

CHAPTER 103 QUALIFIED DOMESTIC RELATIONS ORDERS

SUMMARY: This Chapter implements the provisions of the Maine State Retirement System statutes relating to qualified domestic relations orders (5 MRSA §§17059 to 17061) which were enacted by PL 1991, c. 746. Chapter 746 provided the statutory authority for the Retirement System to pay benefits to the spouse or former spouse of a member or retiree when the right to such payment is established by a qualified domestic relations order. This Chapter provides the standards for such orders, procedures for their filing, and the procedures to be followed by the Retirement System in reviewing and administering the statute.

1. Definitions

A. Alternate Payee. "Alternate payee" means a spouse, former spouse, child or other dependent of a member or retiree who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable by the Retirement System with respect to that member or retiree.

B. Benefits Payable With Respect to a Member or Retiree. "Benefits payable with respect to a member or retiree" means any payment made or required to be made to a member, retiree or beneficiary under 5 MRSA, chapter 423, subchapter V, or chapter 425, subchapter V, and withdrawal of accumulated contributions, but excluding benefits payable under:

1. Section 17953, subsection 4;
2. Section 18003, with relation to dependent children;
3. Section 18553, subsection 4; and
4. Section 18603, with relation to dependent children.

C. Domestic relations order. "Domestic relations order" means a judgment, decree or order, including approval of a property settlement agreement, that:

1. Relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of a member or retiree; and
2. Is made pursuant to a domestic relations law of this State or another state.

D. Executive director. "Executive director" means the executive director of the Maine State Retirement System or the executive director's designee.

E. Qualified domestic relations order. "Qualified domestic relations order" means a domestic relations order that:

1. Creates or recognizes the right of an alternate payee, or assigns to an alternate payee the right to receive all or a portion of the benefits payable with respect to a member or retiree under the Retirement System;
2. Directs the Retirement System to disburse benefits to the alternate payee; and
3. Meets the requirements of 5 MRSA §17059 and this chapter.

F. System. "system" means the Maine State Retirement System.

G. Other terms. All other terms used in this chapter, unless the context otherwise indicates, shall have the same definition as in 5 MRSA §17001.

2. Information to Spouse

Upon receipt of an attested copy of the complaint for divorce and a written request which identifies the member or retiree by name and social security number and which states the date of the marriage, the System will provide the spouse or former spouse of a member or retiree with the same information that would be provided to the member or retiree on the member's or retiree's account or benefits which is relevant to the spouse's or former spouse's interest in the member's or retiree's account or benefits.

3. Payments by Maine State Retirement System

The System shall make payments of death or retirement benefits or of refunded contributions only as directed by statutes and rules or by a qualified domestic relations order.

4. Submission of Orders

A. A person who wishes to have the System review a domestic relations order to establish whether it meets the requirements for a qualified domestic relations order must submit to the System a written request for review and a copy of the domestic relations order. The request may be made either before or after the order has been entered by the court. The order will be reviewed as provided by section 5. If the order has been entered, it must have been certified by the clerk of the court that entered the order.

B. Subject to review and approval by the Board, the Executive Director will establish and may revise from time to time a filing fee for the processing and review of orders. The fee will be based on the time required for processing and review of orders, will be reasonable, and will not be set at a level which requires the System's members and employers as a whole to subsidize the cost of processing and review. The fee in effect at the time an order is first submitted, whether before or after entry by the court, must be paid before the order will be processed and reviewed. In addition, the System will charge for legal and actuarial services as provided by section 5, subsection B.

C. If a domestic relations order is submitted for review after it has been entered by the court and is thereafter amended with the intention that it be a qualified domestic relations order, the member or retiree or alternate payee must submit a certified copy of the amended order to the System. The System shall review any amended order that it receives according to the same rules applicable to all other orders. A filing fee is not required with the submission of an amended order if the fee was paid with the initial submission of the order.

5. Review of Orders

A. The executive director shall review the order for compliance with the requirements imposed by 5 MRSA §17059 and this chapter. Upon completion of the review:

1. If the order has not been entered by the court, the executive director will not issue a determination that the order is or is not a qualified domestic relations order but will, in writing, inform the person who submitted the order whether the order meets the requirements for a qualified domestic relations order, identifying any provisions of 5 MRSA §17059 or this chapter that the order does not meet;

2. If the order has been entered by the court, the executive director shall notify the member or retiree and each alternate payee in writing of the determination that the order is or is not a

qualified domestic relations order identifying any provision of 5 MRSA §17059 or this chapter that the order does not meet.

B. In addition to the filing fee provided by section 3, subsection B, the System will charge for legal and actuarial services necessary in the review of an order at a rate to be determined by the executive director, based upon costs to the System. These charges must be paid before notification of determination on an order will be issued. Before any legal or actuarial services are performed, the executive director will notify the person who requested the review of the order that such services will be needed as part of the review. The notification will include an estimate of the extent of such services and the estimated costs relating to those services. No charge will be made for the first hour of legal or actuarial services or combination of both.

C. During any period, not to exceed 18 months, in which a domestic relations order is under review to determine whether it is a qualified domestic relations order or a determination that an order is not qualified is on appeal to the Board or to court, the System will, in the manner provided by 5 MRSA §17059, sub-§§7,8,9, and 10, identify and hold amounts that would have been paid to the alternate payee if the order had been determined to be a qualified domestic relations order and will pay those amounts during or after the period as therein provided.

6. Payment Pursuant to Qualified Orders

If the order is determined to be a qualified domestic relations order, the System shall, subject to the limitations of applicable statutes and this chapter, pay benefits in accordance with the order at the time benefits become payable to or in the case of contributions, are withdrawn by the member. Any determination that an order is a qualified domestic relations order is voidable or subject to modification if the System determines that the provisions of the order have been changed or that circumstances relevant to the determination have changed.

7. Orders Not Qualified

The executive director shall provide a written notice of any determination that an order is not a qualified domestic relations order, identifying the provisions of 5 MRSA §17059 or this chapter that the order does not meet.

8. Appeal of Determination that Order is Not Qualified

A determination by the executive director that an order is not a qualified domestic relations order is a decision that may be appealed to the Board of Trustees of the System as provided by 5 MRSA 17451.

9. Determination of Whether an Order is a Qualified Domestic Relations Order

The executive director will apply the requirements of 5 MRSA §17059 to determine whether an order is a qualified domestic relations order. The following provisions will also be used in making the determination:

A. The order must provide for all possible distributions of benefits by the System for the member or retiree under plan provisions. This requirement shall be deemed to have been met by a provision that:

1. Awards to the alternate payee a specific or clearly determinable percentage rather than an amount, of each distribution by the Retirement System based on the member's account or retiree's benefit;

2. Awards to the member or retiree, in accordance with plan provisions, all benefits payable with respect to a member or retiree not specifically awarded to the alternate payee.

B. The order must provide for reducing the amount awarded in the event of reduction of the benefit based on the age of the member, each reduction to be in proportion to the factors used to reduce the standard monthly benefit on the basis of the member's age below normal retirement age. This requirements shall be deemed to have been met if:

1. The order awards a percentage of whatever monthly benefit is payable after all elections have been made by the member, or in the event of death benefits, by the designated beneficiary;

2. The member or retiree has reached normal retirement age and, if a retiree, has retired without any reduction for early age retirement at the time of the determination as to whether the order is a qualified domestic relations order; or

3. The order reflects that the retiree is or will be receiving retirement benefits reduced for early age retirement and the award to the alternate payee has considered the reduced amount of the retiree's monthly benefit payments.

C. The order may not:

1. Purport to require the designation by the member or retiree of a particular person as the recipient of benefits in the event of a member's or retiree's death;

2. Purport to require the selection of a particular benefit payment plan or option or to limit the benefit payment plans or options from which the member or beneficiary may select;

3. Require any action on the part of the System contrary to its governing laws or plan provisions other than the direct payment of the benefit awarded to an alternate payee;

4. Make the award to the alternate payee an interest which is contingent on any condition other than those conditions resulting in the liability of the System for payment under its plan provisions;

5. Purport to give to someone other than a member or retiree the right to designate a beneficiary or to choose any retirement plan or option available from the System;

6. Attach a lien to any part of amounts payable with respect to a member or retiree;

7. Award an alternate payee a portion of the benefits payable with respect to a member or retiree under the System and purport to require the System to make a lump sum payment of the awarded portion of the benefits to the alternate payee that are not payable in a lump sum; or

8. Purport to require the System, without action by the member, to terminate a member from membership or employment, to refund contributions, or to retire a member.

D. A qualified domestic relations order may not provide for the award of a specific amount of a benefit, rather than a percentage of this benefit, to an alternate payee unless the order also provides for a reduction of the amount awarded in the event that the benefits available to the retiree or member are reduced by law. This requirement shall not apply to benefit waivers executed by the member.

E. The System will divide future benefit increases provided by statute or act of the Legislature between the member, retiree or beneficiary and the alternate payee in the same proportion that the benefits are divided.

F. An order shall specify the date of the marriage, if the alternate payee is the member's or retiree's spouse or former spouse.

10. Restoration to Service

For the purpose of calculating earnings limitations for retirees or recipients of disability retirement benefits who have been restored to service, the retiree's or recipient's retirement benefit or disability benefit will be considered to be the amount that would have been paid if there had been no qualified domestic relations order.

11. Amount of Disability Retirement Benefits Subject to Qualified Domestic relations Order

If the benefit of a recipient of a disability retirement benefit is reduced because of amounts received by the recipient as Workers' Compensation or Social Security benefits, or both, the amount of the benefit subject to a qualified domestic relations order is the amount of benefit remaining after reduction for the Workers' Compensation or the Social Security benefits or both.

12. Benefits Resulting from Resumption of Membership and Reinstatement of Service Credit

If a member terminates membership in the Retirement System by withdrawal of contributions, the System shall pay all or a portion of the amount withdrawn to any alternate payee as directed by a qualified domestic relations order. If the former member later resumes membership in the System, the System shall pay to an alternate payee no portion of any benefits payable to the member or retiree which result from the resumption of membership, even if those benefits result in part from reinstatement of service credit initially credited during the marriage.

13. Reinstatement of Service Credit

In order to receive credit for all service represented by withdrawn or refunded contributions, a member who is reinstating service credit by repaying amounts previously withdrawn or refunded must repay the entire amount withdrawn or refunded, regardless of whether a portion or all of the amount was paid to an alternate payee. Repayment must be made in accordance with 5 MRSA §17703 or §18304 and service credit shall be granted in accordance with 5 MRSA §17757 or §18357.

14. Death of an Alternate Payee Before Commencement of Payments Under a Qualified Domestic Relations Order

When the System has not yet begun to make payment to an alternate payee under section 15 and is provided with proof of the death of the alternate payee, benefits payable with respect to the member or retiree will be paid without regard to the qualified domestic relations order.

15. Form of Payment to Alternate Payee: Service Retirement Benefits

A. When the interest awarded to an alternate payee by a qualified domestic relations order is distributed as a portion of a service retirement benefit, the System will pay the alternate payee an amount that is the actuarial equivalent of that interest in the form of an annuity payable in equal monthly installments for the life of the alternate payee when:

- 1.the qualified domestic relations order arises in or because of divorce; and
- 2.the qualified domestic relations order divides service retirement benefits between a member and her/his former spouse; and
- 3.the determination that the order is a qualified domestic relations order is made prior to the member's retirement.
- 4.Payment under this subsection shall be determined as follows:

- a. As of the date payment to the alternate payee is scheduled to begin, the System shall determine the single life annuity value of the retirement benefit payable to the member:
- b. If the portion of the benefit awarded to the alternate payee by the order is not clearly stated as a percentage of full benefits, the System shall determine the percentage of full benefits that is the equivalent to the benefit awarded to the alternate payee.
- c. The single life annuity value determined by the System shall be multiplied by the percentage of full benefits awarded to the alternate payee. The result of this calculation shall be actuarially converted to a single life annuity payable to the alternate payee for the lifetime of the alternate payee; and
- d. The benefit payable to the member shall be reduced by an amount equivalent to the value of the benefit payable to the alternate payee. Payment by the System of the alternate payee's interest as provided by this section has no effect on the right of a member to name a beneficiary or the right of a member to choose an optional method of payment upon retirement.
- e. Payment of the alternate payee's interest under this subsection will be effective as of the same day benefit payments are effective for the member.

B. When the interest awarded to an alternate payee by a qualified domestic relations order is distributed as a portion of a service retirement benefit and the determination that the order is a qualified domestic relations order is made subsequent to the member's retirement, the interest awarded the alternate payee by the qualified domestic relations order will be paid as a portion of the service retirement benefit the retiree is receiving.

1. If the alternate payee is already a named beneficiary under any option elected by the retiree at retirement, the total monthly benefit to which the retiree is entitled without regard to the qualified domestic relations order, whether payable to the retiree only or as divided between the retiree and the alternate payee beneficiary, will be apportioned between the retiree and the alternate payee according to the terms of the qualified domestic relations order. Upon the death of either the retiree or the alternate payee beneficiary, the benefit amount to be paid to the survivor will be that required under the option elected by the retiree at retirement, as though no qualified domestic relations order had existed.

2. If the alternate payee is not a named beneficiary under the option elected by the retiree at retirement, the benefit to which the retiree is entitled without regard to the qualified domestic relations order, will be apportioned between the retiree and the alternate payee according to the terms of the qualified domestic relations order. If the retiree pre-deceases the alternate payee, payments to the alternate payee will cease and payments to the retiree's named beneficiary or beneficiaries will be made as required under the option elected by the retiree at retirement, as though no qualified domestic relations order had existed. If the alternate payee pre-deceases the retiree, the benefit then being paid to the retiree will be increased by the amount of the benefit which was being paid to the alternate payee at time of death.

3. Payment according to the terms of the qualified domestic relations order under this section will commence as of the first day of the month following the date upon which the order is determined to be qualified, unless the parties jointly direct that payment is to commence at a later date.

16. Payments Made in Error

A. If a member or retiree, or the beneficiary or estate of either receives any amount of a distributions that has been awarded to an alternate payee, the recipient is designated a constructive trustee for the amount received and shall immediately transmit such amount to the alternate payee.

B. If an alternate payee or the estate, heirs, or legatees of the alternate payee receives any amount of a distribution that should not have been paid to a member or retiree, or the estate, heirs, or legatees of either, the recipient is designated a constructive trustee for the amount received and shall immediately transmit such amount to the member or retiree or other person to whom the amount should have been paid.

C. If a member, retiree, or the beneficiary, estate, heirs, or legatees of either receive any amount of a distribution that should not have been paid by the System, the recipient is designated a constructive trustee for the amount received and shall immediately transmit such amount to the System.

17 Effective Date of Maine State Retirement System Review of Orders

A. After September 1, 1992, the System will review domestic relations orders issued on and after March 27, 1992, to determine whether they are qualified domestic relations orders.

B. Any domestic relations order issued before March 27, 1992, will be reviewed after September 1, 1992, upon receipt by the System of the order and a written declaration signed by both parties that each consents to the application of 5 MRSA §§17059 to 17061 and this chapter to the order.

EFFECTIVE DATE: October 4, 1992

AMENDED: November 28, 1993

AMENDED: February 14, 1994

BASIS STATEMENT: By legislation held over from the First Regular Session of the 115th Legislature and enacted in its Second Regular Session, the Maine Legislature established the legal concept of "qualified domestic relations order" as a means by which the Retirement System, pursuant to a court-entered order dividing retirement benefits between a member or retiree and an "alternate payee", would make direct payments of benefits payable under the System to the persons to whom the order applies without regard to the status of those persons as members or retirees under the System. While, by the terms of the statute (PL 1991, c. 746), qualified domestic relations orders are available in domestic relations situations other than divorce, the statute's principal focus is on the use of such orders in a divorce and the experience in other states is that virtually all such orders relate to divorce.

Several states have statutory schemes implementing the concepts of qualified domestic relations orders. The approach chosen for the Maine legislature for this implementing rule, for the accompanying model order and related information, and for the Retirement System's administrative processes and practices is that of Texas. However, while the basic legal and regulatory structures are much the same, there are significant differences in implementation between the Texas and Maine approaches.

Chapter 103 was proposed for hearing on July 22, 1992. Its public hearing was on August 13, 1992: the written comment period closed on August 24, 1992, and the rule was adopted by the Board of Trustees on September 10, 1992. Members of the Maine Bar who practice family law were involved in the development of the legislation and had the opportunity to review the proposed rule. None appeared at the public hearing and no written comments were received from them. Discussion at the public hearing among the Board members, Board counsel and Retirement System staff resulted in some adjustments to the proposed rule, but in no significant changes to it.

In a divorce where the assets to be divided include benefits payable under the Retirement System, the payment of those benefits to which the parties agree or are subject is, under the qualified domestic relations orders statutes and rules, implemented directly by the Retirement System. Having reviewed a domestic relations order and issued a determination that it is a "qualified order", the Retirement System is therefore authorized and required to pay the parties in accordance with the order. The member/retiree who is subject to the order no longer controls the actual distribution to the other party of benefits awarded by the order; the other party, called the "alternate payee", receives his or her portion of whatever benefit is (or will be) payable under the order directly from the System

Benefits subject to division by a qualified domestic relations order include service retirement benefits, disability benefits, member contributions, and death benefits except those payable to dependent children. Whatever its form, no benefit becomes payable to an alternate payee before it becomes payable to a member. In the case of service retirement benefits, a qualified domestic relations order cannot specify which option a member must choose nor limit the member's choices among the options offered by the Retirement System. To permit otherwise would require the System to police and enforce qualified domestic relations orders to ensure that a member's choice of option was permitted under the order, a role which is not appropriate. Parties and attorneys who understand and utilize the model order which the System will be publishing in conjunction with the rule will realize that the choice of an option by a member will not dictate or even influence the amount of the member's benefit which is paid to the alternate payee since that amount is calculated on the member's full benefit and the option choice is applied to the member's benefit as thereby reduced.

When, at the retirement of a member, the service retirement benefit is divided pursuant to a qualified domestic relations order, Chapter 103(15) requires that the System calculate the actuarial equivalent of the interest awarded to the alternate payee, which is then paid in equal monthly installments for the life of the alternate payee. While in some cases this method of calculation and payment will mean that an alternate payee receives a smaller amount per month, s/he will receive that amount for her/his lifetime. the interest of an alternate payee does not survive her/his death.

The statute (and the rule as initially proposed) provides that an order submitted for review and determination as to its status as a qualified order must have been entered by the court and certified by the clerk. If followed literally, this would mean that an order determined not to be qualified would have to go through a sometimes arduous and time-consuming process of amendment by the court before it could be resubmitted. Chapter 103 as adopted permits orders to be submitted and reviewed before they are entered by the court; however, no actual determination that an order is or is not "qualified" will be issued until an order is presented as entered and certified by the court.

The Board, as a result of discussion with MSRS staff and legal counsel, revised section 2 to provide that a spouse or former spouse of a member or retiree who wishes to obtain information relating to the member's or retiree's account or benefits does not need to specify what information is wanted. The Retirement System will prepare a list of items of information that appear to be relevant to the spouse's interest and supply that information to both the spouse or former spouse and the member or retiree. Should other information be requested, it will be supplied to both, if the System determines that it is relevant to the parties' interests.

A question arose regarding section 16 of the rule. The question related to the problems that would result, such as inaccurate income tax liability, if one party transmitted funds that had been received in error to the other party. The Retirement System staff expects that when one party does not receive a full amount due, the System will be notified and appropriate adjustments will be made. This section of the rule establishes the recipient-in-error as constructive trustee with an obligation to put the funds into the hands of the person entitled to them. On the basis of this obligation, the System may adjust subsequent payments to both parties if the recipient-in-error

fails to act directly. In addition, the instructions relating to the model order will recommend that any time either party receives an excess amount, it should be returned to the System for transmittal to the proper payee.

BASIS STATEMENT FOR AMENDMENTS ADOPTED NOVEMBER 10, 1993: The qualified domestic relations order statute (5 MRSA §17059 et seq.) permits, but does not require, the Board of Trustees of the Retirement System to provide by rule that the interest of an alternate payee under a qualified domestic relations order (QDRO) in benefits payable to a member or retiree under the Retirement System are to be paid in the form of a life annuity. Chapter 103 as originally adopted provided that when the interest of an alternate payee becomes payable as a portion of a service retirement benefit, the alternate payee's interest would be converted to a life annuity based on the life of the alternate payee, regardless of whether the QRDO was in place pre- or post-retirement. In contrast, these amendments provide that when the interest of an alternate payee under the QRDO becomes payable as a portion of the service retirement benefit, the interest will be paid in the form of a life annuity only when the QRDO was in place prior to the member's retirement.

Experience under the rule as originally adopted demonstrated that implementation of the life annuity provision in a post-retirement QRDO was an exceedingly complex affair. The QRDO provisions had to be meshed with the decisions and choices as to options and benefits already made by the retiree at retirement. Moreover, they had to be meshed in such a way that the cost and actuarial risk to the Retirement System was not increased by the advent of the QRDO. The complex calculations were very difficult to explain to the parties, making it harder for them to feel certain that they had in fact achieved the apportionment of benefits which they desired. The amendments reflect a policy conclusion that the parties' decisions as to the division of their property interests, including retirement benefits, will need to take into account retirement option and benefit choices already made.

A consequence of these amendments is to change the effect of an alternate payee's interest in payments to a named beneficiary other than the alternate payee under an option choice or beneficiary designation made at retirement, where the alternate payee's interest is paid as a portion of a service retirement benefit and the QRDO is post- retirement. Parties whose divorce, retirement and QRDO are closely related in time need to recognize that the alternate payee's interest as alternate payee in these circumstances does not survive the retiree's death to affect payments to a beneficiary other than the alternate payee. The sequence in which divorce, retirement and a QRDO occur has implications for the apportionment of the parties' interests.

Finally, it is important to recall that the purpose of the QRDO statute is to provide a mechanism for the payment of benefits as apportioned by the parties, not to ensure the fairness of the apportionment which it implements.

The public hearing on the proposed amendments to Chapter 103 was on October 14, 1993; the written comment period closed on October 25, 1993, and the rule was adopted by the Board of Trustees on November 10, 1993. No one appeared at the public hearing and no written comments were received. The amendments as adopted differ from those proposed only where changes were made for the sake of clarity.

BASIS STATEMENT FOR AMENDMENTS ADOPTED JANUARY 13, 1994: The qualified domestic relations order statute (5 MRSA §17059 et seq.) permits the Board to establish a fee for the review and processing of qualified domestic relations orders. As originally adopted, Chapter 103 provided for a \$100 filing fee and for the assessment of additional charges where exceptional amounts of legal and/or actuarial time were required. Review of qualified domestic relations order statistics one year after the System implemented usage of qualified domestic relations orders indicated that the \$100 fee did not reflect the actual cost of the review and processing of orders. It was thus apparent that the system's members and employers as a whole were subsidizing the

cost associated with qualified domestic relations orders, while the benefit of such orders flows to the relatively small number of members utilizing qualified domestic relations orders.

As a matter of policy, the Board decided that the cost of review and processing of qualified domestic relations orders ought to be borne by the persons who benefit from the orders and directed staff to prepare an amendment to the rule establishing the filing fee at a level which reflected this policy. Because the cost associated with review and processing of qualified domestic relations orders will change over time, the proposed amendment, instead of simply establishing a higher fee, establishes a process for setting the fee which precludes the necessity of going to rulemaking each time the fee is to be revised. Thus, the amendment provides that the Executive Director will establish and review the filing fee; that the fee will be based on criteria specified in the rule; and that the establishment and subsequent revision of the fee will be subject to review and approval by the Board.

The public hearing on the proposed amendment was held on December 9, 1993. The written comment period closed on December 21, 1993, and the rule was adopted by the Board of Trustees on January 13, 1994. No one appeared at the public hearing and no written comments were received. The amendment as adopted does not differ from that proposed.