

## **PROPOSED JUDGMENT OF DIVORCE EXAMPLES FOR SHARING RETIREMENT ASSETS**

Retirement plans vary considerably and the examples below are intended to be suitable for many situations. Nonetheless, they are not appropriate for all situations. Accordingly, please provide us with the provisions you draft into the Judgment of Divorce for our review sufficiently prior to the date that the parties intend to execute it and enter it with the Court. In cases where we are drafted into the Judgment of Divorce to prepare the division orders, we will review the drafted language at no additional charge.

### **Defined Contribution Plans**

The following suggested judgment of divorce provisions may be suitable for a typical defined contribution plan. A defined contribution plan provides an individual account for each participant. The benefits are based on account balances (the amount contributed into the plan and associated income, expenses, gains and losses). There are no promises of a set monthly benefit at retirement. Some examples of defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans and profit sharing plans.

#### **Defined Contribution Example A – Percentage Award**

The Plaintiff is hereby awarded a **[fifty percent (50%)]**<sup>1</sup> interest in the Defendant's **[Plan Name]** account attributable to contributions made during their marriage through **[the date of entry of this Judgment of Divorce]**<sup>2</sup> including any allocable investment income and investment gains or losses on such contributions. If an outstanding loan balance exists in the Defendant's account on the **[the date of entry of this Judgment of Divorce]**, the account balance divided as of that date shall **[exclude/include]**<sup>3</sup> such outstanding loan balance. The Participant is solely responsible for repayment of any such loan. The Defendant shall retain the balance of his account as the Defendant's sole and separate property, free and clear of all right, title, claim or interest of the Plaintiff. This award shall be pursuant to a qualified domestic relations order, eligible domestic relations order and/or other domestic relations order, whichever is appropriate. The division order shall be prepared by Jon Mallin of QDRO Professionals PLLC. The parties shall cooperate fully in providing all information necessary to prepare the division order and

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<sup>1</sup> Adjust, where appropriate.

<sup>2</sup> The division date is usually the divorce date though it may be any other date mutually agreeable to the parties.

<sup>3</sup> Generally, if the proceeds of such loan were shared by the divorcing parties or used jointly, then the loan balance should be excluded. If the proceeds of such loan were retained or used by the participant exclusively (for example, if the participant raided the account because of the impending divorce), then the loan balance should be included.

they shall sign all documents required to effectuate the assignment of retirement benefits. The fees for preparation of the division order and any fees assessed by the plan to qualify or administer such order shall be paid in equal shares by the Plaintiff and Defendant.

### **Defined Contribution Example B – Dollar Award**

The Plaintiff is hereby awarded [\$\_\_\_\_\_]<sup>4</sup> of the Defendant's **[Plan Name]** account as of **[the date of entry of this Judgment of Divorce including]**<sup>5</sup> any allocable investment income and investment gains or losses on such amount through the date(s) of distribution. The Participant is solely responsible for repayment of any such loan that may exist on the account. The Defendant shall retain the balance of his account as the Defendant's sole and separate property, free and clear of all right, title, claim or interest of the Plaintiff. This award shall be pursuant to a qualified domestic relations order, eligible domestic relations order and/or other domestic relations order, whichever is appropriate. The division order shall be prepared by Jon Mallin of QDRO Professionals PLLC. The parties shall cooperate fully in providing all information necessary to prepare the division order and they shall sign all documents required to effectuate the assignment of retirement benefits. The fees for preparation of the division order and any fees assessed by the plan to qualify or administer such order shall be paid in equal shares by the Plaintiff and Defendant.

### **Defined Benefit Plans**

The following suggested judgment of divorce provisions may be suitable for a typical defined benefit pension plan where pension benefit payments have not yet commenced. A defined benefit plan promises the participant a specific monthly benefit at retirement calculated according to a benefit formula that usually considers a participant's salary and years of service or is stated as an exact dollar amount. Unlike defined contribution plans, the participant is not required to make investment decisions.

### **Defined Benefit Example A – Flat Percentage or Accrued Coverture**

1. The Plaintiff ("Alternate Payee") is hereby awarded **[50% of the marital portion]**<sup>6</sup> of the Defendant's ("Participant") accrued benefit under the **[Plan Name]** ("Plan") as of **[the date of entry of this Judgment of Divorce]**. [The "marital portion" shall be determined by multiplying the Participant's accrued benefit as of **[the date of entry of this Judgment of Divorce]** by a fraction which consists of a numerator equal to the Participant's credited service earned during the marriage but not after **[the date of entry**

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<sup>4</sup> The amount assigned cannot exceed the net vested account balance on the date the account is segregated for the benefit of the alternate payee.

<sup>5</sup> In some cases, the parties agree to a flat dollar award. In those cases, change the words in brackets to "excluding."

<sup>6</sup> Adjust, as appropriate. If the Participant began participating in the plan after the parties married, then omit "of the marital portion."

**of this Judgment of Divorce]** and a denominator equal to the Participant's credited service at **[the date of entry of this Judgment of Divorce].]**<sup>7</sup>

2. The Alternate Payee may elect to receive benefits in any benefit payment form available under the Plan at the Alternate Payee's sole election.
3. The Alternate Payee may commence benefits upon the Participant attaining the Plan's earliest retirement age or earlier, if permitted by the Plan.<sup>8</sup>
4. The Alternate Payee is hereby awarded a proportionate share of any early retirement supplements, interim or temporary benefits and cost of living increases provided to the Participant on or after the Participant's date of retirement.
5. Prior to the Alternate Payee's benefit commencement date, the Alternate Payee shall be named the pre-retirement surviving spouse under the Plan to the extent necessary to preserve the Alternate Payee's entire award. If the Alternate Payee does not elect a benefit based upon the Alternate Payee's lifetime, the Alternate Payee shall also be named the post-retirement surviving spouse under the Plan to the extent necessary to preserve the Alternate Payee's entire award. If permitted by the Plan, the Participant may name another spouse on any other pre-retirement or post-retirement survivor benefit following qualification of the division order that will effectuate the division provided for herein.
6. In the event that the Participant becomes disabled, the Alternate Payee shall be awarded a proportionate share of any disability pension benefit the Participant receives. Notwithstanding, if the disability pension benefit is paid prior to the plan's earliest retirement age, it shall be considered income replacement and shall not be shared with the Alternate Payee. Provided further, when the Participant attains the Plan's earliest retirement age, the Alternate Payee shall share proportionately in any such benefit paid on or after that date.
7. All benefits provided under the Plan not awarded to the Alternate Payee herein shall remain the Participant's sole and separate property, free and clear of all right, title, claim or interest of the Alternate Payee.
8. This award shall be pursuant to a qualified domestic relations order, eligible domestic relations order and/or other domestic relations order, whichever is appropriate. The division order shall be prepared by Jon Mallin of QDRO Professionals PLLC. The parties shall cooperate fully in providing all information necessary to prepare the division order and they shall sign all documents required to effectuate the assignment of retirement benefits. The fees for preparation of the division order and any fees assessed

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<sup>7</sup> If the Participant began participating in the plan after the parties married, then this entire sentence should be omitted.

<sup>8</sup> Consider restricting or eliminating the Alternate Payee's right to draw before the Participant for State of Michigan Plans, including MPSERS, to avoid the actuarial recoupment problem.

by the plan to qualify or administer such order shall be paid in equal shares by the Participant and Alternate Payee.

9. Until the division order is approved by the Plan, the Participant shall continue to name the Alternate Payee for purposes of all surviving spouse benefits the Alternate Payee would have had if the parties remained married. The Alternate Payee shall have a claim against the Participant's estate if the Participant revokes survivorship rights. This Court expressly retains jurisdiction to issue further orders to provide the Alternate Payee with the equivalent of the Alternate Payee's awarded interest.

### **Defined Benefit Example B – Prospective Coverture Method**

1. The Plaintiff (“Alternate Payee”) is hereby awarded **[50%]**<sup>9</sup> of the marital portion of the Defendant’s (“Participant”) accrued benefit under the **[Plan Name]** (“Plan”) as of **[the date of entry of this Judgment of Divorce]**. [The “marital portion” shall be determined by multiplying the Participant’s accrued benefit as of the date benefits first commence to either party by a fraction which consists of a numerator equal to the Participant’s credited service earned during the marriage but not after **[the date of entry of this Judgment of Divorce]** and a denominator equal to the Participant’s credited service at the date benefits first commence to either party.]

2. The Alternate Payee may elect to receive benefits in any benefit payment form available under the Plan at the Alternate Payee’s sole election.

3. The Alternate Payee may commence benefits upon the Participant attaining the Plan’s earliest retirement age or earlier, if permitted by the Plan.<sup>10</sup>

4. The Alternate Payee is hereby awarded a proportionate share of any early retirement supplements, interim or temporary benefits and cost of living increases provided to the Participant on or after the Participant’s date of retirement.

5. Prior to the Alternate Payee’s benefit commencement date, the Alternate Payee shall be named the pre-retirement surviving spouse under the Plan to the extent necessary to preserve the Alternate Payee’s entire award. If the Alternate Payee does not elect a benefit based upon the Alternate Payee’s lifetime, the Alternate Payee shall also be named the post-retirement surviving spouse under the Plan to the extent necessary to preserve the Alternate Payee’s entire award. If permitted by the Plan, the Participant may name another spouse on any other pre-retirement or post-retirement survivor benefit following qualification of the division order that will effectuate the division provided for herein.

6. In the event that the Participant becomes disabled, the Alternate Payee shall be awarded a proportionate share of any disability pension benefit the Participant receives.

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<sup>9</sup> Adjust, as appropriate.

<sup>10</sup> Consider restricting or eliminating the Alternate Payee’s right to draw before the Participant for State of Michigan Plans, including MPSERS, to avoid the actuarial recoupment problem.

Notwithstanding, if the disability pension benefit is paid prior to the plan's earliest retirement age, it shall be considered income replacement and shall not be shared with the Alternate Payee. Provided further, when the Participant attains the Plan's earliest retirement age, the Alternate Payee shall share proportionately in any such benefit paid on or after that date.

7. All benefits provided under the Plan not awarded to the Alternate Payee herein shall remain the Participant's sole and separate property, free and clear of all right, title, claim or interest of the Alternate Payee.

8. This award shall be pursuant to a qualified domestic relations order, eligible domestic relations order and/or other domestic relations order, whichever is appropriate. The division order shall be prepared by Jon Mallin of QDRO Professionals PLLC. The parties shall cooperate fully in providing all information necessary to prepare the division order and they shall sign all documents required to effectuate the assignment of retirement benefits. The fees for preparation of the division order and any fees assessed by the plan to qualify or administer such order shall be paid in equal shares by the Participant and Alternate Payee.

9. Until the division order is approved by the Plan, the Participant shall continue to name the Alternate Payee for purposes of all surviving spouse benefits the Alternate Payee would have had if the parties remained married. The Alternate Payee shall have a claim against the Participant's estate if the Participant revokes survivorship rights. This Court expressly retains jurisdiction to issue further orders to provide the Alternate Payee with the equivalent of the Alternate Payee's awarded interest.

This article is not a substitute for legal advice. Retirement plans vary considerably and the examples above are intended to be suitable for many situations. Nonetheless, they are not appropriate for all situations. Accordingly, please provide us with the provisions you draft into the Judgment of Divorce for our review sufficiently prior to the date that the parties intend to execute it and enter it with the Court. In cases where we are drafted into the Judgment of Divorce to prepare the division orders, we will review the drafted language at no additional charge.

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**This article is not a substitute for legal advice. If you need legal advice, please contact Jon Mallin at 248.865.4700 or by e-mail at [JON@QDRO.PRO](mailto:JON@QDRO.PRO).**