



NEW YORK
CITY BAR

REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION

A.9143
S.7567-A

M. of A. Tapia
Sen. Sepulveda

AN ACT to amend the retirement and social security law, in relation to death benefits for the beneficiaries of certain members of the retirement system

THIS BILL IS APPROVED

The Council on Judicial Administration of the New York City Bar Association (City Bar) supports the enactment of A.9143 / S.7567-A, which permits an eligible retirement system member to receive, in lieu of an ordinary death benefit, a death benefit such member would otherwise be entitled to receive provided such member is a state-paid judge or justice of the unified court system or a housing judge of the civil court of the city of New York.

Background. In 2015, the New York County Lawyers' Association (NYCLA) proposed an amendment to Retirement and Social Security Law that would eliminate the “*Death Gamble*” to ensure that state-paid judges and justices receive death benefits even if they were not retired by their time of death.¹ The New York City Bar Association, by and through its Council on Judicial Administration, supported NYCLA’s proposal and in keeping therewith, supports this legislation.

Reasons for Support. 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)², 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

¹ See <https://www.nycla.org/resource/board-report/report-by-the-new-york-county-lawyers-association-on-the-death-gamble-and-section-60-of-the-new-york-retirement-and-social-security-law/> (all websites last visited May 8, 2024).

² See <https://casetext.com/case/matter-of-obrien-v-tremaine-2>.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

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.

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 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%.³ 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 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.

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

As such, 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.

Given the foregoing, the City Bar supports this Bill and urges its enactment into law.

Council on Judicial Administration
Fran Hoffinger, Chair

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