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For Gays, Read the Fine Print

By KENJI YOSHINO

THE news earlier this month about how a New York court treated the dissolution of a gay relationship demonstrates how far gays have come in the struggle for marriage equality and how far we have yet to go. The court held that a separation agreement between two men was binding even though they were not married.

This is an advance over earlier cases in which such agreements were sometimes deemed unenforceable. At the same time, it falls far short of marriage.

The case sounds like a contracts question on the New York Bar Exam. Steven Green and David Gonzalez moved in together in 2001. Over the course of their relationship, Mr. Green, whom the court describes as "a person of considerable assets and income," showered Mr. Gonzalez with gifts, including cars and a ski house.

In 2005, the couple, whose primary residence was in Westchester County, traveled to Massachusetts, which permits resident same-sex couples to marry, and took part in a marriage ceremony on Valentine's Day. But months later, they decided to end their relationship.

In September 2005, the two men signed a written separation agreement under which Mr. Green paid Mr. Gonzalez \$780,000 and Mr. Gonzalez transferred the title of the ski house to Mr. Green. More than a year later, when Mr. Gonzalez filed for divorce, Mr. Green sought to rescind the contract. He argued that because there was no marriage, the contract was invalid. Question: Can Mr. Green get his money back?

In responding with a thundering "no," the court answered exactly right. It first observed that the marriage issue was a red herring. Massachusetts only permits resident same-sex couples to marry. As nonresidents, Mr. Green and Mr. Gonzalez's marriage ceremony did not entitle them to recognition in Massachusetts, much less New York.

Mr. Green argued that under contract law, it was enough that he and Mr. Gonzalez believed they were married. (Under the doctrine of "mutual mistake," a contract can be deemed invalid if both parties are laboring under a misapprehension that goes to its heart.) The court rejected this contention as well. It observed that Mr. Green and Mr. Gonzalez never held themselves out to be married in filing taxes or buying property, and

that, by Mr. Green's own admission, they had gotten married only "because it seemed like a nice thing to have, since couples in the gay community are seeking such status."

The real issue, the court said, was whether separation agreements between unmarried, cohabiting individuals are binding. Under New York law, such contracts are enforceable so long as "illicit sexual relations were not part of the consideration of the contract." In other words, contracts will not be invalidated just because the parties are cohabiting, so long as they do not violate the prohibition on prostitution.

It may seem obvious that a separation agreement is not what used to be called a "meretricious contract." But other courts in other times have deemed contracts between two people who have been sexually involved with each other with suspicion, particularly if the people are of the same sex. In dispensing with the "meretricious contract" exception in a footnote, the court properly refused to dignify arguments made under it. It concluded that the contract was enforceable.

I am confident that most courts around the country will get this question right. My only concern about such decisions is their potential to serve as substitutes for same-sex marriage, rather than as stations toward it. Too many people reacted to the New York decision by reaffirming that gays could get all the significant benefits of marriage through contract. This is false.

Gays cannot enter into a contract for benefits bestowed on married couples by third parties. Such benefits include those that the government provides, like immigration rights, custody rights, tax benefits and the various spousal privileges available in litigation. They also include benefits provided by private institutions, like access to a partner's hospital room or coverage under his health plan. And a gay couple, of course, cannot enter a contract with each other for the simple dignity of having the state recognize a commitment between them as a marriage. This seems to be the only count on which Mr. Green was right: marriage is indeed "a nice thing to have."

The fiction that gays can get the rights of marriage through contract is pernicious because it permits inertia on the part of those who have incentives to remain inert. As with any civil rights struggle, those in power will be tempted to rest on their laurels. Prior to election, Gov. Eliot Spitzer was an open and ardent supporter of same-sex marriage. His Jan. 3 State of the State address, however, made no reference to the issue, other than the oblique phrase that the civil rights movement in the state "still has chapters to be written."

But the final chapter in this struggle must be marriage. And it must be written soon.

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