

Sample Domestic Relations Order

For a Domestic Relations Order regarding a member's HRB benefits to be enforceable, it must be accepted by the Holyoke Retirement Board (HRB). Although you do have some leeway in drafting such an order, remember that we cannot approve an order that does not comply with M.G.L. c. 32. Accordingly, if you wish to include any unusual provisions in your DRO, it is vital that you first consult with us to be sure that we can accept them.

What follows is a sample domestic relations order for an active member (the plaintiff) who agrees to select Option C at retirement and divide his pension with his former spouse according to a specific percentage. Where appropriate, we have included explanations and comments directly after the text that they relate to. Brackets indicate general variable information which will be different depending upon your particular case.

THIS DOCUMENT IS NOT INTENDED TO CONSTITUTE, OR TO BE A SUBSTITUTE FOR, COMPETENT LEGAL ADVICE. YOU ARE URGED TO CONSULT WITH AN ATTORNEY TO DETERMINE YOUR LEGAL RIGHTS UPON DIVORCE.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

[Hampden]

Division Docket No. [00000]

[John T. Plaintiff],
Plaintiff

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DOMESTIC RELATIONS ORDER

v.

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[Mary T. Defendant],
Defendant

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As a part of the final Judgment in this matter, pursuant to M.G.L. Chapter 208, Section 34, governing the division of marital property between spouses and former spouses in divorce actions, and the decision of the Supreme Judicial Court, *Contributory Retirement Board of Arlington v. Mangiacotti*, 406 Mass. 184 (1989), it is hereby ordered as follows:

◇The opening paragraph contains the standard statutory language, citing the appropriate case law and provisions of Chapter 208. This paragraph should not be altered or amended.

1. DEFINITIONS

For the purposes of this Order, the following terms are defined:

- a. **Retirement Plan shall refer to the Holyoke Contributory Retirement System (M.G.L. Chapter 32);**
- b. **Plan Administrator shall refer to the Holyoke Contributory Retirement System, 20 Korean Veterans Plaza, Room 207 Drive, Holyoke, MA 01040;**
- c. **Participant shall refer to [John T. Plaintiff, 1 Litigation Drive, Boston, Massachusetts 02111; Social Security number 000-00-0000; date of birth January 1, 1970];**
◇The Participant is the plan participant whose retirement benefit is the subject of the Order.
- d. **Alternate Payee shall refer to [Mary T. Defendant, 1 Litigation Drive, Boston, Massachusetts 01111; Social Security number 000-00-0000; date of birth January 1, 1971];**
◇The Alternate Payee is usually the spouse of plan participant who will be receiving a share of the retirement benefit.
- e. **Alternate Payee's Benefit shall refer to the separate benefit to be established and administered for the Alternate Payee pursuant to paragraph 3 or paragraph 8 of this Order.**

2. ALLOCATION AND OPTION SELECTION OF PARTICIPANT'S RETIREMENT BENEFIT

The Plan Administrator is advised that the Alternate Payee and the Participant have agreed on allocating the retirement benefit of the Participant under the Retirement Plan which had accrued as of [agreed

upon date]. At the time of his/her retirement, the Participant may elect to receive his/her retirement benefit under any payment Option offered by the Retirement Plan, subject to the conditions given in paragraph 5 of this Order.

◇It is not necessary that parties agree to an option selection. However, if they do it should be stated in this paragraph. For example: instead of “the Participant may elect to receive...under any payment Option,” it should be stated that “the Participant has agreed to elect Option B (or C)”. An Alternate Payee can only be designated as an Option C beneficiary if he/she remains unmarried at the Participant’s date of retirement. If Option C is agreed to, there should be an alternative agreement stipulated in the event the Alternate Payee remarries. If an option selection is to be designated, it needs to be consistent throughout the Order. There also needs to be additional paragraphs to stipulate “PARTICIPANT’S INTENT TO DESIGNATE THE ALTERNATE PAYEE AS HIS OR HER BENEFICIARY OF RETIREE SURVIVOR BENEFITS”

3. ALTERNATE PAYEE’S RIGHT TO BENEFITS

The Alternate Payee is awarded all right, title and interest in and to the Alternate Payee’s Benefit as defined in paragraph 5 of this Order, commencing at the Participant’s actual retirement date and continuing while both parties are alive. This is an assignment of the Participant’s interest pursuant to M.G.L. c. 32, §19.

◇This paragraph addresses the rights that will be conferred on the Alternate Payee and when those rights will become effective. This paragraph is written in conformance with M.G.L. c. 32 and should not be altered or amended.

4. PAYMENT OF BENEFITS BY PLAN ADMINISTRATOR

The Holyoke Contributory Retirement System shall pay directly to the Alternate Payee the Alternate Payee’s Benefit, awarded by this Order, commencing concurrently with the Participant’s benefit and continuing until the first death of either the Participant or the Alternate Payee.

◇Like paragraph 3, this paragraph addresses the rights that will be conferred on the Alternate Payee and when those rights will become effective. This paragraph is written in conformance with M.G.L. c. 32 and should not be altered or amended.

5. DETERMINATION OF ALTERNATE PAYEE’S BENEFIT

The Alternate Payee’s Benefit shall be equal to [XX] % of the marital portion of the Participant’s benefit commencing at the time of the Participant’s actual retirement. The marital portion of the Participant’s benefit is the benefit which the Participant would have received at [his/her] actual retirement date in the absence of this Order, determined using [his/her] highest consecutive three year average salary at [his/her] actual retirement date and using the benefit percentage specified in the Retirement Plan for the age at which the Participant actually retires and commences receiving [his/her] benefit, but using only [his/her] credited service under the Retirement Plan through [agreed upon date].

As previously stated in paragraph 3 of this Order, at the time of his/her retirement, the Participant may elect to receive his/her retirement benefit under any payment Option offered by the Retirement Plan, subject to the conditions given in paragraph 8 of this Order. If, at the time of his/her retirement, the Participant elects to receive his/her retirement under Option C (or Option B) of the Retirement Plan, and also, at the time of his/her retirement, names the Alternate Payee as the sole Option C (or Option B) survivor beneficiary, the benefit assigned to the Alternate Payee shall be reduced to reflect the entire cost of selecting Option C (or Option B) rather than Option A, pursuant to Paragraph 8 of this Order. The “cost” of Option C (or Option B) shall be defined as the difference between the monthly benefit under the elected option and what the monthly benefit would have been under Option A.

If, however, at the time of his/her retirement, the Participant elects to receive his/her retirement benefit under Option C (or Option B) of the Retirement Plan, and also, at the time of his/her retirement, names anyone other than the Alternate Payee as the sole Option C (or Option B) survivor (or beneficiary), the benefit assigned to the Participant shall be reduced to reflect the entire cost of selecting Option C (or Option B) rather than Option A.

◇ This paragraph allows the parties to designate the percentage to be received by the Alternate Payee as of a specific date. This date should be the same as stated in paragraph 2 and remain consistent throughout the Order. The sample language of the Order uses a common formula in determining the marital portion to be awarded to the Alternate Payee. The parties, however, have the flexibility of establishing their own formula or, if the member is retired, they can simply state a specific dollar amount or percentage to be awarded at the time of divorce. We strongly suggest that if you plan on deviating from the sample formula that you consult the HRB to ensure that your particular formula can be implemented in compliance with the Retirement Plan. If the parties have agreed, or the Court has ordered that the benefit be split as of a particular date (usually the date of separation or divorce), this date should be used in relation to any mention of creditable service. Again, this is merely an option—the parties are free to develop any apportionment of the benefit that is consistent with the divorce decree as long as it does not violate the terms of the Retirement Plan. You should also restate the option choice if it has been agreed upon. As in the example above, the formula for determining the “Marital Portion” can be based on factors, such as age and salary that are determined after the date of retirement.

◇ If, at the time of processing the Participant’s application for retirement, the HRB finds that the Participant failed to select the specific court-ordered option, we will stop processing the application and notify all parties.

6. DETERMINATION OF ALTERNATE PAYEE’S BENEFIT IN EVENT OF PARTICIPANT’S DISABILITY RETIREMENT

In the event that the Participant receives a disability benefit from the Hampshire County Retirement Board, due to either accidental or ordinary disability, the Alternate Payee’s Benefit shall be equal to [XX]% of the marital portion of the Participant’s disability benefit commencing at the time of the Participant’s disability retirement. For purposes of ordinary or accidental disability, the marital portion shall mean a fraction, the numerator of which is the Participant’s number of years and months of credited service through [agreed upon date], and the denominator of which shall be the Participant’s total number of years and months of service through the date of [his/her] disability.

However, for purposes of determining the portion of the accidental disability benefit payable to the Alternate Payee, such fraction shall be applied only to the amount of disability benefit which would have been payable for ordinary disability rather than the actual amount payable for accidental disability; the Participant shall retain 100% of the excess of the amount of the accidental disability benefit over the amount of the benefit which would have been payable for ordinary disability.

◇ Benefit amounts allowed in accidental and ordinary disability cases are calculated differently from regular retirement allowances; accordingly, if the Participant does ultimately retire under a disability allowance, it is necessary to offer an alternative formula to that presented in paragraph 5. The provisions for ordinary and accidental disability benefit allowances are described in detail in Sections 6 and 7 of M.G.L. c. 32. This paragraph allows the parties to designate how the benefit would be apportioned in the event that the Participant is retired on the basis of either accidental or ordinary disability.

While this paragraph is not mandatory, it is helpful in avoiding future complications if the Participant does eventually receive a disability allowance. If no provisions are made for dividing a disability allowance, the Board will not be able to implement the Order and the parties will be required to seek clarification from the Court regarding the division of the allowance. Again, the formula offered in this sample is a common one, defining the marital portion and awarding a percentage of that portion to the Alternate Payee. Again, this is merely an option—the parties are free to develop any apportionment of the benefit that is consistent with the divorce decree as long as it does not violate the terms of the Retirement Plan.

7. ALLOCATION OF PARTICIPANT’S ANNUITY SAVINGS ACCOUNT REFUND, IF ANY

In the event the Participant elects to receive a return of [his/her] accumulated contributions and interest prior to [his/her] retirement or death, the Alternate Payee's benefit shall equal [XX]% of the Participant's balance which had accrued as of [agreed upon date], commencing at the time the distribution is made to the Participant.

◇This paragraph allows the parties to award a portion of the member's annuity savings account to the Alternate Payee in the event that the Participant does not retire and elects to receive a return of his or her accumulated contributions and interest. While this paragraph is not mandatory, it does protect the interests of the Alternate Payee. If and when the Participant either applies for retirement benefits or requests a refund of his or her annuity savings account balance, the HRB will attempt to notify the Alternate Payee of the Participant's action. Accordingly, it is extremely important that the Alternate Payee keep the HRB informed of his or her current address.

8. PARTICIPANT'S INTENT TO DESIGNATE THE ALTERNATE PAYEE AS HIS OR HER BENEFICIARY OF ACTIVE SURVIVOR BENEFITS

In the event that the Participant should die prior to retiring and receiving [his/her] retirement benefit, the Participant hereby agrees to designate the Alternate Payee as the beneficiary for a death benefit pursuant to M.G.L. Chapter 32, Section 12(2)(d), provided that the Alternate Payee is living and has not remarried at the time of the Participant's death. Such death benefit is to be payable to the Alternate Payee. The Participant and Alternate Payee acknowledge that if the Participant remarries, the surviving spouse may have a statutory right to elect a member-survivor allowance that will supersede the Alternate Payee's rights under this paragraph. In the alternative, in the event the Alternate Payee becomes ineligible to receive the death benefit provided in Section 12(2)(d) by virtue of [his/her] remarriage, the Alternate Payee shall receive [XX]% of the Participant's contributions through [agreed upon date] together with the interest credited on such contributions through the date of the Participant's death. The Participant is further required to designate the Alternate Payee as the beneficiary on the prescribed form issued by the Holyoke Retirement Board. The designation of the Alternate Payee as the beneficiary shall be continued and maintained in full force and effect during [his/her] lifetime, or until the commencement of benefit payments to both the Participant and the Alternate Payee upon the retirement of the Participant.

◇This paragraph allows the Participant to make provisions for the Alternate Payee in the event the Participant dies prior to retirement. The Alternate Payee is only eligible for the survivor (or continuation) benefit if he or she has not remarried at the time of the Participant's death. The continuing survivor benefit cannot be apportioned between the Alternate Payee and another beneficiary. This benefit is described in M.G.L. c. 32, §12(2) (d). The parties are also allowed to designate the Alternate Payee as the lump-sum beneficiary pursuant to M.G.L. c. 32, §11(2) (c) in the event the Alternate Payee has remarried.

IMPORTANT REMINDER: In Massachusetts, if the member dies and is survived by a spouse (who meets the statutory requirements of M.G.L. c. 32, §12 (2) (d)) or dependent children, the surviving spouse and children have a superior right to the member's retirement plan benefits. This means that even if the DRO and the Participant designate the Alternate Payee as the 12(2) (d) or 11(2) (c) beneficiary, if the Participant has remarried and his or her current spouse meets the statutory requirements of section 12(2) (d), his or her current spouse will have the statutory right to elect to receive this benefit. In effect, designation of the Alternate Payee as the 12(2) (d) member-survivor beneficiary or the 11(2) (c) lump-sum beneficiary will only be implemented if the Participant has not remarried at the time of the Participant's death. Again, if the Alternate Payee is to be named as the beneficiary under any option, the order should compel the Participant to designate the Alternate Payee as such on a form prescribed by the Board. **Naming** the Alternate Payee as beneficiary in the Order does not meet the statutory requirement for designating a beneficiary.

9. ACTIONS NOT REQUIRED OF PLAN ADMINISTRATOR

Nothing in this Order shall be construed to require the Retirement Plan or Plan Administrator:

- a. to provide to the Alternate Payee any type or form of benefit or any option not otherwise provided under the Retirement Plan;

- b. to provide to the Alternate Payee increased benefits (determined on the basis of actuarial equivalence stated in the Retirement Plan); or
- c. to pay any benefits to the Alternate Payee which are required to be paid to another alternate payee under another order previously determined to be a Domestic Relations Order sanctioned by the Supreme Judicial Court, *Contributory Retirement Board of Arlington v. Mangiacotti*, 406 Mass. 184 (1989).

10. ALTERNATE PAYEE'S RIGHT TO COST OF LIVING ADJUSTMENTS, IF ANY

The Alternate Payee shall be entitled to receive a pro rata share of any subsequent cost-of-living increases which may be granted on benefits which are in pay status.

◇This paragraph spells out how any future cost of living adjustments will be passed on to the parties. In the event that a specific dollar amount is specified as the Alternate Payee's Benefit, then we cannot change that amount and any COLAs will not be paid to the Alternate Payee.

11. ALTERNATE PAYEE'S TAX LIABILITY

The Alternate Payee shall include all of the taxable portion of [his/her] Alternate Payee Benefit, if and when received, in [his/her] gross taxable income. For purposes of sections 72 and 402(a) (9) of the Internal Revenue Code, the Alternate Payee shall be treated as the distributee of any distribution or payment made to said Alternate Payee under this Order. Said Alternate Payee's Benefit when paid shall not be declared as taxable income or claimed as a deduction on the Participant's tax return.

◇This paragraph identifies the tax benefits and burdens of the parties.

12. CONSTRUCTIVE RECEIPT

In the event that the Plan Administrator inadvertently pays to either party sums that are assigned to the other party pursuant to this Order, the party receiving the payment in error shall within thirty (30) days of receipt reimburse the other party to the extent of such payments. In no event shall the Plan Administrator be liable for payment to either party of any sum paid to the other party.

13. INTENT OF DOMESTIC RELATIONS ORDER

It is intended that this Order qualify as a *Domestic Relations Order* sanctioned by the Supreme Judicial Court, *Contributory Retirement Board of Arlington v. Mangiacotti*, 406 Mass. 184 (1989), and the provisions of this Order shall be interpreted and complied with in a manner consistent therewith.

14. JURISDICTION AND MODIFICATION

The Court retains jurisdiction over this matter to amend this Order to establish or maintain its status as a Domestic Relations Order sanctioned by the Supreme Judicial Court, *Contributory Retirement Board of Arlington v. Mangiacotti*, 406 Mass. 184 (1989), and pursuant to M.G.L. Chapter 32, Section 19, and in light of any subsequent legislation or appellate court ruling. In the event this Order is held not to be a Domestic Relations Order sanctioned by the Supreme Judicial Court, *Contributory Retirement Board of Arlington v. Mangiacotti*, 406 Mass. 184 (1989), the parties hereby agree to submit to and request the Probate Court to make it a Domestic Relations Order sanctioned by the Supreme Judicial Court, *Contributory Retirement Board of Arlington v. Mangiacotti*, 406 Mass. 184 (1989) in such a manner that will reflect the parties' intent as herein expressed and thereafter to enter an Order modifying the Domestic Relations Order entered by the Court, said modification Order to be entered *nunc pro tunc* if appropriate.

SO ORDERED

Dated _____

Justice,
Probate and Family Court Department
[Hampden] Division