

STATE OF NEW YORK DEPARTMENT OF HEALTH

Coming Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

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Brian J. Lucey, Esq.
Whiteman, Osterman & Hanna
One Commerce Plaza
Albany, NY 12260

DOH GC Opinion No. 06-02
Disposition of Remains

Dear Mr. Lucey:

In your April 5, 2006 letter on behalf of the New York State Funeral Directors Association, Inc., you have sought guidance as to the preemptive effect of Chapter 768 of the Laws of 2005 on those provisions of the New York City Code which are in conflict with that chapter, which added Public Health Law (PHL) § 4201 concerning the disposition of human remains.

The New York City Health Code, which pre-dates Chapter 768, has for some time set forth a next-of-kin hierarchy of persons who may give instructions for the disposal of the remains of a decedent who has died in New York City. The list includes in first priority a spouse or domestic partner as defined in Title 24, § 205.01(d)(1) of the code. That section applies to a domestic partner who has registered a domestic partnership in accordance with applicable law with the City. The City code's definition and priority ranking of a domestic partner differ from those of the State PHL § 4201 which is to become effective next month.

Chapter 768, approved on February 3, 2006 and effective August 2, 2006, added PHL § 4201 which, among other things, creates a list of persons in descending priority who shall have the right to control the disposition of the remains of a decedent. The list includes in second priority a surviving spouse and in third priority a domestic partner as defined in PHL § 4201(1)(c). A domestic partner is defined to include: (1) a formal party in a domestic partnership entered pursuant to law; (2) a beneficiary or covered person under the other person's employment benefits or health insurance; or (3) a person at least eighteen years of age and dependent or mutually dependent on the other person for support, indicating a mutual intent to be domestic partners. The definition excludes persons related by blood in a manner that would bar marriage in New York State. The chapter requires additional proof of six months of cohabitation and financial interdependence, in order to be deemed a domestic partner.

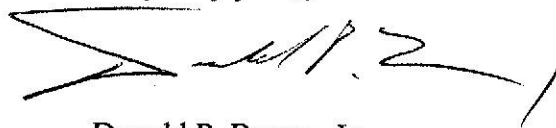
Recently, indeed since you wrote, Chapter 76 of the Laws of 2006, approved on June 7, 2006 and effective August 2, 2006, has amended PHL § 4201 as enacted by Chapter 768 of the Laws of 2005. Among other things, Chapter 76 amends the State definition of domestic partner. The definition continues to include in substantially the same form as Chapter 768: (1) a formal party, etc.; (2) a beneficiary or covered person, etc.; or (3) a person dependent or mutually interdependent, etc. The additional requirements for proof of cohabitation and financial interdependence are changed. Chapter 76 adds to the definition persons registered as domestic partners in a registry maintained by an employer of either party or any state, municipality or foreign jurisdiction. Chapter 76 continues to rank in second priority a surviving spouse and in third priority a domestic partner as newly defined in PHL § 4201(1)(c).

Thus, the State definition of domestic partner in PHL § 4201, effective August 2, 2006, will be broader than the City's definition in § 205.01(d)(1), but will include all persons included in the City's definition. The State's ranking of persons who shall have the right to control the disposition of the remains of a decedent will place domestic partners in different priority than the City does. There are other differences in the priority rankings. For example, the city list includes nieces and nephews of the decedent, but the state list will not, and the state list will include a person designated in writing by the decedent, but the city list does not.

Neither Chapter 768 nor Chapter 76 limits the geographic applicability of PHL § 4201 and so, by its terms, § 4201 will apply throughout the state, including in New York City. As you note, every local government, including that of New York City, shall have the power to adopt and amend local laws "not inconsistent with the provisions of [the state] Constitution or any general law". See, N.Y. Constitution, Article IX, § 2(c)(i). Where the State has set up a complete and comprehensive scheme for controlling a particular activity of substantial state concern, a municipality may not enforce a local law inconsistent with the state statute. Consolidated Edison Company v. Town of Red Hook, 60 N.Y.2d 99 (1983); Matter of Kress & Co. v. Department of Health, 283 N.Y. 55 (1940).

When Title 24, § 205.01(d)(1) of the New York City code was enacted, neither PHL § 4201 nor any other comprehensive state scheme for the regulation of the disposition of a decedent's remains existed, and so the city code was not then inconsistent with any state statute. However, in my opinion, when PHL § 4201 becomes effective on August 2, 2006, the city code - to the extent that it may continue to be inconsistent with § 4201 - will to that extent be preempted by state law.

Very truly yours,



Donald P. Berens, Jr.
General Counsel