



MEMORANDUM

DIVORCE AND ACERA BENEFITS

Disclaimer: The disposition of retirement benefits in domestic relations proceedings involves complex marital rights, domestic partnership rights, and tax issues. You are hereby advised and put on notice that you should seek and/or engage competent independent legal counsel of your choosing to provide you with advice and counsel, if you are involved in or foresee being involved in a nullity, legal separation or dissolution of marriage or registered domestic partnership, before you use or otherwise rely on the information contained in this communication or on the Alameda County Employees' Retirement Association's (ACERA's) website sample court orders for dividing retirement benefits to effectuate a division of community property.

When an ACERA member is a party to a court case (a dissolution, legal separation, or nullity case) addressing his or her marriage, a final judgment issued by the court may be issued concerning the member's retirement benefits. ACERA will rely on the final judgment in the court dissolution or legal separation action in order to determine whether a division of ACERA benefits shall be made in connection with your retirement benefits, and to recognize the termination/severance of surviving spouse status. Additionally, ACERA requires the court, after issuance of a judgment, to make an order specifying numerous matters in connection with the division of your ACERA benefits. Below, you will find more information regarding ACERA's policy and practice in connection with making any division of your retirement benefits in connection with a legal proceeding involving dissolution or separation.

Generally, under California law the compensation and retirement benefits earned as a result of employment covered by ACERA between the date of marriage and the date of separation are community property, belonging equally to the parties. Generally, benefits earned as a result of employment before the date of marriage or after the date of separation are the member's separate property. A divorce or legal separation severs the community interests.

The court, many times with the stipulation of the parties, makes determinations concerning community and separate property interests. When ACERA benefits are considered and divided, ACERA may be required to facilitate that division based on the court's judgment and specific order to divide members' retirement benefits. ACERA requires members to submit a court filed/stamped judgment and further order detailing how ACERA shall make any division of community property interests from member benefits. In the past, ACERA has observed the courts take one of the following approaches when making awards of retirement benefits to divide and distribute community property:

1. Award to One Party. The court might issue a judgment and specific order to award the benefits entirely to the member and award community property to the nonmember that is equal in value to the community property interest in the benefits. Such judgment and order would require an independent determination of a value, probably based on an actuarial valuation, for the community interest in the benefits.

2. Buy-Out. Another possibility is for the court to issue a judgment and specific order that the parties effectuate a buy-out, in which the member receives the benefits and pays the nonmember one-half of the current value of the community property interest, either in cash or with an interest-bearing note. This too would require an independent determination of a value, probably based on an actuarial valuation.

3. Division Between the Parties. A third option ACERA has observed in the past is to divide the community interest in the benefits equally between the parties. When the member has not yet retired, the judgment issued and specific order of the court instructs ACERA to divide the member's contributions, earnings, and service credit and treat the amounts as two separate benefit records. When, on the other hand, the member has already retired, the judgment and specific order may instruct ACERA to wait until the member has retired, and then to pay the nonmember a portion of the member's monthly retirement allowance over the lifetime of the member. In such cases, the payment to the nonmember is reflective of the respective shares of the parties in the ACERA benefits. Division between the parties in such cases may not involve an independent determination of a value.

Parties should be aware that far more cases end in settlement than trial (i.e., marital settlement agreement or stipulation to divide retirement benefits). Parties who reach a settlement must have the court enter/file and stamp a final judgment and an additional, specific order that addresses ACERA retirement benefits. The judgment and specific order may reflect the agreement of the parties that have settled their case. Provided that the agreement (i.e., judgment and specific order) does not violate the laws and regulations under which ACERA operate, ACERA will implement it and make a division and distribution of ACERA benefits to the parties. For example, ACERA is unable to comply with a court order (customarily found) in California Judicial Council Form FL-348. This form is entitled, *Pension Benefits—Attachment to Judgment*. Form FL-348 orders ACERA to consider former spouses as surviving spouses for the purpose of receiving continuance benefits. ACERA shall not comply with such a court order and may be required to litigate this issue, with the understanding that the prevailing party may seek legal fees and costs. Additionally, ACERA shall not treat nonmembers who secure judgments of legal separation (from our members) as surviving spouses. This means nonmembers who are a party to judgments of legal separation are not eligible to be designated as beneficiaries to receive a 60% continuance benefit at the time of the member's death. Please note, Family Code Section 2337 requires that ACERA be joined in the dissolution action. (Your attorney will file California Judicial Council forms FL-370, FL-372, and FL-375.)

ACERA has prepared sample court orders, which may be reviewed with your attorney or advisor to assist you in understanding what the judgment and court order to divide benefits may involve. These are sample agreements relating to discussion of ACERA retirement benefits that members may wish to consider when obtaining court orders regarding ACERA benefits. Parties should understand, however, that such forms were not designed with their specific case in mind. Consequently, parties should modify the sample agreements to fit their specific case. You should consult independent legal counsel as you consider issues such as redeposits or service purchases; when the community property interest in the benefits is not to be divided equally between the parties; and when the member has reciprocity rights based on service credit with both ACERA and one or more other public pension plans.

After members have secured their final judgments in their dissolution and separation matters, members should present proposed orders to ACERA so that ACERA may review them, with attention on numerous issues connected to division and distribution of ACERA benefits and community property rights in general. In cases of judgments of dissolution of marriage, members should present draft court orders

pertaining to designation of community property and the division and distribution of community property to ACERA for approval before final submission to the court. This requirement ensures that ACERA will be able to carry out the orders if the court approves them. It is also important to understand that ACERA will not approve any court orders which require ACERA to make payments in any manner that will result in an increase in the amount of benefits provided under the plan.

When a member's spouse or former spouse may have a community property interest in the benefits and such interests were not addressed in divorce judgements, ACERA must assess whether it has exposure to liability if it pays the member all retirement benefits to which he or she is entitled under the plan. Some of the things ACERA will consider are the following:

1. Notice of Claim. Has ACERA received *written* notice that the spouse or former spouse claims to be entitled to all or some part of any future payment or refund that ACERA might make to the member under the plan?

2. Joinder. Through a legal procedure known as "Joinder," has ACERA been made a party to a court case addressing the marriage?

3. Judgment. Is the judgment silent as to community property interests in ACERA benefits? Does the judgment state there were no community property interests but their marriage overlapped ACERA covered employment?

4. Judgments of Legal Separation, even those that attempt to address maintaining nonmembers as surviving spouses, shall not be approved by ACERA. Judgments of Legal Separation sever the nonmember's rights to surviving spouse status; and therefore terminate nonmembers legal status as surviving spouse. In sum, Judgments of Legal Separation terminate the nonmember's right to be designated as a beneficiary to receive a continuance benefit under the unmodified option (e.g., 60% continuance benefits).

Please note that, in some cases where ACERA has neither received a written notice of claim nor been joined, ACERA may require that our member execute an *Indemnity and Hold Harmless Agreement*.

An ACERA member whose marriage is being terminated should consider the possibility that changes may be appropriate in his or her designations of beneficiaries to receive benefits on the member's death. Members who wish to change beneficiary designations should contact their ACERA retirement specialists.

When the member has already retired, the parties should understand that termination of their marriage will terminate the nonmember's rights, if any, to continuance payments under the unmodified option on the member's death and to any existing medical coverage through ACERA as the member's spouse. On termination of the marriage, the member must notify ACERA's Benefits Department to remove the nonmember from medical coverage. The nonmember may, however, be able to receive medical coverage through ACERA at his or her own expense if ACERA will be paying the nonmember a portion of the member's monthly retirement payment in accordance with a court order.

Dissolution of Domestic Partnerships. The discussion of divorce in this memo also applies to dissolution of domestic partnerships registered with the California Secretary of State, with the date of registration substituted for the date of marriage.

PLEASE Note: ACERA's administrative process of court filing of notice of appearance after Order of Joinder is issued, reviewing draft court orders to divide benefits, approving final court orders, audit of member contributions during the time period of the overlap of marriage and ACERA covered employment, division of member record, preparation of notice of entitlement to nonmember, payroll/processing payment to non member, and finalizing member retirements after securing documentation (social security and completion of tax form) may take *several months*.

Consultation is Advised: ACERA strongly urges both parties to a divorce or dissolution of domestic partnership to contact an independent attorney for advice. Please note you should contact ACERA's Legal Department if you have general questions about the agency's processes or procedures.