NEW YORK
CITY BAR

SCOPE OF GUBERNATORIAL AUTHORITY TO RECOGNIZE SAME-SEX CIVIL UNIONS AND OTHER SUBSTANTIAL LEGAL EQUIVALENTS OF MARRIAGE CONTRACTED OUTSIDE OF NEW YORK STATE[1]

June 4, 2008

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[1] This memorandum was prepared by NYCB's Lesbian, Gay, Bisexual and Transgender Rights Committee and Sex and Law Committee. The Committees wish to thank Jay Weiser (Sex and Law), Allen A. Drexel (Co-Chair, LGBT Rights) and Maria Cilenti (Chair, Sex and Law) for their contributions to the memorandum and the project, and Lisa Badner (former Co-Chair, LGBT Rights), Robert Cohen, David Lin, Linton Mann III, Hope Pordy and Leslie Rubin for their contributions to the project. Thanks also to Beth Bernstein and Duane Graham for their assistance.

A. Introduction

The New York City Bar (NYCB), which has been advocating for the rights of same-sex couples for more than a decade through a series of reports and amicus briefs, supports the Governor's determination that New York executive agencies should recognize same-sex marriages entered into by couples outside of the State. Affording these couples equal rights under New York law is not only just; it is within the scope of our State's well-established principles of comity and administrative law.

In addition, we have urged the Governor to extend executive agency recognition to same-sex couples in civil unions and other relationships that are the substantial legal equivalents of marriage in the jurisdictions in which they are executed. Section B of this memorandum reviews the leading New York cases on the scope of Executive Order authority, and, more specifically, considers the enforceability of the Executive Order proposed by NYCB directing State agencies to treat civil unions and similar relationships entered into outside New York by same-sex couples *as marriages* and to treat the parties to such relationships *as spouses* under the agencies' respective policy statements and regulations, and under the legislation subject to construction by such agencies. Such an Executive Order should be held enforceable to the extent that it (1) applies to agencies under Executive control and public benefit corporations and boards at least one of whose members is appointed by the Governor; (2) deals with the internal management of such agencies, corporations and boards, or interprets the law and regulations applying to them; and (3) does not conflict with legislative policy.

Decisions by the Second and Third Departments of the New York Supreme Court, Appellate Division, in *Langan v. St. Vincent's Hosp. of New York*, 25 A.D.3d 90 (2nd Dep't 2005) ("*Langan I*"), and *Langan v. State Farm Fire & Casualty*, 48 A.D.3d 76 (3rd Dep't 2007) ("*Langan II*"), in which the courts declined to recognize the surviving spouse in a civil union under the wrongful death provision of the Estates, Powers, and Trusts Law and the Workers' Compensation Law, respectively, are inapposite here, and do not preclude the enforcement of an Executive Order directing State agencies to respect civil unions as marriages and civil union partners as spouses.

In light of the directive issued by the Governor's Counsel, David Nocenti, on May 14, 2008, which directs State agencies, consistent with *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't 2008), *appeal dismissed*, ___ N.Y.2d ___, 2008 WL 1958987 (N.Y. May 6, 2008), to construe their respective policies and regulations, as well as those statutes whose construction is vested in the agencies, in a manner which encompasses same-sex

marriages, this memorandum does not directly consider the enforceability of a hypothetical Executive Order directing that out-of-state same-sex marriages be recognized. (In *Martinez*, a unanimous panel of the Appellate Division, Fourth Department, recognized lawful out-of-state same-sex marriages under New York's longstanding "marriage recognition rule," because such marriages are neither statutorily proscribed nor "abhorrent" to the public's sense of morality. *Id.* at 742-43.) However, given the holding in *Martinez* – to date, the only New York appellate court decision to address the recognition of out-of-state same-sex marriages in New York – as well as an unbroken string of trial court decisions concluding that such marriages are recognized,[2] we believe the Governor's authority to issue such an Executive Order would be very strong, provided that the Order satisfied the three conditions set forth above.

Section C of the memorandum is a codebook incorporating the analysis set forth in this memorandum which was used by NYCB attorneys to determine which of the more than 1,300 rights and responsibilities of spouses under New York statutes and regulations we believe may properly be extended by Executive Order to same-sex partners in civil unions and other substantial legal equivalents of marriage.[3] These classifications, detailed in a chart to be provided separately, reflect our best efforts to apply the principles of Executive Order authority, as set out in Section B of this memorandum, to the vast, diverse array of laws governing marriage and spousal relationships in New York. Alas, we can make no claim to perfection with respect to our coding work; State agency counsel and staff, with greater expertise as to operations of their respective departments, will no doubt differ with respect to some of our classifications.

Finally, the text of the Executive Order we propose is set forth in Section D of this memorandum.

B. Executive order authority

1. Executive order versus rulemaking or agency non-rule action

There appears to be no case law specifying when an executive action requires a

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[2] These decisions are *Beth R. v. Donna M.*, 2008 WL 696441 (Sup. Ct. N.Y. Co. Feb. 25, 2008); *Godfrey v. DiNapoli*, Index No. 5896-06, 2007 WL 3054718 (Sup. Ct. Albany Co. Sept. 5, 2007); *Godfrey v. Spano*, 15 Misc. 3d 809 (Sup. Ct. Westchester Co. 2007); *Lewis v. New York State Dep't of Civil Service*, 3/18/08 N.Y.L.J. 28 (col. 1) (Sup. Ct. Albany Co.); *see also Funderburke v. New York State Dep't of Civil Service*, 49 A.D.3d 809 (2nd Dep't 2008) (after appeal became moot, vacating trial court ruling that had denied recognition to out-of-state same-sex marriage, so that ruling could not "be used as precedent in future cases, causing confusion of the legal issues in this area of the law."). Appeals have been docketed in *Beth R., Lewis, DiNapoli*, and *Spano*.

[3] Although this memorandum does not directly consider the enforceability of an Executive Order directing agencies to recognize out-of-state same-sex marriages, NYCB's coding analysis would apply equally to such an order.

rulemaking, as opposed to an Executive Order. Logically, an Executive Order dealing with issues outside the definition of "rule" in the State Administrative Procedure Act would not require a rulemaking. *Cf. Rapp v. Carey,* 44 N.Y.2d 157, 163 (acknowledging existence of post-1950 Executive Orders with rulemaking components, but observing that those Executive Orders repeated and implemented existing legislative standards. Implicitly, rulemaking was not required).

In general, an agency can adopt, by rulemaking, regulations that go beyond the text of enabling legislation, provided they are not inconsistent with statutory language or its underlying purposes. *Lewis v. N.Y.S. Dept. of Civil Services,* No. 4078-07, N.Y.L.J., Mar. 18, 2008 (Alb. Co. Sup. Ct.) (Employee Benefits Division recognition of spouses in same-sex marriages for purposes of New York State Health Insurance Program); *General Elec. Capital Corp. v. New York State Div. of Tax Appeals,* 2 N.Y.3d 249, 778 N.Y.S.2d 412, 810 N.E.2d 864 (2004). The state rulemaking procedure is set forth in STATE ADMINISTRATIVE PROCEDURE ACT ("SAPA") §202(1)(a), which provides:

> Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule.

"Rule" is defined at SAPA §102. For our purposes, we are concerned with executive actions which fall outside the definition and are therefore exempt from the requirement to enter into a formal rulemaking under SAPA §202(1)(a):

> 2. (a) "Rule" means (i) the whole or part of each agency statement, *regulation* or code *of general applicability that implements or applies law*, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.
>
> (b) *Not included* within paragraph (a) of this subdivision *are:*
>
> > (i) *rules concerning the internal management* of the agency *which do not* directly and significantly *affect the rights of* or procedures or practices available to *the public*;

. . .

(iv) forms and instructions, *interpretive statements* and *statements of general policy* which in themselves have no legal effect but are merely explanatory . . .

(Italics added.)

There does not appear to be any decisional law establishing when non-rule actions (*i.e.*, those dealing with internal management, interpretation or a statement of general policy) can be taken through Executive Order, rather than by agencies. The Executive supervises the agencies, so arguably, an action falling outside the definition of "rule" under SAPA can be accomplished either by the agency itself or by an Executive Order setting policies for all agencies. This appears to have been the concept behind many Executive Orders that called for the appointment of task forces to implement them. In effect, the individual agencies subject to the Governor's Executive Order created more detailed policies for implementation. *See* Gov. Pataki's Executive Order No. 20 (1995), establishing the Governor's Office of Regulatory Reform ("GORR"), whose members review proposed rules offered by executive branch administrative agencies before promulgation of the proposed rules in the State Register. A challenge to GORR, *Rudder v. Pataki,* 93 N.Y.2d 273, 711 N.E.2d 978, 689 N.Y.S.2d 701 (1999), was dismissed for lack of standing.

a. Internal management

Executive Orders fall within the scope of the Governor's authority when they deal with the internal operations of the Executive Branch. *Rapp v. Carey,* 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978) (Executive Order can regulate political and outside employment activity of appointees serving at Governor's pleasure beyond what is required in conflict of interest legislation). *Rapp* does not appear to provide the outer limits of gubernatorial authority to regulate the internal operations of the Executive Branch. Governor Cuomo issued an Executive Order barring discrimination in employment based on sexual orientation by any state agency or department, 9 NYCRR 4.28 (1983; Cuomo, Gov.). This Executive Order (which was also adopted by Gov. Pataki) remained in effect at least through the adoption of the Sexual Orientation Non-Discrimination Act, and presumably remains in effect today.

The powers exercised by Gov. Cuomo's Executive Order are consistent with the powers exercised by a number of New York administrative entities in the recognition of same-sex relationships. New York City's Corporation Counsel concluded that New York City's pension systems should, under State law, respect same-sex civil unions and marriages validly entered into in other jurisdictions, and with several other State and municipal

administrative directives extending recognition to same-sex civil unions and marriages for public benefits purposes. *See* Letter of Michael A. Cardozo, New York City Corporation Counsel, to Hon. Michael A. Bloomberg, Nov. 17, 2004 (City's pension plans should offer "the same benefits and rights to the partners of plan members in (i) same-sex marriages that are valid in the jurisdiction where they were entered; and (ii) civil unions, whether made valid in Vermont, or in a form substantially similar in legal effect to those created by Vermont law, as they do to spouses from valid opposite-sex marriages."), attached hereto as Exhibit 1; *see also* Letter of Anthony W. Crowell, Special Counsel to Hon. Michael A. Bloomberg, to Alan Van Capelle, Executive Director, Empire State Pride Agenda, Apr. 6, 2005) (New York City recognizes same-sex civil unions and marriages entered into in other jurisdictions "for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law"), attached hereto as Exhibit 2; Letter of Alan G. Hevesi, New York State Comptroller, to Mark E. Daigneault, Oct. 8, 2004 (recognizing civil unions and same-sex marriages for purposes of State pension benefits; upheld as to marriage recognition [without consideration of civil union recognition] in *Godfrey v. DiNapoli*, Index No. 5896-06, 2007 WL 3054718 (Sup. Ct. Albany Co. Sept. 5, 2007)), attached hereto as Exhibit 3; Letter of Frederic P. Schaffer, General Counsel & Vice Chancellor for Legal Affairs, CUNY, to Anthony W. Crowell, Special Counsel to the Mayor, June 17, 2005 (civil unions and same-sex marriages recognized for purposes of pension system of CUNY, a state agency), attached hereto as Exhibit 4.

Rules concerning the internal management of public agencies are outside the scope of SAPA §102(b)(i) only if they:

> do not directly and significantly affect the rights of or procedures or practices available to the public . . .

The "general public" has been interpreted to mean that part of the public with which the agency deals. "Directly and significantly affect" has not been clearly defined, but internal management rules that reduce rights have been held not to be "internal." *See* Patrick J. Borchers & David L. Markell, N.Y.S. ADMIN. PROC. & PRACT. ("Borchers & Markell"), §4.17 (1998 & 2007 Supp.); *Connell v. Regan,* 114 A.D.2d 273, 275-76 (3rd Dept. 1986) (invalidating internal management rule imposing new time limit for state employee to withdraw announced intention to retire).

To the extent that the Executive Order deals with internal practices such as employee benefits for state employees, it should come within the internal management exception. In general, the proposed Executive Order will expand rights rather than reduce them, which will limit the Order's risk of being found not to constitute an internal management rule. However, to the extent that the internal management exception is relied

on and the Executive Order attempts to impose requirements on third parties, such as contractors, this exception may be unavailable. *Cf.* ¶ B.2.b (citing cases in which Executive Orders imposed on contractors without legislative authority have been invalidated, albeit without reference in these decisions to the "internal management" exception).

b. Interpretive statements

Under SAPA §102(2)(b)(iv), interpretive statements that restate statutory or other requirements without adding new rights or duties come under the exception, while actions that add new duties require a rulemaking. *See* Borchers & Markell §4.15; *see also* N.Y. JUR. ADMIN. LAW § 141, which collects cases. The New York State Department of Health's interpretation of an existing rule as requiring actual improvement as a condition of applying the higher Medicaid rate for restorative therapy was held to be interpretive. *See Elcor Health Services, Inc. v. Novello,* 100 N.Y.2d 273 (2003). The Department of Health's construal of the Domestic Relations Law as barring domestic same-sex marriages was also held to be interpretive and thus not subject to the rulemaking process. *Seymour v. Holcomb,* 7 Misc.3d 530 (Sup. Ct. Tompkins Co. 2005); *aff'd on other grounds,* 26 A.D.3d 661 (3rd Dep't 2006), *aff'd on other grounds sub nom. Hernandez v. Robles,* 7 N.Y.3d 338, 855 N.E.2d 1 (2006). Courts have held that the imposition of detailed requirements, such as a point system for assigning patients to an appropriate health facility, *Yaretzky v. Blum,* 456 F.Supp. 653 (S.D.N.Y. 1978), or a reduction in rights, such as the time permitted to seek reconsideration of an adverse agency ruling, *Maher v. N.Y.S. Div. of Housing & Community Renewal,* 158 Misc.2d 826, 601 N.Y.S.2d 667 (Sup. Ct. Westchester Co. 1993), does not constitute an interpretation and is therefore subject to a rulemaking proceeding.

There appears to be no case law dealing with an Executive Order interpreting language such as "husband," "wife" or "spouse" when used in a duly promulgated rule. The proposed Executive Order interpreting these terms to require recognition of out-of-state same-sex legal relationships would not add any new rights or duties. Thus, it should be regarded as an administrative application of existing New York recognition law which falls within the "interpretive statement" exception – even if third parties are affected. Such an interpretation by New York agencies would be fully justified by other states' civil union statutes, all of which either define civil union partners as "spouses," Conn. Gen. Stat. Ann. § 46b-38 ("Wherever in the general statutes the terms 'spouse', 'family', 'immediate family', 'dependent', 'next of kin' or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be included in such use or definition."), or extend to such partners the rights and responsibilities of spouses. *See* 15 V.S.A. § 1201 ("'Civil union' means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses."); N.J.S.A. § 37:1-29 ("Parties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage."); N.H. Rev. Stat. § 457-A:6 ("parties who enter into a civil union pursuant to this chapter shall be entitled to all the

rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined together pursuant to RSA 457 [N.H.'s marriage statute].").

Any interpretation which imposed detailed requirements rather than simply applied existing recognition law, or which reduced parties' rights, would exceed the scope of an interpretive statement.[4]

c. General policy

Under SAPA §102(2)(b)(iv), "statements of general policy" that do not add new rights or duties but are "merely explanatory" come under the exception. If a purported general policy statement creates a binding norm – in particular a numerical test – and does not leave the agency with discretion, a rulemaking will be required. *See* Borchers & Markell § 4.15; *compare Matter of Roman Catholic Diocese of Albany v. New York State Dept. of Health,* 109 A.D.2d 140, 490 N.Y.S.2d 636 (3rd Dept. 1985) (general policy to approve abortion clinics if less than 50% in county are performed outside hospitals does not require rulemaking because one factor among many), *with Sturman v. Ingraham,* 52 A.D.2d 882, 383 N.Y.S.2d 60 (2nd Dept. 1976) (general policy exception does not apply to binding numerical test for approval of nursing home's health-related facility, based on percentage of county's unmet long-term care need; rulemaking required).

An Executive Order extending recognition might not come within the "general policy" exception if the Order applies across the board, unless the Order is regarded as a principle for agencies to apply within their discretion; agency review for compliance with the federal Defense of Marriage Act may be enough to create a "general policy." *Cf. Godfrey v. DiNapoli,* Index No. 5896-06, 2007 WL 3054718 (Sup. Ct. Albany Co. Sept. 5, 2007) (upholding New York State Comptroller policy of out-of-state same-sex marriage recognition); *Godfrey v. Spano,* 15 Misc. 3d 809 (Westchester County Executive Order recognizing out-of-state same-sex marriages constitutes a "policy device"). The Executive Order proposed by NYCB falls more naturally into the "interpretative statements" exception.

2. Executive Order relationship to legislation

With respect to most Executive Orders, the issue is whether the Executive has acted

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[4] An administrative regulation interpreting a provision of one act does not preclude administrative interpretation from being changed prospectively through exercise of appropriate rule-making powers. *National Elevator Industry, Inc. v. N.Y.S. Tax Commission,* 49 N.Y.2d 538, 427 N.Y.S.2d 586, 404 N.E.2d 709 (1980) (McKinney's headnote). Given *National Elevator Industry,* past interpretations of regulations as applying to opposite-sex marriage should not control a new interpretation recognizing out-of-state relationships.

within the scope of legislative authority.

a. Effectuating legislation

Executive Orders are within the scope of the Governor's authority when they effectuate legislation. *Bourquin v. Cuomo,* 85 N.Y.2d 781, 652 N.E.2d 171, 628 N.Y.S.2d 618 (1995) (Citizens' Utility Board to represent consumer interests consistent with legislative policy to promote and encourage the protection of interests of consumers within the State, despite existence of three other entities with overlapping authority to protect utility consumers); *Clark v. Cuomo,* 66 N.Y.2d 185, 486 N.E.2d 794, 495 N.Y.S.2d 936 (1985) (making voter registration forms and assistance available at State agencies is permissible, but provision of receptacles for completed registration forms and presence of forms in boxes under control of agency employees impinges on authority of boards of elections); *Matter of Fullilove v. Beame,* 48 N.Y.2d 376, 398 N.E.2d 765, 423 N.Y.S.2d 144, 22 Empl. Prac. Dec. P 30,572 (1979) (NYC mayor could impose nondiscrimination requirement on contractors; racial affirmative action requirement struck down).

The only New York statute expressly creating rights for same-sex couples in out-of-state relationships is PUB. HEALTH L. § 4201.2(a) (McKinney 2006) (providing for disposition of remains). Several other statutes directly cover "domestic partners" without defining this term or addressing recognition issues related to it; an Executive Order providing recognition under these would be clearly authorized, as such an Order would effectuate the legislation. *See* EXECUTIVE L. § 354-b.2(b) (McKinney 2004) (supplemental burial allowance for domestic partners of deceased military personnel killed in combat); WORKERS' COMP. L. § 4 (McKinney 2002) (workers' compensation benefits for surviving domestic partners of September 11, 2001 terrorist attacks); N.Y. Session Laws 2002, c. 73, §1(7) (legislative history stating that domestic partners are intended to be eligible for federal Victims Compensation Fund); *Braschi v. Stahl Assocs.,* 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (N.Y. 1989) (state administrative code grants rent stabilization successor rights for unmarried life partners). *See also* Exec. Order No. 113.30 (2001) (Pataki, Gov.) (compensation for surviving same-sex partners of World Trade Center victims); Ian Fisher, *Cuomo Decides to Extend Domestic-Partner Benefits,* N.Y. TIMES, June 29, 1994, p. B4; Kevin Sack, *Pataki Drops Threat to Close Down Government,* N.Y. TIMES, Mar. 29, 1995, p.A1 (gubernatorial extension of health insurance benefits to same-sex domestic partners of New York State executive branch employees).

b. Legislative failure to act, or Executive Order contradicting express policy

Executive Orders are outside the scope of the Governor's authority when the Legislature has seriously considered legislation but failed to act, or when the Executive Order goes against expressed legislative policy. There is no clear, consistent distinction

between cases in which courts have found that an Executive Order effectuates legislation and those in which Executive Orders have been found to trespass on the legislative domain after the legislature has repeatedly rejected a bill. *Clark v. Cuomo,* 66 N.Y.2d 185, 486 N.E.2d 794, 495 N.Y.S.2d 936 (1985) (Legislature delegated to boards of elections the maintenance of receptacles for completed registration forms and presence of forms in boxes under control of agency employees; but despite Legislature's failure to pass bill, less intrusive actions were permissible); *Boreali v. Axelrod,* 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987) (comprehensive code to govern tobacco smoking in public areas after Legislature repeatedly failed to pass legislation); *Rapp v. Carey,* 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978) (striking down Executive Order regulating political and outside employment activity of wide range of state employees, many not subject to removal by Governor or within the Executive Department; order went beyond existing conflict of interest legislation).

A series of cases have struck down Executive Orders that added unauthorized requirements to the government contracting process; courts were probably swayed by the strong policy favoring competitive bidding in order to lower costs and prevent corruption, as expressed, *e.g.*, in GEN. MUNIC. LAW §103(1), which requires the selection of the lowest bidder. *See Matter of Fullilove v. Beame,* 48 N.Y.2d 376, 398 N.E.2d 765, 423 N.Y.S.2d 144, 22 Empl. Prac. Dec. P 30,572 (1979) (mayoral racial affirmative action requirement for NYC contractors); *Matter of Fullilove v. Carey,* 48 N.Y.2d 826, 399 N.E.2d 1203, 424 N.Y.S.2d 183 (1979) (racial affirmative action requirement for state contractors); *Subcontractors Trade Assn. v. Koch,* 62 N.Y.2d 422, 465 N.E.2d 840, 477 N.Y.S.2d 120 (1984) (mayoral local content requirement for NYC contractors); *Under 21 v. City of New York,* 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522, 37 Empl. Prac. Dec. P 35,477 (1985) (mayoral Executive Order forbidding NYC contractors from employment discrimination based on sexual orientation). This suggests that courts would be skeptical of an Executive Order requiring government contractors to recognize their employees' out-of state same-sex relationships. *Cf. Council v. Bloomberg,* 6 N.Y.3d 380, 846 N.E.2d 433, 813 N.Y.S.2d 3 (2006) (NYC mayor correctly refused to implement Equal Benefits Law requiring city contractors to provide domestic partner benefits, because GEN. MUNIC. LAW §103(1) pre-empted this.).

The Legislature has never expressed a policy against recognition of out-of-state same-sex spousal relationships, in contrast to other states that have enacted mini-DOMAs, and no civil union legislation has ever come up for a vote. Given that the Legislature traditionally does not occupy the field of comity, the Executive should be free to promulgate an Executive Order so long as the Order does not conflict with other legislative policies, such as those dealing with government contracts. *See, e.g., Lewis v. N.Y.S. Dept. of Civil Services,* No. 4078-07, N.Y.L.J., Mar. 18, 2008 (Sup. Ct. Alb. Co.).

3. Executive v. judicial power to grant recognition: *Langan* inapposite

Customarily, the judiciary grants comity through the case-by-case creation of common law for areas within the judiciary's scope of authority over long periods of time (*e.g.*, torts and private contracts). The judiciary's power to grant comity is not exclusive, and does not prevent the Executive from applying its own comity rules consistent with state law. *See Lewis v. N.Y.S. Dept. of Civil Services,* No. 4078-07, N.Y.L.J., Mar. 18, 2008 (Sup. Ct. Alb. Co.); *Godfrey v. Spano,* 15 Misc.3d 809 (Sup. Ct. Westchester Co. 2007); *Godfrey v. DiNapoli*, Index No. 5896-06, 2007 WL 3054718 (Sup. Ct. Albany Co. Sept. 5, 2007) (all upholding administrative grant of comity).

This memorandum does not address Court of Appeals precedent on recognition of out-of-state same-sex relationships at common law or in areas not administered by executive agencies, because there is none. While the Court of Appeals determined in *Hernandez* that, for purposes of domestic New York marriages under the Domestic Relations Law, "spouse," "husband" and "wife" refer to opposite-sex relationships, it did not consider the issue in the context of recognition.

New York, under *In re May's Estate* 305 N.Y. 486, 493, 114 N.E.2d 4, 7 (1953), recognizes out-of-state marriages that could not be entered into domestically except where the marriage is "offensive to the public sense of morality to a degree regarded generally with abhorrence," so that it would be grossly contrary to New York's public policy. Civil unions that are the substantial equivalents of opposite-sex marriage do not fall within this narrow exception. For a more detailed view of the Association's analysis of civil union recognition under the comity doctrine and New York's marriage recognition rule, see our Second Department *Langan* amicus brief at http://www.abcny.org/pdf/report/Langan.draft12.JW.WORD.pdf.

In *Langan I*, the Appellate Division, Second Department, held that the surviving partner in a same-sex civil union was not a "surviving spouse" within the meaning of the Estates, Powers, and Trusts Law, and thus could not bring a wrongful death action arising from his partner's death. *Langan I*, 25 A.D.3d at 92. While NYCB disagrees with that holding for the reasons enumerated in our amicus brief, even assuming that *Langan I* was correctly decided, that case interpreted a statutory right that was not subject to administrative construction. *Langan I* did not consider, and does not control, an Executive Order that directs State agencies to interpret policies, regulations, and statutes whose construal is vested in those agencies.

Nor does *Langan II*, 48 A.D.3d 76, where the Appellate Division, Third Department,

upheld a Workers' Compensation Law Judge's dismissal of a surviving civil union partner's claim on the basis that the partner was not a "surviving spouse" of the deceased employee, preclude the proposed Executive Order. The holding in *Langan II* rested on the court's determination that

> comity does not *require* New York to recognize [a surviving civil union partner] as decedent's surviving spouse for death benefits purposes. This doctrine is not a *mandate* to adhere to another state's laws, but an expression of one state's *voluntary choice* to defer to another state's policy. Although we may recognize the civil union status of claimant and decedent as a matter of comity, we are not *bound* thereby to confer upon them all of the legal incidents of that status recognized in the foreign jurisdiction that created the relationship . . . . While parties to a civil union may be spouses, and even legal spouses, in Vermont, New York is not *required* to extend such parties all of the benefits extended to marital spouses.

Id. at 79 (emphasis added) (internal citations omitted). While the court held (incorrectly, in NYCB's view) that the State need not recognize same-sex civil unions, it did not conclude that the State is *prohibited* from extending recognition -- in fact, since the Workers Compensation Law is administered through the Executive branch, notwithstanding *Langan II,* the Executive may extend recognition there. For the reasons set forth above, the determination of whether the State's agencies will or will not respect same-sex civil unions is vested with the Governor.

4. Standard of review

Assuming that the proposed Executive Order does not trespass on SAPA or contradict legislative policy on recognition of out-of-state relationships, the standard of review for any challenge to the Order should be the test applied to agency interpretations. The Court of Appeals has recently applied a hybrid rational basis/arbitrary and capricious standard. *See Matter of General Elec. Capital Corp. v N.Y.S. Div. of Tax Appeals,* 2 N.Y.3d 249, 810 N.E.2d 864, 778 N.Y.S.2d 412 (2004) (interpretation of sales tax refund law is "rational" and not "arbitrary and capricious"); *Elcor Health Services, Inc. v. Novello,* 100 N.Y.2d 273, 763 N.Y.S.2d 232, 794 N.E.2d 14 (2003) (upholding Dept. of Health interpretation of regulation as not "arbitrary and capricious, or irrational," and noting that "[T]he commissioner's interpretation is 'controlling and will not be disturbed in the absence of weighty reasons.'") (internal citation omitted); *see also Shields v. Madigan,* 5 Misc.3d 901, 783 N.Y.S.2d 270 (Sup. Ct. Rockland Co. 2004) (Dept. of Health advised municipal clerks not to issue marriage licenses to same-sex couples under domestic New York law; review limited to

whether advice was arbitrary and capricious, lacked rational basis or was otherwise affected by legal error; administrative agency's interpretation of its own regulations and of the statute under which it functions are entitled to great deference), *aff'd on other grounds,* 32 A.D.3d 1036, 820 N.Y.S.2d 890 (2nd Dep't 2006).

5. Conclusion: equity and efficiency arguments for recognition

Many same-sex couples have entered into civil unions and other legal relationships outside of New York which are, in the states in which these relationships were contracted, the substantial equivalents of marriage. The spouses in these couples are permanently and legally committed to each other, yet they exist in a state of legal limbo, with great uncertainty as to their rights under New York law. This lack of clarity generates litigation, resulting in piecemeal, and potentially conflicting, precedents. Unfairly, these couples are denied the rights and obligations that similarly situated opposite-sex couples take for granted. And now, with New York's increasing recognition of same-sex marriages contracted in other jurisdictions, these couples are also denied rights and obligations given to same-sex couples in relationships that are identical in all but name. The Governor has the power, under well-established principles of New York administrative law and comity, to issue an Executive Order pursuant to which executive agencies will recognize as married same-sex couples in civil unions and other substantial legal equivalents of marriage. Equity and efficiency demand recognition.

[Continued on next page.]

C. Coding

In analyzing the over 1,300 New York State laws addressing the rights and responsibilities of spouses, NYCB used the following codebook to determine the appropriate code for each statute or regulation.

Code	Explanation
AG	Attorney General action required. Areas regulated by Attorney General's office (e.g. charitable corporations), otherwise under control of Attorney General or requiring Attorney General opinion. For example, the Attorney General regulates nonprofits.
C	Comptroller action required. Areas under control of Comptroller's office. For example, the already-promulgated Comptroller's order recognizing out-of-state same-sex couples for purposes of pension benefits, which the Comptroller supervises.
EOL	***E***xecutive **O**rder can regulate the interna***L*** affairs of the Executive Branch and other agencies under the Governor's control. This would include the Executive Branch's internal personnel practices. Actions that provide additional rights are often favored, while actions that eliminate rights are often disfavored. Responsibilities that would be imposed on a same-sex partner to a civil union as the result of the recognition of out-of-state same-sex relationships should be coded as *EOL,* since, in entering into an out-of-state relationship while residing in New York, affected couples expected to be subject to the benefits and requirements provided in connection with New York's government. If recognition would involve an elimination of rights that the parties would not have anticipated, note this in the *Comment* column. Coding under *EOL* should include matters affecting the internal affairs of Agencies. *Agency* means any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority at least one of whose members is appointed by the Governor. For an undated, unprovenanced listing of agencies, authorities and boards (with links to them), see http://www.legaltrek.com/HELPSITE/States/New_York.htm. While the draft Executive Order is limited to a subset of authorities, boards and public benefit

Code	Explanation
	corporations, there is no way to determine, without a great deal of further research, whether they fall into the subset. This can be sorted out by the task force appointed when the Executive Order is promulgated: the agencies, authorities and boards will have at their fingertips information on who appoints them. Executive Orders cannot go beyond the text of enabling legislation in a manner that is inconsistent with statutory language or underlying statutory purposes, *General Elec. Capital Corp. v. New York State Div. of Tax Appeals,* 2 N.Y.3d 249, 778 N.Y.S.2d 412, 810 N.E.2d 864 (2004). If the statute or regulation under consideration relates to government contractors, the courts often strike down Executive Orders. Statutes relating to government contractors should generally be coded under *LEG.* Given that in *Hernandez,* the Court of Appeals interpreted the Domestic Relations Law as including only opposite-sex marriage for domestic (in-state) New York marriages, *EOL* is not used for coding in a way that would conflict with *Hernandez.*
EOP	***E***xecutive ***O***rder can inter***P***ret a statute or regulation. Interpretations are not rulemakings, SAPA §102(2)(b)(iv); *Elcor Health Services, Inc. v. Novello,* 100 N.Y.2d 273, 763 N.Y.S.2d 232, 794 N.E.2d 14 (2003), and therefore can be interpreted by Executive Order. SAPA and the case law do not distinguish between interpretations of statutes and regulations. Actions that provide additional rights are often favored, while actions that eliminate rights are often disfavored. Requirements imposed on a same-sex spouse in the course of recognizing an out-of-state same-sex couple are coded as *EOP,* since, in entering into an out-of-state relationship while being present in New York, the couple expected to be subject to the benefits and requirements provided in connection with New York's government. If recognition would involve an elimination of rights that the parties would not have anticipated, this is noted in the *Comment* column. Coding under *EOP* includes matters affecting the internal affairs of Agencies. *Agency* means any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority

Code	Explanation
	at least one of whose members is appointed by the Governor. For an undated, unprovenanced listing of agencies, authorities and boards (with links to them), see http://www.legaltrek.com/HELPSITE/States/New_York.htm. While the draft Executive Order is limited to a subset of authorities, boards and public benefit corporations, there is no way to determine, without a great deal of further research, whether they fall into the subset. This can be sorted out by the task force appointed when the Executive Order is promulgated: the agencies, authorities and boards will have at their fingertips information on who appoints them. Executive Orders cannot go beyond the text of enabling legislation in a manner that is inconsistent with statutory language or underlying statutory purposes, *General Elec. Capital Corp. v. New York State Div. of Tax Appeals,* 2 N.Y.3d 249, 778 N.Y.S.2d 412, 810 N.E.2d 864 (2004). If the statute or regulation under consideration relates to government contractors, the courts often strike down Executive Orders. Statutes relating to government contractors should generally be coded under *LEG.* Given that in *Hernandez,* the Court of Appeals interpreted the Domestic Relations Law as including only opposite-sex marriage for domestic (in-state) New York marriages, *EOP* is used for coding in a way that would conflict with *Hernandez.*
I	Irrelevant. Because of the vast number of statutes & regulations that were pulled, a few may be irrelevant. However, virtually every statute or reg with "marriage," "spouse," "husband," "wife" or "family" should be relevant.
J	Judicial action required. This would include common law areas such as tort law, except for rights created by statute that are administered by the Executive Branch, such as Workers Compensation. Rights created by statute that are interpreted wholly by the courts, such as wrongful death, are coded *J.* In addition, the code *J* is used for legislation dealing with the administration of the courts, such as the CPLR, where the judiciary can issue rules. While the judiciary ordinarily interprets marital status for recognition purposes,

Code	Explanation
	where agencies are involved (*e.g.*, interpretation of the Domestic Relations Law by the Dept. of Health), this should be coded *EOL* or *EOP* rather than *J.* However, given that in *Hernandez,* the Court of Appeals interpreted the Domestic Relations Law as including only opposite-sex marriage for domestic (in-state) New York marriages, *EOL* or *EOP* is not used for coding in a way that would conflict with *Hernandez.* Areas not under the jurisdiction of the Executive, Attorney General, Comptroller or localities where the judiciary should, as a matter of comity, grant recognition, should be coded *J.*
LEG	Areas where *no* actor, other than the Legislature, has the power to recognize out-of-state same-sex couples. While the Legislature has the power to legislate in most areas where other actors may act, the purpose of the coding is to identify areas where *only* the Legislature can act. *LEG* is used where the recognition requirements are imposed on government contractors as a condition of entering into contracts. The line between *J* and *LEG* is hard to draw, but not that crucial to the coding. If the judiciary could apply comity to recognize out-of-state same-sex relationships, that row is coded *J.* If neither the judiciary nor another actor could recognize out-of-state same-sex relationships, that is also coded *LEG.*
LOC	Local action required. This code includes the interpretation of "spouse" and related terms under the Real Property Tax Law, which is administered by counties. It also includes interpretations by municipal pension funds that are locally administered and not subject to the Civil Service Law. And it includes other items subject to municipal home rule.
P	Federal pre-emption. P is used when there is a possibility of federal pre-emption due to federal DOMA or other federal statutes. For example, Executive Orders in these areas may be pre-empted by DOMA:

<table>
<tr><th>Code</th><th>Explanation</th></tr>
<tr><td></td><td>
<table>
<tr><td>State legislation or regulation area</td><td>Federal statute</td></tr>
<tr><td>Health insurance</td><td>ERISA</td></tr>
<tr><td>Medicaid, Medicare</td><td>Social Security</td></tr>
<tr><td>SSA disability or surviving spouse payments</td><td>Social Security</td></tr>
<tr><td>Veterans' benefits</td><td>Federal military statutes</td></tr>
</table>

Whether an Executive Order would be pre-empted will often be hard to determine from the statutory summaries. Some statutes or regulations may appear to be only partially pre-empted by federal law: for example, the state may be administering both state and federal benefits in the social welfare area. For these, both P and the other relevant code are used.
</td></tr>
<tr><td>R</td><td>Rulemaking required.

State Administrative Procedure Act §102(2)(a)(i) provides:

2. (a) "Rule" means (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof. . . .

Because a rule goes through the rulemaking procedure (including public comment), it can bind third parties. A rulemaking is appropriate if it is desired to go beyond the text of enabling legislation in a manner that is not inconsistent with statutory language or underlying statutory purposes, General Elec. Capital Corp. v. New York State Div. of Tax Appeals, 2 N.Y.3d 249, 778 N.Y.S.2d 412, 810 N.E.2d 864 (2004).

An interpretation of an existing rule is coded as EOP, rather than R.

Interpretations of statutes or rules that eliminate rights are coded as R, since a rulemaking will be required. However, requirements imposed on a same-sex spouse in the course of recognizing an out-of-state same-sex couple are coded as EOP,</td></tr>
</table>

Code	Explanation
	since, in entering into an out-of-state relationship while residing in New York, affected couples expected to be subject to the benefits and requirements provided in connection with New York's government.

[Continued on next page.]

D. Draft Executive Order

(1) Recognition Rule.

If a person:

(a) has entered into a valid civil union or other substantial legal equivalent of marriage (including, without limitation, a civil union effective on or before the date of this Executive Order under New Jersey, Vermont, Connecticut, or New Hampshire law, or a domestic partnership effective on or before the date of this Executive Order under Oregon law) with a person of the same sex in another state, province, or country; and

(b) is entitled to all or substantially all of the rights, privileges and obligations of a spouse under the domestic law of that jurisdiction: [5]

then that person will be granted the rights and privileges, and will be subject to the obligations of, a legal spouse by all Agencies. "Agency" means any department, board, bureau, commission, division, office, council, committee, or officer of the state, or a public benefit corporation or public authority at least one of whose members is appointed by the governor. [6]

(2) Task Force.

In order to implement Section 1 of this Executive Order to grant the fullest recognition within my power, I will appoint a task force, including [the Commissioners of the Departments of Correctional Services, Health, Mental Health, Labor, Social Services and the Division of Human Rights, the Superintendent of State Police, the President of the Civil Service Commission, the directors of the Women's Division, the Office of Employee Relations, the Division for Youth and the Office for the Aging, the Chairman of the State Liquor Authority and ___ private citizens whom I shall designate]. The task force will submit reports and recommendations dealing with recognition of out-of-state civil unions and other legal equivalents of civil marriage by State Agencies and Public Authorities. I will designate a chair-person and vice-chairperson of the task force.[7]

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[5] This version of the rights conferred is based on Letter of Michael A. Cardozo, New York City Corporation Counsel, to Hon. Michael A. Bloomberg, Nov. 17, 2004 (dealing with New York City pension funds). However, that letter does not deal with obligations.

[6] This definition of "Agency" comes from Executive Order No. 20 part IB (Nov. 30 1995, Pataki, Gov.), http://www.gorr.state.ny.us/EO20.html (last visited May 30, 2008). Gov. Pataki's Executive Order No. 20 established the Governor's Office of Regulatory Reform ("GORR"), and incorporated by reference the definition of "Agency" from SAPA §102(1), although this draft is somewhat broader than the definition in SAPA §102(1).

[7] This section based on § 4.28(4), Executive Order No. 28: Establishing a Task Force on Sexual Orientation Discrimination on (Nov. 21, 1983; Cuomo, Gov.).

Exhibit 1

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

MICHAEL A. CARDOZO
Corporation Counsel

Phone: 212-788-0800
Fax:212-788-0367
E-mail: mcardozo @ law.nyc.gov

November 17, 2004

Hon. Michael R. Bloomberg
Mayor
City Hall
New York, NY 10007

Dear Mr. Mayor:

In a memorandum dated October 15, 2004, you asked whether State laws governing the City's pension systems allow for treating couples who have entered into same-sex marriages in other jurisdictions where such marriages are legal in the same manner as couples who have entered into opposite-sex marriages, and if so, what actions need to be taken so that the pension systems are administered accordingly.

We have concluded that if a member has entered into a same-sex marriage in another state or country that is valid under the laws of that state or country, any benefits or rights that would be available to a member's "spouse," "widow" or "widower" under the retirement plan should also be available to the member's partner. This conclusion also applies to parties of civil unions entered into in another state or country where the rights and benefits of civil union are equivalent to those of marriage.

Enclosed is a draft resolution that your representatives on the pension boards may introduce to direct that the pension systems be administered in accordance with the advice provided in this opinion. I will be happy to arrange for members of my staff to meet with the boards and other representatives of the systems to discuss this issue further.

New York City Retirement Plans

Most New York City employees and former employees are members of one of five pension plans. Most of the benefits available under these plans do not depend on whether or not the member is married: either the member receives retirement benefits directly, or, if the

member dies before retirement, a death benefit is payable to whomever the member has designated as a beneficiary. Yet some benefits in the New York City retirement plans, including accidental death benefits, are payable only to a surviving "spouse" or to a spouse, child or parent, but not to any other person. See, e.g., Ad. Code 13-149 (NYCERS); id. at § 13-244 (accidental death benefit under police pension fund payable to spouse, then child, then parent.) Additionally, some rights under the New York City retirement plans may only be exercised by a "spouse" or "widow/widower," including the right to take an elective share of the estate of a deceased member. See e.g., New York Estates, Powers and Trusts Law § 5-1.1-A (all retirement plans).

Same-Sex Marriages and Civil Unions

This office and the Attorney General of New York have advised that New York's Domestic Relations Law does not provide for marriage between persons of the same sex. See, Letter of Corp. Counsel to City Clerk Victor Robles, dated March 3, 2004; Op. Atty Gen'l 2004-1 (Inf.). Recently, the Supreme Court for Rockland County cited the Attorney General's opinion in upholding the denial of marriage licenses to same-sex couples against statutory and constitutional challenges. Matter of Shields v. Madigan, 2004 N.Y. Misc. LEXIS 1823. This office and the Attorney General are continuing to litigate the constitutionality of the Domestic Relations Law in other courts. However, the issues in that litigation are separate from the question of the rights under the City's pension systems of parties to same-sex marriages and civil unions recognized in other jurisdictions.

Same-sex marriage is valid in Massachusetts, Goodridge v. Dep't of Public Health, 440 Mass. 309 (2003), and in some foreign countries, including Belgium, the Netherlands and some provinces of Canada. Additionally, Vermont's "civil union" statute offers the legal equivalent of marriage to same-sex and opposite-sex partners. 2000 Vermont Act 91; Vt. Stat. Ann. tit. 15 § 1201 et seq.[1] The question raised is how New York City's retirement plans should consider such relationships that may be entered into by members and retirees when determining entitlement to "spousal" benefits and rights.

New York's Common Law Recognizes Marriages from Other Jurisdictions

New York State common law has long recognized the validity of marriages entered into in other jurisdictions, even where those relationships would not have been legal under New York law. For example, although New York's Domestic Relations Law § 11 specifically precludes common law marriages, New York recognizes such relationships that are created validly in other states or countries. See, e.g., Shea v. Shea, 294 N.Y. 909 (1945); Katebi v. Hooshiari, 288 A.D.2d 188 (2d Dept. 2001) (recognizing common law marriage valid under Pennsylvania and

[1] See Vt. Stat. Ann. tit. 15 § 1204 (a) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.")

Georgia law); In the Matter of the Judicial Settlement of the Accounts of Charles A. White, 129 Misc. 835 (Sur. Ct. Erie Co. 1927) (recognizing Ontario common law marriage).

The practical effects of New York's recognition of such relationships have included findings that a surviving partner to a common law marriage, validly entered into in another state, was entitled: to spousal benefits under New York's workers' compensation program, Mott v. Duncan Petroleum Trans., 51 N.Y.2d 289, 292-93 (1980); to bring a wrongful death action as a surviving spouse, Hulis v. M. Foschi & Sons, 124 A.D.2d 643, 644 (2d Dept. 1986); and to a spouse's elective portion under a will. In the Matter of the Estate of Antonio Pecorino, 64 A.D.2d 711 (2d Dept. 1978). In Matter of the Estate of Jones (File #5167/93, Surr. Ct. Queens, Dec. 5, 1995), the Surrogate Court recognized a Pennsylvania common law marriage and ordered that petitioner be granted a line of duty widow's pension from the New York Fire Department Pension Fund.

Although New York's rule of marriage recognition finds most frequent expression with respect to common law marriages, it has also been applied to other types of marriage specifically precluded by New York law. For example, in a case involving inheritance rights, the Court of Appeals in Van Voorhis v. Brintall, 86 N.Y. 18 (1881), recognized the validity of a man's second marriage entered in another state even though the order of the New York court which granted the annulment of his first marriage provided that he could not remarry while his ex-wife was still alive. And in In re Estate of May, 305 N.Y. 486 (1953), the Court of Appeals recognized a marriage entered in Rhode Island between an uncle and a niece, even though the Domestic Relations Law provided that such a marriage entered in New York would have been "incestuous and void". New York courts have also recognized valid marriages from other countries, even where the particular type of marriage would be illegal under New York law. See, e.g., In re Will of Valente, 18 Misc.2d 701 (Sur. Ct. Kings Co. 1959) (recognizing Italian "marriage by proxy").

Recognition of Same-Sex Marriages and Civil Unions

A New York court last year held that, under principles of full faith and credit and comity, where two New Yorkers had entered into a valid civil union under Vermont law, the surviving partner had the same standing as a "surviving spouse" to bring a wrongful death action under New York law. Langan v. St. Vincent's Hospital of New York, 196 Misc.2d 440 (Sup. Ct. Suffolk Co. 2003). The Langan decision is currently on appeal in the Second Department, where the New York Attorney General has filed an amicus curiae brief in support of plaintiff-respondent. Citing Langan, the Attorney General stated in his March 3, 2004 opinion that "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." More recently, the New York State Comptroller, citing both Langan and the opinion of the Attorney General, determined that same-sex marriages entered into in Canada will be treated as valid for the purpose of determining entitlement to spousal

benefits under the New York State and Local Retirement System. See October 8, 2004 Letter of Alan G. Hevesi to Mark E. Daigneault.[2]

I am satisfied that Langan, the advice of the Attorney General and the State Comptroller's opinion comport with New York law and policy, and that spousal rights and benefits under New York City's retirement plans should be afforded to the partners of members who entered into a same-sex marriage, or other legal relationship equivalent to marriage, that is valid under the laws of the jurisdiction in which the legal relationship was created.

Recognition of such relationships is consistent with New York policy, which has acknowledged both the changing nature of familial relationships in modern society and the need to offer protection against discrimination based on sexual orientation. New York courts have protected same-sex couples for purposes of succession to tenancy as a "family member" in a rent-stabilized or rent-controlled apartment, Braschi v. Stahl Associates Co., 74 N.Y.2d 201, 211 (1989); East 10th Street Assocs. v. Estate of Goldstein, 154 A.D.2d 142 (1st Dep't 1990), motion for lv to app. denied, 84 N.Y.2d 813 (1995), and a same-sex partner's adoption of his or her partner's children. In the Matter of Jacob, 86 N.Y. 2d 651, 667-68 (1995). The Hate Crimes Act of 2000 provided heightened penalties for acts motivated by animus based on sexual orientation, among other grounds. Penal Law §§240.30(3); 240.31; 485.00; 485.05. By Chapter 2 of the Laws of 2002, the State Legislature amended the Civil Rights Law and the Human Rights Law to prohibit discrimination based on sexual orientation in employment, public accommodations, and housing.[3] Several enactments by the State Legislature provide for domestic partners of persons killed or injured in the attacks on the World Trade Center to be treated in the same manner as spouses: Chapter 467 of the Laws of 2002 (added section 4 to the Workers Compensation Law to provide death benefits for surviving domestic partners); Chapters 468 of the Laws of 2002 and 162 of the Laws of 2003 (provided for domestic partners of firefighters to receive death benefits pursuant to General Municipal Law §208-f and Ad. Code 13-347). The "Patriot Plan Act", Chapter 106 of the Laws of 2003, recognized domestic partners in a number of ways. It amended the Real Property Tax Law to provide an extension for both spouses and domestic partners of persons serving in the military. It also added a new section

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[2] The State Comptroller's opinion letter was written in response to a retirement system member who was considering getting married in Canada, and does not address the question, considered below, of whether a Vermont civil union should be treated in the same manner as a marriage.

[3] When the Legislature included "sexual orientation" within the prohibited categories of discrimination under the Human Rights Law, it stated that: "Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state." Laws 2002, ch 2, § 1. I understand this to mean that the Legislature did not intend to change the meaning of New York's Domestic Relations Law with respect to who may lawfully marry in New York. Recognizing same-sex marriages or civil unions from other jurisdictions pursuant to New York's common law rule of marriage recognition does not conflict with this understanding, as it does not affect existing law regarding who may enter into marriage in New York State.

354-b to the Executive Law, providing supplemental burial benefits to the domestic partner or spouse of certain persons who die while on active duty. Finally, it amended several statutes to promote communication between members of the service and their spouses or domestic partners, as well as other family members. Education Law §272 (requiring libraries to offer Internet access); Public Service Law §92 (requiring State to negotiate with telephone companies to provide special rates); Military Law §254 (requiring State to make teleconferencing facilities available). This year, the Legislature added section 2805-q to the Public Health Law to ensure that domestic partners have the same visitation rights in hospitals and nursing facilities as spouses.

The City of New York also has strong laws and policies protecting the interests of same-sex couples. Local Law Number 2 of 1986 (the "Gay Rights Law") amended the City's Human Rights Law, Ad. Code 8-101 *et seq.*, to prohibit discrimination based on sexual orientation. Orders conferring benefits on domestic partners were adopted by Mayor Koch and Mayor Dinkins; these orders were ratified by Mayor Giuliani and then by you. City employees have been able to obtain health benefit coverage for their domestic partners since 1994. Local Law No. 27 of 1998 codified a domestic partner registration program and amended the Charter and Administrative Code to provide equal treatment for domestic partners registered pursuant to the City's program and spouses in a number of areas. The rights and benefits so extended to domestic partners registered in the City were made applicable to domestic partners registered in other jurisdictions, as well as to parties to same-sex marriages and civil unions from other jurisdictions, by Local Law 24 of 2002.

The federal "Defense of Marriage Act" ("DOMA"), defines "marriage" for purposes of federal law and rules as "only a legal union between one man and one woman as husband and wife ," 1 U.S.C. § 7, and provides that no State "shall be required to give effect to any public act, record, or judicial proceeding of any other State, ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State...." 28 U.S.C. §1783C. Langan observes that New York, unlike the federal government and a majority of the other states, has not enacted legislation explicitly withholding recognition of same-sex marriages from other jurisdictions. 196 Misc. 2d at 445. I agree with the Langan court that this is further evidence 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.

Two aspects of the Langan decision merit further discussion here. First, the court's ruling in Langan was explicitly limited to the question of whether a same-sex marriage or civil union should be recognized for the purposes of determining spousal standing under New York's wrongful death statute, and did not address other purposes such as the administration of pension benefits. 196 Misc. 2d at 444. However, the court rulings and legislative acts cited by Langan, and additional legislation described above, all support the conclusion that same-sex marriages should be recognized by our pension systems. That recognition is consistent with public policy in this context is supported in particular by the fact that legislation was enacted in the wake of the attacks on the World Trade Center to afford pension and workers' compensation benefits to domestic partners, including same-sex and opposite-sex partners, on the same basis as spouses. There is nothing in the statutes governing the City's pension systems that would lead to a different conclusion.

Second, Langan treated a civil union performed under Vermont law as the equivalent of a marriage. The equivalency of these relationships is a novel issue which is now before the Second Department on appeal. For the reasons explained below, I agree with the holding of Langan and advise that the pension systems treat parties to a Vermont civil union in the same manner as parties to a marriage.

In Baker v. State, 744 A.2d 864 (1999), the Vermont Supreme Court held that the exclusion of same-sex couples from the rights and benefits of marriage violated the Common Benefits Clause of the Vermont Constitution. The Court ordered the Vermont Legislature to "craft an appropriate means of addressing this constitutional mandate" that would afford same-sex couples the opportunity to obtain the "same benefits and protections afforded by Vermont law to married opposite-sex couples." Id. at 886.

The Vermont Legislature responded by creating the institution of "civil union." 2000 Vermont Act 91; Vt. Stat. Ann. tit. 15 § 1201 et seq. In so doing, the Legislature stated in legislative findings that "[c]ivil marriage under Vermont's marriage statutes consists of a union between a man and a woman," and that "a system of civil unions does not bestow the status of civil marriage." The Legislature identified the purpose of the civil union law as follows: "The purpose of this act is to respond to the constitutional violation found by the Vermont Supreme Court in Baker v. State, and to provide eligible same-sex couples the opportunity to 'obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples' as required by Chapter I, Article 7th of the Vermont Constitution."

Like the findings described above, the substantive provisions of the Vermont civil union law also draw distinctions between marriage and civil union. Section 1201 (4) defines marriage as "the legally recognized union of one man and one woman." Section 1202 (2), which states the requisites for a civil union, provides that the parties must "be of the same sex and therefore excluded from the marriage laws" of Vermont. However, the body of the law provides for equivalency between the two relationships. Section 1204 (a) states that "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." (Emphasis added.) Section 1204 (e) sets forth a "nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union." (Emphasis added.)

Two cases decided by courts of other states prior to Langan declined to treat a Vermont civil union in the same manner as a marriage. In Burns v. Burns, 560 S.E.2d 47 (Ga. App. 2002), cert. denied, 2002 Ga. LEXIS 626 (Sup. Ct. Ga. July 15, 2002), the court denied custody visitation rights to a mother on the grounds that she had violated a court order by living with another person to whom she was not legally married, even though she had entered into a civil union with that person. Rosengarten v. Downes, 71 Conn. App. 372 (App. Ct.), cert. granted and dismissed, 261 Conn. 936 (2002), held that the court had no jurisdiction over an action to dissolve a Vermont civil union. Both Burns and Rosengarten relied in part on language of the Vermont civil union statute which distinguishes civil unions from marriages.

In contrast, Salucco v. Alldredge, 17 Mass. L. Rep. 498 (Super. Ct. 2004), decided after Langan, held that a Massachusetts court had equity jurisdiction to dissolve a Vermont civil union. It noted that the application of the full faith and credit clause to Vermont civil unions is "not certain" because the parties are not considered to be married in Vermont, and that the Massachusetts divorce law was inapplicable because Vermont does not define civil union as a marriage. Nevertheless, the court determined that allowing the parties a legal remedy for dissolution was consistent with rulings of the Massachusetts high court in Goodridge v. Dep't of Public Health, 440 Mass. 309 (2003)(declaring that exclusion of same-sex couples from marriage violated the Massachusetts constitution).

The Langan court focused more on the substantive provisions of the Vermont civil union law – that is, those conferring benefits, protections, rights and responsibilities, -- than did these other courts. After summarizing these provisions, the court characterized the civil union as "distinguishable from marriage only in title," noting that the statute "goes so far as to include a presumption of legitimacy for either party's natural child born during the union," and that:

> The presumption of legitimacy, when extended to a same sex couple, together with the obligations of support and requirement for a divorce, indicate that the civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union."

196 Misc. 2d 448-449. Similarly, the Attorney General's *amicus curiae* brief to the Second Department argues that:

> There is only one difference between the Vermont law governing "marriage" and the Vermont law governing "civil unions," and this is purely a difference in form, not substance: Vermont reserves the label "marriage" only for "the legally recognized union of one man and one woman," and the label "civil union" only for the legally-recognized union of two persons of the same sex. As a result, the procedures for licensing and recording marriages and civil unions, though virtually the same in substance, are located in separate, albeit adjacent, chapters of Vermont's statutory compilation. This difference in name, however, cannot be grounds for including a party to a Vermont marriage, but not a party to a Vermont civil union, within the term "spouse" under EPTL §4-4.1(a). Again, Vermont law expressly affords parties to a Vermont civil union all the same legal rights and responsibilities afforded parties to a Vermont marriage.

The views expressed by the Langan court and the Attorney General are, in my opinion, correct. They are supported by the Vermont civil union statute when read in its entirety, and by its history as an enactment required to remedy the violation of Vermont's constitution which arose in the absence of equal rights for same-sex couples to enter a relationship equivalent to marriage.

Conclusion

In light of the foregoing, New York City's retirement plans should offer the same benefits and rights to the partners of plan members in (i) same-sex marriages that are valid in the jurisdiction where they were entered; and (ii) civil unions, whether made valid in Vermont, or in a form substantially similar in legal effect to those created by Vermont law, as they do to spouses from valid opposite-sex marriages.

Sincerely yours,

MICHAEL A. CARDOZO

RECOGNIZING THE SPOUSAL STATUS OF THE PARTNERS OF TEACHERS RETIREMENT SYSTEM MEMBERS WHERE THE MEMBER AND PARTNER HAVE ENTERED INTO A VALID SAME-SEX MARRIAGE OR CIVIL UNION IN ANOTHER JURISDICTION

Whereas, The Board of Trustees is aware that a same-sex couple may now enter into a valid marriage in the Commonwealth of Massachusetts and in certain foreign countries, including Canada; and

Whereas, The Board of Trustees also is aware that in Vermont, a same-sex couple may now enter into a legal relationship known as a "civil union" which affords substantially all of the rights and responsibilities of a civil marriage; and

Whereas, The Comptroller of the State of New York, as sole trustee of the State retirement systems, has recently announced his decision to treat the partners of members as "spouses" where the member and the member's partner entered into a legal same-sex marriage in Canada; and

Whereas, The Board of Trustees is aware that members of the Teachers Retirement System may enter into valid same-sex marriages or civil unions in other jurisdictions; and

Whereas, The Corporation Counsel recently has advised that the law and public policy of New York State and New York City support the Teachers Retirement System's recognition of a member's same-sex partner as a spouse, where the member and the member's partner have entered into a valid same-sex marriage, or civil union in another jurisdiction where the rights and benefits of civil union are equivalent to those of marriage; now, therefore, be it

Resolved, That the Board of Trustees authorizes and directs the Executive Director, consistent with the attached opinion of the Corporation Counsel, to recognize the same-sex marriages and civil unions of Teachers Retirement System members lawfully entered into in other jurisdictions, for the purpose of determining all rights, responsibilities and benefits afforded to the "spouse," "surviving spouse," "widow" or "widower" of a member.

Respectfully Submitted:

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Executive Director

RECOGNIZING THE SPOUSAL STATUS OF THE PARTNERS OF NYCERS MEMBERS WHERE THE MEMBER AND PARTNER HAVE ENTERED INTO A VALID SAME-SEX MARRIAGE OR CIVIL UNION IN ANOTHER JURISDICTION

Whereas, The Board of Trustees is aware that a same-sex couple may now enter into a valid marriage in the Commonwealth of Massachusetts and in certain foreign countries, including Canada; and

Whereas, The Board of Trustees also is aware that in Vermont, a same-sex couple may now enter into a legal relationship known as a "civil union" which affords substantially all of the rights and responsibilities of a civil marriage; and

Whereas, The Comptroller of the State of New York, as sole trustee of the State retirement systems, has recently announced his decision to treat the partners of members as "spouses" where the member and the member's partner entered into a legal same-sex marriage in Canada; and

Whereas, The Board of Trustees is aware that members of NYCERS may enter into valid same-sex marriages or civil unions in other jurisdictions; and

Whereas, The Corporation Counsel recently has advised that the law and public policy of New York State and New York City support NYCERS' recognition of a member's same-sex partner as a spouse, where the member and the member's partner have entered into a valid same-sex marriage, or civil union in another jurisdiction where the rights and benefits of civil union are equivalent to those of marriage; now, therefore, be it

Resolved, That the Board of Trustees authorizes and directs the Executive Director, consistent with the attached opinion of the Corporation Counsel, to recognize the same-sex marriages and civil unions of NYCERS members lawfully entered into in other jurisdictions, for the purpose of determining all rights, responsibilities and benefits afforded to the "spouse," "surviving spouse," "widow" or "widower" of a member.

Respectfully Submitted:

_____

Executive Director

Exhibit 2

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

ANTHONY W. CROWELL
SPECIAL COUNSEL TO THE MAYOR

April 6, 2005

Alan Van Capelle
Executive Director
Empire State Pride Agenda
16 West 22nd Street
New York, NY 10010

Dear Alan:

In response to Mayor Bloomberg's announcement that he supports same-sex marriages for gay and lesbian couples in New York State, you asked me whether the City of New York recognizes same-sex marriages and civil unions lawfully entered into in other jurisdictions, including Massachusetts, Vermont, Canada and other foreign nations, in the same manner that it recognizes such marriages lawfully entered into by opposite-sex couples.

On behalf of the Mayor, I am pleased to confirm for you that it is the policy of the City of New York to recognize equally all marriages, whether between same- or opposite-sex couples, and civil unions lawfully entered into in jurisdictions other than New York State, for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law. Also, please note that New York City recognizes equally domestic partnerships entered into in other jurisdictions in a similar manner.

Sincerely,

Anthony W. Crowell

cc: Mayor Michael R. Bloomberg

Exhibit 3

ALAN G. HEVESI
COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

October 8, 2004

Mr. Mark E. Daigneault
[redacted]

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,

Alan G. Hevesi

Alan G. Hevesi

Office of the New York State Comptroller
Alan G. Hevesi
New York State and Local Retirement System
Employees' Retirement System
Police and Fire Retirement System
110 State Street, Albany, New York 12244-

George S. King, Counsel to the Retirement System

Phone: 518-474-3592
Fax: 518-474-5119
E-mail: GKing@osc.state.ny.us
Web: www.osc.state.ny.us/retire

October 8, 2004

Mark E. Daigneault
[redacted]

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 (2nd 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 (2nd 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.[1] 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

[1] 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,

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

Exhibit 4

The City University of New York

535 East 80th Street
New York, NY 10021
tel: 212-794-5508
fax. 212-794-5426

June 17, 2005

Anthony W. Crowell
Special Counsel to the Mayor
Office of the Mayor
City Hall
New York, New York 10007

Dear Anthony:

I am writing in response to your June 7th letter and to confirm the substance of our telephone conversation today. It has long been the policy of The City University of New York to prohibit discrimination on the ground of sexual orientation and to afford the same benefits to domestic partners as it does to married couples. Mr. Pisano appears to have been the first person to present a marriage license for a same-sex couple from another jurisdiction, and there was apparently some uncertainty as to how to handle it. However, it follows from the University's existing policies that, like the City of New York, the University should recognize equally all civil unions and marriages, whether between same-sex or opposite-sex couples, lawfully entered into in jurisdictions other than New York State, for the purposes of administering its benefits programs, to the maximum extent allowed by law. Mr. Pisano's marriage license from Ontario therefore should have been sufficient for the purpose of qualifying for spousal benefits and he should not have been required to obtain a certificate of domestic partnership from the City of New York. The University will revise its written procedures so that they are consistent with those of the City, thereby ensuring that this does not occur again.

We appreciate your interest in this matter.

Sincerely,

Fredernck P. Schaffer