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12-2023

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Arthur S. Leonard

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and that she had visited Evanston was concerning. As such, the court held that the trial court's decision was not against the manifest weight of evidence.

Justice Rena Van Tine authored the judgement and opinion of the court. Justices Bertina Lampkin and Debra B. Walker concurred in the judgement and opinion.

A.A. was represented by Aziza Khatoon, Benjamin J. Bennett, and Miriam Hallbauer of the Legal Aid Society of Chicago. Her mother, Nita A., was represented by Lawrence A. Stein of Lawrence A. Stein LLC.. ■

Jared M. Trujillo is an Associate Professor at CUNY Law School.

New York Appellate Division Applies Marriage Equality Law Retroactively in Lesbian Divorce Case

By Arthur S. Leonard

The New York Appellate Division, 2nd Department, ruled on November 15 in *Mackoff v. Bluemke-Mackoff*, 2023 N.Y. Slip Op 05721, 2023 N.Y. App. Div. LEXIS 5809, 2023 WL 7561813, that New York's Marriage Equality Law (MEL), which made it legal for same-sex couples to marry in New York as of July 24, 2011, should be applied retroactively to a lesbian couple's July 21, 2005, religious marriage ceremony in deciding whether assets acquired between those two dates should be considered marital property for purposes of equitable distribution in a divorce proceeding. Writing for a unanimous four-judge panel, Justice William G. Ford wrote that the issue presented was apparently one of first impression for a New York appellate court and reversed the trial court refusal to allow the respondent to amend her answer to the complaint using the earlier date for the marriage.

Robin Mackoff and Linda Bluemke had a traditional Jewish wedding ceremony in 2005, which was performed and "solemnized" by a rabbi in the presence of about 100 guests. Wrote Ford, "The ceremony was performed under a chuppah and the parties signed a Ketubah." A chuppah is the traditional canopy held over the couple during the ceremony, and a Ketubah is a formal contract of marriage written in Hebrew which each of them signs. They did not have a marriage license, because New York did not issue marriage licenses to same-sex couples at that time. Robin and Linda lived together as a married couple after that ceremony. The marriage then had no legal significance.

In June 2011, New York enacted the MEA, which amended the state's marriage law to allow same-sex couples to get marriage licenses and enter legally recognized marriages. The MEA provided that there should be no distinction between same-sex and difference-sex marriages for any purpose of New York law. In June 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges*, 576 U.S. 644, that same-sex couples have a federal constitutional right to marry. Since then, courts in many states have struggled with the questions of whether and how to apply that ruling retroactively, since it was based on the 14th Amendment, which was adopted in 1868 after the Civil War.

The question of retroactive application is easiest when a state recognized common law marriage, a doctrine under which a couple who live together and hold themselves out to the public as spouses would have that legal status despite the lack of a marriage license or a formal marriage ceremony. New York used to have common law marriages, but a statute passed in the 1930s put an end to that practice, although New York courts will still recognize a common law marriage that was formed *prior* to that statute or that is recognized in the state where the couple resided when they had fulfilled that state's requirements for proving a common law marriage. Only a handful of states still recognize common law marriage today, the doctrine has been abolished either by statute or judicial decision in the other states.

The Mackoff-Bluemke marriage occurred long *after* common law marriage was abolished by statute in New York, so the question arising in this case is whether the religious marriage ceremony that they had in 2005 would be irrelevant or would be deemed "valid" for purposes of the state's Equitable Distribution Law.

When Robin filed for divorce on January 23, 2019, she claimed in her petition that they were married on July 28, 2011. When Linda filed an answer to the petition several months later, she did not "refute" the July 28, 2011, marriage date, and she was then awarded certain relief pending a final ruling on the divorce, including temporary spousal

maintenance. Justice Ford's opinion doesn't reveal the situation regarding assets that Robin or Linda acquired, either jointly or separately, between their religious marriage ceremony and their civil marriage ceremony, but presumably the assets are substantial enough to have prompted Linda to subsequently move the court for permission to amend her answer to substitute the earlier date for the marriage. Robin opposed the motion.

Suffolk County Supreme Court Justice John J. Leo denied Linda's motion on two grounds. First, Justice Leo concluded that the amendment was "patently devoid of merit" because the MEA did not go into effect until 2011 and was not by its terms retroactive. Second, he found that it would be prejudicial to Robin to allow the amendment, in light of the time that had elapsed and the temporary relief that had already been awarded to Linda after she had filed her original answer. Linda appealed this ruling.

The Appellate Division decided that Justice Leo was wrong on both issues. Although the MEA did not specifically say that it was retroactive, it did say that for all purposes same-sex and different-sex marriages should be treated the same, and there is precedent under New York Law for deeming a marriage that was performed without a license but otherwise in conformity with New York Law as "valid." Justice Ford cited three prior New York cases, *Bernstein v. Benchemoun*, 216 App. Div. 3d at 894; *Yusupov v. Barin*, 197 App. Div. 3d at 539; and *Matter of Faraj*, 62 App. Div. 3d at 1083. In none of these did the court found the unlicensed marriage to be valid, but in each case, there were problems with proving that all the requirements for "solemnization" of the marriage had been met. The courts stated that if those requirements had been met, the marriages would have been deemed "valid."

Justice Ford pointed out that although the MEA said nothing about retroactive application, it was a "remedial" statute intended to remedy a problem in the law – in this case, the denial of a fundamental right to marry to same-sex couples as proclaimed by the legislature's findings in the statute – and the New York State Tax Department had already interpreted the statute as being retroactive for parties who prove they *would* have married had it been possible, usually by showing some sort of civil union ceremony or agreement between them. In addition, New York courts have recognized same-sex marriages that were legally contracted in other jurisdictions (the handful of other states that had marriage equality before New York, or Canada, for example) before July 2011 as valid. Taking these factors together, the court decided that Linda's argument for retroactive recognition of the 2005 marriage was not "patently devoid of merit." The court also found that it would not be prejudicial to Robin to allow the amendment of Linda's answer. "Neither the length of time between the defendant's original answer and her motion for leave to amend, nor the fact that the amendment may affect the plaintiff's maintenance and equitable distribution obligations, are sufficient to establish prejudice to the plaintiff," declared the court, sending the case back to Justice Leo while granting Linda's motion to amend her answer.

It is still up to Justice Leo to determine, based on evidence presented by Robin and Linda, whether the 2005 marriage is valid for this purpose. The facts alleged by Linda suggest none of the problems that led earlier courts to reject unlicensed marriages two of which were unlicensed Jewish marriages performed by rabbis. There was also a case of a marriage performed without a license by an Imam, but the ceremony took place in New Jersey, not New York, and New Jersey law renders invalid all unlicensed marriages, so the New York law on this subject could not be applied, and the New York court would not recognize the marriage in determining distribution of assets from the estate of one of the "spouses" who died without a will.

Danielle Sican and Stanford Bankston of Michael B. Schulman & Associates, P.C., Melville, New York, represent Linda. Gilbert L. Balanoff of Garden City, New York represents Robin.

The other judges on the unanimous 2nd Department panel were Betsy Barros, Paul Wooten, and Barry E. Warhit. ■

Eighth Circuit Finds Bisexual Guatemalan Failed to Establish Persecution

By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the Eight Circuit has found that a bisexual Guatemalan man was not entitled to asylum because he failed to establish that the groping and homophobic slurs he endured during childhood and young adulthood rose to the level of persecution and that he had not established a pattern or practice of persecution of bisexual men in Guatemala, in *Juarez-Vicente v. Garland*, 2023 WL 7317335 (8th Cir., November 7, 2023).

Petitioner stated that from elementary school through adulthood, his classmates and coworkers touched his "private parts" and subjected him to homophobic slurs because he was bisexual. He left both the University and a workplace on account of abuse and harassment, but never reported any incidents to his school or to the police. Petitioner came to the United States seeking asylum, withholding of removal, and protection under the Convention Against Torture. An Immigration Judge denied his applications for relief and the Board of Immigration Appeals dismissed his appeal, finding Petitioner "did not experience harm severe enough to be persecution" and that he did not show the Guatemalan government would be unwilling or unable to protect him from future harm. He brought a timely petition for review of the decision before the 8th Circuit.

Speaking for a panel of the court, Trump-nominated Circuit Judge Jonathan Allen Kobes, the first federal judicial nominee ever confirmed by a tie-breaking vote, noted that the review of the Board's dismissal was under the substantial evidence standard. Petitioner argued that "repeated sexual harassment by classmates and coworkers over more than ten years cumulatively is past