rights granted by the court. Time should not extinguish a clear property right. Certainly, the chance of the asset being lost or frittered away exists, but an artificial divestiture of a property right should not be countenanced by the court whether it is one year after the divorce or 20. Those individuals who are awarded specific assets in their divorce decree, especially pension assets, have enough hurdles to clear in securing that property without courts putting up another one.

An Important Constitutional Point. No court should be able to divest a property owner of her previously awarded property by employing dormancy or repose statutes without affording the property owner due process to protect that property. When a court buys into dormancy or repose arguments, it basically is saying that the property was never really awarded. That is nonsense in the eyes of the authors.

Let's look at the cases more closely. In *Smith*, the wife was to receive a \$175,000 payment from the husband in addition to one-half of his 401(k) account "effective as of the date of the divorce" that was in 1999. In 2009, the wife's attorney sent a letter demanding the \$175,000 and half of the 401(k). The wife argued that the original decree was unenforceable because the \$175,000 did not have a date attached nor did it contain "an order for the creation of a Qualified Domestic Relations Order (QDRO) to disburse the 401(k) funds owed."

The Kansas Court of Appeals affirmed the district court's decision that the judgment had become dormant. Both courts agreed that the wife had the affirmative responsibility to extend the life of the judgment entry past the five years after the filing date spelled out in K.S.A. 60-2404. Following the five years she had another two years to "revive the judgment." They felt she had missed both dates because she had neither moved to amend or alter the judgment and, in the words of the district court: "there have been no timely executions or proceedings in aid of execution on that judgment to avoid dormancy or to revive the dormant judgment."

The following paragraph from the *Smith* decision is likely to give chills to domestic relations attorneys with dormancy statutes in their states, which makes the point that “she [the nonparticipant awarded the property] had nothing to enforce” after missing the dormancy deadlines. In essence, the court is saying that property that was clearly awarded to one of the parties is lost if she does not move to collect it in a timely fashion:

“We agree that the district court had the obligation to enter a QDRO in order to enforce the judgment had one been timely requested. The problem for Pam, however, is that she waited until the judgment had become dormant to request it. Again, all she needed to do if she desired to enforce the judgment before it became dormant was first to procure from the court an order requiring Jeffrey to cooperate in providing information about the 401(k) account that was necessary in a QDRO. She then had only to obtain the court’s signature on a QDRO that would divide the plan according to the decree and submit it to the administrator of Jeffrey’s 401(k) account. *But once dormancy exceeded the time within which it could be revived, she had nothing to enforce.*”^{4,5} (Emphasis added by authors.)

QDROs are not the only property award that may require future actions and obligations of the receiving party. Would a court that awards the wife the BMW suddenly return the car to the husband years later because she did not transfer title or maintain current license plates?

§ 18.03 ACTIONS THAT MAY NOT RISE TO THE LEVEL OF FULL-BLOWN MALPRACTICE, BUT ARE SERIOUS NONETHELESS

[A] Including the Actuarial Present Value Amount in the QDRO

Now that both parties have stipulated to the present value of the participant’s pension benefits, it is agreed that a QDRO shall issue which provides the non-participant spouse with a portion of the participant’s pension benefits. As you prepare to complete the applicable section of the separation agreement, do not fall into the potential malpractice trap of incorporating the stipulated present value amount into the agreement.

The inherent problems caused by including the present value dollar amount in the separation agreement or the QDRO are part of the reasons that QDROs were created. Companies that sponsor defined benefit pension plans generally cannot administer QDROs that include an assignment in the form of a lump-sum dollar amount. This is because their plans only offer benefits payable in the form of a monthly dollar amount over the participant’s lifetime (or on an actuarially adjusted

^{4,5} *Marriage of Smith v. Smith*, 275 P.3d 931, 2012 WL 1649835 (Kan. App.) at 5.

basis over the alternate payee's lifetime). The following example illustrates this point:

EXAMPLE

Once both parties have stipulated to the present value of the participant's pension, it is agreed that a QDRO shall issue. Assume John, age 40, has worked for twenty years at Company ABC as of the date of his divorce from Jane. His accrued benefit under the plan as of the date of divorce is \$2,000 per month. Your valuation expert determines that the actuarial present value of John's accrued benefit is \$80,640 at the time of his divorce on August 1, 2009.

Actuarial present values are merely *snapshots* of the frozen accrued pension as of the date of divorce, and they are basically used for offsetting asset purposes only. In other words, if the parties own a home with a built-up equity of roughly \$80,000, then perhaps Jane can keep the house and John can keep his pension free and clear of any claim by Jane. In this case, the equity in the home will offset Jane's ownership interest in John's pension. The stipulated present value amount (in this case, \$80,640) is accurate for one day only—the date of valuation. The present value of John's pension benefits will change the following day and each day thereafter until he retires. It is for this reason that the stipulated present value amount should *never* be included in the separation agreement if a QDRO is anticipated. It may only serve to mislead the parties, their respective counsels, and perhaps even the judge. And it will certainly lead to a rejected QDRO if you attempt to include the lump sum figure in the QDRO.

Under a defined benefit pension plan, the only way to provide inflationary protection is to utilize the coverture, or marital portion approach. In this manner, the alternate payee's share of the benefits is based on 50 percent of the participant's ultimate pension and not the accrued benefit as of the date of divorce. The ultimate pension is then multiplied by a coverture fraction whereby the numerator is equal to the participant's years of service earned under the plan while married and the denominator is equal to the participant's total years of service under the plan at retirement.

While a reference to \$40,320 (50 percent of the present value of the pension in the example above) would appear simple enough to administer in the QDRO, this cannot be readily translated by the plan administrator years later, when benefits become payable in the form of a monthly annuity. Further, the value of 50 percent of the marital portion of John's pension at retirement will certainly differ greatly from the \$40,320 that reflected Jane's ownership interest at the time of divorce.

Clearly, the terms of the separation agreement that refer to \$80,620 (and to Jane's 1/2 interest) will have to be interpreted in a different fashion when the QDRO is prepared. Unfortunately, many attorneys wait months, even years, before drafting the QDRO. Once this issue arises years later, the big question is: On what basis do you now prepare the QDRO?

It is here where the battle lines are often drawn by the attorneys as they discuss the original intent of the parties. Do we freeze Jane's 50 percent share as of the date of divorce? How do we translate the originally stated sum of \$40,320 into a workable QDRO? Should Jane, who has an ownership right to a portion of John's pension, and who also must wait years before she can commence her share, be afforded inflationary protection via a coverture-based QDRO? Is it equitable for John to receive 100 percent of the inflationary protection on his \$40,320 piece of the present value, while Jane receives no growth on her ownership interest?

The attorney for John will argue that the intent was to freeze Jane's share of the pension and to prepare a QDRO that provides her with 50 percent of John's accrued benefit under the plan as of the date of divorce. Using 20/20 hindsight while attempting to show that he was keenly aware of this situation all along, John's attorney will say, "After all, that's why we decided to include the fixed-dollar present value figure in the separation agreement. She gets \$40,320 period" (or, now that we realize that she cannot get \$40,320, she should get a fixed-dollar facsimile when translated into a portion of John's monthly accrued benefit).

[Next page is 18-13.]

Jane's attorney will argue that the intent was to provide Jane with 50 percent of the *marital portion* of John's accrued benefit under the plan as of John's date of retirement, utilizing the coverture approach. After all, his 50 percent share of the value of the pension as of the date of divorce was also stated to be \$40,320. Why should Jane, who is a co-owner of John's pension, not be afforded the same inflationary increases that John is given on his \$40,320 share of the pension. Further, if your jurisdiction is one that readily accepts the use of the coverture method, then this argument will likely prevail when the dust settles.

Regardless of which party you represent, always state the alternate payee's share of the participant's pension in the form of a percentage of his monthly accrued pension. In the author's opinion, it is always best to use the coverture approach, which is the only equitable means of providing inflationary protection under a defined benefit pension plan.

In addition, when drafting the separation agreement, never refer to your client's share as being based on one-half of the value of the participant's benefits as of the date of divorce. This can be just as damaging as including the specific present value dollar amount. Your reference to *value* as of the date of divorce, might be interpreted as effectively freezing your client's share of the benefit as of the date of divorce. This would preclude use of the coverture formula when defining the alternate payee's share of the pension.

[B] Accidentally Using the Word "Vest, Vested, or Vesting" in the QDRO

If you are drafting a QDRO for a defined contribution plan, never mention the word "vested" when referencing the alternate payee's assigned share of the total account balance. Many Model QDROs that are prepared by plan administrators will include the following language: "The alternate payee is hereby assigned 50 percent of the participant's *vested* account balance under the plan as of [date of divorce]." This is a big "oops" if you represent the alternate payee. The word vesting refers to that portion of the participant's total account balance that is considered "nonforfeitable" as of any particular point in time. Many 401(k) plans include a vesting schedule for plan participants, where for example, they will be 30 percent vested in their account balance after three years of employment, 40 percent vested after four years, etc., until they are 100 percent vested in their total account balance. If a plan participant has \$20,000 in his 401(k) and terminates employment when he is only 40 percent vested, he will only be entitled to a distribution of \$8,000. A vesting schedule is a way to encourage employees to stay with their employer for the long haul, so that they don't quit after a couple of years and take their full 401(k) with them. Any nonvested amounts will then be reapportioned among the remaining workforce in a proportionate manner.

In the example above, if the alternate payee is assigned 50 percent of the participant's total *vested* account balance at the time of divorce (when he is only

40 percent vested), she would only receive \$4,000 (1/2 of the \$8,000 vested balance). This is not an equitable approach to use for a defined contribution plan QDRO. The alternate payee, as a co-owner of the assets in the plan, should be entitled to 1/2 of the participant's *total account balance*, whether it is vested or not. In our example above, the alternate payee should receive \$10,000 (1/2 of the \$20,000 total account balance). However, the alternate payee may not currently be eligible to receive her full assignment until the participant earns more vesting service under the plan. So don't be fooled by the word "vested" in the company model — just delete the word "vested." And if you do get initially caught by the vested trap, do a second QDRO to provide the alternate payee with any shortfall. The judge should be on your side in this case.

[C] Failure to Include Investment Growth Language in the QDRO

Remember to include affirmative language in your defined contribution QDRO that provides the alternate payee with any interest or investment income or losses attributable to her share of the participant's total account balance for periods subsequent to the date of division of plan assets. If you forget to include this language, the alternate payee's share of the participant's account could be deemed frozen as of the date of divorce. From a practical standpoint, however, most plan administrators would give her the growth on her funds even if the QDRO was silent on this issue, but it is certainly not worth the risk that you are dealing with a more lenient plan administrator. Also, don't forget to mention the investment losses as well as the gains, when you are addressing this issue.

[D] Failure to Explain the QDRO Provisions to the Client

Whether you draft the QDRO yourself from model QDRO language that you receive at a seminar or from a company, or whether you have your QDROs drafted by an expert, you should fully understand the provisions and implications of the QDRO so that you can properly explain them to your client. This is particularly true with respect to any survivorship rights that your client may or may not have or how your client's actual share of the benefits will be calculated by the plan administrator. Even if you represent the participant and have nothing to do with the drafting of the QDRO, you should review its terms with your client before it is implemented by the company.

If the separation agreement in your case is vague regarding the equitable division of the participant's pension benefits (e.g., "Wife gets one-half of husband's pension with Company ABC"), the participant may be surprised many years later to realize that the QDRO language provided the alternate payee with a portion of the participant's accrued benefit at retirement (using a coverture fraction), while the participant expected the alternate payee to receive one-half of the participant's frozen accrued benefit at the time of the divorce. Complications can also arise when the participant learns that the alternate payee is receiving a

portion of the participant's annual postretirement COLAs. Even though the QDRO language may be deemed equitable, it may not necessarily adhere to the intent of the parties, especially your client.

Before your QDRO is submitted to the company for processing, you should fully review its terms with your client. You should discuss features such as the following:

- Coverture-based formula
- Pre- and postretirement survivorship rights
- COLAs, if any
- Early retirement subsidies and supplements, if any
- Commencement date alternatives for the alternate payee
- How the alternate payee's share of the benefits is to be calculated (coverture versus another approach)
- Actuarial adjustments for early commencement
- Actuarial adjustments for conversion to alternate payee's life expectancy

The one case that will most certainly get you in trouble is when the alternate payee is awarded a fixed-dollar portion of the participant's pension benefits. For example, the divorce decree may assign the amount of \$1,000 per month to the alternate payee. So your QDRO also includes the reference to the \$1,000 a month. If you don't explain to the alternate payee that her eventual share of the benefits may be actuarially reduced to reflect her longer life expectancy and also further reduced if she elects to start her share early (before the participant retires), then you can certainly expect a 2 a.m. phone call when she finds out she will only be receiving \$300 per month instead of the \$1,000 figure that she remembers so well from her judgment entry of divorce. A few extra minutes with your client now can save you many hours (and perhaps many dollars) down the road.

§ 18.04 ACTIONS THAT ARE NOT SO BAD, BUT THE ATTORNEY SHOULD KNOW BETTER

[A] Sending in a "Draft" QDRO for a Retired Participant

If the plan participant is already retired and in receipt of his monthly pension annuity, you should consider getting the QDRO signed by the judge before submitting it to the plan administrator for review. Even if the plan administrator encourages attorneys to send "draft" orders for pre-approval, you should still get your QDRO signed right away, even if it may ultimately be rejected by the plan. This is the only way to insure that the plan administrator will immediately suspend and segregate the alternate payee's "called-for" portion of the pension

while the QDRO process is pending. If you simply send in a draft order for pre-approval, it is entirely possible that the plan administrator will not yet begin to withhold the appropriate amounts from the participant's monthly pension. This is because many plan administrators treat "draft" orders as mere pages of paper with no legal meaning behind them. However, a signed QDRO document requires the plan administrators to withhold the alternate payee's share in accordance with the terms of the QDRO, whether or not the order will be initially rejected. Some attorneys will inquire with the plan administrator whether a hold will be placed on the alternate payee's benefits if a draft order is submitted. A simple request to the plan may be easier and less time consuming than getting the judge's signature right away. But a warning to those who do submit a draft order: Even if the plan administrator will place an appropriate hold on the participant's benefits upon the receipt of a draft order, they may only keep the hold in place for a limited period of time (for example, six months). So you had better be "on top of your game" or be willing to quickly amend the terms of the order if the company rejects it. Then, once the deficiencies in the order are cured and it is officially approved as a QDRO, the plan administrator will pay the appropriate portion of the withheld amounts to the alternate payee.

[B] Sending in a "Separate Interest" QDRO for a Retired Participant

Remember, if the participant is already retired when the parties get divorced, you must utilize the shared payment approach for your QDRO. Under this approach, the alternate payee simply *shares* in each monthly pension check paid to the participant. It is generally too late to draft a separate interest QDRO. In other words, once the participant is retired, the alternate payee's share of the benefits can no longer be tied to her life expectancy through the use of a separate interest QDRO. While this mistake probably won't end up in a malpractice claim, you'll have to expend a lot more effort by redrafting the QDRO using a shared payment approach. Also, remember to include postretirement survivorship protection for the alternate payee based on the same level of coverage elected by the participant on the date of his retirement, if any.

[C] Including Investment Earnings in a Defined Benefit QDRO

Never include language in a traditional defined benefit pension plan QDRO that provides the alternate payee with interest and investment income on her assigned share of the participant's benefits. Remember, under a defined benefit pension plan, there are no individual accounts and hence no interest or investment earnings posted to any accounts. The only way to provide inflationary protection for the alternate payee is to utilize the coverture, or marital portion approach, which bases the alternate payee's share of the benefits on the participant's accrued benefit

as of the date of retirement, not the date of divorce. See Chapter 5 for a detailed description of the coverture formula.

[D] Failure to Realize the Participant Just Took a Loan from the 401(k)

In most cases, plan loans that were taken during the marriage are utilized for some marital purpose, such as the purchase of a home, a car, a college education for the children, etc. In such cases, it makes sense that the alternate payee's assigned share of the 401(k) benefits is first reduced by any outstanding loan balance. However, we encourage attorneys who represent the alternate payee to watch out for a participant who attempts to make a loan or withdrawal just before the submission of a QDRO in order to artificially reduce the alternate payee's assigned percent share of the benefits. You can always obtain this information from the plan prior to preparing the QDRO. If the plan statement indicates that the participant took out a loan just before the divorce and "squirreled" it away somewhere, then be sure to include language in your QDRO that reads as follows:

"The alternate payee's percentage share of the total account balance as specified above is to be calculated without regard to any previous loans made by the participant before the date of divorce."

What if you forget to include the above language and the alternate payee's share is reduced for a loan that was not used for a marital purpose? You can always prepare a "supplemental" or second QDRO in the case if you determine that the alternate payee is entitled to further funds from the participant's benefits. As long as you can prove your case to the judge and the participant still has funds in the plan, just do another QDRO.

[E] "DB" QDRO Has "DC" Language

If you are drafting a QDRO for a "defined benefit pension plan," do not include/mention the following in the QDRO:

1. Don't refer to the participant's "total account balance"
2. Don't include a lump sum dollar amount
3. Don't include interest or investment earnings or appreciation language for the alternate payee
4. Don't name the alternate payee's "estate" as a beneficiary
5. Don't provide the alternate payee with an immediate distribution upon approval of the QDRO.

Your QDRO will surely be rejected if it includes one or more of the above items that are usually only found in a QDRO for a defined contribution plan, such as a 401(k).

[F] “DC” QDRO Has “DB” Language

If you are drafting a QDRO for a “defined contribution” plan, do not include/mention the following in the QDRO:

1. Don’t refer to the participant’s “accrued benefit”
2. Don’t include a monthly benefit amount
3. Don’t use a coverture formula
4. Don’t provide the alternate payee with COLA or early retirement subsidy protection
5. Don’t include ERISA’s pre- or postretirement survivor annuity language
6. Don’t require the alternate payee to wait until the participant attains the plan’s earliest retirement age before she can commence benefits.

Your QDRO will likely be rejected if you include one or more of the above items in your QDRO. And if it is not rejected, it may be interpreted in a manner that may be unintended by the parties.

[G] Failure to Carefully Review the Plan’s QDRO Approval Letter

The plan administrator has just sent you a letter approving the QDRO that was drafted on behalf of your client. Is your job done? Perhaps not. It is quite possible that the plan administrator’s interpretation of your QDRO will not match the intent of the parties, including how you thought the QDRO would be administered. If the QDRO approval letter does not include a complete description of how the company will interpret the provisions of the QDRO, you should request this information.

Quite often, a QDRO is not very specific with regard to survivorship rights for the alternate payee. There may be a single sentence in the QDRO that provides the alternate payee with preretirement or postretirement survivorship rights, but usually the method of calculation of the survivor benefits is missing from the QDRO. A good plan administrator will reject a QDRO if it is silent with regard to the extent of such survivorship protection for the alternate payee. You should definitely inquire as to how the plan administrator will actually calculate these death benefits, if any, that may become payable to an alternate payee.

Another area of potential conflict deals with the duration of benefits to the alternate payee. A properly drafted QDRO must be specific with respect to the duration of benefits payable to the alternate payee. For example, if the intent is to

provide the alternate payee with an annuity payable for the alternate payee's entire lifetime, then the QDRO must contain language to this effect. In other words, the QDRO should state that the alternate payee's share of the benefits is to be actuarially adjusted based on her own life expectancy. Otherwise, the plan administrator may interpret your QDRO to provide benefits to the alternate payee for only so long as the participant is alive and receiving benefits.

[H] Using the Plan's Own Model QDRO Language

Now that QDROs have been around for awhile, many plan administrators have developed their own model QDROs for use by family law attorneys. While the use of such models may expedite the QDRO approval process, you should review the terms of the QDRO carefully to be sure that the intent of the parties is fully satisfied. Many sample QDROs effectively mandate the terms of a property settlement by being very restrictive in their methodology. Do not let a plan administrator dictate the terms of your property settlement. For example, many model QDROs do not contain any language regarding COLA adjustments or early retirement subsidies. Or they may contain faulty "coverture" language that effectively *freezes* your client's share of the pension. And they certainly do not include many of the protective clauses that should be included in a properly drafted QDRO. Remember, their goal is not to protect the rights of the alternate payee. Their models are designed solely to ease their own administrative burden regarding QDROs, and in many circumstances, to protect the rights of their own participants from a paternalistic perspective. So be very careful before you simply start "filling in the blanks" of a company's model QDRO.

§ 18.05 SOME ESOTERIC QDRO ISSUES

[A] The Plan Administrator Changed Recordkeepers Before the QDRO Was Drafted

Nowadays, there is more reason than ever before to draft the QDRO and get it approved immediately (i.e., coincident with the divorce or dissolution proceedings). This is especially true for defined contribution plans. With fiscal corporate budgets at an all-time low, many corporations are continually changing 401(k) recordkeepers as they look for the best service at the lowest price. This was unheard of years ago, when a company utilized the same actuary, benefits consultants, and recordkeepers for decades on end. This is having a negative effect on the administration of QDROs for defined contribution plans. Therefore, if your client's divorce was back in 2001, but you are only drafting the QDRO today, significant problems might arise if the participant's employer has since changed recordkeepers for their 401(k). They may no longer be able to ascertain the participant's account balance at the time of divorce, nor will they be able to trace investment gains/losses from 2001 to the present. Chapter 6

contains a detailed discussion on this issue and some alternatives to consider if the plan administrator did change recordkeepers before the QDRO was drafted.

[B] The Tax-Basis Problem for Stock Plans

When drafting a QDRO for a stock plan, such as an ESOP, be sure to include language that directs the plan administrator to maintain an *equivalent tax basis* for the alternate payee when segregating the participant's account. Absent such instructions, a plan administrator could transfer 50 percent of the participant's total number of shares so that the alternate payee's eventual tax liability is significantly greater than that of the participant.

[C] Beware of the Power of the Actuarial Reduction

Under a defined benefit pension plan, an alternate payee can commence receiving benefits on or after the participant's earliest retirement age even if the participant does not retire at such time. However, the alternate payee may be shocked to realize that her intended \$500 per month (which represents one-half of the participant's accrued benefit) could be reduced by as much as 30 to 40 percent if the alternate payee commences his or her share before the participant's normal retirement age and by another 20 to 30 percent on top of that, if the participant does not retire when the alternate payee elects to commence receiving benefits. Instead of \$500 per month for life, the alternate payee could receive only \$200 per month after a full actuarial reduction is applied to her share of the benefit. You should include broad language in the QDRO that permits the alternate payee to elect when to commence receiving benefits. If the alternate payee has other sources of income, it may be wise to defer the pension commencement date. The closer the alternate payee's benefit commencement date is to the participant's normal retirement age under the plan, the more monthly benefits the alternate payee may be entitled to. In order to make an informed decision, the alternate payee should request benefit estimates from the plan administrator based on various commencement dates.

[D] How the Age of the Client Can Affect QDRO Negotiations

Dividing the participant's pension benefits remains your last settlement issue. In this case, the participant is 65 years old and preparing to retire on a \$2,000 per month pension. The pension has been assigned a present value of \$223,690 by your pension evaluator. You represent the 70-year-old nonparticipant spouse. Since there are no other significant offsetting assets, you and opposing counsel agree to a QDRO providing your client with 50 percent of the participant's monthly pension benefits.

No neophyte to the domestic relations arena, you (and your malpractice carrier) are keenly aware of the dangers associated with the early demise of a plan participant. Remember, without adequate survivorship protection, your client's rights to a portion of the participant's pension benefits will immediately cease upon the death of the participant, and your problems will begin. Therefore, in your negotiations, you sagely propose that your client be treated as a surviving spouse with respect to the plan's postretirement, 50 percent qualified joint and survivor annuity. In this manner, the participant must elect to receive the pension benefits in the form of a reduced monthly annuity that provides your client with survivorship rights to 50 percent of such reduced benefits upon the participant's death.

Let us use real numbers. The participant's monthly accrued pension of \$2,000 will be reduced to \$1,800 when payable in the form of a 50 percent joint and survivor annuity. This \$200 reduction reflects the added actuarial risk of providing an annuity stream of income over potentially two lives rather than just the participant's lifetime. It is then agreed that the participant will receive \$900 per month and your client will receive the remaining \$900 per month. In other words, they are each absorbing equally the costs associated with the reduction in the participant's accrued pension. You breathe a sigh of relief, knowing that you cleared the last hurdle: protecting your client's property rights with this survivorship coverage. Should the participant die first, your client will continue to receive \$900 per month for life, which essentially represents the 50 percent survivor annuity payable under such joint and survivor form of annuity.

What you did not consider, though, was the age of the participant. Do not feel too sheepish. Few, if any, family law attorneys know about the money-makers we are about to discuss in the following section. In this case, the participant is age 65 and your client, the nonparticipant spouse, is age 70.

[1] How Can a \$2,000 Monthly Pension Instantly Grow to \$2,157?
Answer: The Beauty of Actuarial Math

Under a defined benefit pension plan, a participant's monthly accrued benefit typically commences on an unreduced basis at his or her normal retirement age, usually age 65. From a simplistic standpoint, the actuarial present value of a participant's monthly pension annuity as of his normal retirement date is the amount of money needed to fund the annuity for the remainder of his lifetime.

Let us review this critical definition. The actuarial present value assigned by a plan refers to a lump sum of money needed to pay the pension. If the actuarial tables are correct in any particular case, this theoretical pot of money held on behalf of the participant (i.e., the present value amount), which is being dissipated with each monthly pension payment, will become exhausted at the exact point in time of the participant's death. In other words, the actuarial present value takes into account the time value of money (at assumed interest rates) and the plan participant's chances of dying.

As you know, there are two approaches to providing an alternate payee with benefits under a QDRO — the separate interest approach and the shared payment approach. Under the shared payment approach, the alternate payee receives the assigned portion of the participant's benefits *when* the participant actually receives them. In other words, the alternate payee must wait for the participant to retire and then will receive the called-for portion from each monthly pension check for as long as the participant is alive and receiving benefits. In this manner, the payments to the alternate payee are still contingent upon the survival (i.e., life expectancy) of the plan participant. Benefit payments to the alternate payee will automatically cease upon the death of the participant, unless the alternate payee is treated as a surviving spouse for purposes of the plan's qualified joint and survivor annuity.

In the case under discussion, the present value of the participant's \$2,000 monthly pension annuity as of his date of retirement at age 65 is \$223,690. As referenced above, the QDRO that you negotiated in this case provides your client with \$900 per month, which incorporates the reduction for the 50 percent joint and survivor annuity. In essence, the \$900 monthly payment to your client is still based on the life expectancy of the participant. That is, once the participant dies, this \$900 annuity payment to your client will immediately cease. Of course, she will continue to receive \$900 per month for the remainder of her lifetime as a result of the commencement of the 50 percent survivor annuity payments.

Under the separate interest approach, however, the alternate payee may commence her share of the benefits at any time on or after the participant's earliest retirement age under the plan, even if the participant has not yet retired. More importantly, the alternate payee will receive an actuarially adjusted benefit based on her own life expectancy for the remainder of her lifetime. Once the alternate payee commences her share of the benefit payments, she will continue to receive them for life, even if the participant predeceases the alternate payee. It is almost as though the alternate payee is treated as a participant in her own right. Since payments will continue to the alternate payee for life, it is not necessary, and not equitable, to provide additional postretirement survivorship protection for the alternate payee. Depending on the plan administrator, though, preretirement death benefit coverage may still be necessary to protect the alternate payee's rights in the event that the participant dies before retirement and before the alternate payee commences her benefit payments.

Remember, when it was agreed that your client would receive 50 percent of the participant's pension benefits, she was really entitled to 50 percent of the *present value* of the participant's pension. When you instructed the plan administrator to provide your client with 50 percent of the participant's pension, you should have also stated in the QDRO that your client's share of the benefits was to be actuarially adjusted based on her own life expectancy.

The result is the magic of actuarial science. You could provide \$2,157 of total monthly pension benefits with a well-drafted clause. Your client was entitled to 50 percent of the present value of the participant's pension annuity, which was \$223,690. Therefore, your client's share should be \$111,845. Now, the

question is, how much of a monthly annuity could a 70-year-old purchase with \$111,845? More than a 65-year-old? Certainly, when you consider her shorter life expectancy.

Because an older annuitant has a shorter life expectancy (all other things being equal), she could purchase a larger monthly annuity. With each party receiving a present value amount of \$111,845, the participant could receive his full 50 percent share, or \$1,000 per month (remember that his original, unreduced accrued pension of \$2,000 per month was based on a present value of \$223,690) for the remainder of his lifetime. The alternate payee, on the other hand, could receive a monthly pension payment equal to \$1,157 for the remainder of her (anticipated shorter) lifetime.

Simply put, the shorter one's life expectancy, the more purchasing power one has when buying annuities. The same can be said for pension plan annuity payments.

Also, when a QDRO instructs the plan administrator to actuarially adjust the alternate payee's share of the pension based on her own life expectancy, there is no need to provide her with additional postretirement joint and survivor annuity protection. Again, under this separate interest approach, your client is, for all intents and purposes, considered a plan participant herself with respect to her share of the annuity. This cleaving of the participant's pension into two distinct components, each with their own respective ownership rights, is very different than assigning an alternate payee a portion of one pension (for as long as both parties are alive), with associated postretirement survivorship rights.

Think about this: You could have provided your client with an additional \$257 per month. That is, her monthly pension payments would be \$1,157 per month for life, rather than \$900 per month for life. In addition, the participant could have received his full \$1,000 share of the pension for life, without the necessity of electing a reduced 50 percent joint and survivor annuity.

Very rarely are there "win-win" situations in a divorce, but this is one of them. In reality, the plan administrator will make a monthly pension payment of \$1,157 to your client and \$1,000 to the participant, for a total of \$2,157 per month. This seems hard to believe since the participant's total monthly pension payment at retirement was \$2,000. But it is not magic. Remember, half of the participant's total present value is being paid over a shorter life expectancy. The \$1,157 monthly payment made over your client's lifetime plus the \$1,000 monthly payment over the participant's lifetime is still actuarially equivalent to a \$2,000 monthly benefit payable solely over the participant's lifetime. Remember, though, that there may be no reversion of benefits to the employee should the alternate payee predecease him.

While it appears that this would violate one of the QDRO provisions contained in Code Section 414(p) regarding the payment of increased benefits under the plan, it does not. An exact reading, which states that the QDRO may "not require the plan to provide increased benefits (*determined on the basis of actuarial value*)" [emphasis added], has not been violated.

[E] **Overpayments Made to the Participant: Impact on Separation Agreement and QDRO**

Although it is certainly not the norm, on some occasions a plan administrator will calculate the participant's benefits incorrectly; when the plan administrator discovers the error, say, two years later, the company attempts to recoup the overpayments from the retiree. If the company cannot obtain a lump-sum repayment from the participant, the plan administrator may decide to collect the overpayments on a prospective basis by reducing the participant's monthly pension payments for a period of time. Clearly, in this situation, it would seem equitable under a QDRO to provide that the recoupment liability imposed by such overpayments should be allocated on a prorata basis between the participant and the alternate payee. You should include language to this effect in the separation agreement and QDRO.

Sometimes, however, a plan participant's pension annuity may be retroactively reduced for other reasons. In one case, a participant was retired and in receipt of his monthly pension benefits. After the participant's date of retirement, while he was receiving his pension benefits from the company, he repeatedly, yet unsuccessfully, attempted to receive Social Security disability benefits from the federal government. His application was continually rejected, until one day the Social Security Administration decided to approve his application for Social Security disability payments *on a retroactive basis*. In other words, he received a lump-sum Social Security award retroactive to his original date of retirement with the company. It turned out that his company's pension plan contained a Social Security offset provision in the event anyone received Social Security disability benefits. As a result, the company reduced his pension benefits on a prospective basis to recoup the overpayments made to the extent of the retroactive Social Security award.

All this time, the participant's former spouse was receiving a portion of his pension benefits under a QDRO. The plan administrator decided to recoup the overpayments from both the participant's share of the benefits and the alternate payee's share of the benefits on a prorata basis. Whether this was an equitable decision on the part of the plan administrator is certainly open for discussion; this centers on the issue of whether disability benefits are marital property. Notice that the alternate payee did not receive any of the lump-sum Social Security award, but was nonetheless required to reimburse the company through reduced payments.

The issue of disability benefits as marital property is arising in courts throughout the country today. Although this chapter is not devoted to addressing the disability issue, if you do not specifically address the alternate payee's receipt of disability benefits in the separation agreement and QDRO, you should include language to reserve jurisdiction for the court to consider the liability question with respect to such overpayments. You may want to include the following language:

Overpayments: In the event that the Plan Administrator determines that an overpayment has been made to the Participant and/or the Alternate Payee for any reason, including but not limited to, the Participant's

retroactive eligibility for Social Security disability payments, and the parties cannot come to an agreement regarding their respective liability toward the Plan's recoupment of such overpayments, the Court shall reserve jurisdiction regarding the allocation of such repayments to the Plan between the Participant and Alternate Payee. For purposes of this Section, an "overpayment" does not refer to an inadvertent payment made in error by the plan record-keeper as more fully described in the section entitled "Inadvertent Payment(s) to Plan Participant." An overpayment refers to a situation where the plan's actual calculations were in error and the participant's monthly pension annuity is in excess of what it should be.

[F] Delayed Plan Contributions Under a Defined Contribution Plan

When drafting a QDRO for a participant covered under a defined contribution plan, such as a 401(k) plan, do not simply provide the alternate payee with 50 percent of the participant's account balance as of the date of divorce. The alternate payee should also be entitled to a prorata share of any contributions made to the plan *after* the date of divorce *that are attributable to periods or plan years before the divorce*. Many times, a plan administrator makes some of its plan contributions after the end of any particular plan year. For example, if the divorce took place on November 1, 2008, it is possible that the plan administrator will not make all of the 2008 plan contributions until sometime in 2009. From an equitable standpoint, the alternate payee should be entitled to a pro rata share of the contributions made in 2009; those that are attributable to the period January 1, 2008 to November 1, 2008.

§ 18.06 THE BEST MALPRACTICE INSURANCE: THE TERMINATION LETTER

It is becoming increasingly commonplace for attorneys finishing a divorce case to send a termination letter to each client. While it appears that most lawyers do not, it is very sound practice, especially if you wish to limit your liability exposure in a case. The Supreme Court ruling in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*,⁵ discussed in Section 18.02 (K) offers perhaps the strongest arguments for the necessity of a termination letter that at least warns the client that all beneficiary designations with banks, retirement plans and insurance companies need to be reviewed — and likely changed.

The five common reasons for the letter include practical issues and those important liability considerations. The first three reasons we list relate to the liability concerns. The letter will:

⁵ 555 U.S. 285, 129 S. Ct. 865 (2009).

- (1) Start the clock running for the statute of limitations by officially terminating the relationship, i.e., thus the name “Termination Letter.”
- (2) Apportion responsibility for carrying out necessary tasks to the appropriate party.
- (3) Clarify the judgment entry so less confusion exists.

The next two reasons for the letter relate to the practical aspects of running a business

- (4) Detail the final bill.
- (5) Explain future services the client might wish to avail themselves of.

The following sample of a termination letter⁶ pays special attention to QDROs and retirement plans recognizing that unresolved QDROs and retirement issues are ticking time bombs in the files of many attorneys. This type of letter is usually written, as we have indicated above, with the judgment entry in hand. The authors decided not to strip out all non-retirement plan discussions because the entire letter needs to be understood in context of finalizing the responsibilities and clarifying the rulings of the court.

⁶The sample letter was graciously provided to the authors by attorney Randal A. Lowry of Cuyahoga Falls, Ohio, a fellow of the American Academy of Matrimonial Lawyers.

EXHIBIT 1 Sample Termination Letter

Mr. John Smith
1 Courthouse Way
Akron, OH 44333

Dear Mr. Smith:

Enclosed herewith please find a time-stamped copy of your final decree of divorce. You were provided with a certified copy of the Decree immediately after your final hearing. Please retain this document in a safe location insofar as you may be required to produce it at a future date for such things as remarriage, social security and the like.

With respect to child issues, you have entered into a Shared Parenting Plan which addresses the issues of child support, parenting time, payment of medical and extracurricular activities expenses and the like. Please review each and every provision contained in the Shared Parenting Plan with respect to your rights and obligations associated with the same. If you should have any questions regarding the same, please contact my office.

With respect to child support, please keep in mind the Court retains jurisdiction over all issues involving the children including the amount of child support, companionship rights, medical payments, and the tax exemption. If there should be a change in either your income or your spouse's income, you may wish to petition the Court for either an increase or decrease in child support. Any modification of child support must be done prospectively. This means that the Court can only modify these orders from the date of the filing of a motion to do so forward. The Court cannot retroactively modify any court orders. Any agreements to modify these orders must be in writing, executed by both parties and entered by the Court as an order. As these matters arise, please feel free to consult with my office.

You will retain the real property known as 1 Courthouse Way, Akron, Ohio, as your property pursuant to Article 4 of the Decree. You are required to refinance the outstanding mortgages into your name alone by May 31, 2011.

You are required to pay a property settlement payment to Mrs. Smith in the amount of

of \$ _____ by May 31, 2011, in accordance with Article 5 of the Decree.

Personal property and household furniture are divided pursuant to Articles 6 and 7 of the Decree.

Each party shall retain those automobiles as more fully set forth in Article 8 of the Decree.

The retirement accounts shall be divided pursuant to Article 9 of the Decree.

With respect to the preparation of the qualified domestic relations order(s), please deposit the sum of \$ _____ with my office by way of check payable to QDRO Consultants representing your portion of the QDRO fee. In addition, you are required to deposit the sum of \$ _____ with Pension Evaluators representing 1/2 of the fee to value the STRS and social security benefits. **Please be advised that unless and until the QDRO(s) are prepared, you will not receive your portion of the retirement funds.** The division of the retirement account(s) does not occur automatically upon the filing of the Decree of Divorce, but rather requires the preparation and processing of the QDRO(s). You will receive paperwork from my office and directly from the plan administrator as the processing of the QDRO(s) progresses. If you do not receive any paperwork regarding the processing of the QDRO(s) within 60 days of the date of your final entry of divorce, please contact my office to ascertain the current status of the order(s).

Due to the fact that your Decree of Divorce divides retirement benefits pursuant to a Division of Property Order regarding your former spouse's retirement benefits with STRS, there is a requirement for the Plan Participant (your former wife) to name the Alternate Payee (you) as a beneficiary under certain life insurance benefits in accordance with Article 9E of your Decree. **It is your responsibility** to follow through to verify that life insurance is in place and that both you and your former spouse are in compliance with the requirements of the Decree of Divorce as they relate to maintaining life insurance to secure the Alternate Payee's portion of the retirement benefits prior to the Participant's retirement under STRS.

Even when the Division of Property Order (DOPO) has been filed with the Court, the procurement of life insurance is necessary because if the Plan Participant should die before she is in pay status with respect to her retirement benefits through STRS, you will not receive your portion of the STRS benefits. Once the Plan Participant has

made a survivorship election for you at retirement and is in pay status, the life insurance may be terminated, as it is no longer necessary to secure your benefits. Please review the terms and provision of Article 9E of the Decree of Divorce with respect to your rights and obligations associated with the Division of Property Order and related life insurance and if you should have any questions, please contact my office regarding the same.

Each party shall retain the bank accounts in his or her own name as set forth in Article 10 of the Decree.

Income taxes shall be filed pursuant to Article 11 of the Decree.

Each party shall pay college expenses as more fully set forth in Article 12 of the Decree.

Each party shall pay those debts as more fully set forth in Article 13 of the Decree.

Each party has waived spousal support from each to the other pursuant to Article 15 of the Decree.

Each party shall retain life insurance pursuant to Article 16 of the Decree.

Each party shall comply with temporary orders through the date of the Decree pursuant to Article 17 of the Decree.

If you should have any questions regarding any of the terms and conditions contained in the final decree of divorce or shared parenting plan, please do not hesitate to contact my office.

Although our representation has actually come to a close at this point, I wanted to make certain you were reminded of several matters which may very well be of importance to you.

All documents which you have received are extremely important which should be kept in a place of safe keeping with your other valuable records for future reference.

Please make certain you do the following as each applies to your individual circumstances:

1. Contact each of the insurance companies or their agents including, but not limited to life insurance, homeowners, automobile, etc. to make certain the coverage and beneficiaries are appropriate and consistent with the Decree. Failure to change the designated beneficiary on your life insurance policies could result in your former spouse receiving the life insurance benefits in the case of your death.
2. Be sure to contact all credit card companies and others with whom you have done business in the past to inform them as to your change in status;
3. Revise or redraft your Will and/or any trusts that may be effected by your change in status;
4. Remove your former spouse's name from any jointly held assets awarded to you, such as bank accounts;
5. Change the beneficiary on all of your retirement accounts including, but not limited to, your employer sponsored retirement accounts and your individual retirement accounts. Failure to change the designated beneficiary on your retirement accounts could result in your former spouse receiving the benefits in the case of your death. **IF IN THE EVENT YOU PREVIOUSLY NAMED YOUR FORMER SPOUSE AS A BENEFICIARY ON YOUR RETIREMENT PLAN(S) AND YOU DO NOT CHANGE THE BENEFICIARY DESIGNATION SUBSEQUENT TO THE DECREE OF DIVORCE, YOUR FORMER SPOUSE MAY BE ENTITLED TO RECEIVE YOUR RETIREMENT BENEFITS IN THE EVENT OF YOUR DEATH. THEREFORE, IT IS ABSOLUTELY ESSENTIAL THAT YOU CHANGE THE BENEFICIARY OF YOUR RETIREMENT PLAN(S) SUBSEQUENT TO THE FILING OF YOUR FINAL DECREE OF DIVORCE.**

6. Make any necessary transfers of stocks and bonds or other securities, bank accounts, money market accounts, etc.
7. Under current Federal Law when your marriage has ended, you have the right to remain on your ex-spouse's medical insurance for a period up to three years at the group rate. Be aware, however, that the law requires you to notify the employer immediately (no later than 30 days) after the date of your divorce or dissolution. To this end, I suggest that you immediately contact your ex-spouse's employer and put them on notice that you want to elect COBRA Coverage. There are specific forms which **you** must fill out and your ex-spouse's employer is required to furnish those to you. I suggest that you follow up this telephone call with a **certified letter** in which you provide the employer notice of your election to continue medical coverage. Your failure to fill out the appropriate forms within 30 days will result in your inability to elect this hospitalization coverage. Please do not rely upon your ex-spouse's assurances that he or she will do this on your behalf. It is absolutely incumbent that you take the initiative to make this election within the very short time period allowed by law.
8. Transfer any motor vehicle titles consistent with the Decree.
9. Court orders regarding responsibility for payment of debts and liabilities are effective between you and your former spouse, but do not bind the creditor. If you still maintain joint credit cards with your former spouse, the only sure way to protect yourself against liability for future charges is to cancel the credit card. You need to notify the credit card company directly by certified mail, return receipt requested, that you wish to close the account.

Your Decree will indicate which party is to assume responsibility for payment of certain debts or obligations. For example, if your former spouse is awarded the marital residence and is ordered to assume responsibility for the payment of the mortgage, your former spouse's failure to make the monthly mortgage payment may cause the creditor to look to you for the payment of the mortgage until such time as your

former spouse removes your name from the mortgage. This is true with any other debts which your spouse is assuming. You may officially notify the Internal Revenue Service that you have changed your address from the address used on your last return by filing IRS Form 8822.

10. If you or your former spouse were married for more than ten (10) years and paid into the Social Security Trust Funds, you may be entitled to spouse's or survivor's benefits on your former spouse's account upon reaching age 62, regardless of whether your former spouse has retired at that time. These benefits are provided by the Federal Government. I suggest that you visit the Social Security at www.socialsecurity.gov
11. Please revoke all powers and duties you have previously provided to your former spouse during the marriage with respect to the following:
 - a. Powers and duties under your Last Will and Testament;
 - b. Powers and duties under any Revocable Trust Agreement;
 - c. Powers and duties under any Irrevocable Trust Agreement;
 - d. Funeral directives pursuant to O.R.C. 2108.72;
 - e. Designation of your former spouse as a beneficiary under an annuity;
 - f. Designation of your former spouse as a beneficiary under a life insurance policy;
 - g. Designation of your former spouse as a beneficiary under an IRA plan;
 - h. Designation of your former spouse under employee death benefit plans;
 - i. Designation of your former spouse on any death benefits arising

under a contract including contracts arising before or after May 31, 1990.

Please note that any judgments that you may have for unpaid child support or unpaid spousal support or other obligations your spouse may owe you as a result of the divorce will expire in five years from the date of the judgment unless otherwise modified.

In the process of discussing matters with your accountant or tax advisor, please be certain to review all of the documents, both preliminary and final, so that you may receive advice as to any possible tax consequences or tax savings. We will be pleased to consult with your accountants, upon request, as to our opinion on the tax effects of any of the orders.

It is extremely important that you promptly contact the health insurance carrier from whom you will be experiencing protection. There are specific time periods involved with regard to converting or continuing any group policy your former spouse may have had which is referred to as a "COBRA" conversion. In the case of conversion, you must take care of matters immediately.

Please understand that the responsibility for enforcement of all orders rests with you. Although we will be happy to work with you and offer assistance as it is needed, please be aware of the fact that there may be additional fees incurred which will be your responsibility. It will be necessary for you to contact us to specifically engage us to represent you in any post-decree enforcement proceeding.

Although often not anticipated, there are always possibilities of remarriage. I respectfully suggest to you that prior to entering into a subsequent marriage that you consult us regarding the advisability of entering into a premarital agreement. Likewise we will be happy to meet with you to discuss the impact of a remarriage on any of the terms of your existing agreement.

There are usually a number of documents which we have in our file that may be of interest to you. Although the vast majority of the records which we have reviewed tend to be copies as opposed to original documents, we will be happy to return any of them to you upon request.

However, you should be advised that we will not be responsible for maintaining those documents indefinitely and, therefore ask that you contact us within 30 days if there are specific documents you wish to have returned that have not already been given to you.

As you know, my final fee is based upon a combination of the following factors:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services promptly;
2. The fee customarily charged in the locality for similar legal services;
3. The amount (value) involved in the litigation and the results obtained;
4. The time limitations imposed by the client or by the circumstances;
5. The experience, reputation and ability of the lawyer in rendering services in family law and related matters;
6. The nature and length of the professional relationship with the client;
7. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
8. Whether the fee is fixed or contingent.

Based upon the factors contained in your fee agreement your final legal fees balance over and above all prior retainers is the sum of \$ _____.

I would be more than happy to review with you at any time your complete file to show you how we arrived at the balance due and owing. Please keep in mind that our final fee is not just merely based upon time records alone, but includes the factors set forth above.

It has been our privilege to work with you and if you wish me to represent you on any future issues, please do not hesitate to contact me and we will discuss further representation.

Respectfully,

RANDAL A. LOWRY
Attorney at Law

RAL:sc

Enclosures

**§ 18.07 WHERE SHOULD A DOMESTIC RELATIONS ATTORNEY
TURN FOR QDRO-DRAFTING HELP TO AVOID
MALPRACTICE OR VIOLATING STATE LAW?**

Some confusion exists as to whom an attorney can turn to for help in drafting QDROs. This confusion is understandable in light of the standards promulgated by other professionals in the pension field, such as actuaries and CPAs. Therefore, we have engaged in a lengthy discussion on this most serious subject. If you are in a rush, you can merely skip to the end of this section to see our conclusions and observations.

Many domestic relations attorneys feel that retaining outside help in drafting QDROs is prudent and turn to a number of sources. The typical places to which they turn should be spelled out to help bring some focus to the following discussion.

(A) In-state and out-of-state attorneys

- (1) A state domestic relations attorney who has focused on the field of QDROs
- (2) An in-state ERISA attorney
- (3) An out-of-state DR attorney
- (4) An out-of-state ERISA attorney

(B) Non-attorneys

- (5) Actuary
- (6) CPA
- (7) National QDRO preparation firm

- (8) Others, i.e., pension consultants, financial advisors, employee benefit consultant

First, let's examine the role of lawyers, both in-state and out-of-state in preparing QDROs. Some domestic relations attorneys believe that they should only turn to an in-state attorney because only those admitted to practice in the state can undertake what they clearly see as a legal function. Of course, states have temporary practice statutes that typically permit an out-of-state lawyer to provide legal services in a state when working with an in-state attorney. The common wording of those statutes goes something like this: "A lawyer may provide legal services on a temporary basis in [name of state] when they are undertaken in association with a lawyer who is admitted to practice in [name of state] and actively participates in the matter." Other qualifiers apply. The "local counsel" standard is not a cosmetic cover for an out-of-state attorney to become, in effect, an in-state attorney without being admitted to the bar. The in-state attorney must "actively participate" in the representation and, of course, shares legal responsibility in the matter. The in-state attorney, of course, will primarily handle everything coincident with the divorce, including the property award and separation agreement language. The role of an outside QDRO-preparer should generally be limited to effectuating a judgment entry through the drafting of a QDRO that carries out the intentions of the parties and the court.

Out-of-state counsel should not be directing the domestic relations attorney on what in-state law is. But attorneys often contact national QDRO experts to give them ammunition to argue their cases. Finding someone with a holistic knowledge of an issue can be extremely useful when a state or jurisdiction is mired down with a myopic, antiquated or perverse viewpoint. The authors make an observation about case law and precedent after reviewing, collectively, thousands of cases over 27 years in our narrow area of expertise. Please do not take this as an arrogant "putdown" of those laboring in the field of domestic relations law. It is meant as a sincere effort to improve the quality of domestic relations decisions. While focusing on precedent is a legal requirement, we find it an unproductive preoccupation, considering how sketchy and poorly argued most QDRO and present value issues are. There are few QDRO cases, for example, where the authors feel the issue was thoroughly aired. For our money, most of the time an attorney spends preparing to argue — or litigate — an issue after doing the necessary research on precedent should be on a more comprehensive understanding of the issue and not attempting to divine what a previous court did — based, as we contend, on superficial and incomplete arguments.

Consider, for example, the hundreds of cases where courts have battled over whether survivorship should be granted because the separation agreement or judgment entry did not specifically spell out the nonparticipant's right to survivorship. Invariably, appeals of these cases focus on what the parties and court said. Lawyers pour over transcripts trying to ferret out the meaning of every word. And the whole

inequitable nature of the decision goes out of focus based on the legalisms. No, the authors are not against careful examination of obscure and challenging statutes, just against courts that lose sight of their real job: the equitable distribution of property and an inordinate dependence on precedent. If you go to § 7.06 “Arguments for Granting Survivorship Rights to a Former Spouse When Survivorship Was Not Mentioned in the Judgment Entry,” you will find six arguments based on the basic unconscionability and unfairness of not awarding survivorship unless it is expressly mentioned in the judgment entry. For example, the authors could not imagine an attorney not making a basic point about language; something like this when the court is “confused” over whether survivorship should be “granted” to the nonparticipant:

“Survivorship is an inherent part of a pension, not a nice little adjunct to it. If payments from something do not last for a lifetime, it is *not* a pension. When the wife receives such contingent payments for the life of the husband, call them a stipend, spousal support or tips, but do not call them a pension when *it is no such thing*. When courts say they are dividing the pension and do not grant survivorship they have not divided a pension. One party got the pension and the other received some monthly payments for an indeterminate time, but no pension. The court effectuated an incomplete property transfer.” (See § 7.06.)

We quote just one of our arguments to make a simple point. Attorneys owe their clients good representation and that is impossible when trapped in the web of precedent and provincialism. State domestic relations attorneys turn to outside help such as ERISA attorneys (in- or out-of-state makes little difference), actuaries or other pension professionals as well as their books, articles and videos to help them develop a more comprehensive understanding of the issue.

This should help you understand what kind of help a domestic relations attorney is looking for. In essence, the QDRO-drafter is not representing the parties *per se*. Basically, the drafter is merely carrying out the directions of the primary counsel and the terms of a property settlement.

But their role may be larger. They may also be educating the parties and counsel about the larger issues involved. Often the lawyers and court itself seek guidance on esoteric and often misunderstood QDRO issues, almost always federal in nature. Even though QDROs have been around for over 27 years, there is still no “one size fits all” order. Because plan administrators have the final say on “qualifying” QDROs for their own plans, thousands of QDRO interpretations have arisen which wreak havoc on carrying out the intent of the parties. For example, many plan administrators do not require QPSA pre-retirement survivor protection in their separate interest QDROs, and if an unknowing attorney includes this otherwise standard QDRO language, the alternate payee will receive double benefits! In other words, she will not only receive her separate lifetime award of benefits, but will also receive additional survivor benefits upon the death of the plan participant.

It is for this reason that attorneys not steeped in the esoteric elements of ERISA and the federal QDRO guidelines should avoid pontificating on QDROs and employing verbatim model QDROs handed out by paternalistic plan administrators. There is almost a Catch-22 involved in the drafting of QDROs here because those individuals who have spent their careers understanding the ins and outs of pensions, *e.g.*, actuaries, are not licensed to draft QDROs, which has been deemed to constitute the practice of law.

This question of whether a domestic relations attorney should employ a non-lawyer like an actuary is more complicated. Most domestic relations attorneys believe they can hire anyone they want because it is the domestic relations attorney who bears ultimate responsibility for any problems that arise with the QDRO.

These “I can hire anyone I believe will most help me” attorneys believe that the American Bar Association rule “Unauthorized Practice of Law; Multijurisdictional Practice of Law” clearly captures their responsibility in comment 2 to Rule 5.5. It reads in part:

“This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”

Now to whom should an attorney turn in drafting QDROs? Must it be an attorney from within the state to avoid malpractice or a breach of state law—especially “unlicensed practice of law” statutes? The issue recently cropped up in Florida where a Florida domestic relations attorney filed a QDRO-drafting complaint with the state bar for the unauthorized practice of law against anyone who is not a licensed Florida attorney—where QDROs, of course, are his bread and butter. Not only does he want to avoid QDRO-drafting competition from those who are not licensed attorneys, but he also wants Florida courts to agree that only “Florida lawyers” can draft QDROs for Florida residents. While the clear focus of his complaint was against non-lawyers like accountants or actuaries, it actually extends to out-of-state attorneys as well because anyone who is not admitted to practice in front of the Florida Bar is considered a non-lawyer in Florida.

The central thesis of his general complaint against non-Florida lawyers drafting QDROs is that even if a Florida lawyer employs someone like an actuary or non-Florida lawyer, he or she has no ability to supervise someone who is performing that work. The complaint read in part:

“When attorneys hire non-attorneys to deal with QDRO issues, they are also asking these non-attorneys to render a legal opinion on something that they (the attorneys) do not know much (or anything) about; *i.e.* state and federal law pertaining to retirement accounts. If this were not the case, these family lawyers would likely not refer this work out to third parties. It is thus quite clear

that the referring family law attorneys are not able to supervise, nor are they actively supervising, these non-attorneys.”⁷

The contention that a domestic relations attorney turning to an out-of-state third party is never actually “supervising” these hires is novel. Novel because it distorts the meaning of “supervising.” Always bear in mind that true supervision is strong on clarity, but weak on specificity. Many, many companies employ supervisors who know exactly what product they are working on and lead teams developing those products with individuals whose work could not be done by the supervisor. For example, a software development supervisor might well direct a team to write thousands of lines of code so that a program could carry out certain tasks without necessarily being able to do that programming. The nature of supervision is in providing clear directions, not in detailing the steps to be taken.

So also with a domestic relations attorney who hires an out-of-state ERISA attorney, an actuary or pension professional to help draft an order. Clearly, the domestic relations attorney must provide the separation agreement or judgment entry as the directions to how the pension assets are to be divided. How to get to the destination is best left to the drivers — or in this case to the drafters.

Many intriguing questions are raised in such complaints. If the QDRO is drafted in Florida for use in a Florida divorce case, but reviewed in Massachusetts, does the Florida attorney expect the plan to be familiar with Florida domestic relations law? Would a Florida court accuse a Massachusetts lawyer reviewing the QDRO for a company in Florida to be undertaking the unauthorized practice of law? Clearly, if the court determines that an out-of-state lawyer cannot “draft” the QDRO for a company in another state, then the court might be tempted to say that an out-of-state lawyer cannot “review” the QDRO without running afoul of the unauthorized practice of law. Of course, the latter is unlikely considering the nearly omniscient power that federal law grants plans in administering QDROs.

Drafting and reviewing a QDRO are essentially two facets of the same stone. This illustrates why the prohibition on drafting of QDROs by out-of-state lawyers makes little sense. If someone drafts a QDRO utilizing the company model, is that the unauthorized practice of law? Is the filling out of a real estate transaction form the unauthorized practice of law?

⁷ VERIFIED PETITION/REQUEST FOR FORMAL ADVISORY OPINION AS TO THE UNLICENSED PRACTICE OF LAW IN QDRO SERVICES filed with Florida Bar’s “Standing Committee on Unlicensed Practice of Law by Matthew L. Lundy, Nov. 22, 2011 at 7. (Interestingly, the Florida Bar Counsel responded that “the committee felt that nonlawyer preparation of QDROs as described in your request was clearly the unlicensed practice of law so a formal advisory opinion was not necessary. Whether an out-of-state attorney is engaged in the unlicensed practice of law would depend on whether the attorney falls within Florida’s multijurisdictional practice of law rule” Those guidelines, however, state: “This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating work functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”)

Someone who drafts the QDRO document or fills out a model QDRO is not “representing” the parties in a legal sense with respect to their divorce or dissolution. Once again the QDRO-drafter is merely drafting language to effectuate the terms of the separation agreement or judgment entry, not aiding in an advocacy effort to shape the order to favor one party over the other.

The authors’ conclusion is that the attorney can literally select any individual or entity to help in the preparation of the QDRO, recognizing that they do not unload their liability to that individual or entity. Of course, if the individual or entity fails to perform according to reasonable expectations, the lawyer may well have a malpractice case against the drafter. However, they are likely to be the first on the firing range for their selection of a QDRO-drafter.

As with the hiring of any expert in any field, the domestic relations attorney needs to carefully assess the qualifications of the proposed QDRO-drafter. That drafter will likely come from the pension world and less likely from the domestic relations world. ERISA attorneys, actuaries and pension consultants who deal with pension planning, drafting, actuarial analysis and QDROs on a day-to-day basis represent strong choices. Keep in mind that the actual implementation of the QDRO will invariably be made by the plan actuary. As you review the Actuarial Standards Board advice to actuaries you will get a sense of the expertise that an actuary brings to the QDRO-drafting process. Because two of the authors are attorneys, we can make the following statement without it being self serving: Usually, pension credentials and experience weigh more heavily than a law license for attorneys needing help with a QDRO.

But non-attorneys should be very careful in writing the entire draft QDRO. As all would agree, this would be the unauthorized practice of law if done for any individual in any state by a non-attorney. However, the rules are significantly different for non-lawyers helping attorneys. Even then it seems prudent for the non-attorney to confine her aid to providing advice on the salient clauses of the QDRO, i.e., the benefit clause.

Study the guidelines of the Actuarial Standards Board in advising actuaries how to avoid the unauthorized practice of law in “**assisting**” (authors’ emphasis) attorneys in preparing QDROs. Someone who is “assisting” an attorney should be careful that he is providing technical knowledge and not presenting the impression that his knowledge of the law is so comprehensive that he can draft the entire document.

Avoid the Unauthorized Practice of Law — The actuary should be familiar with the rules regulating the practice of law in the jurisdiction where the actuaries will be rendering the services and should avoid the unauthorized practice of law. For example, normally it would be inappropriate for an actuary to advise a non-attorney whether a draft order meets applicable procedural requirements to be a valid order in the jurisdiction. It would, however, be appropriate for the actuary to advise whether the order is consistent with the

terms of the retirement plan and whether each party's benefit is definitely determinable from the order.⁸

Note that the Actuarial Standards Board is suggesting specific areas *within* the QDRO where the actuary may advise the attorney. It is not suggesting that an actuary should assume control in directing the entire process.

Here is the section of the Actuarial Standards discussing the actuary's actual assistance in drafting a court order. Again note how carefully the Board words the assistance of the actuary with activities such as "calculating benefits," "providing sample documents" and "suggest that the appropriate language. . . ." The Standard assiduously avoids picturing the actuary at a keyboard drafting the entire order. It suggests that the actuary has comprehensive knowledge of the plan and should be suggesting clauses and ideas, and does not talk about the actuary putting pen to paper. That is the dividing line in the mind of the authors for the unauthorized practice of law: putting pen to paper and preparing comprehensive legal documents.

Assisting in Drafting a Court Order — When retirement plan benefits are to be directly divided or assigned by court order, the actuary may be retained to assist in drafting a court order that may accomplish the desired division of retirement plan benefits. Such assistance may include providing sample documents and calculating benefits payable under different payments schemes.

The actuaries assisting in drafting a court order should take into account early retirement subsidies and ancillary benefits available under the retirement plan as appropriate. The actuary should suggest that the appropriate language unambiguously define the benefit amount payable to each party and that relevant contingent events such as the covered party's death before retirement or the covered party's retirement after becoming eligible for subsidized early retirement plan benefits be appropriately considered.⁹

CPAs often assert their right to enter the QDRO-drafting process. For example, the American Institute of CPAs asserts that:

BACKGROUND: It is widely recognized that an overlap of the accounting and legal professions exists. The areas of tax practice, estate planning and pension planning are so interrelated that it is difficult to distinguish professional jurisdictions. For more than forty years the American Bar Association (ABA) and the AICPA have worked together through the National Conference of Lawyers and Certified Public Accountants to promote understanding between the professions and their clients.¹⁰

⁸ "Actuarial Practice Concerning Retirement Plan Benefits in Domestic Relations Actions" (Doc. No. 151; May 2011), Publication #34 of the Actuarial Standards Board.

⁹ ASB Publication 34.

¹⁰ "Right to Practice," at <http://www.aicpa.org/advocacy/state/pages/righttopractice.aspx>.

However, the Institute does not flesh out those disagreements in the QDRO area. As with the Actuarial Standards Board, it is unlikely that CPA organizations stress the right of CPAs to draft full orders. While individual CPAs do assert that right, we are not familiar with professional CPA organizations that make that assertion.

Again, the hiring of a non-attorney is predicated on the parties having obtained legal representation to guide them through the divorce process and to review the terms of the QDRO as drafted. Astute domestic relations attorneys recognize that they can never wash their hands of the QDRO process even if they hire an in-state attorney.

The domestic relations attorney needs to answer the following questions before bringing a QDRO-drafter on board. In essence, the attorney should consider how the expert will “hold up” in court if any QDRO issues are litigated. And more specifically the attorney should consider the:

- (1) Drafter’s knowledge of ERISA and the salient QDRO criteria under the IRC;
- (2) Training and experience of the QDRO-drafter;
- (3) Credentials of the QDRO-drafter;
- (4) Number of QDROs drafted and/or reviewed;
- (5) Publications and articles the QDRO-drafter has authored, reviewed or mastered;
- (6) Drafter’s “ring time” as an expert in court.

Remember, it is the job of the QDRO-drafter to prepare a document that will pass muster with the plan administrator and result in a “qualified” order. It is the job of the domestic relations attorney to make sure that the QDRO document carries out the intentions of the parties and the court. Thus, it is a mistaken notion that the QDRO-drafter is the one responsible for negotiating the property award under state law. It is the domestic relations attorney who drafts the separation agreement that provides direction to the QDRO-drafter. The focus of the DR attorney is on the equitable distribution of property under “state” law while the focus of the QDRO-drafter rests solely on federal law and plan requirements. The QDRO-drafter does not need to ponder state law. Yes, the expert may help provide insights and arguments regarding state law, but that is not her main role. State law is the bailiwick of the domestic relations attorney. The drafter is preparing a document helping the negotiated agreement or imposed judgment entry to be carried out.

Conclusions: Be careful that full draft QDROs obtained by the domestic relations attorney have had a lawyer’s touch either in the drafting stage or by the domestic relations attorney in carefully reviewing the draft order. Preparation of the order by a non-lawyer puts more responsibility on the shoulders of the

domestic relations lawyer. This should not cause the domestic relations lawyer to avoid excellent professionals in the field, like actuaries, but to be aware that the preparation of a full length legal document like a QDRO is the practice of law.

To sum up:

- (1) An attorney can hire anyone for help in the QDRO-drafting, but always retains responsibility for the final draft order submitted to the judge and plan for a product developed under her supervision;
- (2) An attorney's choice is best justified when she turns to credentialed and experienced pension professionals in the field because knowledge of the pension plan in question and federal pension law are now paramount with the separation agreement and/or judgment entry now a fait accompli. The domestic relations attorneys representing the clients in the actual action are clearly responsible for the separation agreement and knowledge of the state law employed.
- (3) Actuaries, CPAs and other non-lawyer pension professionals should avoid preparing entire draft QDROs because something that is the essence of the unauthorized practice of law will reflect poorly on the domestic relations attorney if litigation ensues. The point is important enough to review some of the questions that are likely in a malpractice trial occasioned by the QDRO. While such a suit is unlikely, in the experience of the authors, the questions do point to the exposure that an attorney could face when overly relying on non-lawyers.

Question 1: Mr. Actuary or CPA, do you agree that it would be the unauthorized practice of law if you prepared an entire draft QDRO for an unrepresented individual in this or any other state?¹¹

Question 2: You drafted an entire order in this case, did you not?

Question 3: And your order is the one that was submitted to the judge for signature and then to plan, is it not?

Question 4: Mr. _____ (the attorney being sued) did not change anything substantial in your order, did he?

Question 5: Would you agree that the unauthorized practice of law statutes are meant to protect the public from legal services being rendered by unqualified persons?

¹¹ Note that it is the unlicensed practice of law for any attorney to draft legal documents directly for an unrepresented client out-of-state. Non-attorneys stand little chance of prevailing if they perform the function of the required in-state attorney. See *In re: Complaint as to the Conduct of ANN MERCER*, Case No. 10-74 (Or. 2010) mentioned in the *Lundy* complaint to the Florida Bar where a Washington State attorney was found in violation of the bar ethics in both Oregon and Washington for drafting a QDRO for an Oregon client.

Question 6: If someone neither adds, edits or deletes anything in an order it seems a rather passive, inactive, role for Mr. _____ (the attorney being sued), does it not?

Question 7: Did he review the order with you section by section and offer questions especially about section _____, which is focus of this case?

- (4) Non-attorneys might be able to avoid this trap if they prepare draft orders where boilerplate provisions developed over time with attorneys are labeled for informational and comparative purposes with appropriate caveats and the specifically tailored sections for the offered order are emphasized as the “meat” of their suggestions for the draft.

Out-of-state lawyers skilled and experienced in QDROs should withstand scrutiny rather easily. It is easy to explain that the out-of-state lawyer could have easily been admitted to practice in the state in the instant case under rather perfunctory guidelines if she had so attempted. However, because she was not appearing in court or representing the client per se, but rather assisting the attorney in a task that could be delegated to paraprofessionals in the state under the direct supervision of the domestic relations attorney, it was thought to be unnecessary.

§ 18.08 HOW DOES THE CONCURRENT JURISDICTION OF STATE AND FEDERAL COURTS ENTER INTO THE SELECTION OF A QDRO-DRAFTER?

There is concurrent jurisdiction of state and federal courts over QDROs.¹² However, a strong tendency has emerged where the property division rests more with the state and the QDRO-determination issues more with the federal court. While the authors question the inflexible application of this principle, it is a good starting point for most courts. The reason that the authors question the wisdom of forcing all divorcing parties with QDRO-qualification issues to pursue federal litigation is its costs. Straightforward non-ERISA-type administration issues need not be removed to federal court. Even simple ERISA issues need not always be resolved in federal court.

Clearly, it is uncommon for a federal court to review the actual distribution of property specifics by a state court where the individual has not exhausted all state

¹² See *Langston v. Wilson McShane Corporation*, 2012 WL 34027 at *2 (Minn. App.), which explained how the Minnesota Supreme Court in *Langston v. Wilson McShane Corp.*, 776 N.W.2d 684, 693 (Minn. 2009) rejected the contention that “the district court lacked subject-matter jurisdiction to decide whether a DRO qualified under ERISA, construing the issue to be a federal question limited to exclusive federal-court jurisdiction. *Langston v. Wilson McShane Corp.*, 758 N.W.2d 583, 590 (Minn. App. 2008).”

appeals. An attempt by a disgruntled party in a divorce to appeal the state-mandated property distribution with a federal court is often viewed as merely venue shopping for a more sympathetic court.

The issue of “venue shopping” and Rooker-Feldman doctrine crops up in *Carmona v. Carmona*.¹³ Central in *Carmona* was the Rooker-Feldman doctrine, which was explained in the case discussion as:

The Rooker-Feldman doctrine takes its name from two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). It stands for the relatively straightforward principle that federal district courts do not have jurisdiction to hear de facto appeals from state court judgments. *Noel*, 341 F.3d at 1155. The jurisdictional prohibition arises from a negative inference drawn from 28 U.S.C. § 1257 which grants jurisdiction to review state court decisions in the United States Supreme Court. *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004). . . . Because it grants jurisdiction to the Supreme Court, section 1257 impliedly prohibits lower federal courts from reviewing state court decisions.

The Rooker-Feldman doctrine was devised to stop losers in state courts from shopping for a better result under federal courts. In practice it is a “narrow preclusion doctrine, separate and distinct from res judicata and collateral estoppel.” See *Noel*, 341 F.3d at 1162-64.

To more fully understand the essential elements of Rooker-Feldman, the authors include this additional discussion from *Carmona*:

We have previously explained how federal courts should distinguish a forbidden de facto appeal of a state court decision that is barred by Rooker-Feldman from a suit that is barred by other preclusion principles. A suit brought in federal district court is a “de facto appeal” forbidden by Rooker-Feldman when “a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision.” *Id.* at 1164. In contrast, if a plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, Rooker-Feldman does not bar jurisdiction.

Although it is often misapplied, we agree with the district court that Rooker-Feldman is applicable in this case, and therefore the district court was correct in dismissing Janis’s claims for lack of jurisdiction. According to her amended complaint, Janis claimed that the family court orders were based upon an erroneous application of ERISA preemption law and that the family court unlawfully reassigned benefits in which she had an irrevocable vested interest. She sought relief from the state court orders and prayed for the federal district court to “order that the proceedings in Family Court in case number D181580 be dismissed with prejudice” and to enjoin enforcement of the orders. Thus she was asserting both that her injury was caused by a “legal

¹³ 603 F.3d 1041 (9th Cir. 2010).

error or errors by the state court” and that the appropriate remedy was “relief from the state court judgment.” *Kougasian*, 359 F.3d at 1140.

The federal-state balance of pensions in domestic relations cases is important to review. As we noted earlier, in general, state domestic relations courts determine what is marital and how the marital estate is to be divided. The federal court is more often seen as establishing the rules for mechanically carrying out the wishes of state courts. However, that interpretation is far too simple, as one can see in a case like this. What if the state court does something that is clearly at odds with the precise rules laid out by ERISA to effectuate what it considers to be an equitable distribution of assets?

Clearly, *Rooker-Feldman* does not preclude collateral review by a federal court of a state order. Interestingly, in this case because wife eight did not attempt to remove the case to federal court, she “implicitly subjected herself to the final determination of the state court. Because Congress had established concurrent jurisdiction at that time, we conclude that it did not intend to prevent the *Rooker-Feldman* jurisdictional bar.” In *Langston v. Wilson McShane Corporation*,¹⁴ the state court of appeals, not the federal court, determined that “the district court erred by declaring the domestic relations order to be ‘qualified’ under ERISA.” Interestingly, the Minnesota court of appeals first rejected reviewing whether the district court had “erred,” but did so after the Minnesota Supreme Court told it to make the determination.¹⁵

However, if the Minnesota Supreme Court had not forced the court of appeals to revisit the ERISA issue and if it had not ruled in favor of the plan administrator, it would likely have ended up in federal court.

The conclusion of the *Carmona* court was that the plan (IATSE) had standing and that:

We agree with its contention that it is not required to make payment of the surviving spouse benefits to Judy or to the constructive trust ordered by the Nevada family court. Under ERISA, Janis’s interest in the surviving spouse benefits vested at Lupe’s retirement and federal law preempted the state court orders directing the plans to change the beneficiaries and creating a constructive trust.

¹⁴ 2012 WL 34027 (Minn. App.) at *1.

¹⁵ *Langston v. Wilson McShane Corp.*, 776 N.W.2d 684, 693 (Minn. 2009).