

**REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION
SUPPORTING RECOMMENDATIONS THAT THE BENEFICIARIES OF JUDGES
AND JUSTICES OF THE UNIFIED COURT SYSTEM WHO DIE IN OFFICE BE
ENTITLED TO RECEIVE A PENSION INSTEAD OF A DEATH BENEFIT**

In *Matter of Hilda L. O'Brien v. Morris S. Tremaine as Comptroller of the State of New York*, 285 N.Y. 233, 235-236 (1941), the Court of Appeals reviewed the State Comptroller's denial of a retirement allowance to the widow of the Late Associate Judge John F. O'Brien, who died six (6) days before his retirement.

In 1939, while John F. O'Brien was rendering the thirteenth year of his distinguished service as an Associate Judge of [the Court of Appeals], he suffered a serious impairment of health. By reason of that fact, and on December first of that year, he filed a written application with the State Comptroller***for retirement from active judicial service and for payment to him, beginning January 1, 1940, of a retirement allowance ***. Judge O'Brien was then sixty-five years of age. He had joined the retirement system in 1928 and thereafter ... he made the required contributions to the annuity savings fund, which contributions covered both his prior public service of more than twenty-eight years as an Assistant Corporation Counsel of the City of New York and his entire service as an Associate Justice of the Court of Appeals. By his application filed December 1, 1939, he selected "Option No. 2" ***to be the form of optional benefit under which he elected that payments should be made, and nominated his wife *** to receive any benefit payable according to law after his death.

Judge O'Brien died December 25, 1939, six days before the date which he had fixed for his retirement. Thereafter, on May 18, 1940, his widow applied to the State Comptroller for payment of the optional retirement benefits to which she claimed to be entitled under "Option No. 2."

After affording [Mrs. O'Brien] a full hearing, the Comptroller denied her application on the ground that the death of Judge O'Brien had occurred before his retirement and at a time when his status was that of a member of the Retirement System, not a beneficiary thereof,***. The Comptroller also ruled that *** [Mrs. O'Brien] was entitled to the return of all contributions made by her deceased husband and, in addition thereto, the death benefit provided by section 65-b [of the Civil Service Law].

By a unanimous vote, the Court of Appeals affirmed the Comptroller's decision because it had no power to amend the terms of a clearly drawn statute.

Despite the passage of 74 years, the law remains unchanged. The beneficiaries of a judge who, either dies in office, or before his or her retirement becomes effective receive a death benefit equal to three times the judge's average salary during the his or her final three years in office. However, once a judge reaches 60 years of age, his or her death benefit is reduced by 4% per annum up to a maximum of 40%.¹ In other words, the death benefit of a judge who dies in office at the age of 70 is reduced to only 60% of three times the judge's average salary during the his or her final three years in office. Neither the full, nor the reduced death benefits are as generous as the more substantial pension benefits the judge's beneficiaries would have received had the judge passed away while retired; and neither the full, nor the reduced death benefits provide beneficiaries with the option to receive a monthly allowance.

In this day and age, judges are forced to gamble that they can live long enough to retire so that when they die, their families will be entitled to receive an adequate pension that they can opt to receive as a monthly allowance. This situation has been characterized as the *Death Gamble*. Unfortunately, if a judge loses the *Death Gamble* and dies in office, it is the judge's family which suffers by receiving the necessarily smaller lump sum death benefit instead of a pension. Moreover, for the many judges who enter judicial service in their fifties or sixties without prior governmental service, the Death Gamble is not theoretical, as they hope to serve long enough to accrue significant retirement credit.

Prior to 2000, thousands of police officers, firefighters, teachers, judges and certain non-judicial personnel were required to risk the *Death Gamble*. Recognizing the unfairness of forcing participants and their families to gamble on whether a participant would live long enough to retire on an adequate pension, in 2000, the Legislature relieved those police officers, firefighters and teachers who were eligible for Service Retirement at the time of their deaths from the need to gamble with their families' financial security.² Their beneficiaries were given the same benefit options that would have been available to them had the participants retired on the date before their deaths, or had the participants chosen a monthly retirement allowance. Judges and justices of the Unified Court System were specifically excluded from the Legislation. The 2000 law only exempted police officers, firefighters and teachers from the general operation of New York Retirement and Social Security Law §§ 60 f. 1. and 3, and 448 1.

Although non-judicial court personnel also face the *Death Gamble*, their situation has been ameliorated by OCA's increasing use of early retirements to trim its budget. Instead of remaining in service to increase their pension after becoming eligible to retire, non-judicial employees have been able to retire early while significantly increasing their pension credits. Judges and justices are not eligible to participate in such early retirement programs.

¹ See, New York Retirement and Social Security Law § 448 a. 2. and 3.

² See, L. 2000, Ch. 551 amending New York Retirement and Social Security Law §§ 60 f. 1. and 3.

OCA has offered legislation to eliminate the Death Gamble for judges and justices. The last such bill A.8711 was introduced in the 2009-2010 legislative session on June 4, 2009. The bill sought to amend New York Retirement and Social Security Law §§ 60, 448 and 606 in order to permit an eligible retirement system member to elect to have the member's beneficiaries receive, in lieu of an ordinary death benefit, the retirement benefit such beneficiaries would have been entitled to receive had the member retired effective prior to the date of his or her death. It would also permit the late judge's death benefit beneficiary to posthumously make the election if the judge failed to do so before he or she passed away. Unfortunately, OCA's efforts have met with a notable lack of success.

Given the foregoing, the New York City Bar Association Council on Judicial Administration supports recommendations³ that the Legislature amend New York Retirement and Social Security Law §§ 60, 448 and 606 to permit an eligible retirement system member (such as a sitting judge) to elect that the member's beneficiary receives, in lieu of an ordinary death benefit, the death benefit to which such beneficiary would have been entitled to receive had the member retired effective prior to the date of his or her death; and to permit the late judge's death benefit beneficiary to posthumously make the election if the judge failed to do so before he or she passed away.

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³ See, *Report by the New York County Lawyers Association on the Death Gamble and Section 60 of the New York Retirement and Social Security Law*, approved by the NYCLA Board of Directors on June 8, 2015.