



## GUIDE FOR DRAFTING A DOMESTIC RELATIONS ORDER ACCEPTABLE TO THE RETIREMENT SYSTEMS DIVISION AT THE N.C. DEPARTMENT OF STATE TREASURER

NOTE: The following information is **not** intended to be a substitute for individual consultation with an attorney. For answers to specific questions about the distribution of benefits from a public pension account with the State of North Carolina or with any of its political subdivisions, in the context of divorce, members and their spouses are advised to seek **private** legal advice.

### HOW PUBLIC PLANS ARE DIFFERENT FROM “ERISA” PLANS

Governmental retirement plans for governmental employees are **not** subject, as are the plans of most private companies and private institutions, to the federal requirements contained in the Employee Retirement Income Security Act (ERISA) and the Retirement Equity Act of 1984 (REA) regarding qualified domestic relations orders. Thus under current State law, unlike ERISA-governed plans, the spouse of the member of a North Carolina public pension plan is not required to waive potential rights in the member’s pension benefits, in writing, before the member can designate another person as beneficiary for those public pension rights.

Unlike ERISA plans, this difference means that – in the absence of an appropriate Domestic Relations Order (DRO) addressed to N.C. Retirement Systems plan (RSD) plan – a member in a North Carolina public plan **may take any action with regard to the member’s retirement benefits without any notice to or consent required from anyone, including the member’s spouse.** Such actions include the designation of beneficiaries and withdrawal of accumulated employee contributions.

### PURPOSE OF THIS GUIDE

This section of the Retirement System Division’s website explains the major requirements which you and your attorney need to know in order for you to obtain an approved DRO applicable to a public pension account – either a defined benefit or defined contribution plan – acquired through employment with a State or local agency, including a State agency participating in the Teachers’ and State Employees’ Retirement System (TSERS) or a local agency in North Carolina participating in the Local Governmental Employees’ Retirement System (LGERS). TSERS and the LGERS are the two major public pension plans in North Carolina. The North Carolina Supplemental Retirement Plans – the NC 401(k) Plan, the NC 457 Plan, and the NC 403(b) Program – are defined contribution plans that are available to the employees of participating State and local agencies.

Templates of acceptable provisions for inclusion in a DRO are also provided by links found on this website. Orders dividing a member’s interest in either TSERS, LGERS, the NC 401(k) Plan, or the NC 457 Plan **must be consistent with the template orders on this website.** The current template orders

were revised July 2017. However, nothing in the suggested provisions is intended to constitute legal advice; and the templates are not an adequate substitute for legal representation during divorce.

It is recommended that a *draft* DRO be submitted prior to the actual entry of a DRO by the Court, because changes may have to be made to the draft before RSD can accept all the proposed terms in a draft Order. Unless and until the proposed language in a DRO is approved, the DRO cannot be accepted or implemented by RSD. All DROs pertaining to TSERS, LGERS, or any of the other defined benefit plans administered by RSD (Judicial, Legislative, Fire & Rescue Squad Workers), whether draft or final, should be submitted to: N.C. Department of State Treasurer, Retirement Systems Division, 3200 Atlantic Ave. Raleigh, NC 27604. Orders may also be faxed to 919-855-5800, or submitted electronically to ncretirement@nctreasurer.com. Put “DRO Draft Order” in the subject line.

Review of a draft DRO by RSD or its attorneys is solely to ensure that all the provisions in the DRO are in compliance with all statutory requirements. Neither RSD nor its attorneys will offer any advice on the advisability of any particular provision, feature, or option in any of RSD’s pension plans.

RSD will not choose terms for the parties. Nor will RSD administer any DRO signed by a judge which contains terms that cannot be approved.

#### **TYPES OF RETIREMENT BENEFITS AVAILABLE IN THE PLANS ADMINISTERED BY RSD**

RSD oversees defined benefit plans, in which participation is mandatory for eligible employees, as well as defined contribution plans, in which participation is optional. Generally, a DRO can assign all or a portion of each of these types of benefit to an alternate payee.

The two major defined benefit plans in North Carolina, TSERS and LGERS, pay basic monthly retirement benefits based on a statutory formula. The formula multiplies a statutory accrual factor times an employee’s creditable service times an employee’s average final compensation. Other defined benefit plans in North Carolina, such as the one for eligible firefighters and rescue squad workers, pay a fixed monthly retirement benefit regardless of differences between retired workers in final compensation or length of total service.

Both TSERS and LGERS deposit an employee’s own contributions into an individually identifiable account. Employer contributions go into another fund, where all other employer contributions are pooled. However, prior to retirement, the employee’s account can only be withdrawn by single total lump sum, with accrued interest and only upon the employee’s complete separation from employment with a TSERS or LGERS employer. Such withdrawal forfeits any and all rights to a monthly benefit during retirement.

Both TSERS and LGERS include retirement options which allow a retiree to elect to receive a lower monthly benefit in exchange for a monthly benefit payable to a designated beneficiary after the retiree’s death. Under both plans, survivor benefits are available at 50% or 100% of the member’s monthly benefit, depending upon the election taken by the retiring member.

A DRO addressed to one of the State’s defined benefit plans must utilize the benefit structure established by the General Assembly. Any substantive changes to the benefit structure in the DRO will cause the DRO to be rejected. Similarly, a DRO cannot alter any election already made by a member, if such election is made irrevocable by statute.

**Special Retirement Allowance.** In addition to the above, at or after retirement, members of TSERS or LGERS have the option to transfer any balance they may have in the State 401(k) or 457 Plans to the system from which they are retired, and receive a monthly annuity payment based upon the amount transferred, referred to in the statutes as a Special Retirement Allowance (SRA). RSD will not construe any DRO dividing a member's benefit in TSERS or LGERS as applying to any SRA which may become payable. If the member has a State 401(k) or 457 Plan account and has not transferred moneys in order to receive a SRA, then that account(s) should be divided in a separate DRO. If the member has already begun receiving a SRA at the time of equitable distribution, then the DRO may include a provision that divides the SRA, either as a percentage of the monthly SRA or as a fixed dollar amount.

**Defined Contribution Plans.** A DRO for the NC 401(k) Plan or the NC 457 Plan should be submitted to Prudential Retirement, the third-party administrator for the plans, at P.O. Box 5340 Scranton, PA 18505. RSD does not review DROs for the NC 403(b) Program; instead, a DRO should be submitted according to the procedures of the school district or community college that sponsors the 403(b) plan that is part of the NC 403(b) Program. Eligible employees may participate in more than one North Carolina Supplemental Retirement Plan. A member's benefits under a defined contribution plan are based solely on the amounts contributed to the account, gains or losses on those contributions, and expenses of administration. Unlike TSERS or LGERS, the defined contribution plans permit a retirement benefit to be paid in the form of a lump sum payment of the member's entire account balance. Such plans may also have provisions for partial withdrawals during active service, unlike the defined benefit plans in North Carolina.

#### **WHY IT MATTERS THAT THE ATTORNEY RECOGNIZE THE TYPE OF PLAN BEING DIVIDED IN A DOMESTIC RELATIONS ORDER**

In general, funds held in a State defined contribution plan can be divided between divorcing parties at any time. However, the attorney for an alternate payee must consider possible tax consequences with respect to the distribution to the alternate payee. RSD does not provide any legal advice on taxation of benefits.

Funds in a State defined benefit plan cannot be paid out as retirement benefits until, at the earliest, the member retires. This feature of the defined benefit plans means that the non-member spouse cannot begin to receive his/her marital share until the member actually begins receiving benefits. The payments of an alternate payee will end with the member's death unless the member has elected a survivor benefit for the alternate payee. For orders entered on or after January 1, 2015, payment to a non-member ex-spouse are limited to the lifetime of that non-member, and if the non-member predeceases the member, the non-member's share shall revert to the member.

In addition, if a member in TSERS or LGERS retires prior to the date on which the member is eligible for unreduced service benefits, the monthly benefit will be actuarially reduced to account for the early retirement.

Funds distributed from a defined contribution plan may be distributed periodically or by single lump sum. None of these distributions is adjusted by cost-of-living increases.

Except for a lump sum withdrawal prior to retirement which forfeits any future monthly annuity benefits, payments made from TSERS or LGERS may be granted cost-of-living increases, at the discretion of the General Assembly.

A DRO for TSERS or LGERS can provide that the alternate payee will commence receiving benefit payments when the member begins receiving payments or at a later stated date. The DRO may also provide that the alternate payee will cease to share in the benefit payments as of a definite date (or upon a stated event, provided that adequate notice is given to the plan).

In splitting the monthly benefit payments under the State's defined benefit plans, the DRO may award the alternate payee either a percentage or a dollar amount of each of the member's benefit payments. In either case, the amount awarded cannot exceed the amount of each payment to which the member is entitled under the plan.

If a DRO awards a percentage of the member's monthly benefit payments (rather than a dollar amount), then, unless the DRO provides otherwise, the alternate payee generally will automatically receive a share of any future increase in the member's benefits.

For the NC 401(k) Plan and the NC 457 Plan, a DRO may award the alternate payee either a percentage or a dollar amount of the member's account balance as of a certain date, as well as any gains or losses on such amount from such date through the date that the alternate payee receives the award. The DRO can provide for distribution to the alternate payee as soon as practicable or as otherwise provided in the plan documents. Please note that a DRO cannot be administered for an amount greater than the current amount of the member's account.