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# GENERAL PROVISIONS

*Always obtain the plan’s rules for processing DROs before negotiating an agreement.*

# Any Other Retirement Benefit Plans

***Sample 1 (Waiver):*** Except as otherwise provided for in this Stipulation, the Husband shall retain and have all right, title and interest as to any and all savings and checking accounts, businesses, securities, investments, IRAs, annuities, profit sharing plans, deferred compensation plans, etc., which are now in his name, control or possession, or held jointly with another or others or in trust for him or for another. The Wife specifically waives any claim to any interest in the foregoing.

***Sample 2 (Rights Reserved):***The husband represents that the Plans described above are the only pension or retirement funds in which he has an interest. The wife expressly reserves her right to no less than 50% of the share to which the husband is entitled that accrued from the date of marriage through the date of commencement of this action for divorce, including any refund of contributions and calculated prior to any option modification, of any other pension or retirement fund in which the husband has an interest that is discovered after the date of signing of this Stipulation.

***Sample 3 (Rights Reserved):*** The Wife shall receive an irrevocable *pro rata* interest, determined as of the date of the commencement of the action for divorce, in any other retirement benefits to which the Husband is entitled, and which are not specifically set forth herein.

# Residual Liability of Participant to Alternate Payee:

***Sample 1:*** The husband shall not make any type of withdrawal or take any loan after the date of signing of this stipulation and before the establishment of the wife’s separate account which will cause the account balance to fall below the amount awarded to the wife. In the event that the husband made any withdrawal or took any loans from the plan prior to the signing of this Stipulation which caused the account balance to fall below the amount awarded to the wife, he shall be responsible for reimbursing the wife for any shortfall, directly to the wife, from the husband’s own separate assets.

***Sample 2:*** If, for any reason, the Qualified Domestic Relations Order is not in place at the time benefits reach pay status, the WIFE, as alternate payee, shall be entitled to her share of the benefits as defined in this Agreement. Said benefit shall be payable to the WIFE directly from the HUSBAND until such time as the Domestic Relations Orders are submitted. In such event, the payments made from the HUSBAND to the WIFE shall be deemed maintenance paid to the WIFE for income tax purposes.

***Sample 3:***The parties hereby acknowledge and represent that the Wife is unequivocally entitled to share in the Husband's benefits under the plan(s) to the extent required in this agreement. The Domestic Relations Order (DRO) shall be binding on the Husband and the Husband's estate, and, should the plan not pay the Wife directly, the Husband or his estate shall pay the Wife the moneys called for in the DRO, whether or not the DRO is honored by the plan administrators as a QDRO.

***Sample 4:*** Nothing in this Agreement shall be construed to limit the remedies of the Wife in obtaining her portion of the Husband’s Plan(s) from the Husband in the event the QDRO(s) is/are not entered or in the event a DRO does not attain the status of a QDRO.

***Sample 5:*** The Participant shall not take any actions, affirmative or otherwise, that circumvent the terms and provisions of the QDRO, or that diminish or extinguish the rights and entitlements of the Alternate Payee as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, the Participant shall be required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects of the Participant’s actions or inactions and to the extent of the Alternate Payee’s full entitlements hereunder.

# Duty to Cooperate

If the Trustee of the Plaintiffs pension certifies to the parties that the order submitted to him or her in accordance with provisions of this Article is not a QDRO, the parties shall take the appropriate steps to amend the QDRO so that it shall so qualify.

# Loans and Other Encumbrances Not Permitted

The Participant shall not take any loans or any other actions, affirmative or otherwise, that circumvent the terms and provisions of the QDRO, or that diminish or extinguish the rights and entitlements of the Alternate Payee as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, the Participant shall be required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects of the Participant’s actions or inactions and to the extent of the Alternate Payee’s full entitlements hereunder.

# Support and Maintenance Obligation

The husband’s obligation to pay maintenance shall end upon the wife’s remarriage, her demise, his demise, or when the wife commences to receive payments pursuant to the Domestic Relations Order dividing his New York City Employees’ Retirement System Pension as set forth below, whichever is earliest.

# A DRO Shall Issue; Responsibility to Prepare DRO

The Wife shall prepare a Domestic Relations Order (DRO) in accordance with the terms of this agreement and the Plan’s requirements, and the Wife shall, file, serve, and submit the DRO to the Plan Administrator for processing. The DRO shall be deemed incorporated and made a part of this agreement, as if set forth at length herein. The DRO shall be granted upon 10 days’ Notice of Settlement to effectuate the pension distribution as set forth herein, and the parties agree to cooperate in having the DRO qualified.

# Cost of Preparation

The parties shall equally share the cost of the preparation of said QDRO.

# Continued Jurisdiction

The parties agree that the Court shall retain jurisdiction to implement and supervise the payment of retirement benefits as provided herein should either party or the Plan Administrator make such application, and the Court determines such to be appropriate and necessary.

# Time to File QDRO: There shall be no time limit placed on the parties’ pursuit of the preparation and submission of a Domestic Relations Order(s) effectuating the terms of this Agreement.

# DEFINED BENEFIT PENSION PLANS GENERALLY

# Shared or Separate Interest QDRO

## Shared Interest:

Benefits payable to Alternate Payee “if, as, and when” they are paid to Participant.

Payments stop upon death of Participant unless the Alternate Payee is designated survivor annuity beneficiary.

## Separate Interest:

Available only for ERISA plans not currently in pay status.

Must be Explicitly Awarded in Stipulation or Court Order; silent default is a Shared Interest QDRO.

Treats the Alternate Payee as a member of the plan.

Benefits are payable for Alternate Payee’s lifetime, and are actuarially adjusted.

Alternate Payee may commence benefits at Participant’s earliest retirement age, even if Participant is not yet retired.

Alternate Payee may elect survivor option and designate a beneficiary.

Some plans resist awarding Alternate Payee Separate Interest QDRO with Survivor Annuity as “double-dipping”

# Formulas

## Sum Certain;

## Percentage of Monthly Benefit;

## Coverture Fraction (A/K/A Marital Share or Majauskas Formula)

## Default Formula vs. Hypothetical Formula

The denominator of the Coverture Fraction

Default Formula allocates a portion of entire benefit.

Hypothetical Formula awards a benefit based on the pension earned by the Participant as of a date prior to the date of retirement or commencement of benefits, e.g., date of commencement of the divorce.

Hypothetical Formula is less common and provides Alternate Payee a smaller benefit because it excludes post cut-off date accruals.

If Hypothetical Formula is intended, Agreement or Court Order must make it explicit

# Death Benefits and Survivor Annuities – Pre-Retirement and Post-Retirement

*Each must be independently and explicitly awarded in Agreement or Court Order*

*Silent Default: Upon death of Participant, all payments under a Shared Interest QDRO cease*

## Death Benefits

* + 1. Lump Sum payment
    2. Multiple beneficiaries possible
  1. Primary vs. Contingent Beneficiaries
     1. NYS and NYC Public Retirement Systems provide Pre-Retirement Death Benefits but no pre-retirement survivor annuity;
        + 1. Post-Retirement Death Benefit sometimes also available

## Survivor Annuity:

*monthly lifetime benefit payable to designated beneficiary upon death of Participant or Retiree*

### Qualified Pre-Retirement Survivor Annuity (“QPSA”)

* + - 1. ERISA Plans
      2. Lifetime Annuity payable upon death of Participant before retirement
      3. Amount is a percentage of what Participant would have received had he or she retired on date of death
      4. Payable at Participant’s earliest retirement age
      5. Some plans permit allocation of QPSA among multiple beneficiaries

### Post-Retirement Survivor Annuity/Qualified Joint & Survivor Annuity (“QJSA”)

* + - * 1. All plans
        2. Survivor Annuity and Beneficiary are selected at Retirement
        3. Agreement or Court Order must clearly direct Participant to elect a survivor annuity and designate Alternate Payee as surviving spouse
        4. Irrevocability of election of a Survivor Annuity and designation of beneficiary upon commencement of payment
        5. Some plans permit allocation of QJSA among multiple beneficiaries
        6. Cost of Option: The Election of a Survivor Annuity reduces the amount of the monthly benefit paid during the participant’s retirement to actuarially reflect the additional payments payable to the designated survivor after the participant’s death. The reduction can be applied on a *pro rata* basis, or it can be shifted to either the Participant or Alternate Payee. The equities may favor cost-shifting in different circumstances. For example, if the Alternate Payee is not entitled to a Survivor Annuity, and the Participant retires and designates a subsequently married spouse, it is unfair to have the Alternate Payee’s award reduced to benefit the subsequent spouse. If, on the other hand, the Alternate Payee is the designated Survivor Annuity beneficiary, reducing her share of the benefits paid during the Participant’s lifetime is more appropriate. The Silent Default is to have the Alternate Payee’s award reduced on account of any option selection, even if another person is designated as beneficiary. Therefore, the Agreement or Court Order must explicitly provide that the Alternate Payee’s share will not be reduced for any option or that the benefit of only one party will be reduced due to the option.

# SAMPLE PROVISIONS

# Sum Certain:

The Wife shall be entitled to a monthly benefit in the amount of $1500.00 (one thousand five hundred dollars exactly) until the death of either party.

# Percentage:

The Wife shall receive 50% of the monthly pension benefit paid to the Husband until the death of either party.

# Shared Interest:

At such time as the Husband has retired from and is actually receiving benefits from the [Name of Plan] (the “Fund” or “Plan”), the Wife shall receive, in accordance with the formula devised in the case of *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1987), a portion of the Husband's monthly benefit equal to fifty percent (50%) of the product obtained by multiplying the total amount of the monthly benefit due the Husband by the Coverture Fraction. The term "Coverture Fraction" shall be defined to mean a fraction which represents that portion of the husband's benefit which accrued during the period of marriage (from May 6, 1989 ( the date the parties were married) to June 30, 2017 (the date of the commencement of this action for divorce)), and shall be determined by multiplying the husband’s accrued benefit by a fraction, the numerator of which is equal to the number of months during which the husband was both married to the wife and accrued benefits under the Plan, and the denominator of which is the total number of months during which the husband accrued benefits under the Plan. The Wife shall also receive a pro-rata share of any post-retirement cost of living adjustments, supplements, subsidies, or other economic improvements made to the Husband’s benefits on or after the date of his retirement, if permitted by said plan.

# Separate Interest Form & Commencement Sample:

Wife is entitled to a separate interest in the Husband’s benefits under the Plan. She shall be permitted to commence her share of the benefits under the Plan as of the Husband’s earliest retirement date under the Plan, even if the Husband has not commenced benefits. The Wife shall be permitted to elect to receive her benefits in any one of the allowable benefit distribution options permitted under the Plan other than a Qualified Joint & Survivor Annuity for any subsequent spouse.

The Wife’s benefit shall be based on her life expectancy. Any necessary actuarial adjustments to convert Wife’s benefit to one based on her life expectancy shall be applied to her share of the benefits. Further, should any early commencement reduction be necessary in the event Wife commences her benefits prior to Husband’s Normal Retirement Date under the Plan, then such reduction shall be applied to Wife’s benefits in accordance with the terms of the Plan.

# Separate Interest Percentage Award Sample:

Wife is entitled to a separate interest equal to fifty percent (50%) of the Husband’s accrued benefit in the Plan as of [date]. Wife shall receive a proportionate share of all plan enhancements, supplements, COLAs, subsidies, and other *ad hoc* improvements. Wife shall be named as the QPSA recipient for the amount of benefit assigned herein in the event of the death of the Husband prior to commencement of Wife’s benefits.

# Separate Interest *Majauskas* Formula Sample:

The Wife is entitled to a portion of the Husband’s retirement benefits in an amount equal to the actuarial equivalent of fifty percent (50%) of the Marital Portion of the Husband’s Accrued Benefit under the Plan as of the earlier of the Husband’s benefit commencement date, or the Wife’s benefit commencement date, if earlier.

The Marital Portion shall be determined pursuant to *Majauskas v. Majauskas* by multiplying the Husband’s Accrued Benefit by a fraction (less than or equal to 1.0), the numerator of which is the number of months of the Husband’s credited service in the Plan earned during the marriage (from [date] to [date]), and the denominator of which is the total number of months of the Husband’s credited service in the Plan as of the earliest of his date of cessation of benefit accruals or the date that the Wife commences her share of the benefits hereunder.

# Hypothetical Formula

***Sample 1:***

The Wife shall be entitled to a fifty percent (50%) interest in the value of any pension plan, 401k plan, Simplified Employee Pension, Keogh, Individual Retirement Account, or similar employee benefit in the name of the Husband up to the date of the execution of this Agreement. The manner in which such value shall be paid to the Wife shall be mutually agreed upon by the parties.

***Sample 2:***

The Wife is entitled to share in the Husband’s pension. At such time as the Husband has retired from and is actually receiving retirement benefits from the Plan, the Wife is entitled to a portion of a hypothetical service retirement, based on the Husband’s earnings and years of credited service as of the date of the execution of this Separation Agreement, that being May 5, 2006. The retirement benefit shall be calculated in the same manner as a normal service pension would be calculated using the factors in place when calculating the Husband’s actual retirement benefit. From this hypothetical service retirement, the Wife shall receive that portion of the Participant’s monthly retirement benefit which is equal to 50 percent of a fraction. The numerator of the fraction shall be the number of months of service credited to the Husband between the date of marriage, that being November 29, 1997, and the date of the execution of this Separation Agreement, that being May 5, 2006, and the denominator shall be the total number of months of service credit which the Husband had as of the date of the execution of this Separation Agreement, that being May 5, 2006.

# Disability Pension:

Should the husband retire on a disability pension, the wife shall receive a share of the disability pension attributable to the husband’s earnings and years of credited service only. Said share shall be calculated in the same manner as a normal service pension would be calculated without any reduction for early termination of employment and in the same manner as service-based pension would be based on the Husband’s eligibility at separation of service, i.e., a Vested or Service Retirement pension.

# Post-Retirement Cost-of-Living Adjustments:

Wife shall receive a pro rata share of any post-retirement cost of living adjustment or other economic improvements to Husband’s benefits. Such pro rata share shall be calculated in the same manner as Wife’s share of Husband’s retirement benefits pursuant to the Coverture Formula as set forth above.

# Early Retirement Subsidy:

Wife shall be entitled to a pro rata share of any employer­ provided early retirement subsidy provided to Husband on the date of his retirement, and in the event Wife has already commenced her share of the benefits on the date of Husband’s retirement, then the amounts payable to Wife shall be increased on the same pro rata basis to extent permitted under the Plan. Such pro rata share shall be calculated in the same manner as Wife’s share of Husband’s retirement benefits is calculated pursuant to Coverture Fraction described hereinabove.

# Early Retirement Supplements:

Wife shall be entitled to a *pro rata* share of any early retirement supplements, interim supplements or temporary benefits payable to the Husband. The Wife’s share of said benefits shall be calculated in the same manner as her share of Husband’s retirement benefits is calculated pursuant to this section of the Separation Agreement.

# Reductions due to Loans

***Sample 1:***

The Wife’s share shall not be diminished by any outstanding pension loans the Husband may have at retirement.

***Sample 2:***

The wife’s portion of the pension benefits shall not be diminished on account of any outstanding pension loan balance that the husband may have at the time of his retirement, including but not limited to the $6,717.62 in pension loans outstanding as of August 21, 2008, and any such loans shall be repaid solely by the husband.

# Refund of Employee Contributions:

In the event that the husband’s employment is terminated prior to the time that he becomes vested in a retirement benefit, and he becomes eligible to receive a return of his accumulated annual contributions plus interest, the wife shall receive a pro rata share of said return of accumulated annual contributions plus interest accrued on the date of termination. The wife’s share shall be fifty percent (50%) of the amount determined by multiplying the total return by the Coverture Fraction.

# Death Benefits and Survivor Annuity Provisions

## Pre-Retirement Samples

### NYCERS Pre-Retirement Death Benefit:

The husband shall designate the wife as the beneficiary of the husband’s pre-retirement death benefit, so that in the event the husband dies prior to his retirement, the wife shall receive a *pro rata* share of the pre-retirement death benefit, calculated pursuant to the Coverture Formula [alternatively: calculated pursuant to a fraction, the numerator of which is the number of months of credited service earned by the husband during the marriage, and months, and the denominator of which shall be the total number of months of service credit as the date of the husband’s death, multiplied by 50%, and then multiplied by the pre-retirement survivor benefit.]

Within 15 days after the execution of this Agreement, the husband shall complete and submit all necessary Designation of Beneficiary forms as required by NYCERS to ensure compliance with this provision. Within 15 days after said Designation of Beneficiary forms have been filed with NYCERS, the husband shall provide copies (time stamped by the Fund) to both the wife and her attorney, via Certified Mail.

### ERISA Pre-Retirement Survivor Annuity

***Sample 1:***

In the event the Husband predeceases the Wife prior to the commencement of benefits, the Wife shall be treated as the Husband’s surviving spouse for purposes of the Qualified Pre-Retirement Survivor Annuity (“QPSA”) benefit available under the Plan, but only to the extent of the lesser of: (a) the amount that would have been payable to the Wife pursuant to this Stipulation and the DRO had the Husband not died; or (b) 100% of the Qualified Pre-Retirement Survivor Annuity that becomes payable under the Plan. For purposes of determining the eligibility for such surviving spouse benefits, the Wife and Husband have satisfied the one (1) year marriage requirement as enumerated in Internal Revenue Code Sections 401(a)(11) and 417(d) and as may be required under the terms and conditions of the Plan.

The husband is therefore directed to designate the wife as the beneficiary of the husband’s Qualified Pre-Retirement Survivor Annuity. Within 15 days after the execution of this Stipulation, the husband shall complete and submit all necessary Designation of Beneficiary forms as required by the Fund to ensure compliance with this provision. Within 15 days after said Designation of Beneficiary forms have been filed with the Fund, the husband shall provide copies of same (time stamped by the Fund) to both the wife and her attorney, via Certified Mail.

***Sample 2:***

To secure Plaintiff’s ownership right in the assigned portion of Defendant's retirement benefits under the Plan, in the event that Defendant predeceases Plaintiff and neither Plaintiff nor Defendant has commenced his or her benefits under the Plan, Plaintiff shall be designated as the surviving spouse of Defendant for purposes of establishing Plaintiffs entitlement to receipt of the monthly Qualified Pre-Retirement Surviving Spouse Annuity.

The designation shall apply to the Marital Portion of Defendant's Accrued Benefit as set forth above. In the event that the costs associated with the Pre-Retirement Surviving Spouse Annuity are not fully subsidized under the plan, then Defendant must make an affirmative election for such Qualified Pre-Retirement Surviving Spouse Annuity coverage in a timely manner and in accordance with the terms of the plan.

## Post-Retirement Survivor Annuity Samples

### NYCERS Post-Retirement Survivor Annuity (“Options”)

If Wife is alive at the time of Husband’s retirement, the husband shall elect “Option 4” and designate the wife as beneficiary of the husband’s pensionso that in the event the husband predeceases the Wife after benefits have commenced, the wife shall receive a monthly annuity in the same amount as calculated under the Coverture Fraction formula set forth herein.

### ERISA Qualified Joint and Survivor Annuity Election.

In the event the Husband predeceases the Wife after the payment of benefits has commenced, the Wife shall be designated as the surviving spouse of the Husband for purposes of establishing the Wife’s entitlement to receipt of the monthly post-retirement 50% Qualified Joint and Survivor Annuity (“QJSA”). For purposes of determining the eligibility for such surviving spouse benefits, the Wife and Husband have satisfied the one (1) year marriage requirement enumerated in Code Sections 401(a)(11) and 417(d) and as may be required under the terms and conditions of the Plan.

Therefore, upon retirement, the Husband must elect his benefits in the form of a reduced 50% Joint and Survivor Annuity to provide the Wife with a survivor annuity as set forth above. Within 15 days after the husband files for retirement benefits, the husband shall complete and submit all necessary option election and designation of beneficiary forms as required by the Fund to ensure compliance with this provision. Within 15 days after said forms have been filed with the Fund, the husband shall provide copies (time stamped by the Fund) to both the wife and her attorney, via Certified Mail.

## Cost Of Option:

***Sample 1:*** In the event that by choosing retirement option 4, there is a reduction in the maximum pension which the husband will receive, the amount of that reduction shall be charged only to the wife’s share of the pension.

***Sample 2:*** The parties shall divide the option reduction on a *pro rata* basis from each of their shares of the pension.

***Sample 3:*** The Wife’s share of the pension shall be based on the maximum available pension, and shall not be subject to reduction for the election of a survivor annuity or term-certain annuity.

***Sample 4:*** The Wife’s share shall be calculated based on the Husband’s full retirement allowance prior to any reduction for any option selected by the Husband.

# Full Sample Stipulation - ERISA Plan Shared Interest:

At such time as the Husband has retired from and is actually receiving benefits from the [Name of Plan] (the “Fund” or “Plan”), the Wife shall receive, in accordance with the formula devised in he case of *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1987), a portion of the Husband's monthly benefit equal to fifty percent (50%) of the product obtained by multiplying the total amount of the monthly benefit due the Husband by the Coverture Fraction. The term "Coverture Fraction" shall be defined to mean a fraction which represents that portion of the husband's benefit which accrued during the period of marriage (from May 6, 1989 ( the date the parties were married) to June 30, 2017 (the date of the commencement of this action for divorce)), and shall be determined by multiplying the husband’s accrued benefit by a fraction, the numerator of which is equal to the number of months during which the husband was both married to the wife and accrued benefits under the Plan, and the denominator of which is the total number of months during which the husband accrued benefits under the Plan. The Wife shall also receive a pro-rata share of any post-retirement cost of living adjustments, supplements, subsidies, or other economic improvements made to the Husband’s benefits on or after the date of his retirement, if permitted by said plan.

If the Husband predeceases the Wife prior to the commencement of benefits, the Wife shall be treated as the Husband’s surviving spouse for purposes of the pre-retirement survivor annuity benefit available under the Plan but only to the extent of the lesser of: (a) the amount that would have been payable to the Wife pursuant to this Order had the Husband not died; or (b) 100% of the pre-retirement survivor annuity that becomes payable under the Plan.

The husband is therefore directed to designate the wife as the beneficiary of the husband’s pre-retirement survivor benefit. Within 15 days after this Agreement is executed, the Husband shall complete and submit all necessary Designation of Beneficiary forms as required by the Fund to ensure compliance with this provision. Within 15 days after said Designation of Beneficiary forms have been filed with the Fund, the husband shall provide copies (time stamped by the Fund) to both the wife and her attorney, via Certified Mail.

In the event of the Husband’s death prior to that of the Wife and after the payment of benefits to the Wife has commenced, such Wife shall be designated as the surviving spouse of the Husband for purposes of establishing the Wife’s entitlement to receipt of the monthly post-retirement survivor annuity.

Therefore, the Husband shall elect a reduced joint and survivor annuity upon retirement to the extent necessary to provide the Wife with a 50% survivor annuity as set forth above. Within 15 days after the husband files for retirement benefits, he shall complete and submit all necessary Designation of Beneficiary forms as required by the Fund to ensure compliance with this provision. Within 15 days after said Designation of Beneficiary forms have been filed with the Fund, the Husband shall provide copies (time stamped by the Fund) to both the Wife and her attorney, via Certified Mail.

# Full Sample Stipulation – Non-ERISA Government Plan Shared Interest

The parties agree that the pension benefits earned by the husband with the New York City Employees’ Retirement System (“NYCERS” or “the Plan”), to the extent to which they accrued during the marriage, are marital property. These benefits, including pension benefits and any improvements, adjustments or Cost of Living Adjustments (COLA), shall be divided by Domestic Relations Order.

At such time as the husband has retired from and is actually receiving a retirement allowance from the Plan, the wife, in accordance with the Equitable Distribution Law set forth in Section 236, Part B, Subdivision 5(d) of the Domestic Relations Law of the State of New York, and in accordance with the formula devised in *Majauskas v. Majauskas*, shall receive from the husband’s retirement allowance, Fifty Percent (50%) of a fraction of the husband’s monthly retirement allowance. The term “retirement allowance” as used herein, shall be deemed to include any annuity as well as supplemental retirement allowance which is paid by NYCERS to the husband.

The numerator of said fraction (the “Coverture Fraction”) shall be the number of months of service credit the husband accrued in the Plan during the marriage, between the date of the marriage, that being May 1, 2000, and the date of filing of the divorce, that being January 10, 2008), and the denominator shall be the total number of months of service credit in NYCERS which the husband has at the time of retirement, termination of employment, or death. The wife’s portion of the pension benefits shall not be diminished on account of any outstanding pension loan balance that the husband may have at the time of his retirement, and any such loans shall be repaid solely by the husband.

The wife’s share shall be calculated based on the husband’s full retirement allowance prior to any reduction for any option that may be selected by the husband.

The husband is directed to designate the wife as beneficiary of NYCERS, so that in the event the husband dies prior to retirement, the wife shall receive her *pro rata* share of any pre-retirement death benefits calculated pursuant to the Coverture Formula set forth above. To ensure compliance with this provision, the husband shall complete and submit all necessary Designation of Beneficiary forms as required by NYCERS within 15 days after the DRO is signed by the Court. Within 15 days after said Designation of Beneficiary forms have been filed with NYCERS, the husband shall provide copies of the Designation of Beneficiary forms (time stamped by NYCERS) to both the wife and her attorney, via Certified Mail.

Should the husband retire on a disability pension, the wife shall receive a share of the disability pension attributable to the husband’s earnings and years of credited service only. Said share shall be calculated in the same manner as a normal service pension would be calculated without any reduction for early termination of employment.

The husband is directed to elect at the time of retirement, if the wife is then living, to receive the retirement allowance pursuant to the terms of Option 5, the “Pop-Up” option, and shall provide that the wife shall receive the same (100%) of the lifetime allowance as the husband, for the purpose of providing the wife, upon the husband’s death, with a monthly retirement allowance payable pursuant to such option.

In the event that the husband’s employment is terminated prior to the time that he becomes vested in a retirement benefit, or is otherwise eligible to receive a return of his accumulated annual contributions and interest, the wife shall receive a *pro rata* share of said return of accumulated annual contributions and interest accrued on the date of termination. The wife’s share shall be fifty percent (50%) of the amount determined by multiplying the total return by the Coverture Fraction.

In the event the wife predeceases the husband, the husband shall have full benefits paid to him and the Domestic Relations Order shall be void.

In the event that the Plan inadvertently pays to one party any benefits that are assigned to the other party pursuant to the terms of the DRO, the recipient shall notify NYCERS within five business days of receipt, and shall comply with any corrective procedures established by NYCERS.

The Court shall retain jurisdiction to implement and supervise the payment of retirement benefits as provided herein should either party or NYCERS make such application, and the Court determines such to be appropriate and necessary.

# Full Stipulation Sample - Separate Interest

**Sample 1:**

The Husband is a participant in \_\_\_\_\_\_\_\_\_\_ (“the Plan”). For the purposes of the division of marital property, the Wife shall receive an irrevocable separate interest in the Husband’s retirement benefits under the Plan(s) as follows:

The Wife shall be known as the alternate payee and shall be assigned a portion of the Husband’s defined benefit retirement benefits in an amount equal to fifty percent (50%) of the marital portion of the Husband's benefits under the Plan.

The marital portion shall be determined by multiplying the benefits by a fraction, the numerator of which shall be the number of months of the Husband’s participation in the Plan between the date of the marriage or the Husband’s Plan participation date, whichever is later, and the commencement of this action for a divorce, that being \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and the denominator of which shall be the total number of months of the Husband’s participation in the Plan, until the date of his retirement, termination, death, or the date that benefits to the alternate payee commence, whichever event occurs first.

The Wife shall also receive a *pro rata* share of any post-retirement cost-of- living adjustments or other economic improvements made to the Husband’s benefits on or after the date of his retirement, if permitted by the Plan.

The Wife may elect to commence her share of the benefits under the Plan as of the earliest retirement date on which the Husband is eligible to commence benefits under the Plan., even if the Husband has not then commenced receiving benefits. The Wife may elect to receive her benefits under any one of the allowable benefit distribution options permitted under the terms and provisions of the Plan. The form of benefits elected by the Wife is to be based on her life expectancy and any actuarial adjustment that might be necessary to convert the Wife's benefits to one based on her lifetime shall be applied to her share of the benefits.

In the event that the Husband predeceases the Wife and neither the Wife nor the Husband has commenced benefits under the Plan, the Wife shall be considered the designated beneficiary and/or the surviving spouse of the Husband for purposes of establishing the Wife's entitlement to receive a *pro rata* share of the pre-retirement surviving spouse benefit. In the event that the costs associated with providing this preretirement benefit coverage are not fully subsidized by the Husband’s employer, then the Husband must make an affirmative election for such pre-retirement surviving spouse coverage in a timely manner and in accordance with the Plan’s election procedures.

From the execution of this agreement until the commencement of receipt by the Husband of retirement benefits, the Husband will designate and maintain the Wife as his beneficiary for a pro-rata share of his pre-retirement survivor benefits under the pension Plan.

Within 15 days after the QDRO is signed by the Court, the husband shall complete and submit all necessary Designation of Beneficiary forms as required by the Fund to ensure that this provision is complied with. Within 15 days after said Designation of Beneficiary has been filed with the Fund, the husband shall provide copies of the Designation of Beneficiary forms (time stamped by the Fund) to both the wife and her attorney, via Certified Mail.

It is the further intention that any judgment or order contemplated pursuant to this Agreement shall contain a provision that the survivor benefits payable to the Wife in this Agreement shall not be reduced due to the fact that any subsequent remarriage of the Husband would result in a reduced survivor benefit under the terms of the Plan.

**Sample 2:**

The Parties acknowledge and agree that the Husband is a participant in the [Name of Plan] (the “Pension Plan”). The Parties consent to the entry of a Qualified Domestic Relations Order (“QDRO”) pursuant to Section 236(B) of the Domestic Relations Law, which relates to, among other things, the provisions of marital property rights, as defined therein, between spouses and former spouses in actions of divorce.

The terms of this Article shall be embodied in said QDRO, which shall be presented to the Court upon 10 days’ Notice of Settlement and which shall subsequently be served upon the Pension Plan administrators, to effectuate compliance with the terms of this Article, and to effectuate payment of the Wife’s share of the Husband’s retirement benefits directly to the Wife. The Parties agree that the essential terms of the QDRO shall be consistent with the following paragraphs.

The Plaintiff shall be identified as the “Participant” and the Defendant shall be identified as the “Alternate Payee.”

The QDRO shall be drafted as a “separate interest” QDRO, such that Alternate Payee’s benefits shall be based on the Alternate Payee’s life expectancy.

The QDRO shall assign to the Alternate Payee as her marital property interest and as her sole and separate property, in accordance with the formula set forth by the New York Court of Appeals in Majauskas v. Majauskas, 61 N.Y.2d 481 (1984); 50% of the Participant’s monthly retirement benefit, multiplied by a fraction, the numerator of which shall be the number of months during which the Participant was covered under the Pension Plan during the period commencing on January 24, 1986 (the date of marriage) or the date of initial participation, whichever is later, and ending on October 17, 2007 (the date of the commencement of this action), and the denominator of which shall be the total number of months during which the Participant was covered under the Pension Plan, up to the earlier of the date that the Participant retires or the date the Alternate Payee elects, in accordance with Pension Plan procedures, to commence receiving her share of the Participant’s vested accrued benefit under the Pension Plan. The Alternate Payee shall also be entitled to receive the same pro rata share of any improvements, adjustments, COLAs (cost of living adjustments), early retirement subsidies, early retirement supplements, and other economic improvements applicable to the Pension Plan.

The Alternate Payee’s interest shall be computed as if no loans, if any, have been taken by the Participant.

The Participant shall designate and maintain the Alternate Payee as his irrevocable beneficiary, to the extent of the Alternate Payee’s separate interest as set forth herein, of any and all pre-retirement survivor death benefits, including the Pension Plan’s Pre-Retirement Survivor Annuity.

The Participant’s death prior to that of the Alternate Payee shall have no effect on the Wife’s right to continue receiving her benefits payments as described herein.

The Parties further agree that in the event of the Alternate Payee’s death prior to distribution from the pension plan of the amount agreed to above, such amount shall revert to the Participant.

In the event of the Alternate Payee’s death after benefits have begun to be paid to the Alternate Payee, if the Pension Plan allows, the named beneficiaries of the Alternate Payee shall be paid the balance of the benefits otherwise due to or for the account of the Alternate Payee, if any. The Alternate Payee shall agree to designate \_\_\_\_\_\_\_\_\_\_ as the irrevocable beneficiary of said benefits.

The Alternate Payee shall be eligible to commence her benefits under the Pension Plan as of the earliest date on which the Participant is eligible to commence benefits under the Pension Plan, and such benefits will be payable in the form in which she elects and is permitted under the Pension Plan, including the form of a single life annuity to the Alternate Payee, based on her lifetime.

In the event the Plan Administrator inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee pursuant to the QDRO, the Participant shall immediately return any excess amounts so received to the Alternate Payee within ten (10) days of receipt.

In the event the Participant’s benefit payments are suspended due to his return to covered employment, the Alternate Payee’s benefit payments shall not be affected thereby.

The Participant shall not take any actions, affirmative or otherwise, that circumvent the terms and provisions of the QDRO, or that diminish or extinguish the rights and entitlements of the Alternate Payee as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, the Participant shall be required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects of the Participant’s actions or inactions and to the extent of the Alternate Payee’s full entitlements hereunder.

If the Trustee of the Plaintiffs pension certifies to the parties that the order submitted to him or her in accordance with provisions of this Article is not a QDRO, the parties shall take the appropriate steps to amend the QDRO so that it shall so qualify.

The Wife shall share the cost of the preparation of said QDRO.

# **DEFI**NED CONTRIBUTION PLANS GENERALLY

* *Always Ascertain the Plan’s QDRO Requirements First.*
* Clearly identify the award.
* Clearly identify the valuation date.
* Clearly state whether earnings apply.
* Clearly identify treatment of loans.
* Clearly provide for disposition on death of either party prior to distribution of funds.
* Clearly state that Alternate Payee’s share may be enforced against Participant in event of insufficient funds in the plan.
* Clearly identify who is responsible for any plan QDRO administration fees.

# Award Formulas

## Sum certain.

(Caution: Because of market fluctuation, withdrawals, or loans, there may be insufficient funds in account on date of transfer.

## Percentage of account balance on particular date.

(Caution: if using a past valuation date, there may not be sufficient funds in account on date of transfer.)

## Accrual Method

(Used to calculate the contributions that were made between date of marriage and date of commencement or other cut-off date.) This method subtracts any pre-marital and/or post-marital contributions and earnings to determine the marital portion of the account balance. Many plans, however, do not accept DROs that use accrual formulas. In such cases, it may be necessary to hire an expert appraiser.

# Valuation Date Options:

1. Date of Execution of Stipulation.
2. Date of Commencement of Divorce Action.
3. Date of Establishment of Alternate Payee’s Account.
4. Date of Transfer of Funds to Alternate Payee’s Account (a/k/a “Liquidation” or “Segregation” Date).

# Earnings.

Under New York case law, if the Alternate Payee is entitled to earnings, the agreement or order must explicitly provide for them; Silent Default: No earnings. Not applicable when using a sum certain.

# Loans:

Plans use different, and often confusing, terminology, e.g., “account shall include/exclude loan balance.” Better to specify if Alternate Payee’s award is reduced or not reduced if there is an outstanding loan balance on the date of valuation and the date of transfer.

# Survivorship:

In the event of the Alternate Payee’s death, either prior to or subsequent to the segregation of assets, specify that the award shall be distributed pursuant to the Plan’s administrative procedures. To the extent permitted by the Plan, all beneficiary designations shall be made after qualification of the Order and segregation of the award into a separate account for the Alternate Payee pursuant to the plan’s administrative procedures.

# Residual Liability:

Specify that the Alternate Payee is entitled to the entire amount stipulated or ordered, and, if the Participant’s account lacks sufficient funds, that the Participant is personally liable to the Alternate Payee for the deficit.

# QDRO Processing Fees.

Specify how any fees charged by the plan will be allocated between the parties, e.g., by one party only, shared equally, or some other percentage. Some plans will not deduct fees from the award, and instead demand payment out of pocket up front.

# SAMPLE PROVISIONS

## Award Provisions

### Entire Balance is Marital/Accumulated During the Marriage

The Wife is entitled to fifty percent (50%) of the total vested balance of the Husband's account in [Name of Plan], determined as of [Date], hereinafter referred to as the “Determination Date”. The amount awarded to the Wife shall be separately accounted for, and shall be adjusted for earnings and losses as specified by the terms of the Plan, in the same manner as other accounts held in the Plan, from the Determination Date, until the benefits are distributed to Wife.

### Account Balance is Not All Marital

#### Percentage Method:

**Sample 1:** Wife shall receive 50% of husband’s vested account balance, unreduced by any loans, as of [date]. Wife’s share shall include gains and losses from [date] to date of transfer.

**Sample 2:** Wife shall receive 50% of Husband’s vested account balance as of August 1, 2021 (Valuation Date). In the event there is an outstanding loan balance as of the Valuation Date, the Husband shall be 100% responsible for the loan balance and Wife’s share shall not be reduced by the loan amount. Wife’s benefit shall include earnings and losses from Valuation Date to date of payment.

#### Sum Certain

**Sample 1:** The parties agree that the husband’s benefits in the [Plan Name], to the extent to which they accrued during the marriage, constitute marital property of which the wife is entitled to one half. The account was opened on November 16, 2000, and the balance of the account on December 31, 2007, the account statement date nearest the January 10, 2008, Date of Marriage, was $20,580.16. The balance of the account on March 31, 2018, the statement date nearest the Date of Commencement of April 15, 2018, was $50,210.96. The parties agree that the marital portion of the total vested account balance is $29,630.80 ($50,210.96 - $20,580.16), and that the wife is entitled to $14,815.40 (0.50 x $29,630.80).

**Sample 2:** Husband shall receive from the Wife’s account in the Plan the sum of $100,000.00, or, if the value of the Wife’s account is less than $100,000.00 as of the date the account is established for the Husband, 100% of the Wife’s vested account balance. The aforesaid amount shall be transferred to said account in the name of the Husband from the Wife’s account under the Plan. To the extent permitted by the rules of the Plan, the Husband shall be eligible for distribution upon the creation of the separate account even if the Wife has not separated from service with the Plan Sponsor.

**Sample 3:** The Wife shall receive $7,486.65 (seven thousand four hundred eighty-six dollars and sixty-five cents) of the Husband’s account, or 100% of the Husband’s account value, if the value of the Husband’s account is less than $7,486.65 as of the date the account is established for the Wife.

### Accrual Method (One Sample):

The husband’s account in the [Name of Plan], to the extent to which it accrued during the marriage, is marital property. The parties agree that the wife shall be entitled to a portion of the husband’s account in the Plan pursuant to a Qualified Domestic Relations Order (QDRO), to be determined as follows.

The Plan Administrator shall establish a separate account in the name of the wife, in the amount of 50% of the total vested contributions to the husband’s account from [Date of Marriage] until [Date of Commencement of Divorce], together with proportionate earnings and/or losses until such time as the account is established for the wife (the “Date of Segregation”).

The parties have been made aware that many plans will not accept a Domestic Relations Order that requires a plan to determine an account balance as of a date in the past or that requires a plan to calculate contributions and investment returns over a period of time. In the event the Plan will not accept a DRO based upon the terms of the above paragraphs, the parties agree as follows: a) The participant shall make available to the alternate payee all available account statements. Based upon these statements, the parties shall determine the amount awarded to the alternate payee, determined as of the date of distribution to the alternate payee; or b) The parties agree that the Wife shall be awarded \_\_\_\_% or a specific amount, that being $\_\_\_\_\_\_\_\_\_\_\_\_ , determined as of the date of distribution to the Wife. If the parties cannot agree on such amount, they will retain the services of a mutually agreed upon party to perform the calculations for them.

# Valuation Date:

Wife shall receive 50% of Husband’s vested account balance as of August 1, 2021, or the closest Plan valuation date thereto (the “Valuation Date”).

# Earnings:

The amount awarded to the Wife shall be separately accounted for, and shall be adjusted for earnings and losses as specified by the terms of the Plan, in the same manner as other accounts held in the Plan, from the Determination Date, until the date the benefits are distributed to Wife.

# Loans:

**Sample 1:** The husband shall not make any type of withdrawal or take any loan after the date of signing of this stipulation and before the establishment of the wife’s separate account which will cause the account balance to fall below the amount awarded to the wife. In the event of a withdrawal or outstanding loan that causes the account balance to fall below the amount awarded to the wife, the husband shall be responsible for directly reimbursing the wife for any shortfall from his own separate assets.

**Sample 2:** The wife’s share of the husband’s account in the plan shall not be diminished by any loans or withdrawals the husband may have taken, including but not limited to a loan issued to the husband in December 2005 for $5,686, and any such loans shall be repaid solely by the husband unless he brings a post-Divorce Judgment motion and establishes that the money for that loan was used for the benefit of the wife during the marriage.

# Death:

The death of the Husband shall not affect the Wife’s entitlement to benefits as described herein. In the event the Wife dies prior to the transfer of her allocation of the Husband’s account to an account in her name, or prior to the actual distribution to the Wife, the benefit shall be payable in accordance with the Plan’s provisions.

# Residual Liability:

The parties hereby acknowledge and represent that the Wife is unequivocally entitled to share in the Husband's benefits under the Plan(s) as stipulated in this Agreement. The DRO shall be binding on the Husband and the Husband's estate, and the Husband or his estate shall pay the Wife any moneys assigned to her in the DRO, whether or not same is honored by the Plan Administrator as a QDRO, should the Plan not pay the Wife directly.

Nothing in this Agreement shall be construed to limit the remedies of the Wife in obtaining her portion of the Husband’s benefits from the Plan(s) in the event the DRO(s) is/are not entered or in the event a DRO does not attain the status of a QDRO.

# QDRO Processing Fees:

If the plan applies a QDRO Administration fee [select one]

* The Husband/Wife shall bear the entire cost
* The parties shall equally bear the cost.
* The parties shall bear the cost on a pro rata basis

# FULL SAMPLE FOR A DEFINED CONTRIBUTION PLAN:

1. The parties agree that the wife shall be entitled to a portion of the husband’s vested account balance in the [Name of Plan], to be determined as follows.
2. The Plan Administrator shall establish a separate account payable in the name of the Wife, in an amount equal to 50% of the value of the Husband’s vested account balance as of the date of commencement of this action, that being May 12, 2018, together with earnings and losses from May 12, 2018, through the date of transfer. The aforesaid amount shall be transferred to said account in the name of the Wife from the Husband’s account under the Plan. To the extent permitted under the rules of the Plan, the Wife shall be eligible for distribution upon the creation of the separate account even if the Husband has not separated from service with the Plan Sponsor.
3. The amount awarded to the Wife shall be separately accounted for, and shall be adjusted for earnings and losses as specified by the terms of the Plan, in the same manner as other accounts held in the Plan, from the Date of Segregation until the benefits are distributed to Wife.
4. To the extent permitted by the Plan, the benefit shall be distributed to the Wife as a lump-sum payment or other form permitted by the Plan as soon as administratively practicable after the Plan Administrator has qualified the Domestic Relations Order. At such time as the Wife’s portion of the account is actually distributed to the Wife, said amount may be made as a "Direct Rollover" transfer into an IRA or similar account as designated by the Wife in accordance with the terms of the Plan and applicable law. The Wife shall provide all necessary information and fill out all necessary documents as required by the Plan Administrator to effectuate such transfer.
5. In the event the Wife dies before the allocated portion of the Plan account has been transferred to an account in her name, or prior to the actual distribution to the Wife, this benefit shall be payable to her designated beneficiaries, or, if she has not designated any beneficiaries, to her estate.
6. A Domestic Relations Order (DRO), shall be prepared in accordance with the terms of this agreement and shall be submitted to the Plan Administrator for processing. The parties agree to cooperate in having the aforesaid order approved by the Plan Administrator, shall execute and deliver necessary documents, and shall take whatever steps that are required to have the order approved. Said Domestic Relations Order shall be deemed incorporated and made a part of this agreement, as if set forth at length herein.
7. The DRO shall be binding on the Husband and the Husband's estate, and, in the event that the Plan does not pay the Wife directly, the Husband or his estate shall pay the Wife the balance of the moneys assigned to her pursuant to this agreement and the DRO, whether or not the DRO is honored by the plan administrators as a DRO.
8. Nothing in this Agreement shall be construed to limit the remedies of the Wife in obtaining her portion of the Husband’s Plan(s) in the event the DRO(s) is/are not entered or in the event a DRO is not approved by the Plan Administrator. The parties hereby acknowledge and represent that the Wife is unequivocally entitled to share in the Husband's benefits under the plan(s) to the extent required in this agreement.
9. If for any reason the DRO is not in place at the time benefits reach pay status, the Wife shall be entitled to her share of the benefits as defined in this agreement and in the Domestic Relations Order. Said benefit shall be payable to the Wife directly from the Husband.
10. It is the parties' intention that the Court shall retain jurisdiction to clarify, correct or expand the DRO to effectuate the intent of the parties as set forth in this Agreement. The parties acknowledge and represent that the language of said DRO may be changed from that which is in this agreement to facilitate acceptance of said order as a DRO, upon the consent and cooperation of the parties.