

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career employees, PERA discourages requests for refunds, because **only the employee portion** of contributions can be withdrawn.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 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 Once withdrawn, the member also forfeits the service credit associated with the contributions.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-

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.



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.

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.

Case No. _____

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]