



## Domestic Relations Orders and A Member's Retirement Benefit

*A Guide to DROs  
and NYSTRS Benefits*

**New York State Teachers' Retirement System**  
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## A. System Overview

### 1. Introduction

This guide is intended to provide basic information about the New York State Teachers' Retirement System (the "System" or "NYSTRS") and the way in which the System administers Domestic Relations Orders ("DROs"). The guide is intended to answer commonly posed questions about the benefits the System provides, the impact a DRO might have on a member's benefits, and the procedures the System follows when it receives proposed and final DROs. This guide also provides [sample language](#) for a DRO.

This guide is based upon the System's current understanding of the law. It is not intended to be a substitute for New York law or the rules and regulations governing the System, which law and rules may be subject to change. We encourage you to submit a draft DRO to the System for pre-approval prior to it being submitted to the court. After it has been granted and certified by the court, upon your receipt of your certified copy of a signed DRO, we encourage you to submit it to the System, so we have it in our records at the time of your retirement.

Questions about the matters discussed in this guide may be directed to the System's Legal Department at (800) 348-7298, Ext. 6200 or email [legal@nystrs.org](mailto:legal@nystrs.org).

**Although this guide is available on the System's website and thus may potentially be accessed by System members and their current or former spouses, this guide is not intended to provide legal advice to members and spouses and may not be relied upon for that purpose. Members and spouses are strongly urged to seek the advice of their own attorney or attorneys regarding the matters discussed in this guide.**

### 2. What is NYSTRS?

NYSTRS is a public employee retirement system established and operating pursuant to Article 11 of the Education Law.

NYSTRS provides retirement and death benefits principally to active and retired teachers and administrators in the public schools of New York State (outside of New York City). All full-time teachers in such schools are required to be members of the System. Part-time teachers in such schools have the right, but are not required, to join the System.

**Practice Pointer:** When a party is a public employee, it is incumbent upon an attorney to verify which entity will be providing the party's retirement benefits. NYSTRS is only one of eight public employee retirement systems in the State of New York. Other public employee pension plans in New York include the New York State and Local Employees' Retirement System, the New York State and Local Police and Fire Retirement System, the New York City Employees' Retirement System, the New York City Teachers' Retirement System, the New York City Police Pension Fund, the New York City Fire Department Pension Fund, and the New York City Board of Education Retirement Fund. New York also has so-called "optional retirement programs" for professional employees of SUNY, CUNY and the State Education Department. Participation in these programs is generally in lieu of participation in one of the eight public employee retirement systems.

### 3. What type of retirement plan does NYSTRS administer?

NYSTRS is a **governmental defined benefit** plan.

As a governmental plan, the System is specifically exempt from the provisions of Title I of ERISA, including ERISA §206. See ERISA §4(b)(1), 29 USC §1003(b)(1). As a governmental plan, the System is also exempt from many of the provisions of the Internal Revenue Code applicable to private sector retirement plans. See e.g. IRC §401(a)(last sentence); 26 USC §401(a)(last sentence). Thus, the System is exempt from the provisions of IRC §§401(a)(11) and 417 and ERISA §205 which require private sector plans to provide joint and survivor annuities and pre-retirement survivor annuities.

As a **defined benefit** plan, the System provides benefits calculated pursuant to benefit formulas established by law which take into account the teacher's credited service and compensation. The System generally does not maintain separate accounts for each participant.

**Practice Pointer:** Because the System is a governmental defined benefit plan, it may not be like private sector retirement plans an attorney may have encountered in other matrimonial actions. Private sector retirement plans are generally subject to the Employment Retirement Security Act (ERISA) and are subject to various Tax Code provisions applicable only to private sector plans. Additionally, private sector retirement plans are often **defined contribution** plans, not defined benefit plans. It is, therefore, important for an attorney used to dealing with private sector retirement plans to understand the important legal differences between the System and a typical private sector retirement plan.

## B. NYSTRS Benefits

### 1. What types of benefits are provided by NYSTRS?

NYSTRS provides three types of benefits:

1. A **retirement benefit**, i.e., a monthly benefit payable for the life of the member after the member has retired from teaching service. The calculation of this benefit takes into account the New York public service of the member credited with the System and the member's salary earned from such service. Most NYSTRS members retire for service and receive a **service retirement benefit**. Some members retire for disability and receive a disability **retirement benefit**.
2. A **post-retirement survivor benefit**, i.e., an annuity or other form of optional benefit which is payable after the member dies in retirement. In order for an optional post-retirement survivor benefit to be payable, the member must have elected the form of benefit at the time of retirement. The election of an optional form of benefit (an "option") reduces the size of the monthly retirement benefit payable to the member during retirement. To provide context, it may be noted that only about one-third of recent NYSTRS retirees elected some optional form of retirement benefit providing a post-retirement survivor benefit; in other words, a significant majority of recent retirees did not elect any form of optional survivor protection when they retired.

3. A **death benefit**, i.e., a lump sum benefit payable upon the member's death. A potentially very significant **active service death benefit** is payable if the member dies while in active service. A more modest **pre-retirement vested member death benefit** is payable if the member dies outside of active service and prior to retirement, provided the member had at least 10 years of credited service at the time of death. An ordinarily very modest **post-retirement death benefit** is payable upon the death of a member in retirement, provided the member had a date of membership on or after July 1, 1973 and was in active service at the time of retirement.

**Practice Pointer:** NYSTRS' [Active Members' Handbook](#) describes the benefits provided by the System in lay terms. The System has also prepared a [Compilation of Laws Covering NYSTRS](#) containing the most relevant laws governing the System and the benefits it pays. It includes a two-page preface to assist the reader. These documents are available in the [Legal Publications](#) section of the Library page on the NYSTRS website at [NYSTRS.org](#).

## 2. How are NYSTRS benefits calculated?

As NYSTRS is a **defined benefit plan**, benefits are generally **not** a function of the contributions made by, or on behalf of, the member. Rather, NYSTRS benefits are determined using formulas which typically take into account the member's tier, compensation and service credited in the System. For example, Tier 1-4 members of the System with 30 years of service credited in the System may be entitled to retire on or after age 55 with a retirement benefit equal to 60% (i.e., 2% X 30 years) of their "final average salary." Generally, the more service credit the member has accrued, the greater the member's benefit. Similarly, the greater the member's regular salary, the greater the member's benefit.

## 3. What are membership tiers and how do they affect the benefit calculation?

NYSTRS has a tiered benefit structure. In other words, the laws governing the precise benefits a member will receive and their calculation will vary somewhat, depending upon the member's tier. Tier structure is based on dates of membership as follows:

Tier	Date of Membership
1	Before 7/1/73
2	7/1/73—7/26/76
3	7/27/76—8/31/83
4	9/1/83—12/31/09
5	1/1/10—3/31/12
6	On or After 4/1/12

**Practice Pointer:** Although Tier 3 members are entitled to a distinct Tier 3 benefit calculation, Tier 3 members are also entitled to retire instead under the Tier 4 benefit calculation and, in the System's experience, usually do so. Tier 3 members typically prefer the Tier 4 benefit calculation because the Tier 3 calculation requires the retirement benefit to be reduced commencing at age 62 when the retiree becomes eligible for Social Security.

#### 4. What entitlements do members and retirees have to contributions made to NYSTRS?

Employer contributions go into a single pool which is used to pay all benefits to all members and retirees. No member or retiree has any specific right to any contributions made by an employer on their behalf either at retirement or at any other time.

Certain Tier 1 and 2 members may have made contributions to what is called the Annuity Savings Fund (ASF) maintained by the System. If so, they are entitled to receive an annuity at retirement based upon those contributions and the interest which has accumulated on those contributions. Alternatively, they may withdraw their accumulated contributions at retirement. Before retirement, they have the right to obtain loans against their accumulated contributions.

Tier 3 and 4 members were required to make contributions for the first 10 years of service or membership, whereas Tier 5 and 6 members are required to make contributions their entire working career. Tier 3, 4, 5 and 6 members who have fewer than 10 years of credited service may withdraw their accumulated contributions if they cease teaching and wish to terminate their NYSTRS membership. Unlike the Tier 1 and 2 member contributions to the Annuity Savings Fund, the contributions of Tier 3, 4, 5 and 6 members help fund all the benefits provided by the System and do not result in any distinct benefit payable to the contributing members at retirement. However, a Tier 3, 4, 5 or 6 member's accumulated contributions will be refunded in the event the member dies prior to retirement. Additionally, Tier 3, 4, 5 and 6 members have the right to borrow against their accumulated contributions.

#### 5. Why are NYSTRS benefits of significance in a divorce?

New York courts have determined that a NYSTRS member's benefits are marital assets subject to **equitable distribution** upon the member's divorce pursuant to Domestic Relations Law §236, to the extent those benefits were acquired during the marriage. *See Majauskas v. Majauskas*, 61 NY2d 481 (1984). Accordingly, when a NYSTRS member is divorced, a court may determine that the member's spouse is entitled to share in the member's benefits.

#### 6. Does a divorce automatically nullify a member's designation of the former spouse as the beneficiary of the member's death benefit?

Prior to the enactment of Chapter 173 of the Laws of 2008, the answer to this question was "no." Chapter 173, however, now generally provides that a divorce, annulment or judicial separation revokes a member's prior designation of a former spouse as beneficiary of certain death benefits and retirement options, except as provided by the express terms of the judgment or decree, or a DRO. Under Chapter 173, the former spouse is treated as having predeceased the member.

In such cases, if a member wishes to retain the former spouse as beneficiary, the member must file a new [\*Designation of Beneficiary For In-Service or Post-Retirement Paragraph 2 Death Benefit\*](#) (NET-11.4) form with the System following the divorce, annulment or judicial separation.

The benefits impacted by Chapter 173 include both the pre-retirement and post-retirement death benefits, and any lump-sum retirement option under which the member is permitted to change the beneficiary. Chapter 173 does not apply to designations that are irrevocable by law, such as the beneficiary designation of a joint and survivor retirement option, or designations that are required under a certified DRO on file with the System.

In order for Chapter 173 to apply, the System must receive written notice of the divorce, annulment or judicial separation before it issues payment of the death benefit or option. Under Chapter 173, "written notice" of a divorce or annulment must be mailed to the System by registered or certified mail, return receipt requested, or served upon the System in the same manner as a summons in a civil action.

The System's Legal Department should be contacted for further information.

### **7. When does the System disclose information in a member's or retiree's file?**

NYSTRS is not permitted under law to provide information from a member or retiree's file except when the System has received a written authorization signed by the member or retiree or when the disclosure is required by law.

An authorization must specifically reference NYSTRS and must be dated. Authorizations executed more than 12 months prior to the date on which information is sought are considered stale and will not be implemented by the System.

The System will also make available information pursuant to a subpoena *duces tecum*. The System will comply with a valid subpoena in a matrimonial action by sending the information requested to the court. Subpoenas must be directed to the System's Legal Department to assure timely processing.

**Practice Pointer:** While the System can provide estimates of a particular member's retirement benefit in specified circumstances, the System does not have an unlimited ability to honor repeated or multiple requests for estimates with respect to any given member. Thus, the System makes every effort to accommodate reasonable requests but reserves the right to assign a very low priority to or deny requests made beyond the point judged reasonable by the System.

## **C. Domestic Relations Orders (DRO) Basics**

### **1. What is a Domestic Relations Order?**

As already discussed, New York law allows for the equitable distribution of a NYSTRS member's benefits upon divorce, to the extent that those benefits were earned during the marriage. A Domestic Relations Order (DRO) is a judgment, order or decree of a court made pursuant to the Domestic Relations Law setting forth how a member's benefits are to be equitably distributed between the member and the member's former spouse.

**Practice Pointer:** The DRO typically received by the System is a court-signed document which is separate from the judgment or decree of divorce and which addresses only the member's benefit entitlements from the System. Following this practice assists System staff in reviewing the DRO and also avoids disclosure of matters which are not germane to the System.

Please note that this guide will often refer to proposed DROs submitted to the System for review. A proposed DRO is not binding on the System. Only a judgment, order or decree which is signed by the court and properly certified and filed with the System can be binding upon the System.

## 2. What role does NYSTRS play when a member's benefits are subject to equitable distribution?

The System only becomes involved in the equitable distribution of a member's benefits when a court issues a DRO directing the System to pay a portion of a member's benefits to a former spouse. The System's Legal Department is responsible for reviewing DROs when submitted to the System to determine whether the DRO is consistent with applicable law and can be administered by the System. The System's Legal Department will also review draft proposed DROs and provide information about the System and its benefits to members, retirees, spouses and their attorneys. Once a court-signed DRO has been filed with the System and approved by the Legal Department, other departments within the System will handle the division of the affected benefits and their payment to the parties.

**Practice Pointer:** The System's Legal Department is available to answer questions an attorney may have bearing upon a DRO and its impact upon a member or retiree's benefits. **Attorneys are strongly advised to submit proposed DRO language to the System's Legal Department for its review prior to seeking court approval.** A failure to do so could result in additional court proceedings if a DRO not submitted for review is not acceptable and could delay in the alternate payee's receipt of benefits.

Please note, however, that it is **not** the role of the System to comment on the terms of a proposed or final DRO, except to the extent those terms either fail to comply with applicable law or rules or cannot be implemented by the System and only to that extent. The System will find a proposed or final DRO acceptable to the System, so long as it can be implemented by the System and is in accordance with the laws governing the System and the System's rules and regulations. The System assumes that the terms of a DRO submitted to the System for review represent the terms which have or will be negotiated by the parties and their attorneys or which have been or will be ordered by the court, as applicable. Any questions as to the fairness of the terms contained in a DRO must be addressed by the parties' respective attorneys.

## 3. Does the System mandate a specific form of DRO?

The System does not mandate a specific form of DRO. However, a sample of language consistent with the *Majauskas* formula and considered acceptable by the System is contained in [Appendix A](#).

## 4. What can be ordered by a DRO?

A DRO may direct NYSTRS to pay a portion of a member's retirement benefit directly to the member's former spouse (known as the "alternate payee"). If the member has not retired or the period for electing an optional form of retirement benefit following retirement has not lapsed, the DRO may direct the member to elect a specific form of retirement benefit. Lastly, the DRO can also direct the System to pay a portion of a death benefit to the alternate payee if a death benefit is payable following the death of the member, whether before or after retirement.

## 5. What cannot be ordered by a DRO?

In general, a DRO may not order the System to take an action which is not permitted under the law and rules governing the System. For example:

- A DRO may not order the System to pay a benefit to an alternate payee when no moneys are otherwise payable. Thus, the alternate payee cannot be paid a share of the member's retirement benefit if the member has not retired and commenced receiving a retirement benefit and cannot be paid a share of a member's death benefit if the member has not died. See *Majauskas v. Majauskas*, 61 NY2d 481 (1984); *Alexandre v. Chase Manhattan Bank*, 61 AD2d 537 (2d Dep't 1978). Put another way, an alternate payee's rights are derived from the member's rights.
- A DRO cannot order the System to provide an optional form of retirement benefit which is not permitted under law or cannot be administered by the System.

## 6. Is NYSTRS subject to tax code or ERISA provisions which apply to Qualified Domestic Relations Orders (QDROs)?

No. As a **governmental plan**, the System is specifically exempt from the provisions of IRC §414(p) and Title I of ERISA, including ERISA §206 relating to qualified domestic relations orders applicable to private sector retirement plans. See IRC §414(p)(11), 26 USC §414(p)(11); ERISA §4(b)(1), 29 USC §1003(b)(1).

## 7. What must happen once a court has signed a DRO?

When a DRO has been signed by a court, a **certified** copy of the DRO should be promptly sent to the System's Legal Department. The System is under no legal obligation to take any action directed by a DRO unless and until a **certified** copy of a court-signed DRO has been filed with the System and approved by the System's Legal Department. If the Legal Department determines that it can be honored by the System, it will be placed in the member's file for immediate implementation at the time of retirement or death or will be transmitted to the appropriate departments within the System for implementation if the member has already retired.

## 8. What is an acceptable certification of a DRO?

The System will accept an **original** certification by the court or an **original** attorney's certification pursuant to CPLR §2105. Please note that a time-stamped copy of a signed DRO must still contain either an **original** court certification or an **original** attorney's certification pursuant to CPLR §2105.

## 9. What happens if a certified copy of a signed DRO is not filed with NYSTRS?

If a certified copy of a DRO is not filed with the System, the System must pay benefits as otherwise required by the law and rules governing the System. Thus, a failure to file a DRO on a timely basis by the responsible attorney could cause the alternate payee to lose benefits to which they may be entitled under the DRO.

The following illustrate the potential adverse consequences of a failure to file a DRO:

- If a DRO is not filed until after the 30-day period for electing or changing an option selection has lapsed, the System has no power to implement a form of payment directed by the DRO, unless it happens that the member had elected that form of payment prior to the expiration of the 30-day period. The System, however, may implement a DRO to the extent that it directs the System to divide the benefit payable during the joint lives of the retired member and the alternate payee between the parties.
- If a DRO is not filed until after the member has commenced receiving retirement benefits, the System cannot pay the alternate payee a share of those benefits already paid to the retired member, unless the DRO expressly requires the System to take the missed share out of the retired member's share of their future benefits.
- If a DRO is not filed with the System until after a member or retiree has died, the System has no power to pay the alternate payee's share of the death or survivor benefit, as applicable, provided for under the DRO because, under law, the benefit has already vested in the member's designated beneficiary or beneficiaries.

#### **10. Are there circumstances in which a spouse or former spouse could lay claim to a member's benefit without there being a DRO in place?**

Generally not. Education Law §524 bars the assignment of a member's benefit to any other party, including a member's spouse. Member benefits are also exempt from attachment, garnishment or any other form of legal process by virtue of Education Law §524. However, Civil Practice Law and Rules §§5241 *et seq.* does provide for income executions to enforce court orders of support, including in situations in which no DRO is on file with the System. EPTL §5-1.1-A also provides certain rights of election to a surviving spouse of a System member.

#### **11. Can NYSTRS divide a member's benefit between the member and the member's spouse without the parties being divorced?**

No. Current law only provides for a division of a member's benefit when a marriage has been terminated and the System has received a certified signed DRO, directing the System to pay a share of the member's benefits to the member's former spouse. Hence, the System cannot honor a written agreement between a member and the member's spouse to divide the member's benefit where the marriage has not been dissolved. Nor can the System honor a court ordered division of a member's benefits where there has been no divorce.

**Practice Pointer:** Domestic Relations Law §236(B)(5) provides for the equitable distribution of marital property by a court *only* in a matrimonial action where the relief granted is "divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce." *See Mesholam v. Mesholam*, 11 N.Y.3d 24, 29 (2008)("Where there is no divorce, there can be no equitable distribution."); *Jacob v. Jacob*, 8 A.D.3d 725, 727 (3d Dep't 2004); *Sinha v. Sinha*, 285 A.D.3d 801, 802-03 (3d Dep't 2001); *Meier v. Meier*, 156 A.D.2d 348 (2d Dept. 1989); *DeLyra v. DeLyra*, 141 A.D.2d 75, 78-79 (2d Dept. 1988); *Rashkov v. Rashkov*, 137 Misc. 2d 824, 829 (1987); *accord*, Scheinkman, Practice Commentary, McKinney's Cons. Laws of NY, Book 14, Domestic Relations Law C236B:3 and C236B:23; 47A *NY Jur. 2d* "Domestic Relations" §1981. A matrimonial action which only concludes with the separation of the parties cannot result in the equitable distribution of the marital property which is binding upon the System.

## **D. DRO Specifics**

### **1. What happens when a certified copy of a signed DRO is filed with the System before the member is eligible to receive a retirement benefit?**

If a certified copy of a signed DRO is submitted to the System prior to a member's retirement, the System will give effect to the DRO upon the member's retirement, unless the DRO otherwise directs or, if applicable, upon the member's death.

### **2. What happens when a certified copy of a signed DRO is filed with the System after the member has begun receiving retirement benefits?**

If a member has already retired when the DRO is received by the System and the DRO was signed by the court in the month in which it is received (and does not contain any provision for retroactive payments), the DRO will be given effect on the date the DRO was signed.

If a member has already retired when the DRO is received by the System and the DRO was signed by the court prior to the month in which it is received (and does not contain any provision for retroactive payments), the DRO will be given effect on the date the DRO was received by the System.

Retroactive provisions in DROs will be implemented to the extent permitted by applicable law and rules and to the extent they are capable of administration by the System.

### **3. May a DRO specify that a member must elect a particular form of post-retirement survivor benefit?**

Yes. The default form of a retirement benefit paid by the System to a retired member is an annuity payable for the life of the retired member only. (The single life annuity is commonly referred to as the Maximum benefit.) New York law, however, allows a System member to elect, in lieu of the Maximum benefit, an optional form of retirement benefit (an "option") which involves the payment of a lower retirement benefit during the retired member's lifetime but also provides some form of post-retirement survivor benefit upon the death of the retired member. If the election of a post-retirement survivor benefit in favor of the alternate payee is required as a result of the division of the member's retirement benefit through equitable distribution, the DRO must clearly set forth that the member is required to elect that survivor benefit at the time of retirement. On the other hand, if there is no requirement that the member elect a post-retirement survivor benefit in favor of the alternate payee, then the DRO should be silent about the matter of post-retirement survivor protection. In that event, the member is free to take the default single life annuity or elect any available optional form of retirement benefit providing for the payment of a survivor benefit.

### **4. May a DRO provide that a member may not elect any optional form of post-retirement survivor protection?**

Yes. A DRO could require a member to elect the Maximum retirement benefit, payable only for the life of the member. However, the same result for the alternate payee can be achieved by specifying that the alternate payee's share is to be calculated as if the retired member were receiving the Maximum retirement benefit. That approach would leave the member free to elect a post-retirement survivor

benefit in favor of someone else, for example, the member's subsequent spouse, while the alternate payee's share would not be affected by the election.

#### **5. Does a requirement in a DRO that the member must elect a post-retirement survivor benefit in favor of an alternate payee affect the ability of a member to provide post-retirement survivor protection to a subsequent spouse or loved one?**

Yes. A member could well be prevented from providing survivor protection to a subsequent spouse or other loved one by a requirement in a DRO that the member elect a form of post-retirement survivor benefit in favor of the alternate payee. For example, if the member is required to elect a joint and survivor annuity with the alternate payee as the beneficiary, the member will be unable to provide joint and survivor protection for a subsequent spouse or other loved one. On the other hand, depending upon the circumstances, certain types of provisions can be made as described in our fact sheet [\*Important Information for Members Required by a DRO to Elect a Joint & Survivor Option in Favor of a Former Spouse.\*](#)

**Practice Pointer:** An attorney representing a member may wish to consider the preclusive impact of a required option selection, particularly in cases where the parties have been married for a very short time or where the divorce occurs relatively early in the member's career.

#### **6. How will a DRO affect a retired member's entitlement to cost-of-living adjustments?**

Education Law §532-a added by Chapter 125 of the Laws of 2000 established a mechanism for providing cost-of-living adjustments (COLA) on the first \$18,000 of a retired member's maximum retirement benefit. COLAs generally commence after the member has been retired for five years.

As a general matter, when a DRO requires the System to pay a percentage of the retiree's benefit to an alternate payee, the System will use the same percentage to pay the alternate payee a share of any COLA adjustments as well, unless the DRO expressly provides that the alternate payee is not to share in the COLA adjustments. On the other hand, as a general matter, when the DRO requires the System to pay a specific dollar amount to the alternate payee, the alternate payee will not share in any COLA adjustments.

**Practice Pointer:** Under law, COLAs are only payable during the retiree's lifetime and are not payable to any beneficiary under any form of post-retirement survivor protection, except in the limited case where the retiree's current spouse is entitled to receive a survivor annuity under a joint and survivor option. Accordingly, any payments of a share of the retiree's COLA to an alternate payee will cease upon the death of the retiree, even where the alternate payee is entitled to receive survivor annuity benefits under an option which the retiree was required to elect at retirement. Thus, in the case of an alternative option, under which the alternate payee is to receive the same amount following the death of the retiree as the alternate payee was receiving during the retiree's life, the System would continue to pay the alternate payee the share of the benefit the alternate payee commenced receiving at the time of retirement, not the share as increased by the alternate payee's share of any COLA to which the retiree subsequently became entitled.

## **E. Division of Benefits**

### **1. Is it necessary for a divorce always to result in a division of a member's retirement benefits?**

No. There is no requirement that the equitable division of the marital estate upon the parties' divorce result in the division of a member's retirement benefit. Although a NYSTRS member's benefits may be considered marital property subject to equitable distribution, the parties could conceivably determine to divide the marital estate in a way which does not involve the division of the member's NYSTRS benefits. For example, the parties could hire an actuary or other professional to calculate a value for the member's benefits and then apportion that value among other assets in the marital estate. On the other hand, in many cases, it is likely the member's retirement benefit will be one of the most valuable marital assets, apart from the parties' house, and it may be difficult, if not impossible, to avoid a division of the member's benefits and still have an equitable division of the marital estate. Additionally, depending upon the former spouse's financial situation, it may be ill-advised for the former spouse to forego the financial security provided by sharing in the member's benefits.

### **2. How should a member's retirement benefit be divided between the member and their spouse in equitable distribution?**

There is no best or unique way for dividing a member's retirement benefit. Many DROs received by the System divide a member's retirement benefit according to the formula set out in *Majauskas v. Majauskas*, 61 NY2d 481 (1984) (the "*Majauskas* formula") which takes into account the service credit which the member accumulated during the marriage and the member's total accumulated credit at the time of retirement. ([Appendix A](#) provides a form of language acceptable to the System which utilizes the *Majauskas* formula.) However, the System has also received DROs which divide member benefits in ways which do not appear to employ a *Majauskas*-type formula.

### **3. Does NYSTRS determine a present value for a member's future retirement benefits?**

No. The System does not do present value calculations of members' future benefits. The System can only give information about a member's current benefit accruals and estimates of a member's future benefit at retirement. The parties will need to consult with an actuary or other financial professional if they desire to have a present value calculated for a member's future benefit.

### **4. When may the member's former spouse begin to receive a share of the member's retirement benefit?**

As stated previously, a former spouse's rights are derived from the member's rights. A member's former spouse may, therefore, only begin to receive a share of the member's retirement benefit as an alternate payee once the member has filed for retirement with the System and commenced receiving a retirement benefit. A DRO may not provide for the alternate payee to receive a benefit any earlier than the member does or require the member to retire on or by a particular date. Rather, a DRO may only provide that the alternate payee is to begin to receive a share of the member's retirement benefit at the time the retired member begins to receive a retirement benefit. Similarly, a former spouse may only receive a share of the member's death benefit when the death benefit is otherwise payable under law.

**Practice Pointer:** When considering how the parties' retirement benefits are to be divided, an attorney should be aware that, if one of the parties is a member of the System and the other party is a participant in some other retirement plan, the respective parties may have different rights to commence receiving and/or continue receipt of their benefits. Even when both parties are members of the System, their benefits may commence at different times and in different amounts.

#### **5. Are there circumstances in which a former spouse could cease receiving a share of the member's retirement benefit after the member has retired?**

Yes. If a retiree returns to active public service in New York, New York law requires that the payment of the retiree's benefit be suspended during the return to service. See Civil Service Law §150; Education Law §503(5). If the payment of a retiree's benefit is suspended due to a return to service, the payment of the alternate payee's share of that benefit would cease as well. Note, however, that a suspension is only required if the retiree returns to public employment in New York. A suspension is not required if the retiree goes to work in the private sector, in public service in another state or in federal government service. There are also rules under which NYSTRS retirees may return to public service in New York without a suspension of pension benefits in certain circumstances. Refer to NYSTRS' pamphlet [Working in Retirement](#) for more information.

#### **6. Are there any other limitations on the alternate payee's share of a member's retirement benefit?**

In no event may an alternate payee receive an amount which would be greater than the amount to which the retiree would have been entitled, had there been no division of the retirement benefit. Moreover, an alternate payee may not receive their share of a member's retirement benefit in any other form than as a portion of the member's retirement benefit when and as it is payable to the member. For example, the alternate payee may not require the System to commute their share of a member's retirement benefit to a lump sum to be paid on a one-time basis.

#### **7. Can it make a difference if the member has already retired when the parties are divorced?**

Yes. Once the member has retired and the 30-day period following retirement for electing an option has elapsed, the form of payment elected by the member at retirement cannot be changed. For example, if the member elected to have their retirement benefit paid in the form of an annuity payable for the life of the member in retirement without any provision for a survivor benefit, that election cannot be altered by a subsequent divorce. Or, for example, if the member had elected a form of benefit providing for the payment of a survivor benefit under a joint and survivor option to the member's spouse whom the member is now divorcing, the divorce cannot rescind or otherwise change the option or the option beneficiary. **The System only has the power to implement a late-filed DRO to the extent that it directs the System to divide the benefit payable during the joint lives of the retired member and the alternate payee between the parties.**

**Practice Pointer:** Education Law §539(6) makes the form of payment or option elected by a member at retirement irrevocable, once 30 days has elapsed from the date of the member's retirement. This deadline makes it incumbent upon the attorney for an alternate payee to have a court-signed DRO on file with the System prior to the lapse date or, failing that, to make sure the member has elected the desired option. Once the 30-day period has elapsed, neither the System nor a court has any power to revive the member's right to elect an option or change the option selection made by the member at retirement.

## 8. What happens to the amount of a member's benefit in retirement when a member is required to elect a post-retirement survivor benefit?

In order to maintain actuarial equivalence, the election of any optional form of retirement benefit requires the amount of the benefit payable to the retired member during the retired member's lifetime to be reduced. This means that the monthly amount paid during the retired member's lifetime will be less than the amount paid during the retired member's lifetime, had the member retired under the Maximum single life annuity.

**Practice Pointer:** In the System's experience, there is considerable discussion between the parties as to the impact that option selection will have on the benefit payable during the retired member's lifetime and how that, in turn, might affect the way in which that benefit should be divided during the joint lives of the parties. For example, where the member is required to elect an option providing survivor protection to the alternate payee, the member may wish to require that the member's share of the benefit payable during the joint lives of the parties is to be computed on the Maximum single life annuity, rather than on the member's lifetime benefit as reduced by the option election. Conversely, where the ability of the member to elect a survivor option is not constrained, the alternate payee may wish to require that the alternate payee share be computed on the Maximum single life annuity, rather than on the member's lifetime benefit as reduced by reason of the option selection.

## 9. What are the ways in which the retirement benefit payable during the joint lives of the parties be divided?

When a DRO requires a member to elect a form of post-retirement survivor protection in favor of the alternate payee, there are three basic ways in which a DRO can provide for the division of the retirement benefit payable during the joint lives of the parties:

- The DRO could provide that the alternate payee's share is computed on the basis of the member's Maximum single life annuity, in which event the alternate payee's share of the benefit payable during the parties' joint lives would not be affected by any option selection;
- The DRO could provide that the alternate payee's share of the benefit is to be calculated "after optional modification," in which event the reduction in the benefit payable during the parties' joint lives is borne proportionally to their respective *Majauskas* shares; or,
- The DRO could provide that the member's share is computed on the basis of the member's Maximum single life annuity, in which event the member's share of the benefit payable during the parties' joint lives would not be affected by any option selection. Alternatively, the DRO could provide that the alternate payee's share is to be computed on the basis of the member's Maximum single life annuity but then reduced dollar for dollar by the amount by which the benefit payable during the member's lifetime has been reduced as a result of the option election.

DROs with more complicated directions as to the form of the option to be selected by the member or the way in which the parties' benefits are to be computed may require review by the System's Actuary to determine the impact of such provisions.

**Practice Pointer:** Sometimes, a DRO submitted to the System will contain conflicting language regarding the election of a post-retirement survivor benefit. Attorneys need to carefully review a DRO to make sure it clearly states what is intended and does not contain extraneous or conflicting language which might create confusion when the DRO is to be implemented. A failure to do so can potentially lead to disastrous outcomes. For example, if a DRO requires the alternate payee's share to be reduced as a result of the election of an option required by the DRO but then does not require the member to provide any survivor protection, the alternate payee's share will not be reduced if the member proceeds to elect survivor protection in favor of the alternate payee because nothing in the DRO had required the member to elect that survivor protection.

#### **10. What happens to an alternate payee's share of a retirement benefit if the retired member predeceases the alternate payee?**

Because payments of a retired member's retirement benefit cease upon the retired member's death, payments of a share of that retirement benefit to the alternate payee will cease as well at that time. In order for an alternate payee to continue to receive any payments from the System after the retired member's death, the retired member must have elected, whether pursuant to a DRO or otherwise, a survivor benefit at the time of retirement in favor of the alternate payee.

#### **11. What happens to an alternate payee's share of a retirement benefit if the alternate payee predeceases the retired member?**

Payments of an alternate payee's share of a retirement benefit cease upon the alternate payee's death. Following the death of the alternate payee, the entire retirement benefit is thereafter paid to the retiree. If the alternate payee had been designated the beneficiary of a joint and survivor benefit at retirement, no payments are made following the death of the retired member. On the other hand, if the alternate payee had been designated the beneficiary of a guaranteed or lump sum option, the retired member may designate another beneficiary or other beneficiaries to receive any payment, if any that is made upon the subsequent death of the retired member.

#### **12. Is the alternate payee entitled to share in a retired member's post-retirement death benefit if the retired member predeceases the alternate payee?**

As noted above, a post-retirement death benefit may be payable upon the death of a retired member following retirement in cases where the retired member had a date of membership on or after July 1, 1973. The amount payable will typically be very modest. If the alternate payee has survived the retired member and the DRO on file with the System **specifically** provides for the alternate payee to share in the member's death benefit, the System will pay the alternate payee their share of that benefit.

**Practice Pointer:** New York law requires a DRO must specifically provide for the payment of a portion of a member's death benefit in order for the alternate payee to share in a death benefit provided by a retirement plan. Language dividing a plan participant's retirement benefit is not sufficient to require a division of a death benefit payable under the terms of the plan. However, if the DRO provides for an alternate payee to share in a NYSTRS member's death benefit and the alternate payee survives the retired member, the alternate payee will be entitled to share in the post-retirement death benefit *pro tanto*, unless the DRO specifically provides either that the alternate payee is not entitled to share in any post-retirement death benefit or that the alternate payee's right to share in the member's death benefit is limited to the death benefit payable prior to the member's retirement.

## **F. Issues Related to *Majauskas*-type Formulas**

### **1. When a *Majauskas*-type formula is used to divide a member's benefit, are there any special matters which should be taken into account?**

Yes. Taking into account the nature of the teacher's work year, the System credits member service on a nine-month basis, rather than a 12-month basis. Thus, nine months of credited member service will result in a full year of service credit in the System. A member, however, may not accrue more than one year of service credit in any plan year (July 1-June 30).

For this reason, where a DRO contemplates with the use of a *Majauskas*-type formula with a fraction consisting of a numerator equaling the service accrued during the marriage and a denominator equaling the total service accrued in the System, care must be taken to express the numerator and denominator in terms of years, and not months. It can be a potential source of confusion if the numerator and/or denominator are expressed in months, as it may not be clear whether the intended base is nine months per year or 12 months per year.

### **2. How is service which is purchased by a member accounted for in a *Majauskas*-type formula?**

New York law has provisions which allow members to purchase credit for certain public service, including military service. Where the numerator of the *Majauskas* fraction is the service credit that has been accrued between two dates (such as the date of the marriage and the date of the commencement of the matrimonial action), the System will only include credit for service which has been rendered between the two dates and, if purchased, has been purchased by the member between those two dates. If the service was rendered outside the two dates or was purchased outside the two dates, it will not be included in the numerator.

### **3. How is RSSL Article 19 credit accounted for in a *Majauskas*-type formula?**

Article 19 of the Retirement and Social Security Law, effective June 1, 2000, provides Tier 1 and 2 members with an additional month of service credit for each year of credited service up to a maximum of two additional years. When a DRO requires the alternate payee's share to be calculated using a *Majauskas*-type formula with a numerator representing the years of service during the marriage and the denominator representing the member's total credited service, the additional Article 19 credit will be added to the denominator. If the numerator is not a definite number but is determined by reference to the number of years of the marriage, a prorated portion of the Article 19 service will be added to the numerator. On the other hand, if the DRO already establishes the numerator as a definite number, the System will assume the parties have taken Article 19 credit into account and use the numerator required by the DRO. If the parties wish to have the Article 19 credit accounted for in some other way, the DRO must expressly state how the Article 19 service is to be accounted for.

**4. Is all of a member's service used in the denominator of a *Majauskas*-type formula if the member has more years of credited service than are permitted to be used in the calculation of the member's retirement benefit?**

Tier 1 and 2 members are subject to certain limits on the number of years of credited service which may be used to calculate their retirement benefits, as are Tier 3 members when the Tier 3 benefit formula is used. Absent express language in the DRO to the contrary, the System will only include in the denominator of *Majauskas*-type formula the years of service which have actually been used to calculate the member's benefit.

## **G. Impact of Certain Situations**

### **1. What if a member dies prior to retiring?**

When a member dies prior to retirement, the System pays whatever death benefit is provided for under law to the member's designated beneficiary or beneficiaries. The System also refunds the member's accumulated contributions in the Annuity Savings Fund (ASF) in the case of a Tier 1 or 2 member or the member's accumulated contributions in the case of a Tier 3, 4, 5 or 6 member. Under law, an alternate payee is only entitled to receive a share of the member's death benefit and accumulated contributions if the DRO expressly provides the alternate payee is to share in the death benefit. Language in a DRO dividing a member's retirement benefits is not sufficient under law to require a division of the member's death benefit.

### **2. What if a member withdraws from the System?**

Tier 1 and 2 members have the right to withdraw from the System at any time prior to retirement if they are no longer in teaching service. Tier 3, 4, 5 and 6 members may only withdraw from the System prior to retirement if they have less than 10 years of credited service and are no longer in teaching service.\* Withdrawal from the System is accomplished by the member requesting a withdrawal of their accumulated contributions, if any. A withdrawal of membership extinguishes any benefit entitlements the member may have. Accordingly, any right, if any that an alternate payee may have to share in such member's benefits, would be extinguished as well. Typically, members will withdraw if their accumulated service affords no entitlement to any retirement benefit or if it is possible for them to obtain retirement credit in some other public retirement system for the service credited in NYSTRS.

The System will permit a member to withdraw their accumulated contributions, if any, and thereby terminate their membership in NYSTRS.

*\*Note: A Tier 3, 4, 5 or 6 member with 10 or more years of credited service may withdraw their accumulated contributions under certain circumstances as set forth in Education Law §512(g).*

### 3. What if a member retires for disability?

The law governing the System permits eligible members who are permanently disabled to retire for disability. When a member is retired for disability, the System will apply the provisions of a DRO requiring an alternate payee to receive a share of a member's retirement benefit, unless the DRO expressly provides that the alternate payee is not to share in the member's disability retirement benefit. This is consistent with New York law which regards the portion of a disability retirement benefit earned during a marriage as marital property unless the recipient demonstrates it represents compensation for personal injuries and, therefore, separate property. *Cameron v. Cameron*, 22 A.D.3d 911, 912 (3d Dep't 2005 ); *Pulaski v. Pulaski*, 22 A.D.3d 820, 821 (2d Dep't 2005).

### 4. What if a member fails to repay a loan?

As mentioned earlier, a Tier 1 or 2 member may borrow from their accumulated contributions, if any, to the System's Annuity Savings Fund (ASF). A Tier 3, 4, 5 or 6 member may borrow from their accumulated contributions. A failure to repay a loan has consequences for the benefit to which the member may be entitled to at retirement.

If a Tier 1 or 2 member fails to repay a loan from their accumulated contributions in the ASF, the member is treated as having received a distribution from the ASF at the time of default. If the Tier 1 or 2 member has not repaid the loan at the time of retirement, the member is treated as having received a distribution of the outstanding amount of the loan at retirement. In either case, the distribution reduces the member's accumulated contributions available at retirement to provide an annuity based upon those contributions.

If a Tier 3, 4, 5 or 6 member fails to repay a loan from their accumulated contributions, the member's benefit is actuarially reduced at retirement to take into account the fact that the unpaid balance of the loan has already been received by the member.

As a general matter, unless a DRO contains specific language prohibiting a member from taking a loan or transferring or encumbering their retirement benefit, the System will place no restriction on the member's right to obtain a loan. On the other hand, if a DRO contains specific language prohibiting the member from taking a loan or from transferring or encumbering their retirement benefit, the System will not permit the member to obtain a loan.

In the case of a Tier 1 or 2 member, if a member was not restricted by a DRO from obtaining a loan from their accumulated contributions in the ASF, the alternate payee's share of the member's accumulated contributions in the ASF at retirement, if any, will be calculated using only the remaining balance of the ASF, unless the DRO expressly provides otherwise.

In the case of a Tier 3, 4, 5 or 6 member, absent specific language directing the System to calculate the alternate payee's share without reduction for outstanding loans, the alternate payee's share of the member's retirement benefit will be calculated based upon the member's retirement benefit taking into account any reduction in that benefit due to a failure on the part of the member to repay the loan. In other words, in the case of a failure by a Tier 3, 4, 5 or 6 member to repay a loan, the reduction in the member's retirement benefit will be assessed against both parties' shares of the retirement benefit.

## **5. What if a Tier 1 or 2 member withdraws their accumulated contributions in the Annuity Savings Fund (ASF) at retirement?**

Under law, a Tier 1 or 2 member has the right to withdraw their accumulated contributions, if any, in the ASF at the time of retirement. If the accumulated contributions are not withdrawn, the System pays an annuity benefit based upon those accumulated contributions to the member following retirement, which annuity is separate from and in addition to the member's retirement benefit.

The System will permit the member to withdraw those accumulated contributions, unless a DRO expressly prohibits the member from withdrawing their accumulated contributions in the ASF, and, in that event, the System will not make any adjustment in the alternate payee's share of the member's retirement benefit, unless the DRO expressly requires the parties' shares to be adjusted to take into account the member's withdrawal of their accumulated contributions. Alternatively, a DRO may provide that the member is permitted to withdraw their accumulated contributions at retirement but require that the accumulated contributions be divided between the member and the alternate payee in a manner which must be expressly provided for in the DRO for the withdrawn contributions.

## **6. What if a Tier 1 or 2 member does not withdraw their accumulated contributions in the Annuity Savings Fund (ASF) at retirement?**

As discussed above, if a Tier 1 or 2 member does not withdraw their accumulated contributions, if any, in the Annuity Savings Fund at retirement, those accumulated contributions are actuarially converted by the System into an annuity which is separate from and in addition to the member's retirement. If the alternate payee is to share in that annuity in addition to the member's retirement benefit, the DRO must so provide and expressly state the manner in which the annuity is to be divided between the parties.

## **H. Tax Matters**

### **1. How are the System's payments of the alternate payee's share of a member's retirement benefits reported to the IRS?**

The share of a member's retirement benefit paid to the alternate payee pursuant to a DRO is reported to the Internal Revenue Service as income paid to the alternate payee.

## Appendix A – Sample DRO Language

[Where member is not required to elect an option in favor of the alternate payee]

ORDERED, that at such time as Participant has retired from and is actually receiving a retirement allowance from the New York State Teachers' Retirement System (hereinafter "NYSTRS"), the said NYSTRS, in accordance with the Equitable Distribution Law, is directed to pay to the Alternate Payee, from Participant's retirement allowance, one half of a fraction of Participant's maximum monthly retirement allowance prior to optional modification and prior to any withholding for taxes or other items. The numerator of said fraction shall be the number of years (and fractions thereof) of service credit accrued by Participant in the NYSTRS after \_\_\_\_\_ (the date of the marriage) and before \_\_\_\_\_ (the earlier of (i) the date of commencement of the action, or (ii) the date of separation agreement, if any), and the denominator shall be the total number of years of service credit in said NYSTRS used by NYSTRS in calculating Participant's retirement benefit at the time of retirement. The term "retirement allowance", as used herein, shall be deemed to include any annuity as well as any cost-of-living adjustment which may be paid by NYSTRS to Participant. Nothing contained in this Order shall in any way require the NYSTRS to provide any form, type, or amount of benefit not otherwise available by law. The NYSTRS shall have no obligation or responsibility as a consequence of this action apart from the specific directions contained in this paragraph.

[Where member is required to elect an option in favor of the alternate payee]

ORDERED, that at such time as Participant has retired from and is actually receiving a retirement allowance from the New York State Teachers' Retirement System (hereinafter "NYSTRS"), the said NYSTRS, in accordance with the Equitable Distribution Law, is directed to pay to the Alternate Payee, from Participant's retirement allowance, one half of a fraction of Participant's maximum monthly retirement allowance prior to optional modification and prior to any withholding for taxes or other items. The numerator of said fraction shall be the number of years (and fractions thereof) of service credit accrued by Participant in the NYSTRS after \_\_\_\_\_ (the date of the marriage) and before \_\_\_\_\_ (the earlier of (i) the date of commencement of the action, or (ii) the date of separation agreement, if any), and the denominator shall be the total number of years of service credit in said NYSTRS used by NYSTRS in calculating Participant's retirement benefit at the time of retirement. The Alternate Payee's share of the Participant's monthly retirement allowance, however, **shall be reduced** dollar for dollar by the amount of the reduction in the Participant's monthly retirement allowance resulting from the election of optional survivor protection required by this Order. The term "retirement allowance", as used herein, shall be deemed to include any annuity as well as any cost-of-living adjustment which may be paid by NYSTRS to Participant. Nothing contained in this Order shall in any way require the NYSTRS to provide any form, type, or amount of benefit not otherwise available by law. The NYSTRS shall have no obligation or responsibility as a consequence of this action apart from the specific directions contained in this paragraph; and be it further

ORDERED, that, at the time of retirement, the Participant shall elect [describe option].