



COUNTY OF TULARE  
**BOARD OF RETIREMENT**

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**Tulare County Employees' Retirement Association**

**Policy Regarding the Division of the Community Property Interest  
in the Accrued Benefits of a Member  
Upon Divorce or Legal Separation**

The California Family Code provides for the division of a pension under community property law in the event of a marriage dissolution or legal separation. Family Code section 2610 authorizes a court: (1) to order the parties to split the benefits when paid after retirement, or, when authorized by law, to order a split of the member's account and service time before retirement, (2) to order the member to elect a particular option, and (3) to order the plan to pay the nonmember directly when payment is due. The court may not order a plan to make payments in any manner that will result in an increase in the amount of benefits paid by the plan.

The County Employees Retirement Law of 1937 (Gov. Code, § 31450 et seq.<sup>1</sup>, hereafter "1937 Act") authorizes a split of the account and service time before retirement upon legal separation or dissolution of marriage (Article 8.4, § 31685 et seq.). The Tulare County Board of Supervisors adopted this optional method effective January 1, 1995, and so TCERA uses the split account system in pre-retirement divorces and separations when the parties have elected (or the Court has ordered) for the pension to be divided.

Under Article 8.4, the member's account is divided into two separate accounts. One account remains in the name of the member, while the other account is established in the name of the nonmember. (As relevant here, Art. 8.4 defines the term "nonmember" as "the spouse or former spouse." (§ 31685.1.)<sup>2</sup>) The nonmember's account is credited with his or her share (as determined by agreement or matter of law) of the community property interest in both the member's accumulated contributions and the member's accrued service credit.

Article 8.4 does not clearly describe the procedures for dividing benefits in a post-retirement divorce, when a member no longer has a separate account to be divided. This policy therefore describes not only how TCERA will administer a Domestic Relations Order (DRO) in a pre-

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<sup>1</sup> All subsequent statutory references are to the Government Code, unless otherwise specified.

<sup>2</sup> At the time Article 8.4 was enacted, registered domestic partners did not have the rights of spouses. Under current law, registered domestic partners are treated as spouses for purposes of community property law, so all references in this policy to a spouse, former spouse, or nonmember should be read as including a registered domestic partner or former registered domestic partner.

retirement divorce or legal separation, but also how TCERA will approach a post-retirement divorce or legal separation, whether or not Article 8.4 is used.

The following provisions describe in general the approach TCERA will use. This policy is not intended to repeat all applicable provisions of the 1937 Act. In the event of conflict between the 1937 Act and this policy, the 1937 Act will control.

## **GENERAL INFORMATION**

### **THESE PROVISIONS ARE NOT MANDATORY**

These provisions are intended to provide the parties with more flexibility in drafting a DRO. However, the parties and their attorneys are not required to use these provisions to divide the community property interest in the member's retirement account. In addition, Family Code section 2610 provides that the provisions of Government Code section 31685 et seq. may be ordered only upon the agreement of the nonmember.

### **DO NOT PROVIDE LEGAL REPRESENTATION**

Neither the Board of Retirement nor its staff, nor its attorneys, can provide legal advice to a member or nonmember on this subject. The parties should consult with their attorneys prior to entering into any agreement or court order for the division of retirement benefits.

### **JOINER AND DRO ARE REQUIRED**

If the retirement account or benefits are to be divided, TCERA must be joined as a party to the proceedings in accordance with the provisions of the Family Code. If the parties have signed a stipulation and proposed DRO before TCERA is joined, TCERA will accept the proposed DRO for review and approval, but will not be bound by the terms of the DRO until TCERA is joined. Even after TCERA has been joined, if the parties obtain a DRO from the court without prior written approval of TCERA, TCERA will have 30 days from the date of service of the order within which to review the order and either approve it or file a motion to set aside or modify the order. The DRO shall not become effective until the court has resolved the motion. If no motion is filed, the DRO shall become effective upon the expiration of the 30-day period.

The court is prohibited from imposing a DRO on TCERA which would require the payment of benefits with an actuarial value in excess of the value of benefits that would be received by the member had the DRO not been issued. While the DRO assists the parties in dividing their interests in the amount that TCERA will pay out, the Court cannot obligate TCERA to pay out more than it would owe in the absence of the split.

A separate DRO may not be necessary if the judgment or another court order provides adequate guidance to TCERA regarding the member's retirement account or benefits. (In addition, the parties do not need to join TCERA in the proceedings if the member is awarded the entire community property interest in the benefits.)

Information regarding a member's account cannot be provided to a nonmember in the absence of joinder. Once TCERA has been joined, TCERA will provide appropriate information to the parties as necessary for the administration of the plan.

**BENEFITS FROM SUPPLEMENTAL RETIREE BENEFIT RESERVE (SRBR)**

While a member is in active status, any future benefit from the Supplemental Retiree Benefit Reserve (SRBR) is speculative and therefore not divisible should the plan member divorce while in active member status. It may not be divided in a pre-retirement DRO.

Any benefit actually paid from the Supplemental Retiree Benefit Reserve (SRBR) can be divided in a post-retirement DRO in the same percentages as the regular pension benefit. If the DRO does not expressly divide this benefit, it will not be divided.

**RECONCILIATION**

If the parties reconcile after a DRO has been implemented by TCERA, the parties should consult TCERA on a case-by-case basis. A new court order, marriage certificate, and/or other official document(s) may be required.

**PRE-RETIREMENT DIVORCE OR SEPARATION**

**THE MEMBER'S ACCOUNT IS DIVIDED**

TCERA staff shall divide the plan member's retirement account in accordance with the terms provided in the DRO or Final Judgment. Staff shall determine the "Community Property period" which is the portion of the total years of TCERA service and contributions made to TCERA during the marriage and/or registered domestic partnership.

Where records indicating the amount of service earned or contributions made during the marriage and/or domestic partnership are unavailable, or where determining these amounts places an extraordinary administrative burden on TCERA staff, staff is authorized to follow the method of dividing the TCERA account balances as provided in "In re Marriage of Judd (1977) 68 Cal.App.3d 515, 522-523". Using this method, the non-member portion of the account shall be determined using the following formula:

$$\frac{\text{Years of marriage while a plan member}}{\text{Years of TCERA membership}} \times .5 = \text{non-member spouse service credit}$$

Service credit is used for two purposes: 1) to determine eligibility to draw a pension or for some other benefit (vesting) and 2) to calculate the benefit amount. This is an important distinction because for purposes of the service credit required for retirement (vesting), the member will retain full service credit as if the account was undivided. For purposes of determining benefit amount, the member will retain service credit that accrued outside of the Community Property period, plus only his/her share of the divided Community Property Service credit. For example, a Tier 4 member at age 52 with 5 years' credit that gets split equally would still have the requisite

5 years' credit for vesting purposes, but his benefit amount if he retired at that time would be based on 2.5 years of service.

### Confidentiality

After a member's account is divided pursuant to a DRO, each party will have sole control over his or her own account. TCERA will share information from each account with the other party only as necessary for the administration of the plan. Additional information pertaining to each account may be released to the other party upon presentation of a signed consent to such release, or in response to a subpoena.

### Considerations, Events, and Subsequent Impacts

The following sections summarize what happens to each account (member and nonmember) in various situations:

#### **1. If Member Is Not Vested in the Retirement System**

Member's Account – The member's service credit, contributions, and interest credited to his or her account will be divided in accordance with the provisions of the DRO. The member will still be credited the full, undivided amount of service credit for the purposes of vesting. That combined service credit counts for vesting only, and does not all count for purposes of determining benefit amount. The member will be requested to name a beneficiary. See Section 3 regarding buyback of service credit.

Nonmember's Account – A separate account will be established by TCERA on behalf of the nonmember with service credit, contributions, and interest transferred from the account of the member in accordance with the provisions of the DRO. The nonmember MUST be paid a refund of the contributions and interest. The non-member will be provided with a Distribution Election Form which will provide the options available for the non-member.

#### **2. If Member Is Vested in the Retirement System**

Member's Account – The member's service credit, contributions and interest credited to his or her account will be divided in accordance with the provisions of the DRO. **The member remains vested in the retirement system regardless of the amount of service credit remaining in his or her account after the division.** The member will be requested to name a beneficiary.

Nonmember's Account – A separate account will be established by TCERA on behalf of the nonmember with service credit, contributions and interest transferred from the account of the member in accordance with the provisions of the DRO. The nonmember will be requested to name a beneficiary. The nonmember will be provided with a Distribution Election Form which will provide the options available for the non-member.

#### **3. If Nonmember Is Paid a Refund**

Member's Account – No effect, but Member may buy back service credit: TCERA will notify the member in writing that the nonmember has received a refund of his or her share of the member's accumulated contributions. The member has five (5) years

from the date notification is received to elect to redeposit with TCERA all contributions withdrawn, plus interest, in order to regain the service credit forfeited by the nonmember. This means the member would have full credit for the service for purposes of benefit amount calculation.

Nonmember's Account – By selecting and accepting a refund, the nonmember waives all rights to receive a retirement benefit in the future. The nonmember may not redeposit contributions that are withdrawn and may not rescind the election to accept a refund after a check is placed in the mail by TCERA.

#### **4. If Nonmember Does Not Elect a Refund**

Member's Account – No effect.

Nonmember's Account – The nonmember may elect to retire, if eligible, or defer.

Contributions on deposit will be credited with interest semiannually. The nonmember may rescind the election to defer at any time and elect to receive a refund of contributions.

A nonmember who elects a deferred retirement, and later files for a monthly retirement allowance, shall have his or her retirement allowance calculated pursuant to the service retirement formula applicable to the member.

### Benefit Calculation

#### **5. If Member Retires Before Nonmember**

Member's Account – The member's retirement benefit will be based on: (1) the age factor applicable to the member on the date of retirement, (2) the member's final average compensation, and (3) the total of service credit remaining in his or her account after the account division, plus service credit accrued after the account division (separate property), plus any other eligible service credit that may have been purchased by the member. The member may elect any retirement option and beneficiary.

Nonmember's Account – TCERA will provide notice to the nonmember of the member's application for retirement, and that the "final compensation" will not increase further. The nonmember may then:

- A. Elect to leave his or her account intact (deferred retirement). The final compensation that will be used to calculate the nonmember's benefit is frozen at the rate applicable to calculate the retirement benefit paid to the member.
- B. Elect to begin receiving a retirement benefit immediately. The benefit will be computed using (1) the member's final compensation, (2) the service credit received from the division of the member's account, plus other eligible service credit that the nonmember may have purchased (see Section 7), and (3) an age factor based on the nonmember's age on the effective retirement date. The

retirement allowance shall be computed pursuant to the service retirement formula applicable to the service credited to the nonmember.

The nonmember may elect an optional retirement allowance as provided in section 31761, 31762, 31763, or 31764. The election of an optional retirement allowance is the only method whereby a nonmember may provide a survivor's continuance. The nonmember may elect a beneficiary.

## **6. If Nonmember Retires Before Member**

Member's Account – No effect.

Nonmember's Account – The retirement benefit will be calculated based on: (1) The determination of what would be the member's "final compensation" were the member to retire at that time, (2) the service credit received from the division of the member's account plus any other eligible service credit that may have been purchased (see section 7), and (3) an age factor based on the nonmember's age on the effective retirement date. The retirement allowance shall be computed pursuant to the service retirement formula applicable to the service credited to the nonmember.

The nonmember may elect an optional retirement allowance as provided in section 31761, 31762, 31763, or 31764. The election of an optional retirement allowance is the only method whereby a nonmember who retires may provide a survivor's continuance. The nonmember may elect a beneficiary.

## **7. Purchase of Service Credit**

This section relates to two types of service credit purchase:

- A. Purchase of purchasable time (such as extra help time, for which back contributions and interest can be paid to make into service credit) that was eligible for purchase at the time of the division of property, which would have been community property.
- B. Repurchase of service credit when a refund was taken at some point (also known as "redeposit of contributions")

Member –

- A. The member may purchase his or her community property share of eligible (purchasable) service credit as specified in the DRO. If the DRO is silent, the member will have the sole right to elect to purchase all eligible service credit. Purchase of service credit must be completed before the member retires.
- B. The member may purchase back any of the nonmember's share of the community property service credit only if the nonmember elects and is paid a refund of contributions, or dies prior to completing purchase of his or her interest in the member's eligible service credit. This election must be made within five years of receipt of notice from TCERA of such withdrawal.

Nonmember –

- A. The nonmember may purchase his or her community property share of purchasable time only as specified in the DRO. If the DRO is silent, the

nonmember will have no right to elect to purchase eligible service credit. Payment for service credit purchased must be made in a lump sum prior to the nonmember's effective date of retirement. If the nonmember elected a refund of contributions awarded when the account was divided, he or she is not eligible to make a purchase of retirement service credit.

- B. The nonmember may purchase back the nonmember's court-determined share of service credit for which the member already took a refund *only* pursuant to court order.<sup>3</sup>

## **8. If Member Dies Prior to Retirement**

Member's Account – The appropriate death benefit will be paid to the member's beneficiary as provided by the 1937 Act.

Nonmember's Account – The nonmember will have the same choices as if the member had retired before the nonmember (see above).

## **9. Member Dies After Retirement**

Member's Account – Retirement payments stop and any survivor benefits are paid based on the option chosen at retirement.

Nonmember's Account – No change. If the nonmember has, for some reason, not yet "retired," he or she will have the same choices as if the member had retired before the nonmember (see above). The nonmember may or may not receive a continuing benefit or one-time death benefit, depending on the option chosen by the member at retirement, the member's named beneficiary, and whether the parties were divorced or only legally separated (see notes regarding legal separation).

## **10. Nonmember Dies Prior to Retirement**

Member's Account – The member will have the option of redepositing all contributions refunded to the beneficiary of the nonmember in the same manner as if the nonmember had taken a refund.

Nonmember's Account – The nonmember's accumulated contributions will be paid to the nonmember's designated beneficiary.

## **11. Nonmember Dies After Retirement**

Member's Account – No effect.

Nonmember's Account – Unless the nonmember elected one of the optional retirement allowances, the nonmember's designated beneficiary will receive only a lump sum, consisting of the difference between the total contributions credited to the nonmember and the total retirement allowance income, if any, plus any unpaid allowance payable at the time of the nonmember's death.

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<sup>3</sup> This is for a situation where a member took a refund, but would be eligible to repurchase service time. The assets are divided, and the Court finds that the service time, and the right to buy it back, is community property. The Court effectively awards the nonmember their community property share of the right to buy back that service credit.

## **12. Vested Member Terminates Service**

Member's Account – The member may retire for service if eligibility requirements are met, elect a refund of his or her contributions and interest, or elect a deferred retirement. Unless reciprocity is established, final average compensation is frozen at the member's termination.

Nonmember's Account – Same as for the member, unless the member's vesting credit includes the nonmember's community property share. See Section 4, including footnote 3.

## **13. Non-vested Member Terminates Service**

Member's Account – The member may elect a refund, establish reciprocity with a reciprocal retirement system, or leave their funds on deposit. Members in Tiers 1-3 can wait until age 70 and retire regardless of years of service.

Nonmember's Account – N/A. The nonmember had to take a refund of contributions and interest credited to his or her account at the time the member's account was divided.

## **14. Member Is Granted Disability Retirement (Before or After Retirement of Nonmember)**

Member's Account – The combined benefit payable to the member and nonmember may not exceed the benefit that would have been payable to the member alone had the DRO not been issued. If this would occur in a particular case, the parties may be required to obtain a new court order.

Nonmember's Account – Same as for the member.

## **POST-RETIREMENT DIVORCE OR LEGAL SEPARATION**

As noted previously, Article 8.4 does not clearly describe the procedures for dividing benefits in a post-retirement divorce, when a member no longer has a separate account to be divided. This section describes how TCERA will approach a post-retirement divorce or legal separation.

### Notification by TCERA

Upon being served with a joinder to the proceedings, or, in the absence of a joinder, when served with a conformed order from the court regarding the dissolution of marriage or judgment of legal separation, TCERA staff shall notify the member and nonmember, or their legal representatives, of the possible effect, or lack thereof, on benefit payments to the nonmember after the member's death, depending on the option selected by the member at retirement.

### Confidentiality

After a member's retirement allowance is divided pursuant to a DRO, each party will have sole control over his or her own allowance. TCERA will share information from each allowance with the other party only as necessary for the administration of the plan. Additional information



pertaining to each allowance may be released to the other party upon presentation of a signed consent to such release, or in response to a subpoena.

#### The Option Chosen at Retirement Is Irrevocable

The 1937 Act provides 5 retirement benefit arrangements (the “unmodified” or default, and 4 optional alternatives) which allow the member to balance payments, timeframe, and death benefits received. The option is chosen at the time of retirement and is irrevocable. The member may not change options once the first payment has been made under the option chosen.

#### Division of Benefits During Member’s Lifetime

The DRO may provide that the retirement allowance being paid to the member, including any cost-of-living and any other benefit adjustments as approved by the Board of Retirement, will be divided between the member and nonmember. Payments would stop upon the death of the member, unless the nonmember was eligible for a continuance.

#### Eligibility for Benefit After Member’s Death

##### **Note re Effect of Legal Separation**

Under current state law, legal separation does not terminate a marriage with regard to spousal rights to any death benefit or continuance. The DRO may divide the future benefit, but cannot eliminate the status of the nonmember as the potential surviving spouse.

As stated above, the 1937 Act provides five retirement benefit arrangements (the “unmodified” or default, and four optional alternatives) which allow the member to balance payments, timeframe, and death benefits received. The option that the member chose at the time of retirement cannot be changed. Here is how the benefit under each option is effected by a divorce or separation:

Unmodified: Only a qualified surviving spouse or qualified children<sup>4</sup> are eligible to receive a *continuing* benefit after the death of the member. **A former spouse is not eligible, and a DRO may not require TCERA to treat a former spouse as eligible. Legal separation will not affect a spouse’s eligibility.** This payment would end upon the death of the surviving spouse or once the children reach the ages(s) specified in California Government Code § 31760.1.

The member may name a contingent beneficiary (should there be no qualified surviving spouse or children) to receive any *lump sum* due at the death of the member. This beneficiary may be changed at any time.

Option 1: This option does not provide for a continuing benefit in any case. The member may name a beneficiary to receive any lump sum due at the death of the member. This beneficiary may be changed at any time. The DRO may not affect this. If the

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<sup>4</sup> See California Government Code § 31760.1 for qualifications.

former or separated spouse is the named beneficiary at the time of the member's death, he/she will receive this benefit.

Options 2, 3 and 4: The designation of the beneficiary or beneficiaries eligible to receive a continuing benefit after the death of the member, as made at the time of retirement, is irrevocable. **This designation is of a specific, named person or persons, so if the then-spouse was named, that person remains the beneficiary even if the parties later divorce or obtain a judgment of legal separation.** The DRO may not affect this. (Any "windfall" to the nonmember, if the continuance that would be provided to the nonmember is greater than the nonmember's share of the community property interest in the benefits, cannot be corrected by adjusting the survivor benefit under the DRO.)

If at the time of the member's death, prior retirement payments had not exhausted his/her contributions and interest, the remainder of such will be returned to the member's named beneficiary. This beneficiary may be changed at any time.

This policy is approved by the Tulare County Employees' Retirement Association Board of Retirement and made effective as of February 9, 2011.

Revised and approved March 8, 2017.

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