

## Rights and Recognition for Same-Sex Marriage

by {ga=ejgoodman}

Friday, September 26, 2008 12:00 AM

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When Patricia Martinez, an employee of [Monroe Community College](#), applied for health care benefits for her spouse, Lisa Ann Golden, whom she had married in Canada, the college denied the benefits, saying it covered only opposite sex spouses. But early in 2008, an appellate court in northern New York

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that by failing to recognize the marriage, the employer had unlawfully discriminated based on sexual orientation. The court concluded, "The sole reason for defendants' rejection of the marital status of plaintiff is her sexual orientation."

A valid same-sex Canadian marriage such as Martinez's and Golden's, is entitled to recognition in this state, and the plaintiff's health care benefits must be extended to her same-sex spouse, wrote Justice Erin M. Peradotto for the Supreme Court Appellate Division, Fourth Department.

Martinez v County of Monroe, received little attention until this spring, when the state's new governor, David Paterson, [issued a memorandum](#) directing all state agencies to treat the valid same-sex marriages of other jurisdictions that permit same-sex marriage -- Canada, Spain, Belgium, the Netherlands, South Africa, Massachusetts and California -- as they would any other marriage. This was similar to earlier directives by former State Comptroller Alan Hevesi and his successor, Thomas DiNapoli.

The governor, in making what he called "a strong step toward marriage," was following the Martinez court mandate. He cautioned state agencies that violations could subject the government to lawsuits and that recognition of same-sex marriages is "consistent with state policy."

### **Married There, Married Here**

For more than a century, New York has recognized the valid marriages of other jurisdictions, except if they involve conditions that are illegal in New York or against public policy, such as polygamy or incest. However, homosexuality is not illegal and does not violate public policy, nor is there any law in this state prohibiting recognition of such marriage. The Martinez decision relied on the absence of any law banning same-sex marriage even though the state's highest court had previously held in [Hernandez v Robles](#) that, under existing law, gay men and lesbians have no right to enter marriage. In other words, the state does not allow gay marriage but also does not prohibit its recognition.

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Unlike the majority of states, New York has not adopted the theory of the federal [Defense of Marriage Act](#)

and has not adopted legislation denying comity or the usual constitutional requirement of giving full faith and credit to acts -- marriages or not -- that are valid in other states. In a country comprised of many states, individuals and businesses are generally free to move from one state to another without disruptions. Gay marriage has become a glaring exception. Same sex couples might be married in one state, but not married when they cross state lines. This is what recognition is meant to avoid.

### Legal Challenge

In a challenge to the governor's position, New York State Sen. Martin Golden (apparently not related to Lisa Ann Golden, spouse of Patricia Martinez) and others represented by the [Alliance Defense Fund](#) of Arizona, which is opposed to same-sex marriage, brought a "taxpayer" lawsuit claiming the governor had acted outside his authority. This was the fourth case brought by Alliance on behalf of New York taxpayers -- the others challenging earlier directives from Hevesi and DiNapoli.

The suit argued Paterson's directive would create a "wrongful expenditure" and waste taxpayer money because it would, for example, lead to state funds paying health and other benefits for two people instead of one.

Ruling on the case, Acting Justice Lucy Billings of the Supreme Court, sitting in the Bronx, dismissed the lawsuit. She acknowledged that state funds are involved, but cited lack of specificity as to what funds would be expended.

Alliance has lost its other three cases as well. The group, based in Scottsdale, Ariz., has appealed all four.

In discussing the taxpayer action, Billings wrote, "The governor's directive is an incremental but important step toward equality long denied." In her 27 page decision, the judge said, "When partners manifest the commitment to their relationship and family by solemnizing that commitment elsewhere, through one of life's most significant events, and come to New York, whether returning home or setting down roots, to carry on that commitment, nothing is more antithetical to family stability than requiring them to abandon solemnizing commitment."

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None of the directives, nor the various lawsuits are about registered domestic relationships or civil unions, and they do not create a right to marry in this state. In accord with the Martinez decision in Monroe, Billings emphasized that the legislature may enact a ban on recognizing out-of-state marriages, or, on the other hand, create a right to marry. Absent such legislation, the decision said, "The governor's directive is another permissible, if not mandated, step toward the objective of equality for a group for whom legal as well as practical barriers to equality persist."

Billings held that same-sex couples "expect equal treatment with other married couples in legal protections and economic benefits for the couples and for their children: owning property as a unit, insurance, workers' compensation, health benefits, medical decision making, wrongful death claims, intestacy, inheritance and espousal privilege, for example. The emotional, familial, financial, and legal stability that accompanies marriage establishes a strong presumption in favor of the marriage's continued validity."

### Getting the Promised Benefits

Still, barriers remain. Ken Sherrill, professor of political science at Hunter College, who married his long-time partner, Gerald Otte in Canada in August 2003 said, "While my spirits are lifted by the governor's actions, I have yet to experience any of the substantive benefits. Without implementation, the order isn't worth the paper it's written on, and the state has yet to issue guidelines, rules and regulations for implementing the policy."

A second problem, Sherrill points out, is that many of the issues involve health and related benefits under contracts with out-of-state vendors. Like Martinez in Monroe, Sherrill was denied certain benefits for his spouse. But the Martinez policy was with a New York company, while Sherrill's union, PSC-CUNY, though part of the state payroll, carries New York State United Teachers' catastrophic care insurance issued by Marsh Affinity Group Services of Illinois. Marsh, according to Sherrill, refuses to accept a Canadian marriage license as proof of the marital relationship.

"We have to see if government agencies or unions representing public employees should be barred from contracting out fringe benefits to corporations that do not recognize marriages like mine," Sherrill said. "Obviously, one solution is to find other vendors."

In the suit, the Office of the Attorney General's Monica Connell represented the governor. Attorneys for [Lambda Legal Defense and Education Fund](#), were represented by Susan

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Sommer, with pro bono assistance from Kramer Levin Naftalis & Frankel LLP. Brian Raum argued the case for Alliance Defense Fund.

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