

Adopted: 9/10/1997
Re-Approved: 1/7/2000
Re-Approved: 10/17/2002
Amended: 5/17/2005
Amended: 5/16/2006
Amended: 7/17/2007
Amended 6/19/2008
Amended 9/25/2008

**THE EDUCATIONAL EMPLOYEES' SUPPLEMENTARY
RETIREMENT SYSTEM OF FAIRFAX COUNTY (ERFC)**

**GUIDELINES FOR THE DEVELOPMENT OF
DOMESTIC RELATIONS ORDERS**

The Educational Employees' Supplementary Retirement System of Fairfax County (ERFC) is a defined benefit pension plan maintained under applicable sections of the Code of Virginia. Section 51.1-802 of the Code of Virginia prohibits the alienation or assignment of benefits except in specific circumstances. These exceptions allow ERFC to make a direct distribution to the former spouse of a member only pursuant to certain domestic relations orders (DROs) issued by a Virginia circuit court. These guidelines provide important information about both the form and substance of a domestic relations order that ERFC will approve. **READ THESE GUIDELINES CAREFULLY.** Please refer to Paragraph 16.04B of ERFC Regulations for definitions of terms used in these Guidelines.

Domestic relations orders are complicated legal documents, and ERFC recommends that all parties to a DRO be represented by an attorney. After carefully reviewing this information, if you still have questions, please call the ERFC Retirement Coordinator at (703) 426-3900.

PART 1: SUMMARY OF DRO REQUIREMENTS

This section summarizes the requirements for an approved DRO. A DRO must contain **all** of the items identified below or it will not be approved. The sections that follow this background section provide model DRO language that can help you and your attorney craft an order that meets both your needs and those of the ERFC.

• ***Court Certification***

The order must be a judgment, decree, or order from a Virginia circuit court. If the member and former spouse were divorced in a state other than Virginia, they must have a Virginia circuit court enter their order before ERFC will honor it. The

order must relate to the division of marital property, and must state that it is issued pursuant to Sections 20-107.3 and 51.1-802 of the Virginia Code. ERFC will review a draft order, but must receive and approve a certified copy of the final order before it will make any payments that the order provides to a former spouse.

- ***Date After July 1, 1991***

The order must have been entered after July 1, 1991. An order entered before July 1, 1991, cannot be accepted. If there is a pre-July 1, 1991, order dividing a member's retirement benefits and the parties want ERFC to pay the former spouse's portion directly to the former spouse, the parties must return to court and have a new order entered. If the new order meets ERFC requirements, it will be approved. ERFC can then make direct payments to the former spouse.

- ***Full Identification of Member and Former Spouse***

The order must give the name and last known address of both the member and the former spouse. The birth dates and social security numbers must be provided in a separate addendum. A former spouse has a duty to keep the ERFC informed of any changes in his or her address.

- ***Order to Pay Former Spouse Directly***

The order must specifically direct or order ERFC to pay the former spouse's share of the member's benefits directly to the former spouse.

- ***Amount of Former Spouse's Portion***

The order must clearly state the former spouse's share of the member's benefits. The amount that ERFC is ordered to pay to the former spouse should be as specific as possible and easily determinable by ERFC. The parties may use a flat dollar amount, a percentage of the total benefit, or a percentage of the marital share of the benefit, which is the portion of the benefits that was earned during marriage. If the parties choose the marital share option, they must include all of the information that is necessary for the ERFC to calculate the share, including date of marriage and date of final separation. No formulation can exceed 50% of the marital share.

- ***Limitations on the Order***

All of the following limitations must be included in every order:

- √ The order must specify that it does not require ERFC to provide any type of benefit or any option not otherwise provided under the plan.

- √ The order must state that it does not require ERFC to provide benefits in any amount greater than the amounts required by the ERFC Plan.
- √ The order must state that the ERFC will not be required to pay benefits to a former spouse that are already assigned to another under another order previously determined to be an approved Domestic Relations Order.
- √ The order must state that it does not require payment of more than 50% of the marital share of the member's benefits.
- √ The order must state that the court will retain jurisdiction to amend the order so that it will constitute an approved DRO as determined by ERFC, even though all matters incident to the divorce have been fully or finally adjudicated.

An order will not be approved if it contains the following:

- x A requirement that ERFC notify the former spouse of any change or alteration of the retirement benefits which are due to the member.
- x A requirement that ERFC pay benefits to the former spouse before the member's account is in pay status. Pay status occurs when:
 1. The member retires;
 2. The member terminates covered employment and requests a refund of accumulated contributions; or
 3. Only in the case of orders approved by ERFC on or before June 19, 2008, and to the extent necessary to comply with such orders, the member dies and a death benefit or refund of contributions and accumulated interest is payable to a person other than the former spouse.

Even though an order may award a former spouse a share of the member's retirement benefits, the former spouse cannot receive any money from ERFC until the member's account is in pay status.

- x A requirement that ERFC enforce election of a particular form of benefit, such as a partial lump sum, joint and survivor option, or standard formula benefit. A court may order or the member and former spouse may agree as part of their divorce settlement that the member will elect (or not elect) a particular form of benefit, or that the member will not change a form of benefit previously elected, but the ERFC will not enforce such a requirement. If such

a requirement is included in the DRO, the DRO must include language indicating that the member and former spouse understand that ERFC will pay benefits in the form elected by the member when he or she moves into pay status, and that ERFC will make any changes the member requests if they are permitted by the ERFC plan document, regardless of any other provisions in the DRO. (See Part 4: Additional Terms for required language).

- x A designation of a beneficiary for survivor benefits or retirement contribution refunds. A court may order or the member and former spouse may agree as part of their divorce settlement that the member will designate (or not designate) a particular beneficiary, or that the member will not change a beneficiary designation that was previously made, but ERFC will not enforce such a requirement. If such a requirement is included in the DRO, the DRO must include language indicating that the member and former spouse understand that ERFC will pay benefits only to the beneficiary who is actually designated by the member in accordance with the plan documents to receive a survivor benefit or who is actually designated by the member on the ERFC's Designation of Beneficiary form on file at the time of the member's death, regardless of any other provisions in the DRO. (See Part 4: Additional Terms for required language).

- x An award of more than 50% of the marital share of the member's retirement benefits. Section 20-107.3 prohibits a former spouse from receiving more than 50% of the marital share of a pension.

- x A provision permitting the former spouse to name a beneficiary who would receive benefits after the death of the former spouse.

- x References to rights protected by ERISA. ERFC is not an ERISA plan, and therefore will not accept an order that purports to give a member or former spouse rights under ERISA.

PART 2: IDENTIFYING THE AMOUNT TO BE PAID

One of the most difficult, yet most important aspects of a DRO is determining how much a former spouse will be paid. As earlier discussed, the Virginia Code limits the amount that can be paid to a former spouse, but otherwise the parties and the court must determine what is fair. ERFC requires that certain language be included in the DRO describing the parties' arrangement.

You must choose paragraph (a) or (b) below if the amount to be paid to the former spouse is to be stated in the form of a percentage of the benefits that become payable to the member. Paragraph (a) may be used by either retired or active members. Paragraph (b) may only be used by active members. If you choose either (a) or (b), the former spouse will get the specified percentage of all benefits payable to the member no matter what form is chosen at the time of retirement, including a lump sum, partial lump sum, or refund of contributions that is paid to the member, and the former spouse will automatically benefit from any future cost-of-living increases that the member receives. If you choose (a), you are certifying to the court and to ERFC that the percentage you chose will not exceed 50% of the marital share, as described above. The ERFC will not be responsible for checking the parties' calculations.

You must choose paragraph (c) below if the amount to be paid to the former spouse is stated as a flat dollar amount per month. If you choose (c), unless the DRO specifically states that the member will receive the entire amount of the COLA, the annual adjustment to the benefit amount will be applied separately to the member's and former spouse's share of the benefit.

Options:

- (a) "Pursuant to sections 20-107.3 and 51.1-802 of the Code of Virginia, the Educational Employees' Supplementary Retirement System of Fairfax County is hereby ordered to pay directly to _____ [insert name of former spouse] ___% of the retirement benefits that become payable to _____ [insert name of ERFC member]. This order does not require the Educational Employees' Supplementary Retirement System of Fairfax County to pay to _____ [insert name of former spouse] an amount which exceeds 50% of the marital share of the payments to _____ [insert name of ERFC member]."

(b) “Pursuant to sections 20-107.3 and 51.1-802 of the Code of Virginia, the Educational Employees’ Supplementary Retirement System of Fairfax County is hereby ordered to pay directly to _____ [insert name of former spouse] a percentage of the retirement benefits that become payable to _____ [insert name of ERFC member] according to the following formula:

$$\frac{\text{Years of ERFC credited service earned during marriage}}{\text{Years of ERFC credited service at termination of ERFC-covered employment}} \times \text{_____ \% [insert percentage not greater than 50\%]}''$$

Please Note: There are two sources of service credit in ERFC other than time actually worked by the member for Fairfax County Public Schools. One is purchased service credit; the other is sick leave that has accumulated and is unused at the time of retirement. Unless your domestic relations order contains an explicit direction about purchased service credit and sick leave, ERFC will **include** in the numerator and denominator of the fraction all service credit that was purchased during the period of the marriage (as that period is defined in the domestic relations order) but will **not include** any credit for unused sick leave in either the numerator or the denominator of the fraction.

(c) “Pursuant to sections 20-107.3 and 51.1-802 of the Code of Virginia, the Educational Employees’ Supplementary Retirement System of Fairfax County is hereby ordered to pay directly to _____ [insert name of former spouse] \$_____ per month.”

Please note that information about the member’s account, such as contribution account balance, benefit estimates through the parties’ final separation date or as if the member remained employed by Fairfax County until retirement, and beneficiary designations, will only be provided to a non-member such as former spouse or the former spouse’s attorney in response to a *subpoena duces tecum* directed to the Retirement Coordinator.

PART 3: STARTING AND STOPPING PAYMENTS

A DRO must identify when the payments to the former spouse will begin and end. By law, a DRO relating to ERFC cannot require payments to be made before the member is in pay status, as described above.

You **must** choose paragraph (a) below if the member **is not** already receiving retirement benefit payments from ERFC. You **must** choose paragraph (b) below if the member **is** already receiving retirement benefit payments from ERFC.

- (a) “Such payments to _____ [insert name of former spouse] shall commence on the date on which payments commence to _____ [insert name of ERFC member].”

- (b) “Such payments to _____ [insert name of former spouse] shall commence as soon as administratively practicable after this order is furnished to and approved by ERFC.”

Likewise, the parties must determine when payments to the former spouse will stop. Parties must choose from among the options below the one that most closely reflects their intended agreement. Option (a) continues benefit payments to the former spouse for as long as payments are made to the member, but not after the death of the former spouse. Option (b) stops benefit payments to the former spouse at an earlier date, after a specified total amount has been paid out. Option (c) permits payments to end prior to the member’s payments, upon the occurrence of a specified date or event such as the former spouse’s remarriage. If payments to the former spouse terminate before the member has received all payments to which he or she is entitled, all payments following that termination will be made to the member.

Options:

- (a) “Such payments shall continue for as long as payments are made to _____ [insert name of ERFC member], but not after the death of [insert name of former spouse].”
- (b) “Such payments shall continue until the total amount of \$_____ has been paid to _____ [insert name of former spouse], until the death of [insert name of former spouse], or until payments cease to be made to _____ [insert name of ERFC member], whichever occurs sooner.”
- (c) “Such payments shall continue until _____ [insert specified date or event] or until payments cease to be made to _____ [insert name of ERFC member], whichever occurs sooner, but not after the death of [insert name of former spouse].”

PART 4: ADDITIONAL TERMS

In the event that the DRO includes a term directing the member to choose or not choose a particular form of election, such as a joint and survivor annuity, a standard form of benefit or a partial lump sum, or to designate or not designate a particular beneficiary, the DRO **must** also include the following disclaimer:

“_____ [insert name of ERFC member] and _____ [insert name of former spouse] understand that a member can elect a retirement option only at retirement, that ERFC permits the member to make certain changes after retirement, and that ERFC will not enforce a domestic relations order that specifies a retirement option that is inconsistent with the election that the member makes under the Plan, including any changes made after retirement. To the extent that this order specifies that the member will or will not select a particular retirement option, or that the order specifies the beneficiary to be named or nominated by the member, it may be enforceable between _____ [insert name of ERFC member] and _____ [insert name of former spouse], but it cannot be enforced against ERFC.”

PLEASE NOTE: In order for the former spouse to receive any payments from ERFC after the member's death, the member must designate the former spouse as his or her beneficiary in accordance with ERFC's procedures for the particular form of benefit that the former spouse is to receive, and the beneficiary designation must remain in effect at the member's death. (There is an exception to this rule for certain orders that were approved by ERFC on or before June 19, 2008, but not for any orders approved after that date.)

PART 5: OTHER CONSIDERATIONS

Although a DRO and related divorce proceedings are complicated and can be difficult to understand, the pension assets that are divided are an important part of your future financial planning. Be sure that you and your attorney have considered the following issues when crafting a DRO:

Are the members' beneficiary designations and DRO consistent? If they are inconsistent, the member's beneficiary designations made on official ERFC forms will govern, and the interest of the former spouse may be reduced.

What will happen to the former spouse's interest if the member dies before retirement? If the member dies before retirement, no payments will be made to the former spouse *unless* (a) death-in-service benefits are payable AND the member has actually designated the former spouse as the beneficiary to receive those benefits in accordance with ERFC's procedures; or (b) a refund of contributions is payable AND the member has actually named the former spouse as the beneficiary to receive that refund following the member's death. ERFC will honor the terms of a DRO that it approved on or before June 19, 2008, if that DRO requires other payments to the former spouse following the death of the member.

What will happen to the former spouse's interest if the member dies after retirement, but before the former spouse?

Payments to the former spouse will terminate on the member's death, unless either (a) the member has selected an optional form of benefit that includes payments to a beneficiary following the member's death AND the member has actually designated the former spouse to receive those payments in accordance with ERFC's procedures; or (b) a refund of residual contributions is payable AND the member has actually named the former spouse as the beneficiary to receive that refund following the member's death. ERFC will honor the terms of a DRO that it approved on or before June 19, 2008, if that DRO requires other payments to the former spouse following the death of the member.

What will happen to the former spouse's share if the former spouse predeceases the member?

The former spouse's right to the member's retirement benefits will terminate when the former spouse dies, and any portion of future benefit payments designated for his or her benefit will revert to the member. A former spouse is not permitted to designate a beneficiary to continue receiving his or her portion of the member's benefits after the former spouse's death.

Does the former spouse have the right to choose an optional form of benefit?

Although the law permits a former spouse to receive a portion of a member's ERFC benefits, the former spouse does not become an ERFC member in his or her own right. Therefore, the former spouse will be treated as a creditor, whose payments are dependent on continued payments to the member, and he or she will not have the right to choose an optional form of benefit.

What if my former spouse, who is an ERFC member, decides not to retire this year when he or she becomes eligible? Will ERFC or the school system enforce our agreement so that I can begin to receive my share of the benefits?

The ERFC cannot require a member to retire, or to elect any particular form of pension, so that a former spouse can begin receiving benefits. No benefits will be paid to a former spouse unless the member is actually receiving benefits. At that time, payments to a former spouse may begin. Consequently, any agreement between a member and a former spouse regarding the time of retirement may be enforced between the parties to the agreement, not by or against ERFC. ERFC will make payments to an ex-spouse only when benefit payments to the member begin.

Will ERFC compute the former spouse's share before or after deducting expenses such as the member's health insurance, taxes and other authorized payments?

Before. The former spouse's share is calculated on the basis of the member's gross ERFC benefit. The member's health insurance and other deductions will be made from the member's share.

Does the member owe taxes on the entire benefit, or just on his or her share?

ERFC will report to the IRS on the member's form W-2P only the amounts paid to the member. On a separate form W-2P, it will report in the former spouse's name the amounts paid to him or her. The IRS will expect both the member and the former spouse, separately, to pay tax on his or her own share of the benefits. Both parties will be entitled separately to elect to have taxes withheld on their share of benefits, or not, as each wishes.

What if the member receives a cost-of-living adjustment (COLA) to his or her monthly benefit? Will the former spouse get an increase, too?

If the former spouse is assigned either a percentage or a percentage of the marital share of the member's benefit, he or she will automatically receive a pro rata share of the COLA. If the DRO specifies a flat dollar amount that the former spouse will receive monthly, the annual adjustment to the benefit amount will be applied separately to the member's and former spouse's share of the benefit unless the DRO specifically provides that the ERFC member will receive the entire amount of the COLA.

What if the parties want to change the terms of their DRO?

If, after ERFC has reviewed and approved a final order, the parties agree to change the terms of the order, they must submit a new DRO for ERFC's consideration. The new DRO must state that it supersedes the previous DRO, must meet all of the same requirements that the original DRO had to meet, and will not be effective until it has been approved by ERFC.

**THE EDUCATIONAL EMPLOYEES' SUPPLEMENTARY
RETIREMENT SYSTEM OF FAIRFAX COUNTY (ERFC)**

MODEL DRO

Below is a model Domestic Relations Order that embodies the simplest form of assignment between an ERFC member and a former spouse. This model can be modified to incorporate one of the alternate formulations of the amount to be paid from Part 2 of the Guidelines for the Development of Domestic Relations Orders, or to stop payments in accordance with any of the other options identified in Part 3 of the Guidelines. This model should not be modified to require election of a particular form of benefit or to specify the member's beneficiary, unless it also includes the disclaimer described in Part 4 of the Guidelines.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN DOE,	:	
	:	
Complainant	:	
	:	
v.	:	IN CHANCERY NO.
X12345	:	
	:	
JANE DOE,	:	
	:	
Defendant	:	

DOMESTIC RELATIONS ORDER

THIS CAUSE came to be heard upon Motion of the Complainant, John Doe, and agreement of the Defendant, Jane Doe, in accordance with Paragraph X of the Separation and Property Settlement Agreement entered into by the parties on September 9, 1999, for entry of a qualifying

court order setting forth the right and entitlement of the Former Spouse to the Member's interests in certain benefits under the Educational Employees' Supplementary Retirement System of Fairfax County.

IT APPEARING TO THE COURT that said Motion is proper and should be granted, it is

ADJUDGED, ORDERED, AND DECREED as follows:

1. This Court has personal jurisdiction over both parties to this cause and jurisdiction over the subject matter in this divorce action.

2. This Order is issued pursuant to Section 20-107.3 of the Virginia Code, which relates to the division of marital property rights between spouses and former spouses in actions for divorce, and Section 51.1-802, which relates to assignment of retirement assets.

3. The Order applies to the Educational Employees' Supplementary Retirement System of Fairfax County ("Plan" or "ERFC"), administered by the ERFC Retirement Office, 8001 Forbes Place, Suite 300, Springfield, VA 22151.

4. The Plan Member is Jane Doe, whose last known mailing address is 123 Anywhere St., Arlington, Virginia 22205.

5. The Former Spouse is John Doe, whose last known mailing address is 123 Somewhere St., Springfield, Virginia 22151.

6. The parties' birth dates and Social Security Numbers are stated in a separate addendum, which shall not be placed in the public record of the court.

13. This Order shall not be interpreted in any way to require ERFC to provide any type of benefit or any option not otherwise provided under the Plan.

14. This Order shall not be interpreted in any way to require ERFC to provide benefits in any amount greater than the amounts provided by the Plan.

15. This Order shall not be interpreted in any way to require ERFC to pay benefits to a former spouse that are already assigned to another under another order previously determined to be an approved Domestic Relations Order.

16. The Court retains jurisdiction to amend this Order so that it will constitute an approved Domestic Relations Order as determined by the ERFC, even though all matters incident to this action or proceeding have been fully and finally adjudicated.

AND IT IS ORDERED.

JUDGE

ENTERED this _____ day of _____, 20____.