
LAW AND THE FAMILY

"OPEN COURT STIPULATIONS IN MATRIMONIAL AGREEMENTS"

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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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