

TESTIMONY BY KANOE MARGOL
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STATE OF HAWAII

TO THE HOUSE COMMITTEE ON FINANCE
ON
HOUSE BILL 1370, H.D. 1

MARCH 4, 2015, 11:00 A.M.

RELATING TO DIVORCE

Chair Luke, Vice Chair Nishimoto and Members of the Committee:

H.B. 1370, H.D. 1 proposes to require the Employees' Retirement System (ERS) to make direct payments, to a non-member former spouse, of a portion of the member's pension, annuity or retirement allowance if the ERS is ordered to do so by a final judgment, order or divorce decree.

The ERS Board of Trustees strongly opposes this bill. This proposal provides no benefit to the ERS membership. The cost to the ERS of providing this service for non-members (in dollars, time and resources) would be better spent toward the benefit of ERS members and the System's \$8.6 billion unfunded liability.

One of the primary concerns of the Board is the administrative and operational cost of implementing this proposal. H.B. 1370, H.D. 1 does provide for an appropriation out of the general fund for the initial implementation of this bill; however, this does not address the on-going and future resources necessary to review, interpret, or clarify court orders or to obtain legal and actuarial advice if there are problems with an order. Additional staff resources would also be needed to calculate and process these additional benefits. In fact, the cost to effectuate the changes to the ERS computer system required by this broad proposal was estimated upwards of \$2 million.

The ERS staff also has technical and operational concerns with respect to this bill which are attached for the Committee's consideration.

Date: March 4, 2015
To: House Committee on Finance
From: Employees' Retirement System Staff
Re: Proposed Revisions for H.B. 1370, H.D. 1

These proposed revisions are primarily excerpted from S.B. 1324, S.D. 1 (Relating to Divorce) with additional changes that are intended to correct technical defects and to incorporate changes that are necessary to provide clarity and, ERS Staff believes, would reduce the costs and burdens on ERS resources. Section 3 of HB1370, HD1 was deleted below as Section 88-93 applies to beneficiary designations of active or deferred members and does not apply to retirants of the ERS.

SECTION 1. The legislature finds that section 88-91, Hawaii Revised Statutes, as currently written and as interpreted by Attorney General Opinion 79-3, prohibits the direct payment of a former spouse's share of an employees' retirement system member's retirement benefits by the employees' retirement system ~~administrator~~. In many cases, this leads to a former spouse not receiving a court ordered portion of the member's retirement benefits as part of a property division in a finalized divorce. This situation can also create a burden on the ~~member~~ retirant having to comply with a court order as the ~~member~~ retirant is required to write monthly checks to the former spouse. Moreover, the inability of a former spouse to receive direct payment from the employees' retirement system ~~administrator~~ may result in the ~~member-retiree~~ retirant bearing all of the tax liability on the tax benefits, even if the retirant is obligated to pay a portion of the benefits to the former spouse.

The purpose of this Act is to create statutory authority for the employees' retirement system ~~administrator~~ to make direct payment to the former spouse of a ~~member~~ retirant who has been awarded a portion of the ~~member's~~ retirant's retirement benefits as part of a property division adjudicated, ordered, or decreed by a family court in a divorce proceeding.

SECTION 2. Chapter 88, Hawaii Revised Statutes, is amended by adding a new section to part II to be appropriately designated and to read as follows:

"§88- Distribution of property in a divorce action. (a)
Effective January 1, 2018, if a final judgment, order, or decree in a divorce action awards the spouse or former spouse of a member or retirant a portion of the pension, annuity, retirement allowance, or refunded contributions of the member or retirant, that portion shall be paid directly to the spouse or former spouse of the member or retirant; provided that the judgment, order, or decree:

- (1) Identifies the member or retirant and spouse or former spouse by name, address, and last four digits of social security number;
- (2) Directs the system to make payment of the share of the spouse or former spouse directly to the spouse or former spouse;

- (3) States the amount or percentage of the member or retirant's benefits or refund of contributions to be paid by the system to the spouse or former spouse, or the manner in which the amount or percentage is to be determined;
- (4) Specifies that each party shall be liable for any taxes on the share of the pension, annuity, retirement benefit, or refunded contributions directly received by the party from the system;
- (5) Conforms to a model order adopted by the system; and
- (6) Does not require the system to:
 - (A) Provide any type or form of benefit, or any option, not otherwise provided by the system;
 - (B) Provide increased benefits, determined on the basis of actuarial value; or
 - (C) Require the system to provide benefits or refunds to the spouse or former spouse that are required to be paid to another spouse or former spouse pursuant to another judgment, decree, or order subject to this section.

(b) Payments to a spouse or former spouse of a portion of a retirant's pension, annuity, or retirement allowance under this section shall commence on the later of:

(1) The month following the month in which the system receives a judgment, decree, or order complying with the requirements of subsection (a) and payment to the system of any fees and charges for review and processing of the judgment, decree, or order; or

(2) Commencement of the member or retirant's retirement benefits.

(c) Payments to a spouse or former spouse of a portion of a retirant's pension, annuity or retirement allowance under this section shall terminate upon the earlier of:

(1) Death of the former spouse; or

(2) Death of the retirant;

(d) The system shall not be bound by any judgment, decree, or order made pursuant to a domestic relations law of this State or another state that:

(1) Requires the designation by a member or retirant of a particular person as the recipient of benefits upon the death of the member or retirant;

(2) Requires the selection of a particular payment plan or option or to limit the benefit payment plans or options which the member or retirant may select;

(3) Requires any action on the part of the system contrary to governing law other than the direct payment of the

benefit awarded to the spouse or former spouse of a member or retiree;

- (4) Makes the award to the spouse or former spouse an interest that is contingent on any condition other than those conditions resulting in liability of the system for payment under governing law;
- (5) Purports to give 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) Attaches a lien to any part of amounts payable with respect to a member or retiree; provided that nothing in this subsection shall be construed as limiting the ability of the child support enforcement agency from collecting child support arrearages from benefits;
- (7) Awards a spouse or former spouse of a member or retiree a portion of the benefits payable with respect to a member or retiree under the system and purports to require the system to make a lump sum payment of the awarded portion of the benefits to the spouse or former spouse that are not payable in a lump sum;
- (8) Awards a spouse or former spouse a portion of benefits payable to a member or retiree in a lump sum or a portion of any contributions withdrawn by a member,

former member or retirant and purports to require the system to make a payment to the spouse or former spouse in any form other than a lump sum; or

(9) Purports 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.

(e) For the purpose of calculating earnings limitations for retirants who have been restored to service, the retirant's maximum retirement allowance shall be considered to be the amount that would have been paid if there had been no judgment, order, or decree for the payment of any portion of the retirant's pension, annuity, or retirement allowance to the retirant's spouse or former spouse.

(f) If a member terminates membership in the system by withdrawal of contributions, the system shall pay all or a portion of the amount withdrawn to a former spouse as directed by a judgment, order, or decree meeting the requirements of subsections (a) and (b). If the former member later resumes membership in the system, the system shall pay to the spouse or former spouse no portion of any benefits payable to the member or retirant that results from the resumption of membership, even if those benefits result in part from reinstatement of service credit initially credited during the marriage.

(g) Subsection (f) notwithstanding, in order to receive credit for all service represented by withdrawn or refunded contributions, a member who in reinstating service credit by repaying amounts previously withdrawn or refunded shall repay the entire amount withdrawn or refunded, regardless of whether a portion or all of the amount was paid to a spouse or former spouse.

(h) When the system has not yet begun to make payment to a spouse or former spouse under this section and is provided with proof of the death of the spouse or former spouse, benefits payable with respect to the member or retirant shall be paid without regard to the judgment, order, or decree providing for payment to the spouse or former spouse.

(i) If a member or retirant or the beneficiary or estate of either receives the amount of any distribution that should have been paid by the system to the spouse or former spouse of the member or retirant, the recipient shall be designated a constructive trustee for the amount received and shall immediately transmit that amount to the person to whom the amount should have been paid. If a spouse or former spouse of a member or retirant, or the estate, heirs, or legatees of the spouse or former spouse receives any amount of a distribution that should have been paid to a member or retirant, or the estate, heirs, or legatees of either, the recipient shall be

designated a constructive trustee for the amount received and shall immediately transmit that amount to the member or retirant or other person to whom the amount should have been paid to the recipient. If a member, retirant, or the beneficiary, estate, heirs, or legatees of either, receive any amount that should not have been paid by the system, the recipient shall be designated a constructive trustee for the amount received and shall immediately transmit that amount to the system.

(j) If upon review of a judgment, order or decree, the system determines that the judgment, order or decree does not comply with this section, the member, retirant or former spouse may, in addition to any other remedies, petition the court which issued the judgment, order or decree, to amend the judgment, order or decree so that it does comply with the requirements of this section. The court which issued the judgment, order or decree or which would otherwise have jurisdiction over the matter has jurisdiction to amend the judgment, order or decree so that it complies with the requirements of this section even though all other matters incident to the action or proceeding have been fully adjudicated. During any period in which a judgment, order or decree is under review by the system or a court of competent jurisdiction for compliance with this section, the system shall separately account for the amounts, in this section referred to as the "segregated amounts," which

would have been payable to the spouse or former spouse during such period if the judgment, order or decree had been determined to be in compliance with this section. If a judgment, order or decree is determined to be in compliance with this section, then the system shall pay the segregated amounts without interest to the spouse or former spouse as provided in the judgment, order or decree and shall thereafter pay benefits pursuant to the judgment, order or decree. If a judgment, order or decree is determined not to be in compliance with this section, the system shall pay the segregated amounts without interest and shall thereafter pay benefits to the person or persons who would have been entitled to such amounts if there had been no judgment, order or decree. This subsection shall not be construed to limit or otherwise affect any liability, responsibility, or duty of a party with respect to any other party to the action out of which the judgment, order or decree arose.

(k) A court does not have jurisdiction over the system with respect to a divorce or other domestic relations action in which a spouse's or former spouse's right to receive all or a portion of the benefits payable to a member or retirant is created or established. A party to such an action who attempts to make a the system a party to the action contrary to the provision of this subsection shall be liable to the system for the system's costs and attorney's fees.

(1) Payments to a spouse or former spouse of a portion of a retirant's pension, annuity or retirement allowance under this section may include the post retirement allowance under section 88-90.

(m) The board shall adopt rules in accordance with chapter 91 and produce such forms as it deems necessary to effectuate this section. The board may, by motion at a duly noticed meeting of the board, establish and revise from time to time:

(1) A filing fee for the processing and review of judgments, orders, and decrees issued for the purposes of this section;

(2) A schedule of charges for legal and actuarial services incurred by the system in the review and processing of judgments, orders, and decrees issued for the purposes of this section; and

(3) A fee, in proportion to the benefits paid to the retirant and former spouse, for the administration of payments under an order subject to this section, which fee may, in addition to other methods of collecting fees that the system may establish, be deducted from the benefit payment."

SECTION 23. Section 88-91, Hawaii Revised Statutes, is amended to read as follows:

"§88-91 Exemption from taxation and execution. The right of a person to a pension, an annuity or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or death benefit, any other right accrued or accruing to any person under this part and the moneys in the various funds created under this part are exempted from any tax of the State and, except as in ~~[section]~~ sections 88-92 and 88-_____ provided, shall not be subject to execution, garnishment or any other process and shall be unassignable except as in this part specifically provided."

SECTION 4. There is appropriated out of the general revenues of the State of Hawaii the sum of \$ _____ or so much thereof as may be necessary for fiscal year 2015 - 2016 and the same sum or so much thereof as may be necessary for fiscal year 2016 - 2017 for the planning and expenditures necessary for the implementation of this Act.

The sums appropriated shall be expended by the employees' retirement system of the State of Hawaii for the purposes of this Act.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2015.