LAW AND THE FAMILY

## "OPEN COURT STIPULATIONS IN MATRIMONIAL AGREEMENTS"

[New York Law Journal](http://www.nylj.com/)

May 23, 2000

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Provisions of state law, if literally applied, would appear to foreclose the

possibility of a less-formal agreement qualifying to serve in lieu of equitable

distribution in case of divorce. However, when construed in the light of

legislative purpose, and in pari materia with CPLR 2104, most courts, to

date, have held that a stipulation on the record in open court may serve in

lieu of the prescribed formalities.

Some of the above-mentioned provisions include the following:

Domestic Relations Law, 236B)(3), which governs matrimonial agreements. It

provides, in part:

Agreement of the parties. An agreement by the parties, made before or during

the marriage, shall be valid and enforceable in a matrimonial action if such

agreement is in writing, subscribed by the parties, and acknowledged or

proven in the manner required to entitle a deed to be recorded. Such an

agreement may include (1) a contract to make a testamentary provision of any

kind, or a waiver or any right to elect against the provisions of a will; (2)

provision for the ownership, division or distribution of separate and marital

property; (3) provision for the amount and duration of maintenance or other

terms and conditions of the marriage relationship, subject to the provisions

of section 5-311 of the general obligations law, and provided that such

terms were fair and reasonable at the time of the making of the agreement and

are not unconscionable at the time of entry of the final judgment; and (4)

provision for the custody, care, education and maintenance of any child of

the parties, subject to the provisions of section two hundred forty of this

chapter. Nothing in this subdivision shall be deemed to affect the validity

of any agreement made prior to the effective date of this subdivision.

New York Civil Practice Law 2103 governs stipulations made between the parties

to an action or proceeding. It provides:

Stipulations. An agreement between parties or their attorneys relating to

any matter in an action, other than one made between counsel in open court,

is not binding upon a party unless it is in a writing subscribed by him or

his attorney or reduced to the form of an order and entered.

After reading those provisions, to be valid, and to serve in lieu of equitable

distribution, one concludes that a matrimonial agreement must be in writing,

subscribed by the parties, and acknowledged or proven in the manner required to

entitle a deed to be recorded. [FN1]

The provisions appear to prevent less-formal pacts from qualifying to serve

instead of equitable distribution. But, as said above, most courts have held

that a stipulation in open court may bypass formalities.

To illustrate some case law on the subject we have the following: the

Appellate Division, First and Second Departments, [FN2] have sustained the

validity of stipulations in lieu of formal agreements, but the Third and Fourth

Departments have failed to do so. [FN3]

In Matisoff v. Dobi, [FN4] the Court of Appeals held that a written

postnuptial agreement that was signed by the parties but not acknowledged is

unenforceable. Plaintiff and defendant were married on April 13, 1981. Because

of defendant's two prior unsuccessful marriages, plaintiff wished to protect

her real property and other assets in the event that their marriage failed.

Thus, at plaintiff's urging, the parties entered into a postnuptial agreement

one month later.

The agreement provided that the parties waived any rights of election pursuant

to the Estates, Power and Trusts Law, "and other rights accruing solely by

reason of the marriage" with regard to property presently owned or subsequently

acquired by either party. It specified that "neither party shall have nor shall

such party acquire any right, title or claim in and to the real and personal

estate of the other solely by reason of the marriage of the parties." The

agreement was drafted by an attorney friend of plaintiff and signed by both

plaintiff and defendant. The document was not acknowledged by the parties or by

anyone else.

The divorce action was commenced on Sept. 17, 1992. Defendant sought to

enforce the postnuptial agreement as a bar to any claim of entitlement by

plaintiff to his property acquired before or during the marriage. Plaintiff

contended that the agreement was invalid because it was not acknowledged as

required by Domestic Relations Law 236(B)(3). Both parties testified at

trial that they had signed the agreement, and neither made any allegation of

fraud or duress.

The Supreme Court deemed the agreement unenforceable, concluding that

admissions by the parties, during a divorce trial 13 years later, that the

signatures on the agreement were genuine, aided to validate the unacknowledged

agreement. The Appellate Division reversed, with one Justice dissenting. It

concluded that the terms of the postnuptial agreement "were acknowledged and

ratified in the daily activities and property relations of the parties

throughout the marriage.''

The Court of Appeals determined that, in these particular circumstances, the

agreement was contrary to the plain language of Domestic Relations Law

236(B)(3), which recognizes no exception to the requirement of formal

acknowledgment. It therefore reversed, holding that the requisite formality

explicitly specified in Domestic Relations Law 236(B)(3) is essential. The

agreement was concededly unacknowledged and, therefore, did not comply with the

terms of Domestic Relations Law 236(B)(3).

Defendant argued that literal compliance with the statutory requirement of

acknowledgment is not required so long as the purpose of that requirement is

satisfied. The Court of Appeals held that the unambiguous statutory language of

236(B)(3), its history and related statutory provisions, establish that the

Legislature did not mean for the formality of acknowledgment to be expendable.

The court noted that Domestic Relations Law 236(B)(3) and the Real Property

Law do not specify when the requisite acknowledgment must be made and that it

was unclear whether acknowledgment must be contemporaneous with the signing of

the agreement. It pointed out that while it has affirmed determinations

allowing parties to provide the requisite acknowledgment under similar

statutory requirements at a later date, it noted that it had never directly

addressed the question whether and under what circumstances the absence of

acknowledgment can be cured and decided that it need not resolve this issue.

It held that even assuming, without deciding, that the requisite

acknowledgment could be supplied at the time of the matrimonial action, each

party's admission in open court that the signatures were authentic did not, by

itself, constitute proper acknowledgment under 236(B)(3).

The statute prescribes acknowledgment "in the manner to entitle a deed to be

recorded." This requires both that an oral acknowledgment be made before an

authorized officer and that a written certificate of acknowledgment be

attached (see, Real Property Law 291, 306). As the Court explained, "[a]n

instrument is not 'duly acknowledged' unless there is not only the oral

acknowledgment but the written certificate also, as required by the statutes

regulating the subject." Because no proper certificate of acknowledgment was

attached to the agreement, the court held that the postnuptial agreement was

invalid.

The Court of Appeals held that the DRL 236(B)(3) requires the invalidation

of any nuptial agreement not acknowledged in the manner of a recordable deed.

Recognizing that such a "bright line" rule might produce harsh results, the

Court nonetheless expressed the view that it was of paramount importance that

the enforceability of nuptial agreements be consistent and predictable and,

accordingly, held that the validity of such agreements should not be made to

depend upon subsequent fact-sensitive inquiries respecting the parties'

original motivations or their postcontractual economic relations during

marriage.

A literal reading of Matisoff would lead to the inescapable conclusion that

open court stipulations are not valid and enforceable agreements within the

meaning of DRL 236(B)(3). Not so!

Recently, in Nordgren v. Nordgren, [FN5] an action for a divorce and ancillary

relief, the plaintiff wife appealed from an order of the Supreme Court which

denied her motion to vacate the parties' stipulation of settlement. The

Appellate Division affirmed. The plaintiff contended that the parties'

stipulation had to be vacated because it was not reduced to a writing, signed

by the parties and acknowledged. The court noted that CPLR 2104 provides

that, other than an agreement between counsel in open court, an agreement

between parties or their attorneys relating to any matter in an action is not

binding unless it is in a writing subscribed by the party or his or her

attorney or reduced to the form of an order and entered. It found that the

agreement was made in open court between counsel with the parties present.

Therefore, there was no necessity that it be reduced to a writing and signed.

It stated that to the extent that the plaintiff relied upon Matisoff v. Dobi to

support her position, "there is nothing in Matisoff v. Dobi, 90 NY2d 127,

which indicates that the Court of Appeals intended to abrogate the well-settled

law of Rule 2104 of the Civil Practice Law and Rules.''

And, in Charland v. Charland, [FN6] the Third Department appears to have

relaxed its restrictive rule. In Charland, immediately prior to commencement of

trial in April 1997, defendant withdrew his answer, permitting plaintiff to

obtain a divorce on the ground of cruel and inhuman treatment.

A trial commenced as to the remaining issues, with the parties

stipulating to the terms of the Family Court custody order, to child support

and to the value of all marital assets and liabilities except the marital

residence and defendant's corporation. Supreme Court thereafter rendered a

written decision upon the issues of custody, child support, maintenance and

equitable distribution. Defendant appealed from the judgment entered thereon.

The Third Department rejected defendant's assertion that reversal was mandated

because the Supreme Court's determinations as to custody, child support and

equitable distribution improperly relied on certain stipulations by the parties

which did not conform to the requirement of Domestic Relations Law 236(B)(3)

in that they were not "in writing, subscribed by the parties, and acknowledged

or proven in the manner required to entitle a deed to be recorded."

It found this assertion to be without merit, stating: "The requirements of

Domestic Relations Law 236(B)(3) pertain to stipulations which effect the

equitable distribution of marital property (see generally, Matisoff v. Dobi,

90 NY2d 127, lv. denied 91 NY2d 805).

Here, the parties' stipulations related to the value of certain marital

property (and debt); equitable distribution, which was determined by the court;

custody; and the manner in which child support was to be calculated. As such,

their stipulations were not marital agreements within the meaning of

Domestic Relations Law 236(B)(3), but rather agreements by the parties,

through their counsel in open court, within the purview of CPLR 2104.

FN(1) Dom. Rel. L. 236, Part B, subdiv 3.

FN(2) Sanders v. Copley, (1989, 1st Dept.) 151 App Div 2d 350, 543 NYS2d 67;

Harrington v. Harrington, (2d Dept) 103 AD2d 356, 479 NYS2d 1000. See also,

Josephson v. Josephson, 121 Misc.2d 572, 469 NYS2d 285.

FN(3) Lischynsky v. Lischynsky, (3d Dept) 95 AD2d 111, 466 NYS2d 815 and

Hanford v. Hanford (4th Dept.) 91 AD2d 829, 458 NYS2d 418.

FN(4) 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376.

FN(5) AD2d , 695 N.Y.S.2d 588 (2d Dept.,1999).

FN(6) 1999 WL 1126799 (N.Y.A.D. 3 Dept.).

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5/23/2000 NYLJ 3, (col. 1)

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