

**EXPLORING EMPLOYMENT PLANS AND BENEFITS
AND DRAFTING QDROs
STATE AND LOCAL GOVERNMENT PLANS**

PHILIP D. PHILLIPS
101 West Randol Mill Road
Suite 110
Arlington, Texas 76011

State Bar of Texas
35th ANNUAL
ADVANCED FAMILY LAW COURSE
August 3-6, 2009
Dallas

CHAPTER 63.3

PHILIP D. PHILLIPS
Cochran & Phillips, L.L.P.
101 W. Randol Mill Rd., Suite 110
Arlington, Texas 76010
(817) 795-6800
Metro (817) 265-1077
Fax (817) 795-6839

Education:

University of Texas at Austin (B.A. in Government, 1976)
University of Houston Bates School of Law (J.D., 1979)

Licensed:

State of Texas - 1979
U.S. District Court, Northern District of Texas - 1981

Board Certification:

Family Law - Texas Board of Legal Specialization (1984)

Current Memberships:

Member, State Bar of Texas
Member, Family Law Section - State Bar of Texas
Member, Texas Academy of Family Law Specialists
Member, Tarrant County Bar Association
Past-President / Director / Member, Tarrant County Family Law Bar Association

Professional Activities and Honors:

President, Tarrant County Family Law Bar Association - 1995
Grievance Committee Member & Dist. 7A-2 Panel Chair - 1996 - 2001
Chair, Mentor Program Committee, Tarrant County Bar Association - 1995 - 1997
Board of Directors, Tarrant County Family Law Bar Association - 1990 – 1996, 2001- 2004
Fee Dispute Committee, Tarrant County Bar Association - 1991 - 1995
Board of Directors, West Texas Legal Services Corp. - 1986 - 1990
Volunteer Court Master, 233rd, 231st, 324th, 325th, & 360th District Courts
Texas Super Lawyers – Family Law, Texas Monthly, 2003 - 2008

Publications and C.L.E. Activities:

Web Master, Tarrant County Family Law Bar Assoc. Web Site (www.tcflba.com), 2001 - present
Editor, Tarrant County Family Law Bar Newsletter, 1995 – 2000
“Defined Benefit Valuation Issues”, 34th Annual Advanced Family Law Course, Aug. 2008, San Antonio, Texas
“Retirement Orders & Division – State & Local Government Plans”, Advanced Family Law Course 2006, San Antonio, TX
“A Practical Guide to the Grievance Process”, Arlington Bar Assoc., Aug. 14, 2002
“QDROs: Shared Interest v. Separate Interest”, Tarrant County Bar Assoc. Bulletin, June 2001
“Retirement Plans: What To Do When No QDRO Is Honored”, Advanced Family Law Course 2000, Aug. 21-24, 2000, San Antonio, Texas
“QDRO's: What You Need Before You Do the Order”, Austin Bar Assoc. – Family Law Sect., Feb., 2000; Nuts & Bolts Fam. Law Sem., June 16-17, 2000, Ft. Worth, Tx
"Special Problems for Divorcing Professionals & Valuation of Professional Practices" (Co-Author), 24th Annual Advanced Family Law Course, Aug. 17-20, 1998, San Antonio, Texas
"Practicing Family Law for Fun and Profit" (Co-Author), Marriage Dissolution Institute, May 8-9, 1997, Dallas, TX
"Divorce and Protective Orders", Lawyer's Against Domestic Violence Seminar - Oct. 21, 1994, Fort Worth, Texas
"Special Problems", Third Annual Family Law Seminar, State Bar of Texas & West Texas Legal Services Corp. Private Attorney Involvement Program - June 16, 1993, Fort Worth, TX
"Calculating the Present Value of Retirement Benefits", Tarrant County Family Law Bar Seminar - May 16, 1991, Fort Worth, Texas
"A Practical Guide for Receiving Direct Payment of Military Retirement Benefits", 51 Tex. Bar Journal 253 (1988)

TABLE OF CONTENTS

- I. INTRODUCTION..... 1
- II. ESSENTIAL POINTS..... 1
 - A. In General 1
 - B. Teacher Retirement System (TRS)..... 1
 - C. Employees Retirement System (ERS)..... 1
 - D. Texas County and District Retirement System (TCDRS) 1
 - E. Texas Municipal Retirement System (TMRS) 1
 - F. Judicial Retirement System – Plan I and Plan II (JRS-I and JRS-II) 1
 - G. Texas Emergency Services Retirement System (TESRS)..... 2
 - H. Other Local Government Defined Benefit Plans..... 2
 - I. Other Local Government Defined Contribution Plans 2
- III. OVERVIEW OF THE SYSTEMS..... 2
 - A. General Provisions for all Systems..... 2
 - 1. ERISA Doesn’t Apply but a QDRO is Required2
 - 2. Qualification of a Domestic Relations Order.....2
 - 3. Making a Public Retirement System a Party.....2
 - 4. Statutory Grounds for Rejection of a QDRO2
 - 5. Decree Must Clearly State Awarded Portion.....3
 - B. Employees Retirement System of Texas (ERS)..... 3
 - 1. System Administration.....3
 - 2. Benefit Funding.....3
 - 3. Benefit Options3
 - 4. Benefit Calculation4
 - 5. QDRO Form4
 - C. Teacher Retirement System of Texas (TRS)..... 4
 - 1. System Administration.....4
 - 2. Benefit Funding.....4
 - 3. Benefit Options4
 - 4. Benefit Calculation5
 - 5. QDRO Form5
 - D. Judicial Retirement System Plan I (JRS-I) and Judicial Retirement System Plan II (JRS-II) 6
 - 1. System Administration.....6
 - 2. Membership6
 - 3. Benefit Funding.....6
 - 4. Benefit Options7
 - 5. Benefit Calculation7
 - 6. QDRO Form7
 - E. Texas County and District Retirement System (TCDRS)..... 8
 - 1. System Administration.....8
 - 2. Benefit Funding.....8
 - 3. Benefit Options8
 - 4. Benefit Calculation8
 - 5. QDRO Form9
 - F. Texas Municipal Retirement System (TMRS)..... 10
 - 1. System Administration.....10
 - 2. Benefit Funding.....10
 - 3. Benefit Options10
 - 4. Benefit Calculation11
 - 5. QDRO Form11
 - G. Texas Emergency Services Retirement System (TESRS)..... 12
 - 1. System Administration.....12
 - 2. Benefit Funding.....12

3. Benefit Options12

4. Benefit Calculation12

5. QDRO Form13

H. Other Local Defined Benefit and Defined Contribution Plans..... 13

 1. Defined Benefit Plans.....13

 2. Defined Contribution Plans13

APPENDIX A 15

APPENDIX B 16

APPENDIX C 19

Exploring Employment Plans and Benefits and Drafting QDROs State and Local Government Plans

I. INTRODUCTION

This paper begins with essential points to aid the attorney in understanding a public retirement plan, dividing the plan, drafting a QDRO and avoiding common malpractice traps. The points each have a reference to the detailed sections that follow for a more complete explanation of each point and each of the seven major State “public retirement systems” (the “Systems”).

II. ESSENTIAL POINTS

A. In General

- Don’t attempt to make a public retirement system a party to the divorce. It’s not necessary and will cost you or your client attorney fees and costs. (III.A.3.)
- A public retirement system may reject a QDRO that requires the designation of a particular person as beneficiary in the event of the member’s death. (III.A.4.)
- A public retirement system may reject a QDRO that requires the member to select a particular benefit payment plan or option. (III.A.4.)
- All public retirement systems have a model or approved form QDRO. Use it and resist making substantial changes!!! (III.A.4.)
- All but one of the following public retirement systems plans require member contributions. Upon retirement, a member may choose to withdraw his or her contributions with interest or receive monthly annuity payments. In some plans, a member may be able to take a partial lump-sum distribution and a reduced monthly annuity payment. (III.A.4.)
- If there is creditable service prior to marriage, clearly state in the Decree whether the division is of the entire benefit to date of divorce or only the community portion. (III.A.5.)

B. Teacher Retirement System (TRS)

- Don’t attempt to award an alternate payee a lump-sum dollar amount. Percentages only. (III.C.5.)
- An alternate payee is not able to “cash-out” his or her awarded portion at time of divorce. (III.C.3)
- Except under limited circumstances, payments to an alternate payee may begin only when the member’s payments begin. (III.C.3)
- The amount of contributions has little to do with the actual present value of the plan benefits. This is a hybrid defined benefit plan. (IIIC.4.)

C. Employees Retirement System (ERS)

- Don’t attempt to award an alternate payee a lump-sum dollar amount. Percentages only. (III.B.5.)
- An alternate payee is not able to “cash-out” his or her awarded portion at time of divorce. (III.B.3.)
- The amount of contributions has little to do with the actual present value of the plan benefits. This is a hybrid defined benefit plan. (III.B.4.)
- Payments to an alternate payee may begin only when the member’s payments begin. (III.B.3.)

D. Texas County and District Retirement System (TCDRS)

- Lump-sum dollar awards to an alternate payee are acceptable, providing the correct language is included in the QDRO. However, this doesn’t necessarily mean that a lump-sum will actually be distributed and there is no immediate payment upon divorce. (III.E.5b.)
- A QDRO can use either the “Accumulated Contributions Formula” or the “Credited Service Formula” method with different benefit results. Make certain the correct one is used considering the circumstances. (III.E.5d.)
- Payments to an alternate payee may begin only when the member’s payments begin. (III.E.3.)

E. Texas Municipal Retirement System (TMRS)

- Lump-sum dollar awards to an alternate payee are acceptable, providing the correct language is included in the QDRO. However, this doesn’t necessarily mean that a lump-sum will actually be distributed and there is no immediate payment upon divorce. (III.F.5b.)
- A QDRO can use either the “Accumulated Contributions Formula” or the “Credited Service Formula” method with different benefit results. Make certain the correct one is used considering the circumstances. (III.F.5d.)
- Payments to an alternate payee may begin only when the member’s payments begin. (III.F.3.)

F. Judicial Retirement System – Plan I and Plan II (JRS-I and JRS-II)

- Don’t attempt to award an alternate payee a lump-sum dollar amount. Percentages only. (III.D.5.)
- An alternate payee is not able to “cash-out” his or her awarded portion at time of divorce. (III.D.3.)
- The amount of contributions has little to do with the actual present value of the plan benefits. This is a hybrid defined benefit plan. (III.D.4.)
- Payments to an alternate payee may begin only when the member’s payments begin. (III.D.3.)

G. Texas Emergency Services Retirement System (TESRS)

- This is the only State public retirement system that does not have employee contributions, participation by the department is optional and the level of participation can vary widely from department to department. (III.G.2.)
- Don't attempt to award an alternate payee a lump-sum dollar amount. Percentages only. (III.G.3.)
- An alternate payee is not able to "cash-out" his or her awarded portion at time of divorce. (III.G.3.)
- Payments to an alternate payee may begin only when the member's payments begin. (III.G.3.)

H. Other Local Government Defined Benefit Plans

- Although most city and local government defined benefit plans permit division by court order and will make direct payments, confirm that fact for yourself as early in the case as possible.

I. Other Local Government Defined Contribution Plans

- Many city and local government defined contribution plans will not permit division by court order, so resolve that question as early in the case as possible.

III. OVERVIEW OF THE SYSTEMS

The seven State public retirement systems are statutory creations. Although some of the Systems deny that they are defined benefit plans, for the purposes of this article, I consider all of them as hybrid defined benefit plans. In addition to these seven Systems, a covered employee may be able to participate in a defined contribution plan, such as a 457(b), 403(b) or 401(k). There are literally hundreds of such plans in Texas and general considerations for division and order drafting are contained in Section V.

The statutory authority for the seven Systems is contained in the Texas Government Code, Title 8, as follows:

Employees Retirement System of Texas

Subtitle B. Chapters 811 - 820

Teacher Retirement System of Texas

Subtitle C. Chapters 821 - 830

Judicial Retirement System of Texas Plan One

Subtitle D. Chapters 831 - 835

Judicial Retirement System of Texas Plan Two

Subtitle E. Chapters 836 - 840

Texas County and District Retirement System

Subtitle F. Chapters 841 - 850

Texas Municipal Retirement System

Subtitle G. Chapters 851 - 860

Texas Emergency Services Retirement System

Subtitle H. Chapters 861 - 870

Additionally, Subtitle A, Chapters 801 - 810, contain provisions generally applicable to all public retirement systems.

A. General Provisions for all Systems**1. ERISA Doesn't Apply but a QDRO is Required**

State public retirement systems are specifically excluded from the provisions of ERISA. However, Chapter 804, Subchapter A, provides anti-alienation provisions to these public retirement systems similar to ERISA and allows an assignment of a benefit to an alternate only by way of a qualified domestic relations order. (Sect. 804.003(a)).

2. Qualification of a Domestic Relations Order

The administrative head of a public retirement system or his/her designee has exclusive authority to determine whether a domestic relations order is a "qualified domestic relations order". Such a determination may only be appealed to the board of trustees of the System. (Sect. 804.003(b)).

3. Making a Public Retirement System a Party

A Court generally does not have jurisdiction over a public retirement system with respect to a divorce or other action in which an alternate payee's right to receive all or a portion of the System benefits is created or established. If a party attempts to make the System a party, that party shall be liable to the System for its costs and attorney's fees. (Sect. 804.003(c)).

4. Statutory Grounds for Rejection of a QDRO

Unlike ERISA plan QDROs, being creative in the drafting of a public retirement system QDRO rarely is rewarded. Omitting or adding language to the System's model QDRO will most likely result in rejection of the QDRO. Some attorneys feel compelled to "tinker" with all legal documents. In this instance, resist the urge. Section 804.003(g) provides for eight situations in which the System may reject the QDRO. The most common situations I see are (g)(2) and (g)(3), dealing with designation of a particular person as a beneficiary in the event of the employee's death and attempting to require the selection of a particular benefit payment form or option, respectively.

Public retirement systems, either by statute or rule, provide how System benefits are to be distributed in the event the employee dies prior to total distribution. Neither the Court nor the parties have the authority to change the statute or rule as to beneficiaries, so such an attempt in the QDRO should be avoided. Although it is common to designate beneficiaries in ERISA plan QDROs, don't do so with public retirement system orders.

All the Systems, except for TESRS, allow a terminating or retiring member to make one of two, and sometimes three, elections in regards to the form

or option of benefit payment. The member may choose to (1) withdraw his/her contributions with interest and cease participation in the System, (2) receive monthly annuity payments for his/her life, or (3) take a partial lump-sum payment with reduced monthly annuity payments for his/her life. Option (3) is available in limited circumstances and only for some of the Systems. A QDRO will be rejected if it attempts to require the member to select one of these options or forms of payment, or if the QDRO itself attempts to make the election for the member.

There are instances in which minor changes are acceptable and required. In the instance in which the parties agree on a date of division different from the date of divorce, the words “date of divorce” in the division formula will have to be replaced with an actual date. So long as one is consistent in the change, the System will usually accept the change.

5. Decree Must Clearly State Awarded Portion

We all recognize that a Court may only divide the community portion of a retirement plan when division of the property is contested. However, the parties are free to contractually agree to divide the separate property portion, if they so choose. In the event the System member has credited service or contributions prior to the marriage, the Decree must be clear and specific as to what is being divided. I see many Decrees that simply state, “Wife is awarded 50% of Husband’s T.R.S. benefits”. Most times, the parties and attorneys intend that to mean 50% of only the community portion, effective on the date of divorce. However, that is not what this provision states and most trial courts before which I have appeared will interpret this language to divide the entire benefit as of the date of divorce, if the Decree was agreed by the parties. There are three harsh but clear Texas Supreme Court decisions on this issue. Don’t get caught; state specifically what is being divided and on what date. One doesn’t have to use the convoluted language contained in the actual QDRO in the Decree but one must still be concise.

B. Employees Retirement System of Texas (ERS)

1. System Administration

This System is self-administered with a Board of Directors. Proposed QDROs and other contacts should be directed to:

Employees Retirement System of Texas
 Customer Benefits Division
 P.O. Box 13207
 Austin, TX 78711-3207
 877-275-4377, ext. 7115 or 7776 (toll-free)
 512-867-7711, ext. 7115 or 7776 (Austin area)
www.ers.state.tx.us

2. Benefit Funding

ERS is a hybrid defined benefit plan, and its members make contributions to the System by income deduction. Currently, beginning on the first of the month following the 90th day as an employee, 6% of the member’s monthly pre-tax salary is deducted and placed into the member’s personal retirement account. This account earns 5% interest annually. Additionally, the State of Texas contributes 6.45% of the member’s salary into a general fund.

3. Benefit Options

Upon termination or retirement, a member must choose one of three benefit options; (1) a refund of the member’s contributions with interest, (2) a monthly annuity, or (3) a partial lump-sum with a permanently reduced monthly annuity. If a refund is elected, it is paid as soon as it can be processed and the member receives no other System benefits in the future. The member receives none of the State’s contributions to the general fund.

If annuity payments are elected, the member must meet certain age and service requirements in order for the benefit payments to begin. Generally, the member must be either (1) age 60 with at least 5 years creditable service, or (2) Rule of 80 with 5 years creditable service. The Rule of 80 is that one’s age in years and months and creditable service in years and months must add up to at least 80. The age and creditable service requirement increases if the member seeks to retire with an annuity and insurance (65 and 10 years or Rule of 80 and 10 years). Service Credit can include unused sick and annual leave, and Service Credit can be purchased under certain requirements. A member may choose between a standard annuity or 5 different options with survivor benefits.

Under certain conditions, a member may elect a partial lump-sum, consisting of up to 36 months of the standard annuity amount. In addition, a monthly annuity payment will be received by the member but it will be permanently reduced because of the lump-sum payment.

A Court may not direct a member as to which benefit option to elect, nor may a QDRO make that election. The election is solely in the discretion of the member. A QDRO that makes such an election or directs the member to make such an election will be rejected by the System.

Even though a member could elect a lump-sum withdrawal of his/her contributions, with interest, that election can only occur upon termination or retirement. Therefore, upon divorce, the alternate payee spouse will not be able to receive his/her portion, unless termination or retirement just happens to occur at the same time. Further, the alternate payee may only receive his/her awarded portion of the benefit if, as, and when the member receives benefit payment.

4. Benefit Calculation

ERS is a hybrid defined benefit plan. Any monthly annuity payments received by the member and any alternate payee is calculated based upon a formula. There is no direct relationship between the amount of the member's contributions and the actual monthly annuity payment. Therefore, counsel should not use the amount of a member's contributions in valuing the System benefits or in "off-setting" a defined contribution account balance, unless, of course, counsel represents the member.

The current formula for a standard annuity under ERS is 2.3% times the number of years (plus .192% times the number of left-over months) of Creditable Service times the average of the member's highest 36 months of salary. The standard annuity must be no less than \$150 per month and no more than 100% of the final average salary. Federal taxes will be withheld but not Social Security or Medicare taxes.

5. QDRO Form

ERS provides a Model Order but it is not a statutorily pre-approved form as with TCDRS and TMRS. That form is available online at <http://www.ers.state.tx.us/retirement/apply/documents/ModelQDRO.pdf>.

Although the Texas Family Law Practice Manual has an ERS QDRO that mostly follows the ERS Model Form, there are some differences. On its web site page, Common QDRO Questions, ERS specifically states that it will not accept the Family Law Practice Manual form without changes, so don't use it.

The Model Order form uses a formula to divide the benefit according to the Berry formula, meaning that it is divided as of date of divorce, not date of retirement. *Berry v Berry*, 647 S.W.2d 945 (Tex. 1983). The method of division is based upon time (Creditable Service), not contributions, with the numerator of the formula being the number of months of Creditable Service between the date of marriage and date of divorce and the denominator being the total months of Creditable Service as of the date of divorce. This fraction is then multiplied times the benefit that the member would receive had the member been entitled to a benefit at the date of divorce and finally, times the percentage awarded to the alternate payee.

In a case in which all of the Creditable Service was during the marriage, I once attempted to "simplify" the Model Order by eliminating the marital formula and simply multiply the percentage awarded to the alternate payee (50%) times the benefit the member would receive had the member been entitled to a benefit at the date of divorce. ERS rejected it for no logical reason, but it taught me to resist simplification and creativity when dealing with State bureaucracies.

Although ERS maintains an individual account containing the member's contributions and interest

which the member may withdraw in lieu of annuity benefits upon termination or retirement, never award an alternate payee a lump-sum dollar amount. The System will reject a QDRO that contains a lump-sum amount since that only instructs the System in the event the member elects a lump-sum distribution upon termination or retirement. If the member elects monthly annuity payments instead, the System has no guidance from the QDRO as to the portion to be paid to the alternate payee. Although the Model Order could be modified by the System to account for lump-sum awards, as does TMRS and TCDRS, it has not done so.

C. **Teacher Retirement System of Texas (TRS)**

1. System Administration

This System has over 1,100,000 active members and annuitants and is self-administered with a Board of Trustees. Proposed QDROs and other contacts should be directed to:

Legal Services

Teacher Retirement System of Texas

1000 Red River St.

Austin, TX 78701-2698

512-542-6400 (Austin area)

800-223-8778 (toll-free)

www.trs.state.tx.us

2. Benefit Funding

TRS is a hybrid defined benefit plan, and its members make contributions to the System by income deduction. Unlike ERS, there is no longer a 90 day membership waiting period. The current pension trust fund is about \$93.7 billion and was generated by the following sources: 69% investment performance, 16% member contributions, 13% State of Texas contributions and 2% employer contributions. Currently, 6.4% of the member's monthly pre-tax salary is deducted and placed into the member's personal retirement account. This account earns 5% interest annually on the mean balance (average of the highest and lowest balances) in the account during that fiscal year that begins on September 1. Additionally, the State of Texas contributes 6% of the member's salary into a general fund and the employer is required to pay a surcharge of 12.4% (total of member and State contributions).

3. Benefit Options

Upon termination or retirement, a member must choose one of three benefit options; (1) a refund of the member's contributions with interest, (2) a monthly annuity, or (3) a Partial Lump Sum Option (PLSO) with a permanently reduced monthly annuity. If a refund is elected, it is paid as soon as it can be processed and the member receives no other System

benefits in the future. The member receives none of the State's or employer's contributions to the general fund.

If annuity payments are elected, the member must meet certain age and service requirements in order for the benefit payments to begin. For a Normal-Age Service Retirement (100% of the benefit formula), the member must be either (1) age 65 with at least 5 years service credit, or (2) "Rule of 80" with 5 years service credit. The "Rule of 80" is that one's age in years and months and creditable service in years and months must add up to at least 80. The age and creditable service requirement increases if the member seeks to retire with an annuity and health benefits through TRS-Care (Rule of 80 and 10 years service or at least 30 years of service credit). Service Credit can include unused sick and personal leave, military service and developmental leave. Service Credit can no longer be purchased after December 31, 2005. A member may choose either a standard annuity or 5 different options with survivor benefits.

For an Early-Age Service Retirement (less than 100% of the Normal-Age Service Retirement benefit), the member must be either (1) age 55 with at least 5 years of service credit, or (2) any age below 50 with at least 30 years of service credit. TRS publishes charts to determine the percentage reduction depending upon age and service credit. Certain "grandfathered" members may elect early retirement at age 55 with at least 20 years service credit and receive more favorable benefits with less of a reduction.

Under certain conditions, a member may elect a Partial Lump Sum Option (PLSO) equal to 12, 24 or 36 months of a standard service retirement annuity. The current requirements for election of a PLSO requires the member to (1) meet the "Rule of 90" (combined age plus years of service credit equal at least 90), (2) not participate in the Deferred Retirement Option Plan (DROP) and (3) not retire under the proportional retirement law. The requirement substantially changed as of August 31, 2005, and a member should carefully review the rules to see if he/she is "grandfathered" into the previous requirements. In order to be "grandfathered", the member must have, as of August 31, 2005, either (1) been at least 50 years old, (2) met the "Rule of 70", or (3) had at least 25 years of service credit. In addition to the partial lump-sum payment, a monthly annuity payment will be received by the member but it will be permanently reduced because of the lump-sum payment.

A Court may not direct a member as to which benefit option to elect, nor may a QDRO make that election. The election is solely in the discretion of the member. A QDRO that makes such an election or directs the member to make such an election will be rejected by the System.

Even though a member could elect a lump-sum withdrawal of his/her contributions, with interest, that election can only occur upon termination or retirement. Therefore, upon divorce, the alternate payee spouse will not be able to receive his/her portion, unless termination or retirement just happens to occur at the same time. Further, in most instances, the alternate payee may only receive his/her awarded portion of the benefit if, as, and when the member receives benefit payment. However, in limited circumstances, an alternate payee may begin receiving benefit payments before payments begin to the TRS participant. This exception only applies if the TRS member is age 62 or older, is otherwise eligible to retire without reduction for early age and has not yet retired. If the alternate payee makes a written request for such an early distribution, the member's benefit will be permanently reduced and is generally greater than a dollar-for-dollar reduction. Therefore, if an alternate payee requests an early distribution, the member must carefully consider whether or not to further delay retirement.

4. Benefit Calculation

TRS is a hybrid defined benefit plan. Any monthly annuity payments received by the member and any alternate payee is calculated based upon a formula. There is no direct relationship between the amount of the member's contributions and the actual monthly annuity payment. Therefore, counsel should not use the amount of a member's contributions in valuing the System benefits or in "off-setting" a defined contribution account balance, unless, of course, counsel represents the member.

The current formula for a Normal-Age Service Retirement monthly annuity, unreduced for early retirement, under TRS is 2.3% times the number of years of Service Credit times the average of the member's highest 5 years of salary divided by 12. Members who, as of August 31, 2005, were age 50 or more, had at least 25 years of service credit, or whose combined age and service credit totaled at least 70, will calculate benefits using the average of their highest 3 years of salary instead of 5 years. The standard annuity must be no less than \$150 per month. Certain highly paid members may face benefit reduction in compliance with the Internal Revenue Code. Federal taxes will be withheld but not Social Security or Medicare taxes.

5. QDRO Form

TRS provides a model QDRO but it is not a statutorily pre-approved form as with TCDRS and TMRS. That form is available online at http://www.trs.state.tx.us/benefits/documents/qdro_model_intro.pdf.

The Family Law Practice Manual has a TRS QDRO that mostly follows the TRS model QDRO and should be acceptable to the System.

The model form uses a formula to divide the benefit that is unique among the public retirement systems. Rather than using a fraction based upon either time (Service Credit) or contributions, the form in effect uses both since it considers the theoretical monthly benefit that would be received at relevant times. For members not yet retired, the numerator of the formula is the amount of a normal-age standard service retirement annuity based on service and salary credit acquired between the date of marriage and date of divorce. The denominator is the normal-age standard annuity based upon all service and salary credit as of the date of retirement. This fraction is then multiplied times the actual benefit that the member is receiving at date of retirement and finally, times the percentage awarded to the alternate payee.

Since the TRS formula partly uses data and benefit calculations at the time of retirement, at first it appears that the out-of-date Cearley-Taggart formula (calculate benefits at time of retirement) is being used rather than the current Berry formula (calculate benefits at time of divorce). However, further analysis reveals that Berry is not only followed, but in considering the actual benefit received instead of simply making the division based upon a standard annuity with no reduction for survivor benefits, the TRS formula may be considered more accurate and fair than other formulas, such as ERS. The ERS formula calculates the benefit payable at time of divorce, but calculates it based upon a standard annuity benefit. The alternate payee's portion is based on this "maximum" benefit that is not reduced by election of a survivor benefit. In the event the participant actually elects an optional benefit at the time of retirement that causes a reduction in the benefit due to a survivor benefit feature, there is no proportionate reduction in the alternate payee's benefit. Therefore, the alternate payee under ERS is receiving a larger portion than he/she is actually entitled.

Sample calculations and further explanation is detailed in Appendix A to illustrate that the TRS formula not only follows Berry but takes into consideration the benefit option elected by the participant. Using the provided factual assumptions, if TRS simply calculated the portion awarded to the alternate payee based upon a standard benefit at date of divorce, the awarded portion would be \$388.13 per month. Assuming the participant elected an Option 1 benefit (100% Joint & Survivor Annuity), which is 90.56% of the standard annuity, the current TRS formula awards \$351.49 per month.

The TRS model QDRO uses different language to be used as the numerator of its formula depending upon whether or not the member is retired. The form

is clearly marked, with Numerator A being for use if the member is not retired and Numerator B being for use if he/she is retired.

An actual letter from TRS approving a QDRO is attached as Appendix B to confirm TRS' computation methods. Finally, an actual annual Statement of Account is attached as Appendix C.

Although TRS maintains an individual account containing the member's contributions and interest which the member may withdraw in lieu of annuity benefits upon termination or retirement, never award an alternate payee a lump-sum dollar amount. The System will reject a QDRO that contains a lump-sum dollar amount since that only instructs the System in the event the member elects a lump-sum distribution upon termination or retirement. If the member elects monthly annuity payments instead, the System has no guidance from the QDRO as to the portion to be paid to the alternate payee. Although the model QDRO could be modified by TRS to account for lump-sum awards, as does TMRS and TCDRS, it has not done so.

D. Judicial Retirement System Plan I (JRS-I) and Judicial Retirement System Plan II (JRS-II)

1. System Administration

These Systems are administered by The Employees Retirement System of Texas (ERS). Proposed QDROs and other contacts should be directed to:

Employees Retirement System of Texas
Customer Benefits Division
P.O. Box 13207
Austin, TX 78711-3207
877-275-4377, ext. 7115 or 7776 (toll-free)
512-867-7711, ext. 7115 or 7776 (Austin area)
<http://www.ers.state.tx.us>

2. Membership

The members of these Systems are judges, justices and commissioners of the Supreme Court, Court of Criminal Appeals, Courts of Appeals, District Courts or specified commissioners to a court. Those that took the bench or began service before September 1, 1985 are in Plan I and those that took the bench or began service on or after September 1, 1985 are in Plan II.

Judicial officers in these Systems are covered by Social Security and any benefit received from Social Security does not affect retirement benefits from JRS-I or JRS-II.

3. Benefit Funding

JRS-I and JRS-II are hybrid defined benefit plans, and its members make contributions to the Systems by income deduction. However, a member who accrues 20 years of service in the System will cease making contributions. Currently, 6% of the member's monthly

pre-tax salary is deducted and placed into the General Revenue Fund. An annual, non-refundable membership fee of \$10 is collected and placed in an Expense Fund and used to help pay operating costs. Additionally, the State of Texas contributes an amount necessary to finance the System.

4. Benefit Options

Upon termination or retirement, a member must choose one of two benefit options; (1) a refund of the member's contributions or (2) a monthly annuity. If a refund is elected, the member receives no other System benefits in the future. The member receives none of the State's contributions to the general fund. There currently is no partial lump-sum option.

A Court may not direct a member as to which benefit option to elect, nor may a QDRO make that election. The election is solely in the discretion of the member. A QDRO that makes such an election or directs the member to make such an election will be rejected by the System.

Even though a member could elect a lump-sum withdrawal of his/her contributions, that election can only occur upon termination or retirement. Therefore, upon divorce, the alternate payee spouse will not be able to receive his/her portion, unless termination or retirement just happens to occur at the same time. Further, the alternate payee may only receive his/her awarded portion of the benefit if, as, and when the member receives benefit payment.

If annuity payments are elected, the member must meet certain age and service requirements in order for the benefit payments to begin, which are slightly different between Plan I and Plan 2.

a. JRS-I

Generally, to receive a base Service Retirement Annuity (SRA) under JRS-I, the member must be either (1) age 65 with at least 10 years creditable service and currently holding a judicial office, (2) age 65 with at least 12 years creditable service, whether or not currently holding a judicial office, or (3) any age with at least 20 years of creditable service, whether or not currently holding a judicial office. Service Credit can be purchased based upon past active military service or previously refunded judicial service. A member may choose either a standard annuity or 5 different options with survivor benefits.

In order to receive early retirement with a reduced benefit, the member must be either (1) age 60 with at least 10 years of creditable service and currently holding judicial office, or (2) age 60 with at least 12 years of creditable service whether of not currently holding judicial office.

b. JRS-II

Generally, to receive a base Service Retirement Annuity (SRA) under JRS-II, the member must be either (1) age 65 with at least 10 years creditable service and currently holding a judicial office, (2) age 65 with at least 12 years creditable service, whether or not currently holding a judicial office, (3) age 55 with at least 20 years of creditable service, whether or not currently holding a judicial office, or (4) served at least two full terms on an appellate court and the sum of age and service credit is at least 70, whether or not currently holding a judicial office. Service Credit can be purchased based upon past active military service or previously refunded judicial service. A member may choose either a standard annuity or 5 different options with survivor benefits.

In order to receive early retirement with a reduced benefit, the member must be either (1) age 60 with at least 10 years of creditable service and currently holding judicial office, or (2) age 60 with at least 12 years of creditable service whether of not currently holding judicial office.

5. Benefit Calculation

JRS-I and JRS-II are hybrid defined benefit plans. Any monthly annuity payments received by the member and any alternate payee is calculated based upon a formula. There is no direct relationship between the amount of the member's contributions and the actual monthly annuity payment. Therefore, counsel should not use the amount of a member's contributions in valuing the System benefits or in "offsetting" a defined contribution account balance, unless, of course, counsel represents the member.

The current formula for a base Service Retirement Annuity (SRA) under JRS-I or JRS-II is 50% of the State salary being paid for a judge or a court of the same classification as the court on which the member last served. This is decreased by 10% if retiring early and increased 10% if the member has not been out of office for more than one year at retirement or has accepted an assignment as a visiting judge within one year prior to retirement. Therefore, the annuity could be either 40%, 50% or 60% of salary. Monthly retirement annuities are automatically adjusted each time judicial salaries change.

6. QDRO Form

ERS provides a Model Order that is also used for JRS-I and JRS-II by changing the System name, but it is not a statutorily pre-approved form as with TCDRS and TMRS. That form is available online at <http://www.ers.state.tx.us/retirement/apply/documents/ModelQDRO.pdf>.

Although the Family Law Practice Manual has an ERS QDRO that mostly follows the ERS Model Form, there are some differences. On its web site page,

Common QDRO Questions, ERS specifically states that it will not accept the Family Law Practice Manual form without changes, so don't use it.

The Model Order form uses a formula to divide the benefit according to the Berry formula, meaning that it is divided as of date of divorce, not date of retirement. *Berry v Berry*, 647 S.W.2d 945 (Tex. 1983). The method of division is based upon time (Creditable Service), not contributions, with the numerator of the formula being the number of months of Creditable Service between the date of marriage and date of divorce and the denominator being the total months of Creditable Service as of the date of divorce. This fraction is then multiplied times the benefit that the member would receive had the member been entitled to a benefit at the date of divorce and finally, times the percentage awarded to the alternate payee.

Although JRS-I and JRS-II maintain member contribution totals from which the member may withdraw in lieu of annuity benefits upon termination or retirement, never award an alternate payee a lump-sum dollar amount. The System will reject a QDRO that contains a lump-sum amount since that only instructs the System in the event the member elects a lump-sum distribution upon termination or retirement. If the member elects monthly annuity payments instead, the System has no guidance from the QDRO as to the portion to be paid to the alternate payee. Although the Model Order could be modified by the System to account for lump-sum awards, as does TMRS and TCDRS, it has not done so.

E. Texas County and District Retirement System (TCDRS)

1. System Administration

This System is self-administered with a Board of Trustees and more than 150,000 members. Proposed QDROs and other contacts should be directed to:

Texas County and District Retirement System
P.O. Box 2034
Austin, TX 78768-2034
800-823-7782 (toll-free)
512-328-8889 (Austin area)
www.tcdrs.org

2. Benefit Funding

TCDRS is a hybrid defined benefit plan, but with features unique to it and TMRS. Benefit payments are funded largely in advance of retirement. Its members make contributions to the System by income deduction. The member's employer decides the percentage of the member's monthly pre-tax salary to deduct and place into the member's contribution "account". The employee contribution will be 4%, 5%, 6% or 7%, as set by the employer. This account earns 7% interest annually, which is credited to the account

on each December 31, based upon the account balance on the previous January 1. Additionally, each employer matches or over-matches the employee contribution, at a 1:1, 1.5:1, 2:1 or some other ratio, as determined by the employer. The employer may also enhance benefits with additional contributions under certain circumstances. The employee and employer contributions are combined and invested by the System to help fund the benefit payments.

3. Benefit Options

Upon termination or retirement, a member must choose one of two benefit options; (1) a refund of the member's contributions with interest, or (2) a monthly annuity. If a refund is elected, it is paid as soon as it can be processed and the member receives no other System benefits in the future. The member receives none of the employer's contributions upon a refund of the member's contributions.

If annuity payments are elected, the member must meet certain age and service requirements in order for the benefit payments to begin. Each employer determines the retirement eligibility requirements for its covered employees. A member may choose between four "single-life" annuities (Life-only, 5 year, 10 year or 15 year guaranteed payments) or 4 "dual-life" annuities with survivor benefits (50%, 75%, 100% or 100% with "pop-up"). There currently is no partial lump-sum option.

A Court may not direct a member as to which benefit option to elect, nor may a QDRO make that election. The election is solely in the discretion of the member. A QDRO that makes such an election or directs the member to make such an election will be rejected by the System.

Even though a member could elect a lump-sum withdrawal of his/her contributions, with interest, that election can only occur upon termination or retirement. Therefore, upon divorce, the alternate payee spouse will not be able to receive his/her portion, unless termination or retirement just happens to occur at the same time. Further, the alternate payee may only receive his/her awarded portion of the benefit if, as, and when the member receives benefit payment.

4. Benefit Calculation

TCDRS is a hybrid defined benefit plan, in my opinion, because it relies upon the same part of the Internal Revenue Code (Sect. 401) for qualification as do the other public retirement systems such as TRS and ERS. Further, one option upon retirement is the payment of monthly annuity benefits. However, in the *Benefits and Divorce* publication, the System states "TCDRS is not a defined benefit plan, but rather a "hybrid" plan containing features of both defined contribution and defined benefit plans" (page 6-7). I agree that it is a "hybrid" due to the fact of employee

contributions, but it is a “hybrid” defined benefit plan, just as TRS, ERS, JRS and the federal plans, CSRS and FERS.

Any monthly annuity payments received by the member and any alternate payee is calculated actuarially considering the amount of the employee and employer contributions, with interest. There is no set formula for benefit calculation such as in TRS or ERS. Since TCDRS is funded by the employee and employer contributions and the investment income those funds earn, the amount of a member’s annuity payments somewhat depend upon market conditions and investment return rates at the time of a member’s retirement. The System provides a member with an annual estimate of future monthly benefits. It is an estimate only and the actual benefit received upon retirement can be different. There is no direct relationship between the amount of the member’s contributions and the actual monthly annuity payment. Therefore, counsel should not use the amount of a member’s contributions in valuing the System benefits or in “off-setting” a defined contribution account balance, unless, of course, counsel represents the member.

5. QDRO Form

a. Pre-approved Form

TCDRS provides statutorily pre-approved QDRO forms. These forms are available at 34 Tex. Admin. Code §109.13 or from TCDRS in a publication entitled “Benefits and Divorce”. The Texas Family Law Practice Manual also contains one version of the Standard form, dividing the benefit using credited service, but not the version using accumulated contributions. The Family Law Practice Manual also does not contain the special language to divide based upon a lump-sum award or for participant’s that are in retirement status at the time of divorce. It is always best to use the forms provided by the System.

b. Lump-Sum Awards

A unique feature of the TCDRS and TMRS forms is that language is provided to deal with Decrees that make lump-sum awards, however, the wording of the formula is difficult to understand unless one reads it numerous times and/or consumes several glasses of wine. Always remember that although the QDRO states a lump-sum award, that does not necessarily mean that a lump-sum will be paid to the alternate payee or that any benefit will be paid at the time of the divorce.

c. Berry Formula Not Used

Since TCDRS does not calculate retirement benefits using a set formula, attempting to draft a QDRO using terms such as “accrued as of date of divorce” are futile. There is no “accrual” of benefits,

only an accumulation of contributions or service credits. The System can “estimate” future retirement benefits but the actual annuity payment is determined only upon actual retirement. Therefore, the “Standard” form QDRO for members not in retirement status uses a fraction in which the denominator is either (1) the total of all contributions of the Participant, or (2) total amount of credited service by the Participant, depending upon which method is used in the numerator. The resulting fraction is then multiplied by the benefit payable on retirement. This is essentially the out-of-date Cearley-Taggart formula, not the current Berry formula.

d. “Accumulated Contributions” verses “Credited Service” Formulas

As mentioned above, the “Standard” Division of Benefit Form contains two alternative formulas for dividing retirement benefits, whether the member elects a lump-sum withdrawal of contributions or an annuity. The formulas are based on (1) “accumulated contributions”, or (2) “credited service”. It is important for counsel to carefully consider which method to use in a particular case because the two methods can yield different results.

In my opinion, use of the “accumulated contributions” formula results in a more accurate and fair division and helps mitigate the System’s continued use of a Cearley-Taggart type division based upon the benefit received upon retirement. A member’s contributions are a percentage of his/her salary. Therefore, a division made upon that criteria would yield different results for a 10-year marriage at the beginning of the member’s career compared to a 10-year marriage at the end of the career, assuming that the member’s salary is higher at the end of his/her career.

The “credited service” formula is a time-based formula and operates as if every month is equal to every other month in salary and contributions. Obviously, that is rarely the case.

Generally, the alternate payee would benefit by use of the “credited service” formula if the marriage was during the early years of the member’s employment, when his/her salary was lowest. Use of the “accumulated contribution” formula would benefit the alternate payee if the member had substantial service prior to the marriage.

e. Special Language for Retired Participant’s

As of 1994, TCDRS has been able to divide the “dual-life” option benefits into two annuity payment plans upon divorce, one for the participant and one for the alternate payee, if the QDRO so authorizes it. This allows the System to make separate actuarial determinations as to the amount of payment to each party. In many instances, this will result in the retiree

participant receiving a higher benefit than some other method, while always resulting in the alternate payee receiving the same amount both before and after the participant's death. The TCDRS pre-approved forms contain this necessary language and should be used where appropriate.

f. Buy-Out Language

In certain cases, the parties may want to agree that the participant may acquire the alternate payee's interest in the Plan for a stated amount of money within some time period after the divorce. This would possibly be appropriate if the alternate payee has a need for cash and the participant does not have funds available at the time of divorce but anticipates having the funds in the near future. The buy-out amount may include interest. In the event this alternative is used, special language must be included in the QDRO. Acceptable language is provided in the TCDRS forms and should be used. If the buy-out occurs, the alternate payee will be required to sign and acknowledge a separate Agreement that is attached to the QDRO as an exhibit. This Agreement is also included in the TCDRS forms. In the event the alternate payee refuses to sign the Agreement upon tender of the buy-out amount, the participant may seek specific performance remedies from the court.

F. Texas Municipal Retirement System (TMRS)

1. System Administration

This System is self-administered with a Board of Trustees and more than 133,000 members, annuitants and beneficiaries. Proposed QDROs and other contacts should be directed to:

Texas Municipal Retirement System
P.O. Box 149153
Austin, TX 78714-9153
800-924-8677 (toll-free)
512-476-7577 (Austin area)
www.tmr.com

2. Benefit Funding

TMRS is a hybrid defined benefit plan, but with features unique to it and TCDRS. Benefit payments are funded largely in advance of retirement. Its members make contributions to the System by income deduction. The employing city decides the percentage of the member's monthly pre-tax salary to deduct and place into the member's contribution "account". The employee contribution will be 5%, 6% or 7%, as set by the employer. This account earns interest annually, which is credited to the account on each December 31, based upon the account balance on the previous January 1. The rate of interest is based upon the investment income of the System and is determined annually by the Board of Directors. Additionally, each

employer matches or over-matches the employee contribution, at a 1:1, 1.5:1, 2:1 ratio, as determined by the employer. The employer may also enhance benefits with additional contributions under certain circumstances. The employer contributions are held in the city's TMRS retirement account until the member retires.

3. Benefit Options

Upon termination or retirement, a member must choose one of three benefit options; (1) a refund of the member's contributions with interest, (2) a monthly annuity, or (3) a Partial Lump Sum Distribution (PLSD) and a permanently reduced monthly annuity payment. If a refund is elected, it is paid as soon as it can be processed and the member receives no other System benefits in the future. The member receives none of the employer's contributions upon a refund of the member's contributions.

If annuity payments are elected, the member must meet certain age and service requirements in order for the benefit payments to begin. Each employer determines the retirement eligibility requirements for its covered employees, but generally it requires (1) at least 5 years of service (10 years in some cities) and at least an age of 60, or (2) at least 20 or 25 years of service at any age. A member may choose between four "single-life" annuities (Retiree Life-only, 5 year, 10 year or 15 year guaranteed payments) or 3 Survivor Lifetime Options with survivor benefits (50%, 75%, or 100%).

A member may elect a Partial Lump Sum Distribution (PLSD) equal to 12, 24 or 36 months of a Retiree Life-only annuity, and the PLSD cannot exceed 75% of the member's contributions plus interest. In addition to the partial lump-sum payment, a monthly annuity payment will be received by the member but it will be permanently reduced because of the lump-sum payment.

A Court may not direct a member as to which benefit option to elect, nor may a QDRO make that election. The election is solely in the discretion of the member. A QDRO that makes such an election or directs the member to make such an election will be rejected by the System.

Even though a member could elect a lump-sum withdrawal of his/her contributions, with interest, that election can only occur upon termination or retirement. Therefore, upon divorce, the alternate payee spouse will not be able to receive his/her portion, unless termination or retirement just happens to occur at the same time. Further, the alternate payee may only receive his/her awarded portion of the benefit if, as, and when the member receives benefit payment.

4. Benefit Calculation

TMRS is a hybrid defined benefit plan, in my opinion, because it relies upon the same part of the Internal Revenue Code for qualification (Sect. 401) as do the other public retirement systems such as TRS and ERS. Further, one option upon retirement is the payment of monthly annuity benefits. However, the System's position is apparently the same as TCDRS, which states "TCDRS is not a defined benefit plan, but rather a "hybrid" plan containing features of both defined contribution and defined benefit plans". In a previous letter from TMRS Legal Counsel, Mr. Kendall states, "TMRS is *not* a defined benefit plan. For that matter, TMRS is also not a "true" defined contribution plan, but rather a hybrid plan, consisting of features of both types of traditional plans". I agree that it is a "hybrid" due to the fact of employee contributions, but it is a "hybrid" defined benefit plan, just as TRS, ERS, JRS and the federal plans, CSRS and FERS.

The monthly annuity benefit is based upon (1) the member's contributions with interest, (2) the city's matching contributions and other credits with interest, (3) the member's life expectancy (and the beneficiary's if certain options are elected), (4) future account interest assumptions as set by law, and (5) the monthly payment plan option elected. There is no set formula for benefit calculation such as in TRS or ERS. Since TMRS is funded by the employee and employer contributions and the investment income those funds earn, the amount of a member's annuity payments somewhat depend upon market conditions and investment return rates at the time of a member's retirement. The System provides a member with an annual estimate of future monthly benefits. It is an estimate only and the actual benefit received upon retirement can be different. There is no direct relationship between the amount of the member's contributions and the actual monthly annuity payment. Therefore, counsel should not use the amount of a member's contributions in valuing the System benefits or in "off-setting" a defined contribution account balance, unless, of course, counsel represents the member.

5. QDRO Form

a. Pre-approved Form

TMRS provides statutorily pre-approved QDRO forms. These forms are available at 34 Tex. Admin. Code §129.13 or from TMRS in a publication entitled "Divorce and Retirement" available online at <http://www.tmr.com/down/pubs/divorcel.pdf> . The Texas Family Law Practice Manual does not provide a sample of this form. The System provides two basic QDRO forms, a "Standard Division of Benefit Form" and a "Simplified Pre-Approved Qualified Domestic Relations Order". Use of the form is not required,

however if one uses the "Simplified" form, no changes can be made to it. The "Simplified" form is very short due to its incorporation of provisions of the Texas Administrative Code by reference instead of inclusion in the form itself.

b. Lump-Sum Awards

A unique feature of the TMRS and TCDRS forms is that language is provided to deal with Decrees that make lump-sum awards, however, the wording of the formula is difficult to understand. Always remember that although the QDRO states a lump-sum award, that does not necessarily mean that a lump-sum will be paid to the alternate payee or that any benefit will be paid at the time of the divorce. However, if an alternate payee's total available benefit is \$10,000 or less, a one-time lump sum payment will be made to the alternate payee.

c. Berry Formula Not Used

Since TMRS does not calculate retirement benefits using a set formula, attempting to draft a QDRO using terms such as "accrued as of date of divorce" are futile. There is no "accrual" of benefits, only an accumulation of contributions or service credits. The System can "estimate" future retirement benefits but the actual annuity payment is determined only upon actual retirement. Therefore, the "Standard" form QDRO for members not in retirement status uses a fraction in which the denominator is either (1) the total of all contributions of the Participant, or (2) total amount of credited service by the Participant, depending upon which method is used in the numerator. The resulting fraction is then multiplied by the benefit payable on retirement. This is essentially the out-of-date Cearley-Taggart formula, not the current Berry formula.

d. "Accumulated Contributions" verses "Credited Service" Formulas

As mentioned above, the "Standard Division of Benefit Form" and the "Simplified" form contains two alternative formulas for dividing retirement benefits, whether the member elects a lump-sum withdrawal of contributions or an annuity. The formulas are based on (1) "accumulated contributions", or (2) "credited service". It is important for counsel to carefully consider which method to use in a particular case because the two methods can yield different results.

In my opinion, use of the "accumulated contributions" formula results in a more accurate and fair division and helps mitigate the System's continued use of a Cearley-Taggart type division based upon the benefit received upon retirement. A member's contributions are a percentage of his/her salary. Therefore, a division make upon that criteria would yield different results for a 10-year marriage at the

beginning of the member's career compared to a 10-year marriage at the end of the career, assuming that the member's salary is higher at the end of his/her career.

The "credited service" formula is a time-based formula and operates as if every month is equal to every other month in salary and contributions. Obviously, that is rarely the case.

Generally, the alternate payee would benefit by use of the "credited service" formula if the marriage was during the early years of the member's employment, when his/her salary was lowest. Use of the "accumulated contribution" formula would benefit the alternate payee if the member had substantial service prior to the marriage.

e. Special Language for Retired Participant's

TMRS is able to divide the Survivor Lifetime Option benefits into two annuity payment plans upon divorce, one for the participant and one for the alternate payee, if the QDRO so authorizes it. This allows the System to make separate actuarial determinations as to the amount of payment to each party. In many instances, this will result in the retiree participant receiving a higher benefit than some other method, while always resulting in the alternate payee receiving the same amount both before and after the participant's death. The TMRS pre-approved forms contain this necessary language and should be used where appropriate.

f. Buy-Out Language

In certain cases, the parties may want to agree that the participant may acquire the alternate payee's interest in the Plan for a stated amount of money within some time period after the divorce. This would possibly be appropriate if the alternate payee has a need for cash and the participant does not have funds available at the time of divorce but anticipates having the funds in the near future. The buy-out amount may include interest. In the event this alternative is used, special language must be included in the QDRO. Acceptable language is provided in the TMRS forms and should be used. If the buy-out occurs, the alternate payee will be required to sign and acknowledge a separate Agreement that is attached to the QDRO as an exhibit. This Agreement is also included in the TMRS forms. In the event the alternate payee refuses to sign the Agreement upon tender of the buy-out amount, the participant may seek specific performance remedies from the court.

G. Texas Emergency Services Retirement System (TESRS)

1. System Administration

This System is administered through the office of the Fire Fighters' Pension Commissioner (FFPC) with

a state-wide Board of Trustees. There are also local boards. The FFPC office also administers the payment of Texas Local Fire Fighters' Retirement Act (TLFFRA) retiree benefits for those departments that were paying retirees prior to the merger into the Texas Statewide Emergency Services Retirement Act (TESRA) fund. Proposed QDROs and other contacts should be directed to:

Office of the Fire Fighters' Pension
Commissioner
P.O. Box 12577
Austin, TX 78711-2577
800-919-3372 (toll-free)
512-936-3372 (Austin area)
www.ffpc.state.tx.us

This System provides benefits for paid and volunteer departments in Texas. Participation by a department is not mandatory and most large cities provide their own retirement programs outside of this System, such as the Dallas Police and Fire Pension System, the Houston Firefighters' Relief and Retirement Fund, the Employees' Retirement Fund of the City of Fort Worth, and the Austin Firefighters Relief and Retirement Fund.

2. Benefit Funding

TESRS is a defined benefit plan funded by the Texas Statewide Emergency Services Personnel Retirement Fund. It is unique among the public retirement systems in that its members do not make contributions. Each participating department contributes at least \$12 each month per member and may contribute more, in \$1 increments. For departments that begin participation after September 1, 2005, the minimum contribution rate is \$36 per month per member. The Fund consists only of department contributions and investment income.

3. Benefit Options

The only benefit option is a monthly annuity payment. Unlike other Systems, members can't elect life-only or various surviving spouse options. There is no lump sum or partial lump sum option under this system, so never attempt to make a lump sum award. An alternate payee may only begin to receive his or her portion of the benefits when the participant elects to begin to receive benefits.

4. Benefit Calculation

At age 55 with at least 15 years of qualified service, a member is eligible to receive a full pension for life that is equal to six times the average monthly contribution made by his or her department. If the member has less than 15 years of service, he or she may receive a reduced benefit. The member vests at

the rate of 25% for the first 5 years, then 5% per year for years 6 through 10 and 10% per year for years 11 through 15. Therefore, a member with 12 years service at time of retirement would receive 70% of the normal benefit. Members with more than 15 years service also receive an additional 7% of the annuity amount, compounded annually. The department can also elect to “buy-back” a member’s years of service prior to participation under TSESRA. The department is required to “buy-back” service years while the department was under the prior TLFFRA up to a maximum of 20 years.

As an example, a 55 year old with 15 years of qualified service and constant, average contributions of \$36 per month by his department could retire with a monthly benefit of 6 X \$36, or \$216 per month. Changes in the amount of the department’s contribution, employment by multiple departments and the departments “buy-back” election can make this seemingly simple computation quite complex.

5. QDRO Form

a. Pre-approved Form

The office of the Fire Fighters’ Pension Commissioner (FFPC) provides a pre-approved QDRO form. The form is available in a publication entitled “Information Booklet” but the website link at the FFPC resulted in only the QDRO Procedures and not the actual model order. The Texas Family Law Practice Manual does not provide a sample of this form.

b. Berry Formula Not Used

The form QDRO for members uses a “Community Property Ratio” based on the total qualified service between the date of marriage and date of division. Since there are no member contributions, there is no “accumulated contribution” ratio option as there is in TMRS. This ratio is solely based upon time (years of qualified service) and therefore assumes every year of service is equal. However, since a department could elect to increase or decrease its contributions to Fund in future years or may have done so in the past, that assumption is not valid. The ratio is multiplied by the percentage of division due to divorce, with the resulting fraction multiplied by the benefit payable on retirement. This is essentially the out-of-date Cearley-Taggart formula, not the current Berry formula. This could be mitigated in large part if the System would accept a QDRO that considered the contributions of the department during the marriage, similar to the “accumulated contributions” formula option under TMRS and TCDRS. I have never attempted to use such language so I can’t say for certain that it would be rejected.

H. Other Local Defined Benefit and Defined Contribution Plans

1. Defined Benefit Plans

In addition to, or in place of, the above state-wide public retirement systems, many cities have their own defined benefit plans for their employees, especially police and fire fighters. Examples of such local plans are the Dallas Police and Fire Pension System, the Houston Firefighters’ Relief and Retirement Fund, the Employees’ Retirement Fund of the City of Fort Worth, and the Austin Firefighters Relief and Retirement Fund. Although local government plans are not subject to ERISA, almost all are divisible by a QDRO or DRO and will make direct payment to an alternate payee. Almost all such plans are “hybrid” defined benefit plans since they include contributions from the members to partially fund the plan. Counsel should check with the city at the beginning of a case to determine if the plan is divisible by Court order and will make direct payment to an alternate payee. As with the above public retirement systems, one should always use the local government plan’s sample division order (QDRO or DRO) and avoid substantial changes without prior plan review.

2. Defined Contribution Plans

Almost all of the larger cities in Texas, and many smaller ones, offer participation in one or more defined contribution plans similar to the familiar 401(k). However, many of these plans are not divisible by court order and will not honor a Decree, QDRO or DRO that attempts to make such a division. For example, the City of Fort Worth Deferred Compensation Plan will not honor a court-ordered division. However, just to the east, the City of Arlington will honor court orders for division of its Thrift Savings Plan and its Deferred Compensation Plan for Public Employees Trust. It is therefore vital that counsel identifies the plan as early in the case as possible and contacts the plan to determine if it will honor a division order. All too often, I receive requests from attorneys to prepare a QDRO for a city defined contribution plan more than 30 days after the Decree has been signed only to have to inform the attorney that the division can’t be accomplished. Don’t fall into that malpractice trap.

Most local government defined contribution plans that will accept division orders have model QDROs that should be used. In the event the plan does not have a model and a “generic” QDRO is used by counsel, it is best to remove all references to ERISA.

Appendix A

Teacher Retirement System of Texas Benefit Calculation Comparison Using Different Formulas

Fact Assumption:

Assume TRS member began service at age 25, while married to a spouse the same age. Divorced at age 40, with 15 years Service Credit and Average Highest Five Year Salary of \$27,000. The member's spouse receives 50% of the TRS benefit upon divorce. Retires at age 60, with 35 years Credited Service and Average Highest Five Year Salary of \$40,000. Upon retirement, member elects Option 1 retirement annuity, which reduces benefit to 90.56% of the standard annuity.

Benefit Calculation:

TRS Formula: $\text{Years of Service Credit} \times 2.3\% \times \text{Average Salary} / 12 = \text{Monthly Standard Annuity}$

Standard Annuity Benefit at Date of Divorce: $15 \times .023 \times \$27,000 / 12 = \776.25 per month

Standard Annuity Benefit at Date of Retirement: $35 \times .023 \times \$40,000 / 12 = \$2,683.33$ per month

Option 1 Annuity Benefit at Date of Retirement: $\$2,683.33 \times .9056 = \$2,430.03$ per month

Calculation of Amount Awarded to Alternate Payee Using Various Methods**Cearley-Taggart Formula:**

$\frac{\text{Years of Credited Service During Marriage}}{\text{Total Years of Credited Service Upon Retirement}} \times \text{Actual Benefit Received Upon Retirement} \times \text{Awarded \%}$

$\frac{15}{35} \times \$2,430.03 \times 50\% = \mathbf{\$520.72}$ per month

Berry Formula:

$\frac{\text{Years of Credited Service During Marriage}}{\text{Total Years of Credited Service at Divorce}} \times \text{Standard Annuity Benefit Accrued at Divorce} \times \text{Awarded \%}$

$\frac{15}{15} \times \$776.25 \times 50\% = \mathbf{\$388.13}$ per month

TRS Model QDRO Formula:

$\frac{\text{Amount of standard annuity at Date of Divorce}}{\text{Amount of standard annuity at Date of Retirement}} \times \text{Actual Benefit Received Upon Retirement} \times \text{Awarded \%}$

$\frac{\$776.25}{\$2,683.33} \times \$2,430.03 \times 50\% = \mathbf{\$351.49}$ per month

Appendix B

Teacher Retirement System
of Texas

1000 Red River Street
Austin, Texas 78701-2698

RECEIVED

EXECUTIVE DIRECTOR
Ronnie G. Jung

AUG 31 2005



800-223-8778 (512) 542-6400 www.trs.state.tx.us

Vivien E. Whatley, Legal Assistant
(512) 542-6613 / (512) 542-6529 - Legal Fax No.

August 29, 2005

Philip D. Phillips, Attorney at Law
Cochran & Phillips, L.L.P.
101 W. Randol Mill Rd., Suite 110
Arlington, Texas 76011

Re: *In the Matter of the Marriage of* [REDACTED]
In the Interest of [REDACTED]
[REDACTED]
[REDACTED]

Dear Mr. Phillips:

On August 18, 2005, the Teacher Retirement System of Texas (TRS) received a certified copy of a court order entitled, "Qualified Domestic Relations Order, Teacher Retirement System of Texas," and styled, *In the Matter of the Marriage of* [REDACTED] Cause No. 325-[REDACTED]-92, in the 325th Judicial District Court of Tarrant County, Texas, signed on August 16, 2005. The copy was submitted by you for a determination of whether it is a qualified domestic relations order (QDRO) for the purpose of allowing TRS to make direct payment to Terry J. O'Halloran of a portion of benefits or amounts payable to Maryjane O'Halloran.

The determination of whether the order is a qualified domestic relations order (QDRO) is governed by Chapter 804, Texas Government Code, and by applicable TRS rules, 34 TAC §§47.1-47.16. TRS has completed its review and hereby notifies the parties that TRS has determined that the order is a qualified domestic relations order. The determination means that TRS will make direct payment to Terry J. O'Halloran of the amount awarded to him in the order.

[REDACTED] currently is receiving a monthly Option 1 service retirement annuity in the gross amount of \$2,525.11 per month. The order awards [REDACTED] forty percent (40%) of a fraction of benefits or amounts payable. TRS has determined that, under the description provided in the order, the numerator of the fraction is \$612.88 (a monthly normal age standard service retirement annuity based on service and salary credit acquired between June 13, 1970, and August 24, 1992, and maintained with the System as of August 24, 1992). The denominator of the fraction is \$2,735.47, a monthly normal

j:\view,qdro,0443-003

Page 2, Philip D. Phillips
August 29, 2005

Appendix B

age standard annuity based on all service and salary credit as of the latest effective date of retirement prior to divorce. Therefore, the amount payable to [REDACTED] is as follows:

$$40\% \times \frac{\$ 612.88}{\$2,735.47} \times \$2,525.11 = \$226.30 \text{ per month}$$

The TRS Benefit Accounting Department will process the file for separate payment to the parties. Payment will be divided beginning with the August, 2005, annuity payment, which is payable at the end of August, 2005. However, TRS records reflect that no payment is due to [REDACTED] for the August, 2005, payment period; therefore, until payment of a benefit becomes due to [REDACTED], no payment will be due to [REDACTED]. If the total amount of the gross annuity is increased or decreased, [REDACTED]'s payment will be adjusted proportionately. If annuity payments are suspended or terminated, payments to [REDACTED] will also be suspended or terminated.

Benefit Accounting can provide general information to the parties regarding federal income tax withholding, income reporting, and the investment in contract, but parties should consult their tax advisors about any specific questions on their tax liability for the payments and on the allocation of the retiree's investment in contract (i.e., the amount of salary contributions on which the retiree has already paid federal income tax during employment). [REDACTED] should contact Benefit Accounting if she wishes to make an adjustment to her income tax withholding in light of her new payment amount.

An Option 1 service retirement annuity is payable throughout the retiree's life with one hundred percent (100%) of the annuity payment continuing to be paid to the designated beneficiary upon the retiree's death. Therefore, if the designated beneficiary and [REDACTED] survive [REDACTED], retirement annuity payments will be made to [REDACTED] after the death of [REDACTED]. Further, if [REDACTED] survives [REDACTED] [REDACTED] will receive a portion of any death or survivor benefits paid by TRS to the beneficiary or beneficiaries; the portion will be determined by the formula set forth in the order.

Please note that under current law the death of an alternate payee terminates that person's interest in any benefits or amounts payable by TRS. Therefore, if [REDACTED] predeceases [REDACTED] [REDACTED], no additional amounts will be payable by TRS to [REDACTED]'s estate or heirs. TRS must be notified immediately of the death of either party since payment by TRS to the parties will be affected.

If [REDACTED] or his estate, heirs, or legatees receive any amount of a distribution that should have been paid to [REDACTED] or her beneficiary, or the estate, heirs or legatees of either, the recipient shall immediately transmit the amount to the person to whom it should have been paid. Also, if [REDACTED] or her beneficiary, or the estate, heirs or legatees of either receive any amount of a distribution that should have been paid to [REDACTED] or his estate, heirs, or legatees, the recipient shall immediately transmit the amount to the person to whom it should have been paid. In either case, the person to whom the amount should have been paid is responsible for recovering the amount from the recipient.

j:\view,qdro,0443-003

Page 3, Philip D. Phillips
August 29, 2005

Appendix B

If either the participant, alternate payee, or the estate, heirs, or legatees receive a distribution that should not have been paid by TRS, the recipient shall immediately return such amount to TRS.

If TRS determines at any time that changes in the law, the administration of the Plan, or any other circumstances make it impossible to calculate the portion of a distribution awarded to the alternate payee under the order and so notifies the parties, either or both parties shall immediately petition the court for reformation of the order.

Finally, in order to avoid loss of payments, [REDACTED] is required to keep TRS informed in writing of any change in his address. The written notice must include his printed name, social security number, new address, date, and signature.

If you have questions regarding this letter, please contact me at 1-800-223-8778, extension 6613.

Sincerely,

Vivien E. Whatley
Vivien E. Whatley

VEW
cc:

[REDACTED]
[REDACTED]
[REDACTED]

Appendix C




Teacher Retirement System of Texas
 1000 Red River Street/Austin, Texas 78701-2698
 Telephone 1-800-223-8778
 www.trs.state.tx.us

TRS 123
 Rev. 08-05

098701

STATEMENT OF ACCOUNT

FISCAL YEAR ENDING AUGUST 31, 2005

*****AUTO**5-DIGIT 76001


 ARLINGTON TX 

TRS administers a **Defined Benefit Plan**, designed to provide a **lifetime retirement benefit** to eligible retirees. Your retirement benefit is **not based on your account balance**, but on a formula (years of service credit multiplied by 2.3 percent times average highest three or five annual salaries). See "Benefit Calculation Grandfather Provisions" below.

SALARIES AND OTHER DATA ARE SUBJECT TO AUDIT AND ADJUSTMENT UPON RETIREMENT

Beginning Account Balance	\$20,284.58	Tax Status of Your Account Dollars:
Total Annual Deposits	\$1,899.33	• Non-taxable dollars in your account
Interest Credited This Year*	\$1,061.71	\$.00
Account Balance as of Aug 31, 2005	\$23,245.62	• Taxable dollars in your account
		\$23,245.62

* Five percent interest credited on average balance. Tax deferred until withdrawn.

<p>INFORMATION ON TRS BENEFITS For detailed information, see the TRS Benefits Handbook at www.trs.state.tx.us</p> <p><u>BENEFIT CALCULATION GRANDFATHER PROVISIONS</u></p> <p>If a member meets any <u>one</u> of the following criteria on or before August 31, 2005, they are grandfathered (exempt) from the following changes and their retirement benefit calculation will not be affected by these changes:</p> <ul style="list-style-type: none"> • at least 50 years old, or • age and years of service credit equal at least 70 ("Rule of 70"), or • have at least 25 years of service credit <p>Members who do <u>not</u> meet one of the above grandfather provisions by August 31, 2005 will be subject to the following new law changes effective September 1, 2005:</p> <ul style="list-style-type: none"> • Final Average Salary at retirement will be determined by the highest five years (instead of three years) of salary. • Subsidized early retirement will be eliminated. This means that members age 55 or older with 20 to 24 years of credited service who take early retirement will receive a greater reduction to their annuities than in the past. • Partial Lump Sum Option (PLSO) eligibility will require a combined age plus years of creditable service that equals at least 90 ("Rule of 90"). <p>In the implementation of the benefit calculation grandfather provision described above, TRS will count service actually credited by 8/31/05 in the Employees Retirement System of Texas (ERS) or another Texas public retirement system participating in the proportionate retirement program.</p>	<p><u>SERVICE RETIREMENT ELIGIBILITY</u></p> <p>Normal retirement age for an unreduced standard annuity is 65 with five or more years of service, or any combination of age and service totaling 80, with at least five years of membership service credit. Members are entitled to early age service retirement when total of age and service is less than 80 and the following conditions are met: At least age 55 with five or more years of service credit OR below age 50 with 30 or more years of service credit.</p> <p><u>TIPS FROM TRS</u></p> <ul style="list-style-type: none"> • Please include your Social Security number on each document you submit to TRS • Contact TRS several months before your retirement date. • File a copy of your birth certificate with TRS before retirement, and note your Social Security number on it. • Contact TRS if you wish to purchase special service credit. The cost of purchasing special service credit increases after August 31 each year. • Employer-approved developmental leave may be eligible for purchase if you notify TRS before taking the leave. • Members with service in another Texas public retirement system participating in the proportionate retirement program may be eligible for a retirement benefit based on combined service credit. Contact each system for details. • Members age 70 1/2 or older who no longer work for a Texas public education employer must begin distribution of TRS benefits or withdraw their account in order to avoid federal income tax penalties • Service Credit Purchase Option ("Air time") is repealed as of January 1, 2006. Members must either purchase the service credit or enter an installment agreement for purchase by 12/31/05.
---	--

Additional information is printed on the reverse side of this form.

Appendix C

Reverse of Form
 TRS 123
 Rev. 08-05

SALARIES AND OTHER DATA ARE SUBJECT TO AUDIT AND ADJUSTMENT UPON RETIREMENT				
SOCIAL SECURITY NUMBER: [REDACTED]	Member is Grandfathered			
Beneficiary's Data*	Salary Reported for FY**	2005	\$29,677	* Beneficiary for death and survivor benefits. Review beneficiary designations regularly.
Date of Birth: [REDACTED]	(Sept.-Aug)			
Gender: MALE	Highest	2003	\$25,350	** As reported by your employer(s). Due to differences in reporting of contract periods, adjustments may be made from one year to another.
	Three (3)	2004	\$26,623	
	Salaries	2005	\$29,677	
Member's Date of Birth: [REDACTED]	3 Year Average Salary:		\$27,217	*** Service is based on school years not calendar years. (Sept.-Aug)
Estimated Years of Creditable Service:*** 15				

To estimate your annuity, visit the TRS website at www.trs.state.tx.us.