

Notes on Sample Separation Agreement QDRO Provisions

NOTE: Consult your own attorney for your unique case.

Preliminary Notes:

1. Every separation agreement or MOU (or permanent orders) must have:
 - a. **Percentage or dollar amount of the assignment.**
 - b. **Valuation Date.** Otherwise we use CRS §14-10-113(5). See video #8.
 - Is better to list a valuation date and not rely on CRS 14-10-113(5)
 - The valuation date is the effective date of the assignment and the beginning of the application of earnings (or losses as the case may be)
 - c. Whether there is a **loan** and whether Alternate Payee is to be debited for a loan balance.
 - d. How the **costs of** preparing and processing the QDRO are to be paid, such as 50-50 split between the Parties.
 - e. If a defined benefit pension plan such as FERS, whether the **Hunt** time rule formula is to be used. I don't agree with it, but I will use it if it is specified in the separation agreement or other court orders. Instead, divide the account using the "bright line" approach, which is totally as of the date of the Decree. No post-Decree enhancements.
2. The separation agreement or other orders should NOT state that the Parties will agree post-Decree some time in the future to "equalize" the accounts. 99% of the time that "**agreement to agree later**" **equalization** will lead to a post-Decree dispute.

I emphasize:

- a. **Make sure you list a valuation date in your separation agreement or Memorandum of Understanding. To avoid later disputes.**
- b. **State that earnings will be included in the Alternate Payee's assignment beginning as of the valuation date. Earnings should always be calculated by the plan administrator and applied to the assignment amount (whether a percentage or a fixed dollar amount) beginning with the valuation date.**
 - Video #8 on valuation date lists several Colorado appellate case opinions which state that CRS 14-10-113(5) is a bright line valuation date. Particularly *Marriage of Coplin* (2020 Ct of Appeals) which was a fixed dollar amount assignment.
- c. **Note that the *Hunt* time rule coverture fraction is just another valuation date opinion (which has been overruled by the Military as of 2017). Rarely if ever should *Hunt* be applied to divide a pension plan.**

1. 401(k), 403(b), 457, and other defined contribution plans

- a. List the **name of the plan** such as “IBM Employee 401(k) Plan” and the name of the financial company which is holding the money (such as Fidelity or Schwab)
- b. **Percentage or dollar amount** to be assigned to the Alternate Payee
- c. Whether there is an existing **loan and** whether Alternate Payee will be debited for a portion of an existing loan balance.
- d. **Valuation date**, which is the effective date of the assignment.
- e. Should also state that **earnings/losses** will be applied to the Alternate Payee’s assignment beginning as of the valuation date.
- f. Should state how the **costs of drafting and processing the QDRO** shall be paid, such as a 50-50 split.
- g. Should state that the QDRO will be drafted by an attorney who is mutually agreed by the Parties. Alternate Payee shall retain the attorney within 10 days of the signing of the separation agreement.
- h. Optional - The Participant’s contributions and the employer’s matching contributions after the valuation date will not be assigned to the Alternate Payee.

Example: Husband has an IBM Employee 401(k) which is held by Fidelity. 50% of the account shall be assigned to Wife. The valuation date shall be the date of the Decree. Earnings and losses shall be applied to the assignment beginning as of the valuation date. There is an existing loan balance. The assignment to Wife shall not be reduced by any of the existing loan balance. In other words, the assignment shall be calculated as if there was no loan on the account. The QDRO shall be drafted by a QDRO lawyer who is mutually agreed upon by both Husband and Wife. The costs of drafting and processing the QDRO shall be split 50-50 between the Parties. Wife shall contact the QDRO lawyer and provide the necessary documentation within 10 days of the date of this agreement (or MOU) so that the QDRO can be timely drafted.

2. Thrift Savings Plan (TSP RBCO). Same as for 401(k) in number 1 above. Except that you don’t need the information in 1.a. above. The TSP is very similar to a 401(k) plan.

3. IRA. If you provide sufficient information in your separation agreement or MOU, then usually you can divide an IRA in a divorce without a specific court Order like a QDRO. The information should include: IRA Owner’s name, Alternate Payee’s name, IRA Custodian’s name, last 4 digits of IRA account, percentage or dollar amount to be assigned, valuation date, and earnings shall accrue beginning with valuation date.

Example. John Doe owns a traditional IRA (or Roth IRA). Fidelity is the IRA Custodian for his account number xxx3421. He assigns 50% of his account to his former spouse Jane Doe. The valuation date is the date of the Decree. Earnings shall accrue beginning with the valuation date.

4. FERS Pension.

- a. Percentage to be assigned to the Alternate Payee
- b. Valuation date. It should be the date of the Decree.
- c. Whether the application of the *Hunt* time rule formula will be used. Note that *Hunt* has been overruled by DFAS and no longer permitted to be used in the division of Military retirement orders. I don't like the use of the *Hunt* time rule formula because it assigns some of the Participant's post-Decree separate property. Instead I suggest using the date of the Decree as if the Participant had retired on the date of the Decree.
- d. Include a 25% or 50% survivor annuity. Which one depends on how long the marriage was. The cost is a 5% reduction in the monthly retirement payment for a 25% annuity and a 10% reduction for a 50% survivor annuity.

Example: Husband is a participant in the Federal FERS pension plan. 50% of the account shall be assigned to Wife as if Husband had retired on the valuation date. The valuation date shall be the date of the Decree. The Parties shall split the cost of a 50% survivor annuity. The QDRO shall be drafted by a QDRO lawyer who is mutually agreed upon by both Husband and Wife. The costs of drafting and processing the QDRO shall be split 50-50 between the Parties. Wife shall contact the QDRO lawyer and provide the necessary documentation within 10 days after the date of this agreement (or MOU) so that the QDRO can be timely drafted.

Note that the *Hunt* time rule coverture fraction is just another valuation date opinion (which has been overruled by the Military as of 2017). Rarely if ever should *Hunt* be applied to divide a pension plan. The reason is that it assigns a portion of the Participant's post-Decree separate property to the Alternate Payee - which is prohibited by CRS §14-10-113 and the relevant decisional case law.

5. Colorado PERA

First, a DRO can't accurately be done until after the Participant's PERA records have been examined. You have to at least see the current match and whether there is premarital separate property.

I suggest that the assignment be **restricted to the match which exists as of the date of the Decree**. Allowing the Alternate Payee to get the benefit of the increase in the match from 0% or 50% at the time of the Decree to 100% at the time of retirement is inconsistent with CRS 14-10-113. Under Colorado law, we divide assets and liabilities as of the Section (5) date, which is usually the date of the Decree. It is never 20 or 30 years or more after the date of the Decree.

Ideally the DRO should also address the Participant's **social security replacement** portion of his benefits account. Similarly for example, the Railroad Pension is split into two Tiers - Tier I is the social security replacement portion; and Tier II is the remaining pension benefit. The Tier I portion is not assignable in a divorce or legal separation. See Video #19 and that discussion of *Zappanti* and *Morehouse*.

I will say that no one that I know of is splitting the PERA account into similar Tiers where the social security replacement portion is not assignable. This should be argued in court and then appealed so that we can have some good law on the social security issue.

PERA Example: Husband is a participant in a PERA retirement benefit plan where that plan includes a replacement for social security and the PERA match is 50% (or it could be 0%) prior to the date of full retirement (which is either age 65 or a combination of age and years of service). The social security replacement portion should NOT be assigned to the Alternate Payee. The PERA match which exists as of the date of the Decree shall not be increased.

The Parties understand that the Alternate Payee is not entitled to a survivor benefit on account of the DRO.

The following example does not address the social security replacement portion.

In the event of a Lump-Sum Rollover/Refund:

If Participant selects a lump-sum rollover/refund, the Alternate Payee's assignment will be 50.0% multiplied by the Participant's Total Contributions account balance as of the December 11, 2023 date of the Decree, including interest and the 50% PERA match. Interest will be calculated and added to Alternate Payee's assignment from December 11, 2023 to the date of rollover/refund, calculated at the same time and interest rate as was applied to Participant's account by PERA. Participant's December 11, 2023 Total Contributions account balance already includes a 50% match. Alternate Payee will not receive any additional match other than the 50%.

The resulting amount will be a one-time payment to Alternate Payee if Participant later receives a lump sum rollover/refund.

In the event of a Lifetime Monthly Retirement Benefit:

If Participant selects a lifetime monthly benefit at retirement, the assignment to Alternate Payee will be 50.0% of the monthly Option 1 benefit amount based on the actual salary and service credit as of the date of the December 11, 2023 Decree, as if Participant were eligible for retirement as of December 11, 2023.

Except that if Participant selects a lifetime monthly benefit amount at retirement and at that time also elects Alternate Payee as the Option 2 or Option 3 Cobeneficiary, then the assignment to Alternate Payee will be 50.1% of the applicable monthly Option 2 or Option 3 benefit amount based on the actual salary and service credit as of the date of the December 11, 2023 Decree, as if Participant were eligible for retirement as of December 11, 2023.

Alternate Payee's monthly payment amount will include annual increases, pursuant to C.R.S. §24-51-1001, *et seq.*

6. Division of Military Retired Pay

a. First, Military retired pay cannot be divided in a divorce such that DFAS will pay the Former Spouse unless the “overlapping 10 and 10” rule has been met. This is the requirement that the Parties have been married for at least 10 years during (overlapping) the time the Service Member has served at least 10 years of credited service.

b. Beginning as of early 2017, DFAS (Military accounting office) will not process an Order which divides Military retired pay unless: (a) the Order includes both the High-3 dollar amount and the months or points of service; and (b) the date of the Decree is the bright line valuation date. The Colorado Supreme Court case *Hunt* time rule coverture formula division of the pension plan is now overruled by DFAS. *Hunt* cannot be used.

c. Many Service Members qualify for disability pay in addition to retired pay. Disability pay is not divisible in a divorce.

- **Example:** The Parties have met the overlapping 10 and 10 rule because Husband has accrued at least 10 years of credited Military service during the time the Parties have been married for at least 10 years. The Service Member is not yet receiving Military retired pay. The Service Member assigns 50% of his retired Military retired pay to his Former Spouse. The valuation date for the 50% shall be the date of the divorce Decree. This means that the assignment will be calculated just as if the Service Member had retired on the date of the Decree. Note that the Service Member will likely not be entitled to retired pay until at least 20 years of credited service has been earned. The 20 year qualification period may extend beyond the date of the Decree. The Service Member does not qualify for disability pay. Note that disability pay is not divisible in a divorce proceeding. The Parties elect the Survivor Benefit Plan (SBP) for the Former Spouse. The cost of the SBP shall be split equally between the Parties. The Parties shall agree on a lawyer to draft the Order. The costs of drafting and processing the Order shall be split 50-50 between the Parties. Wife shall contact the lawyer and provide the necessary documentation within 10 days after the date of this agreement (or MOU) so that the Order can be timely drafted.

7. Additional Notes on equalizing retirement accounts:

a. Avoid equalizing multiple accounts to be done after the Decree has been granted. This is “an agreement to agree” later. Usually does not work because account records as of a specific date are not available. Solve the problem by doing multiple QDROs if you have to.

b. Don’t specify a dollar amount to be divided among multiple accounts. This problem is similar to “an agreement to agree later.”

Regarding equalizing accounts, an IRA account is worth less (has less value) than a 401(k) account. An annuity is worth less than even an IRA account.

8. Additional Notes on the assignment of a fixed dollar amount and the valuation date.

- In December 2023 there is still a myth floating around in Colorado that an assignment of a fixed dollar amount: (1) automatically means that the valuation date is the future date of processing; and (2) it also automatically excludes Alternate Payee earnings. Both are false.

- *Marriage of Coplin* is a 2020 Colorado Court of Appeals decision that affirms:
a. CRS 14-10-113(5) is a bright line division of the retirement account;
- unless you agree otherwise in the separation agreement or MOU
b. Post-Decree property is all separate property; and
c. The earnings on the Alternate Payee's post-Decree separate property assignment all belong to the Alternate Payee. The Participant is not entitled to the earnings on the Alternate Payee's separation property..

- *Coplin* was the assignment of a fixed dollar amount and the dispute was: (1) whether the Alternate Payee's fixed dollar assignment valuation date was the CRS §14-10-113(5) date; and (2) whether the Alternate Payee was entitled to earnings beginning as of the valuation date. The Court of Appeals said "yes" to both questions because **all post-Decree property is all separate property** and the earnings on separate property belong to the owner of that separate property.

- Video #8 lists additional Court of Appeals and Supreme Court cases which affirm the fact that all post-Decree property is separate property.