



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.

Alternative 4 divides the benefits by *initially* assigning a fixed monthly amount to one spouse (usually the non-member) and the remainder to the other. By using this alternative, the spouse initially receiving a fixed monthly amount will receive future cost of living increases based on that spouse's percentage of the entire benefit at the time of the ERB receives and approves the Order dividing the member's retirement. This alternative also requires a designation of the parties' percentage interest of the

community portion should the member have retired under Option A and the member dies prior to retirement so that a death benefit is to be paid.

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 15 – 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.; (Paragraph 1 of the model order);
- ❑ 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. (Paragraphs 2 and 3);
- ❑ 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 (Paragraph 4);
- ❑ The dates of the marriage and divorce (Paragraph 5);
- ❑ 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 (Paragraph 6);
- ❑ The percentage or dollar amount of each party’s interest in the member’s ERB account (Paragraph 7);
- ❑ What payment option member selected at the time of retirement and whether they selected the co-payee as the refund or survivor beneficiary (Paragraph 8);

- A direct order to the ERB to issue separate warrants (checks) for each party (Paragraph 10); and,
- A statement of each party's federal tax liabilities (Paragraph 12).

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.

The parties agree and understand that the party receiving the flat rate is not entitled to any Cost of Living Adjustments (“COLA’s”).

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.

Alternative 4

_____ is entitled to \$_____per month, and _____ is entitled to the balance.

Co-payee is entitled to all Cost of Living Adjustments (“COLA’s”) based on co-payee’s percentage of the entire benefit at the time of ERB’s receipt and approval of this order.

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