

ALAN G. HEVESI  
COMPTROLLER



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ALBANY, NEW YORK 12236

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

October 8, 2004

Mr. Mark E. Daigneault

Dear Mr. Daigneault:

In your letter of September 28, 2004 you indicated that you are a member of the New York State and Local Retirement System and that you and your same-sex partner are considering marriage in Canada. You are gathering information about the legal and financial implications of your marriage.

I have asked my staff to analyze this issue. Our detailed legal analysis is attached.

Based on current law, the Retirement System will recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, under the principle of comity. That principle has been legal practice pursuant to New York Court of Appeals rulings for many years.

Please feel free to contact me if you have further questions.

Sincerely,

A handwritten signature in black ink that reads "Alan G. Hevesi". The signature is written in a cursive style with a large initial "A" and "H".

Alan G. Hevesi



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George S. King, Counsel to the Retirement System

October 8, 2004

Mark E. Daigneault

Dear Mr. Daigneault:

Comptroller Hevesi asked me to respond to your letter of September 28, 2004. You indicate that you are a member of the New York State and Local Retirement System ("Retirement System"), and that you and your same-sex partner are considering marriage in Canada in a province that issues marriage licenses to same-sex couples. You are gathering information about the legal and financial implications of your marriage upon yourself, your partner and your two adopted children. Accordingly, you ask us the following:

1. Will our marriage as a same-sex couple in Canada be legally recognized by the Retirement System?
2. How will my retirement benefits be impacted as a result of our marriage?

Our response is as follows:

#### A. Canadian Law

Same-sex marriages have been judicially authorized in the following Canadian provinces/territories:

- Ontario, effective June 2003
- British Columbia, effective July 2003
- Quebec, effective March 2004
- Yukon Territory, effective July 2004
- Manitoba, effective September 2004
- Nova Scotia, effective September 2004

The courts in these provinces/territories ruled, in effect, that depriving marriage to same-sex couples violated the Canadian constitution. In each of these jurisdictions, therefore, same-sex marriages are now equivalent to opposite-sex marriages, carrying the same rights and responsibilities. In light of this, we base the answer to your questions on the assumption that your marriage will be in a Canadian province/territory which has the authority to perform same-sex marriages.

## B. Recognition of Same-Sex Marriages that are Legally Entered into in Canada

New York courts have adopted a consistent policy of utilizing the doctrine of "comity". The New York Court of Appeals in the case of Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574 (1980) described comity as follows:

The doctrine of comity is not a rule of law but one of practice, convenience and expediency. It does not of its own force compel a particular course of action. Rather, it is an expression of one State's entirely voluntary decision to defer to the policy of another. Such a decision may be perceived as promoting uniformity of decision, as encouraging harmony among participants in a system of co-operative federalism, or as merely an expression of hope for reciprocal advantage in some future case in which the interests of the forum are more critical. ... [T]he determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict.

New York courts have applied the doctrine of "comity" in determining the validity of marriages effectuated in other jurisdictions, even if those marriages would not be valid if entered into in New York. For example, in the case of Carpenter v. Carpenter, 208 AD 2d 882 (2<sup>nd</sup> Dept., 1994), the court held that "a common-law marriage valid under the laws of Pennsylvania... was deserving of recognition under principles of comity in New York State." A nearly identical set of facts resulted in the same conclusion in the case of Katebi v. Hooshiari, 288 A.D.2d 188 (2<sup>nd</sup> Dept, 2001).

New York courts have a long history of recognizing Canadian marriages. In Donohue v. Donohue, 63 Misc. 111 (Erie County Supreme Court, 1909), the Court upheld the validity of a Canadian marriage that would have been void in New York due to the age of the husband and wife at the time they married.<sup>1</sup> The Court stated, "a marriage valid where it is entered into, is valid here." Similarly, in In the Matter of the Judicial Settlement of the Accounts of Charles A. White as Administrator of Max Spector, Deceased, 129 Misc. 835 (Erie County Surrogate's Court, 1927), involving the determination of a widow's share of the decedent's estate, the Court held, "the validity of the ceremonial must be tested, not by the laws of any church, nor by the laws of this State, but by the laws of the place where the ceremony took place, which was the Province of Ontario, Dominion of Canada."

Since it is clear that the consistent policy of New York is to recognize marriages performed in other states and marriages performed in Canada, we now turn our attention to whether this policy should be extended to same-sex marriages.

Attorney General Spitzer issued an advisory opinion ("the Spitzer Opinion") to two municipalities in March, 2004 regarding same-sex marriage. He concluded that such

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<sup>1</sup> The parties were initially too young to be married in Canada, but under Canadian law if the parties cohabitate after marriage, the marriage is ratified and no longer voidable. Even though such arrangement would have resulted in the voiding of a New York marriage, the New York court applied Canadian law in refusing to void the Canadian marriage.

marriages were not legal if performed in New York. However, he distinguished that situation from a same-sex marriage that was validly performed in another jurisdiction. The Spitzer Opinion stated, in relevant part:

New York law presumptively requires that parties to such unions must be treated as spouses for the purposes of New York law.... In general, New York common law requires recognizing as valid a marriage, or its legal equivalent, if it was validly executed in another State, regardless of whether the union at issue would be permitted under New York's Domestic Relations Law. The only exceptions to this rule occur where recognition has been expressly prohibited by statute, or the union is abhorrent to New York's public policy.

We first note that recognition of same-sex marriages validly performed in another jurisdiction is not prohibited by any New York statute. Moreover, the Spitzer Opinion states that the "abhorrence exception is so narrow that only marriages involving polygamy or incest" are included. Accordingly, recognition of same-sex marriages validly performed in another jurisdiction does not fall within the narrow exceptions articulated in the Spitzer Opinion that would prohibit such recognition.

The only New York court decision that addresses the recognition of a same-sex union performed in another jurisdiction is Langan v. St. Vincent's Hospital, 196 Misc. 2d 440 (New York County Supreme Court, 2003). In that case, the court recognized a same-sex civil union entered into in Vermont for the purposes of interpreting the term "spouse" in New York's wrongful death statute (Estates Powers and Trusts Law Section 4.1-1). The court stated, "[W]ith respect to marriages entered into in sister states, New York adheres to the general rule that 'marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes.'" 196 Misc 2d at 443. The court concluded that "New York's public policy does not preclude recognition of a same-sex union entered into in a sister state." 196 Misc 2d at 447.

Based upon the above, the Retirement System, under current law, would give a same-sex marriage validly performed in Canada the same legal recognition as it would give an opposite-sex marriage performed in New York.

### C. Impact on Your Retirement Benefits

In general, most retirement benefits are not affected by whether the Retirement System member is married. The member, not his or her spouse, receives actual retirement payments during the course of his/her life. Should the member die before retirement, an ordinary death benefit is payable to whomever the member named as beneficiary. Similarly, upon the death of a retiree who had selected a payment option that provides for a continuation of benefits, those funds are payable to the retiree's designated beneficiary.

However, there are retirement benefits payable to either a "surviving spouse" or to a "widow/widower."

For example, Retirement and Social Security Law (RSSL) Section 78-a requires the payment of a cost of living adjustment to retired members of the Employees' Retirement System. It continues that:

g. Notwithstanding any other provision of law, the surviving spouse of a deceased retired member who retired under an option which provides that benefits are to be continued for life to the surviving spouse after the death of the retired member, shall be entitled to receive benefits pursuant to this section.

RSSL Section 378-a provides a similar cost of living adjustment for members of the Police and Fire Retirement System.

RSSL Section 61, which is available to Tier I and Tier II members of the Employees' Retirement System, requires the payment of an accidental death benefit to survivors of retirees in certain circumstances. In determining the survivor(s) eligible for payment, the statute identifies:

d...1. The member's widow or widower to continue during his or her widowhood.

RSSL Sections 509 and 607 provide similar accidental death benefits to the surviving spouse of Tier III and Tier IV members of the Employees' Retirement System. RSSL Section 361 provides a similar accidental death benefit to the "widow or widower" of members of the Police and Fire Retirement System.

Pursuant to the doctrine of comity, where a Retirement System member entered into a same-sex marriage that was validly performed in Canada, such marriage would be legally recognized by the Retirement System under current law, and both the cost of living adjustment and the accidental death benefit would be payable to a surviving same-sex spouse, in a manner fully equivalent to the rights to such payment of a surviving opposite-sex spouse.

#### D. Impact of Court Orders/Decisions

As with opposite-sex marriages, former spouses, children or other parties could commence legal actions asserting rights to the member's benefits or challenging the rights of the surviving same-sex spouse in a variety of contexts. Accordingly, our ability to pay benefits may be limited or impacted by court orders.

For example, retirement benefits are frequently the subject of separation or divorce decrees awarding an interest in the benefits as an asset of a marriage. The New York Court of Appeals in the case of Majauskas v. Majauskas, 61 N.Y.2d 481 (1984), determined that retirement benefits constitute marital property and are subject to the equitable distribution provisions found in Domestic Relations Law Section 236 Part B. Therefore, the Retirement System will honor a properly drawn Domestic Relations Order issued upon the dissolution of a marriage by a court with the appropriate jurisdiction,

Mark E. Daigneault  
October 8, 2004  
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subject to the Retirement System's present procedures for filing of out-of-state Domestic Relations Orders.

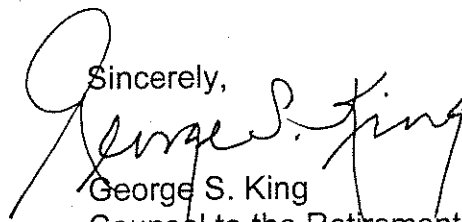
In that same context, if a member agreed by settlement agreement or was ordered in the course of a matrimonial proceeding or a custody action to designate a former spouse as the beneficiary of an ordinary death benefit or as the beneficiary of a retirement option and the member failed to comply, the Comptroller has the discretion under RSSL Section 803-a to change the beneficiary designation or the option consistent with a subsequent court order.

Additionally, a disenfranchised surviving spouse may have a right to a share of a deceased member's estate, and the assertion of those rights may affect the payment of retirement benefits. Pursuant to Estates Powers and Trusts Law Section 5-1.1-A (b)(1)(g) benefits from a retirement system may be considered to be a testamentary substitute so that the value is included in the net estate subject to a disenfranchised surviving spouse's elective right. Any such election is made against the executor or administrator of the will and is administered through Surrogate's Court and not the Retirement System. In such a situation, the Retirement System may be required to deposit the retirement benefit with the court.

#### E. Conclusion

The Retirement System would recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, based on the principle of comity. We note that this decision is based upon the state of the law as it exists today. We will, of course, be bound by any subsequent judicial or legislative pronouncements on this matter. We have addressed a number of issues that could arise in the context of how a marriage, same-sex or opposite-sex, affects Retirement System benefits. If other issues arise that we have not covered herein, we will address them on a case-by-case basis in accordance with the above analysis.

I trust this information regarding Retirement System benefits will be of some assistance to you.

Sincerely,  
  
George S. King  
Counsel to the Retirement System

cc: Alan P. Lebowitz