1 On February 1, 2008, the Appellate Division for the Fourth Department, the intermediate appeals court covering Western and Central New York, issued a truly historic decision, recognizing the same-sex marriage of Pat Martinez and Lisa Golden of Rochester. *Martinez v County of Monroe*, 2008 NY Slip Op. 00909 (4th Dept). In 2004 Pat and Lisa had gone to Niagara Falls in Ontario to be married. Ontario at that time, and all of Canada now, allows persons of the same sex to be married.

The decision was historic because it represents the first appeals court victory in the country for same-sex couples wanting to marry. Yet, the victory is somewhat limited by the circumstances of the case and by variations in state law.

The key circumstance was that Pat and Lisa were married in a jurisdiction that explicitly permitted persons of the same sex to marry. They could not marry in New York because its statutes, as interpreted by the New York Court of Appeals, restrict marriage to opposite-sex couples. In 2006 the Court of Appeals held that this restriction did not violate the New York Constitution. *Hernandez v Robles*, 7 NY3d 338 (2006).

In 2001 Pat and Lisa entered into a Vermont civil union. However, the civil union did not confer upon them the status of marriage and did not grant them any rights under New York law. *Langan v St. Vincent's Hospital of N.Y.*, 25 AD3d 90 (2nd Dept. 2005).

Pat and Lisa could not travel to Massachusetts to marry because Massachusetts will not issue a marriage license to nonresidents who are unable to marry under the laws of their home state.

Ontario thus became the nearest jurisdiction where Pat and Lisa could marry legally. Once married, they invoked a century-old common-law "doctrine." New York will recognize a marriage validly formed in another jurisdiction, which could not be solemnized within New York, with two exceptions. The out-of-state marriage must not be prohibited by the "positive law" of New York and must not be polygamous or incestuous. *Van Voorhis v Brintnall*, 86 NY 18, 24-26 (1881); *Matter of May*, 305 NY 486, 491-492 (1953).

Common law marriage is an example of a type of marriage not available in New York, which New York courts have frequently recognized if one of the parties proves the requisite facts. See, e.g., *Mott v Duncan Petroleum Trans*., 51 NY2d 289 (1980).

In Pat's and Lisa's case the appeals court held that the exceptions did not apply and found no other reason to deviate from the doctrine. It recognized their Ontario marriage.

The court noted that the "overwhelming majority of states" (over 40 to be precise) had adopted by statute or referendum an express prohibition on the recognition of out-of-state same-sex marriages. If it wants, the New York Legislature could follow the crowd. This court would not. The New York Court of Appeals also deferred to the Legislature on changing the law on same-sex couples getting married within New York. *Hernandez v Robles*, supra at 358-359.

Some writers have questioned the logic of the decision. They argue that New York has a statewide definition of marriage, which applies to all marriages wherever solemnized. This definition precludes opposite-sex marriages. The trial court in Pat's and Lisa's case was of this opinion.

The writers are wrong on the law. See the cases cited above and the example of common law marriage. And the writers are wrong as a matter of public policy. New

York recognizes the lawful actions of persons from other states and countries, which actions could not occur here, because it wants the actions of its residents recognized outside New York. See, *Loucks v Standard Oil Co.*, 224 NY 99 (1918). This policy underlies the Full Faith and Credit Clause in the U. S. Constitution. As applied to marriages the policy is called comity.

Recognizing an out-of-state marriage which could not be formed within New York enables the parties to the marriage to enjoy the rights conferred by government on spouses. These are legion and include the right to elect against a will, *Matter of May*, supra, receive workmen's compensation, *Mott v Duncan Petroleum Trans.,* supra, obtain child support, *Fernandes v Fernandes*, 275 AD 777 (2nd Dept. 1949), and obtain a divorce, *Carpenter v Carpenter*, 208 AD2d 882 (2nd Dept. 1994).

Pat is an employee of Monroe Community College. Her collective bargaining agreement granted spouses health benefits without defining the word spouse. When Pat asked the College to cover Lisa after their Ontario marriage, citing the law on recognition, the College refused. So the battle was joined over the right to health care and Pat prevailed on appeal. The decision was unanimous.

The appeals court could have ended its decision after it determined that the College must recognize Pat's and Lisa's marriage and provide Lisa health coverage. But it didn't. It further held that the College's action was discrimination on the basis of sexual orientation, a violation of Executive Law § 296.

Section 296 prohibits an employer from discriminating against an employee "in compensation or in terms, conditions or privileges of employment" on the basis of certain characteristics, such as race and gender. In 2002 the New York Legislature added sexual orientation to the list of characteristics.

The decision is the first statement by a New York appellate court on the addition. The College argued that its refusal turned on Pat and Lisa not being married, or so it thought, not their sexual orientation. The appeals court found this reasoning to be "circular."

The decision is binding on all trial courts in New York.

What happens next? The College (really Monroe County since it provides most of the College's funding) could seek leave to appeal to the New York Court of Appeals. Weighing against such a move is the infrequency with which leave is granted and the cost of a second appeal if leave is granted.

During the lawsuit Pat's union negotiated a new collective bargaining agreement which extended health benefits to same-sex partners. Since January 1, 2006, Lisa has been covered. All that remains to this controversy is the amount of money that the College must reimburse Lisa for health care that she paid between her marriage and December 31, 2005. This sum is about $3,500.

Pretend you are the Monroe County Executive. You have just closed a $50 million deficit on the backs of suburban school districts. Do you pay Pat and Lisa $3,500 or spend many thousands more on an appeal that has a poor chance of success, just to make a political point?

The day this article in the Rochester Business Journal, Monroe County Executive Maggie Brooks announced that the county would appeal. See our page with more information and references about this issue.