

February 11, 2025

Chair Scheible and
Senate Committee on Judiciary

Re: OPPOSITION TO Senate Bill 126 (BDR 11-582)
Sponsor: - Senator Neal

Dear Chair Scheible and Committee Members:

My name is Shelly Cooley. I've been a family law attorney in Clark County, NV, since 2004, more than 20 years.

I was Chair of the State Bar of Nevada, Family Law Section, Executive Council from 2017 to 2019 and I was elected and served on Council for 4 terms, for 9 years.

I am an unpaid lobbyist and I am testifying on behalf of the Nevada Justice Association.

I oppose section 2 of S.B. 126 as it is not equitable or just for the following reasons:

1. Frozen Benefit Violates Nevada Law

Currently, Nevada law requires that community property be equitably divided.

In Gemma v. Gemma, 105 Nev. 458, 778 P.2d 429 (1989), the Court determined that "retirement benefits earned during a marriage are community property." The Court analyzed two (2) general approaches used by courts in dividing defined benefit pension benefits (PERS is a defined benefit pension benefit) - the "frozen benefit" vs. "time rule."

While the Court noted the "frozen benefit" has the advantage of ending the parties' involvement with each other and finalizing the divorce immediately, it noted that the drawbacks are numerous.

First, there might not be sufficient property owned by the employee spouse to cash out or make periodic payments to the nonemployee spouse. Second, the employee spouse is required to pay the community property interest in the pension plan immediately upon divorce, but he or she may not remain employed to actually enjoy the full benefits of the retirement pension or live until the time of vesting. Third, the nonemployee spouse may receive much

less if the present value in the pension is substantially less than the actual vested value upon retirement. And fourth, it is often difficult to ascertain a pension's present value.

With the "time rule," the community interest is determined by multiplying the benefits in question by a fraction, the numerator of which is the number of months employed during the parties' marriage, the denominator of which is the total number of months of time and service of the employee spouse. The Gemma Court addressed the very issues Senator Neal and the supporters of the bill advanced:

early contributions to the pension plan, while smaller, are invested and earned more interest, that the emphasis should be on the qualitative nature of the community interest as opposed to the quantitative interest, and that the early working periods are the building blocks to upward mobility and hopefully an increased salary.

While the "time rule" is imperfect, the Court found the "advantages of the 'time rule' clearly outweigh any other method of pension division." And the "time rule" divides the community property interest in the pension equally in accordance with NRS 123.225.

In Gemma, the Court suggested that if the employee spouse believes that the income he or she will receive upon retirement will be a reflection of increased effort and achievement after marriage, he or she can request that the Court retain jurisdiction and if the increase due to post-marriage efforts does occur, the Court can hear and decide the employee spouse's claim.

Current law in Gemma that has been in effect for 36 years provides a mechanism for an employee spouse, not just a PERS member, to address pension benefits as a result of an employee spouse's post-marriage effort and achievements. However, as stated in Gemma, the "the initial calculation must always comply with the "time rule" and "wait and see" approaches in determining the community interest in a retirement plan.

In Fondi v. Fondi, 106 Nev. 856, 802 P.2d 1264 (1990), the Court reiterated that the district court is required to measure community interest by "time rule" and "wait and see" approach. The Fondi Court held that the "time rule" and "wait and see" approach are two distinct concepts - the "Wait and see" approach requires the parties to "wait and see" the size of the actual community benefit. Again, the Fondi Court stated that the "court can retain jurisdiction to allow the participating spouse to show that future salary increases and corresponding pension increases were the result of "extraordinary efforts," which specifically addresses the concerns raised by Senator Neal and the supporters of the bill.

Lastly, in Sertic v. Sertic, 111 Nev. 1192, 901 P.2d 148 (1995), the Court affirmed that the "time rule" and "wait and see" approaches are mandated in Nevada. In Sertic, the Nevada Supreme Court found that the district court improperly applied the "frozen benefit" rule to the employee spouse's pension. Like in Gemma and Fondi, the Sertic Court reiterated that "the earlier years of employment are often the building blocks of upward

mobility and a higher salary" so "the size of the full pension is based on earlier community labor and the community should receive a share of this benefit." Importantly, the Sertic Court stated that the "salary base should be determined during the pension holding spouse's career and not during the marriage."

NRS 125.155 provides that PERS and Judicial Retirement Plans be divided pursuant to the "time rule." S.B. 126 creates a fictional scenario in which the Public or Judicial employee retires on the day the pension division order is filed. There are no exceptions for the parties' agreement to vary from S.B. 126 - everyone must do it one way, regardless of what spouses decide they want the settlement to say. Most importantly, the "time rule" results in a fair and equal division of community property in accordance with NRS 123.225, unlike S.B. 126.

It is worthy to note that of 50 states, 44 of them apply the "time rule" (as opposed to "frozen benefit"), reasoning that the early years of working are the building blocks of upward mobility and higher salary.

The "time rule" is mandated by Nevada statute and case law because it is fair and equitable.

2. S.B. 126 Confuses Property and Alimony

NRS 125.155 addresses pension or retirement benefit provided by Public Employees' Retirement System or Judicial Retirement Plan. Per Gemma, retirement benefits are community property.

By contrast, NRS 125.150 addresses alimony, which may be awarded by the Court as is "just and equitable." NRS 125.550(9) addresses the factors the Court must consider when determining whether to award alimony. NRS 125.150(10) addresses whether the Court should award rehabilitative alimony to a spouse.

In granting a divorce, all issues must be resolved in the Decree of Divorce, including, jurisdictional requirements, cause for divorce, child custody and support, division of community property and debt, and spousal support. Division of community property includes division of the pension and retirement benefits. Alimony awards may or may not be part of a divorce.

The "homemaker" exception of S.B. 126 provides that the "time rule" applies when one spouse is a "homemaker" while the "frozen benefit" approach applies to non-homemaker spouses. However, whether a spouse is a homemaker or not should have zero impact on the division of community property. Whether a spouse is a homemaker or is not a homemaker should impact whether an award of alimony may be "just and equitable."

Section 1(c) requires the Court to provide "a full" explanation, or ensure that "a full" explanation has been provided relating to the disposition of pension or retirement benefits.

It is important to note that any assignments of pension interests must comply with federal law. For private company pensions, that means the Employee Retirement Income Security Act of 1974 (ERISA), and the Internal Revenue Code. For federal government employee pensions, it means the Civil Service and Federal Employees Retirement Systems (CSRS & FERS) pursuant to Title 5 of the United States Code, and for military retirement benefits it means 10 U.S.C. § 1408. When Nevada Public Employees Retirement System (PERS) benefits are involved, the statutes at issue are Chapter 286 of the NRS. Each of these retirement systems has detailed rules, policies, and procedures. Due to the complex nature of retirement orders, pension division attorneys prepare retirement orders.

Pursuant to Nevada law (including NRS 125.155), retirement benefits are community property and are subject to equal division upon divorce. An individual's status as a "homemaker" should not impact whether s/he is awarded an equal share of the community property. Pursuant to NRS 125.150, alimony may be awarded by the Court as is "just and equitable." An individual's status as a "homemaker" should impact whether one is awarded alimony. S. B. 126 confuses these two (2) issues (property v. alimony).

3. "Frozen Benefit" Violates Equal Protection of the 14th Amendment:

A. "Frozen Benefit" would Treat Parties in a Divorce Unequally.

Pursuant to Gemma, Fondi, and Sertic, and NRS 125.155, retirement benefits are divided according to the "time rule" and "wait and see." For instance, the PERS spouse would receive a greater share in the private company spouse's pension (per the "time rule") than the private company spouse would receive in the PERS' spouse's pension ("frozen benefit"). This is unfair, inequitable, and results in an unequal division of community property.

B. Two (2) Different Tiers of Pension Property Division Would Be Created for Homemaker Spouse (Time Rule/Equal Division) vs. Non-Homemaker Spouse (Frozen Benefit/Unequal Division)

Pursuant to Nevada law (including NRS 125.155), retirement benefits are community property and are subject to equal division upon divorce. An individual's status as a "homemaker" should not impact whether s/he is awarded an equal share ("Time Rule") or unequal share ("Frozen Benefit") of community property.

If Section 3 of SB 126 were challenged, it would likely be rendered unconstitutional.

4. Mechanism to Address Extraordinary Post-Marriage Efforts

The Court has discretion to apply the "frozen benefit rule" when extraordinary post-marriage efforts and achievement would result in an unfair division of the pension. In Gemma, the Court stated:

If the employee spouse believes that the income he or she will receive upon retirement will be a reflection of increased effort and achievement after the marriage, he or she can request that the court retain jurisdiction in the event such predictions become reality. If the district court retains jurisdiction and the increase due to post-marriage efforts does occur, the court then can hear and decide the employee spouse's claim. If the court agrees with the employee spouse, retirement benefits as calculated by the "time rule" and previously declared can be recalculated using the highest income the employee spouse would have received in the normal course of events, this being ordinary promotions and cost of living increases, in contradistinction to the increased income the employee spouse achieved because of his post-marriage effort and accomplishments.

The procedure for retaining jurisdiction over the payment of pension benefits will not add uncertainty in the initial calculation of the community interest by using the "time rule." Rather, it will provide a procedure to accommodate those relatively few cases where it would be inequitable for the nonemployee spouse to receive retirement benefits based upon a high salary level achieved by the employee spouse's post-marriage effort and achievement.

To address the potential inequity or unfairness of the non-PERS spouse receiving a share of the full pension as a result of extraordinary work or achievement of the PERS spouse after the marriage, S.B. 126 could expressly codify the provisions that allow the Court to retain jurisdiction to consider whether the pension was increased due to extraordinary work or achievement of the PERS spouse.

It is for the above-stated reasons that Section 2 of SB 126 is not equitable or just and should be opposed "as introduced."

Thank you for the opportunity to testify before the Committee today and for allowing me to submit written opposition to S.B. 126. I would be happy to answer any questions, etc.

Respectfully,

THE COOLEY LAW FIRM

A handwritten signature in black ink that reads "Shelly Booth Cooley". The signature is written in a cursive, flowing style.

Shelly Booth Cooley