

ACT 263

H.B. NO. 1370

A Bill for an Act Relating to Divorce.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to authorize and require the employees' retirement system to make direct payments to the spouse or former spouse of an employees' retirement system member or retirant when the spouse or former spouse has been awarded all or a portion of the member's or retirant's retirement benefits as part of a property division adjudicated, ordered, or decreed by a court in a domestic relations proceeding. The actuarial cost of the benefits paid by the employees' retirement system to the retirant and the retirant's beneficiaries, if any, and the retirant's spouse or former spouse shall not exceed the actuarial cost of the benefits that would be payable to the retirant and the retirant's beneficiaries, if any, in the absence of this Act. It is the intent of the legislature that the approach taken by this Act, for the allocation of the benefit when the award is made prior to the member's retirement, be based upon what is often referred to as a "separate interest approach." The legislature also intends that the approach taken by this Act, for the allocation of the benefit when the award is made after the member's retirement, be based upon what is often referred to as a "shared payment approach."

The legislature recognizes that the employees' retirement system is not subject to the Employee Retirement Income Security Act of 1974 and it is not the intent of the legislature to require the employees' retirement system to comply with the provisions of that act. It is, however, the legislature's intent that this Act shall comply with the requirements of section 414(p)(11) of the Internal Revenue Code of 1986, as amended, to the extent necessary to allow the distributions or payments made by the employees' retirement system pursuant to this Act to be treated as made pursuant to a qualified domestic relations order for federal income tax purposes.

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

“§88- Distribution of property in a divorce action. (a) As used in this section:

“Alternate payee” means a spouse or former spouse of a member or retirant who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable by the system with respect to that member or retirant.

“Benefits payable with respect to a member or retirant” means any payment required to be made to a member or retirant.

“Domestic relations order” means a judgment, decree, or order, including approval of a property settlement agreement, that:

- (1) Relates to the provision of marital property rights to a spouse or former spouse of a member or retirant; and
- (2) Is made pursuant to a domestic relations law of this State or another state.

“Hawaii 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 retirant under the system;
 - (2) Directs the system to disburse benefits to the alternate payee; and
 - (3) Meets the requirements of this section.
- (b) A Hawaii domestic relations order shall clearly specify:
- (1) The name and last known mailing address, if any, of the member or retirant;
 - (2) The name and mailing address of the alternate payee covered by the order;
 - (3) The amount or percentage of the member or retirant’s benefits to be paid by the system to the alternate payee, or the manner in which the amount or percentage is to be determined;
 - (4) The number of payments or period to which the order applies; and
 - (5) That the order applies to the system.

(c) If, pursuant to a Hawaii domestic relations order, an alternate payee is receiving all or a portion of a retirant’s pension, annuity, or retirement allowance, the alternate payee shall be entitled to receive a post retirement allowance as provided by section 88-90.

(d) A Hawaii domestic relations order shall not:

- (1) Purport to require the designation by the member or retirant of a particular person as the recipient of benefits upon the death of the member or retirant;
- (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 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 that 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 retirant 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 retirant;
- (7) Award an alternate payee a portion of the benefits payable with respect to a member or retirant 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;

- (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;
- (9) Provide any type or form of benefit, or any option, not otherwise provided by the system;
- (10) Provide increased benefits, determined on the basis of actuarial value; or
- (11) Require the system to provide benefits or refunds to an alternate payee that are required to be paid to another alternate payee pursuant to an earlier Hawaii domestic relations order.

(e) Upon receipt of a copy of the complaint for divorce, certified by the clerk of the court in which the complaint was filed, and a written request that identifies the member or retirant by name and social security number and states the date of the marriage, the system shall provide the spouse or former spouse of a member or retirant with the same information that would be provided to the member or retirant on the member's or retirant's benefits that is relevant to the spouse's or former spouse's interest in the member's or retirant's benefits.

(f) A person who wishes to have the system review a domestic relations order or a proposed domestic relations order to establish whether the order or proposed order meets the requirements for a Hawaii domestic relations order shall submit to the system a written request for review and a copy of the order or proposed order. If the order has been entered by a court, the copy of the order shall be certified by the clerk of the court that entered the order. The order or proposed order shall be reviewed as provided by this section.

The filing fee in effect at the time that an order or proposed order is submitted shall be paid before the order or proposed order is processed or reviewed. In addition, the system shall charge for legal and actuarial services as provided by subsection (s).

Before any legal or actuarial services are performed, the system shall notify the person who requested the review of the order or proposed order that the services will be needed as part of the review. The notification shall include an estimate of the extent of the services and the estimated costs relating to those services. The charges for legal and actuarial services shall be paid before the system may issue notification of determination on an order or notification whether or not a proposed order meets the requirements for a Hawaii domestic relations order.

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 shall be a Hawaii domestic relations order, the member, retirant, or the alternate payee shall 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.

(g) The system shall review an order or proposed order for compliance with the requirements imposed by this section. Upon completion of the review:

- (1) The system shall not issue a determination that a proposed order is or is not a Hawaii domestic relations order but shall notify the person who submitted the proposed order, in writing, and may also notify the member or alternate payee whether the proposed order meets the requirements for a Hawaii domestic relations order, identifying any provisions of this section that the proposed order does not meet; and

- (2) If the order has been entered by the court, the system shall notify the member or retirant and the alternate payee in writing of the determination that the order is or is not a Hawaii domestic relations order, identifying any provisions of this section that the order does not meet.

(h) During any period not exceeding eighteen months, beginning on the date on which the first payment would be required to be made to the alternate payee under the domestic relations order, in which a domestic relations order is under review to determine whether it is a Hawaii domestic relations order, or in which a determination that an order is not qualified is on appeal to the board or to a court, the system shall limit the member's or retirant's rights in the member's or retirant's benefits to the extent the system deems appropriate to protect the largest amount that would be payable to the proposed alternate payee under the system's interpretation of the domestic relations order. Any amounts not paid to the member or retirant during this eighteen-month period shall be separately accounted for. If the domestic relations order is determined to be a Hawaii domestic relations order before the end of the eighteen-month period, the system shall pay benefits to the member or retirant and the alternate payee in accordance with the Hawaii domestic relations order and the terms of the plan, including any benefits separately accounted for during the period between the date on which the first payment was to be made under the Hawaii domestic relations order and the date the determination is made. If the domestic relations order is finally determined not to be a Hawaii domestic relations order, or if the eighteen-month period expires without a determination that the domestic relations order is a Hawaii domestic relations order, none of the amounts separately accounted for shall be paid to the alternate payee, and the member or retirant shall be entitled to the member's or retirant's full benefits in accordance with the terms of this chapter, including any benefits that had been separately accounted for and withheld from the member or retirant. If the domestic relations order is determined to be a Hawaii domestic relations order after the end of the eighteen-month period, or if the system later receives another domestic relations order that is determined to be a Hawaii domestic relations order, the Hawaii domestic relations order shall apply prospectively only and shall not affect benefits already paid to the member or retirant.

(i) Subject to the limitations of applicable statutes and this section, if a domestic relations order is determined to be a Hawaii domestic relations order, the system shall pay benefits in accordance with the order at the time benefits become payable to, or in the case of contributions or hypothetical account balances, are withdrawn by, the member or retirant. Any determination that an order is a Hawaii 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.

(j) If a member terminates membership in the system by withdrawal of contributions or hypothetical account balance, the system shall pay all or a portion of the amount withdrawn to any alternate payee as directed by a Hawaii domestic relations order. Payment to any alternate payee pursuant to this subsection shall be in a lump sum. 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 retirant that result from the resumption of membership, even if those benefits result in part from reinstatement of service credit initially credited during the marriage.

(k) In order to receive credit for all service represented by withdrawn or refunded contributions, a member, in reinstating service credit by repaying amounts previously withdrawn or refunded, shall repay the entire amount with-

drawn or refunded, regardless of whether a portion or all of the amount was paid to an alternate payee.

(l) When the system has not yet begun to make payment to an alternate payee under this section and is provided with proof of the death of the alternate payee, benefits payable with respect to the member or retirant shall be paid without regard to the Hawaii domestic relations order.

(m) When the system receives a certified copy of a domestic relations order prior to a member's retirement, and if the domestic relations order is determined to be a Hawaii domestic relations order, the system, except as provided in subsection (j), shall pay the alternate payee an amount that is the actuarial equivalent of the benefit that is awarded to the alternate payee in the form of an annuity payable in equal monthly installments for the life of the alternate payee.

Payment under this subsection shall be determined as follows:

- (1) 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;
- (2) If the portion of the benefit awarded to the alternate payee by the order is not clearly stated as a percentage of the member's maximum retirement allowance, the system shall determine the percentage of the member's maximum retirement allowance that is the equivalent to the benefit awarded to the alternate payee;
- (3) The single life annuity value determined by the system shall be multiplied by the percentage of the member's maximum retirement allowance 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;
- (4) The benefit payable to the member shall be reduced by an amount actuarially 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 shall have 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; and
- (5) Payment of the alternate payee's interest under this subsection shall be effective as of the same date that benefit payments are effective for the member.

(n) When the system receives a certified copy of a domestic relations order subsequent to the member's retirement, and if the domestic relations order is determined to be a Hawaii domestic relations order, the interest awarded to the alternate payee by the Hawaii domestic relations order shall be paid as a portion of the retirement benefit the retirant is receiving as follows:

- (1) If the alternate payee is already a named beneficiary under any option elected by the retirant at retirement, the benefit to which the retirant is entitled, without regard to the Hawaii domestic relations order, shall be apportioned between the retirant and the alternate payee according to the terms of the Hawaii domestic relations order. Upon the death of the retirant or the alternate payee, the benefit amount to be paid to the survivor shall be the amount required under the option elected by the retirant at retirement, as though no Hawaii domestic relations order had existed; or
- (2) If the alternate payee is not a named beneficiary under the option elected by the retirant at retirement, the benefit to which the retirant is entitled without regard to the Hawaii domestic relations order, shall be apportioned between the retirant and the alternate payee according to the terms of the Hawaii domestic relations order. If the

retirant predeceases the alternate payee, payments to the alternate payee shall cease and payments to the retirant's named beneficiary or beneficiaries shall be made as required under the option elected by the retirant at retirement, as though no Hawaii domestic relations order had existed. If the alternate payee predeceases the retirant, the benefit then being paid to the retirant shall be increased by the amount of the benefit that was being paid to the alternate payee at time of death.

Payment according to the terms of the Hawaii domestic relations order under this subsection shall 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 shall commence at a later date.

(o) If a retirant returns to employment requiring active membership in the system:

- (1) Payments to an alternate payee pursuant to a Hawaii domestic relations order shall not be suspended; and
- (2) The system shall pay to an alternate payee no portion of any benefits payable to the retirant that result from the resumption of membership.

(p) 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 not been any Hawaii domestic relations order applicable to the retirant.

(q) A court does not have jurisdiction over the system with respect to a divorce or other domestic relations action in which an alternate payee's right to receive all or a portion of the benefits payable to a member or retirant is created or established. A determination by the system that a domestic relations order is not a Hawaii domestic relations order shall be subject to review as provided in chapter 91 and the system's rules relating to contested cases. The system shall not be made party to any other judicial proceedings except as provided in this subsection. A party to any action who attempts to make the system a party to the action contrary to this subsection shall be liable to the system for the system's costs and attorney's fees in the action, including attorneys' fee and costs for obtaining a dismissal.

(r) 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 receive 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. If a member, retirant, or the beneficiary, estate, heirs, or legatees of either, receives 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. If an alternate payee or the estate, heirs, or legatee of the alternate payee, receives 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.

(s) The board shall adopt rules in accordance with chapter 91, and adopt forms as it deems necessary to effectuate this section. The board, by mo-

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tion at a duly noticed meeting of the board, may establish and revise from time to time:

- (1) A filing fee for processing and review of domestic relations orders and proposed domestic relations orders 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 domestic relations orders and proposed Hawaii domestic relations orders for the purposes of this section; and
- (3) A required form or forms for Hawaii domestic relations orders.”

SECTION 3. 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 provided in [section] sections 88-92 [pro- vided,] and 88-, shall not be subject to execution, garnishment or any other process and shall be unassignable except as in this part specifically provided.”

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 5. This Act shall take effect on July 1, 2018.

(Approved July 12, 2016.)

Note

1. Edited pursuant to HRS §23G-16.5.