

Unacknowledged Nuptial Agreements By Joel R. Brandes

Domestic Relations Law § 236 (B) (3) deals with the enforceability of nuptial agreements in a matrimonial action. It provides that, “[a]n 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.”

In *Matisoff v Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997) the Court of Appeals observed that Domestic Relations Law § 236(B)(3), requires that a nuptial agreement be signed and duly acknowledged, (or proven in the manner required to entitle a deed to be recorded), to be valid and enforceable in a matrimonial action. It held that there are no exceptions and specifically rejected the argument that the Legislature intended that some agreements, though unacknowledged, could be enforceable, observing that the history of Domestic Relations Law § 236(B)(3) did not reflect that intent. It noted that Domestic Relations Law § 236(B), does not incorporate the Statute of Frauds. Rather, “it prescribes its own, more onerous requirements for a nuptial agreement to be enforceable in a matrimonial action. In contrast to the Statute of Frauds, Domestic Relations Law § 236(B)(3) mandates that the agreement be acknowledged.” The Court of Appeals observed that the formality of acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care. It held that “by clearly prescribing acknowledgment as a condition, with no exception, the Legislature opted for a bright-line rule.” It concluded that an unacknowledged agreement is invalid and unenforceable in a matrimonial action.

In *Matisoff v Dobi*, the Court held that each party's admission in open court that the signatures were authentic did not, by itself, constitute proper acknowledgment under Domestic Relations Law § 236(B)(3). For that reason, it was unnecessary to decide whether and under what circumstances the absence of an acknowledgment can be cured.

In *Galetta v Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013) a matrimonial action, plaintiff Michelle Galetta sought a determination that a prenuptial agreement she and defendant Gary Galetta signed was invalid due to a defective acknowledgment. They each separately signed their prenuptial agreement about a week before the wedding. Neither of them was present when the other executed the document and the signatures were witnessed by different notaries public. Their signatures and the accompanying certificates of acknowledgment were set forth on a single page of the document. The certificates appeared to have been typed at the same time, with spaces left blank for dates and signatures that were to be filled in by hand. The certificate of acknowledgment relating to Michelle's signature contained the boilerplate language typical of the time. However, in the acknowledgment relating to Gary's signature the

certificate failed to indicate that the notary public confirmed the identity of the person executing the document or that the person was the individual described in the document.

The Court of Appeals observed that “[t]hree provisions of the Real Property Law must be read together to discern the requisites of a proper acknowledgment. Real Property Law § 292 requires that the party signing the document orally acknowledge to the notary public or other officer that he or she in fact signed the document. Real Property Law § 303 precludes an acknowledgment from being taken by a notary or other officer “unless he [or she] knows or has satisfactory evidence that the person making it is the person described in and who executed such instrument.” And Real Property Law § 306 compels the notary or other officer to execute “a certificate ... stating all the matters required to be done, known, or proved” and to endorse or attach that certificate to the document.” The purpose of the certificate of acknowledgment is to establish that these requirements have been satisfied: 1) that the signer made the oral declaration compelled by Real Property Law § 292; and 2) that the notary or other official either actually knew the identity of the signer or secured “satisfactory evidence” of identity ensuring that the signer was the person described in the document. Thus, a deed may be recorded if it is either “duly acknowledged” or “proved” by use of a subscribing witness.

Absent the omitted language, the certificate did not indicate either that the notary public knew the husband or had ascertained through some form of proof that he was the person described in the prenuptial agreement. It agreed with the Appellate Division, which concluded that the certificate of acknowledgment did not conform with statutory requirements and the agreement was unenforceable. New York courts have long held that an acknowledgment that fails to include a certification to this effect is defective.

In *Anderson v Anderson and Matter of Koegel*, --- N.Y.3d ----, 2021 WL 5935382 (N.Y.), 2021 N.Y. Slip Op. 07058 (2021) decided last month, the Court of Appeals addressed issues unresolved in *Matisoff* and *Galetta*.

In *Anderson v Anderson*, it was presented with the issue of whether non-compliance with the signature acknowledgment requirements of Domestic Relations Law § 236 (B) (3) renders a nuptial agreement irrevocably unenforceable. The opinion by Judge Rivera pointed out that the parties' compliance must be confirmed in a manner adequate under the law. The certificate of acknowledgment establishes that the “signer made the oral declaration compelled by Real Property Law § 292” and the “notary or other official either actually knew the identity of the signer or secured 'satisfactory evidence' of identity ensuring that the signer was the person described in the document”. A properly executed certificate is the means by which the parties document that past events comply with the statutory requirements. Because both *Anderson* and *Koegel* involved only the acknowledgment procedure set forth in the Real Property Law, the Court limited its analysis to that methodology and its requirements.

Candy Anderson signed and acknowledged a nuptial agreement with Jack Anderson the month after their wedding. It was undisputed that regardless of when Jack signed the agreement, his signature was not acknowledged until nearly seven years later, shortly before he commenced a divorce action and in anticipation of Candy's divorce filing. Jack attempted to validate the agreement with full knowledge that Candy intended to end the marriage, and after his attorney informed him that his signature had not been acknowledged as required by Domestic Relations Law § 236 (B) (3). He appeared before a notary public where he orally acknowledged that the signature on the agreement was his. Jack commenced divorce proceedings five days later. Candy then filed for divorce and, in an ancillary action, moved for summary judgment to set aside the nuptial agreement. Supreme Court denied the motion. The Appellate Division reversed and concluded that because Jack's signature had not been contemporaneously acknowledged and the parties had not reaffirmed the agreement when the signature was acknowledged, the agreement was invalid and unenforceable.

The Court of Appeals concluded that the signature must be acknowledged contemporaneously within a reasonable time of signing. Because the wife signed and acknowledged the agreement the month after the wedding, while the husband delayed nearly seven years before acknowledging his signature and did so shortly before he commenced a divorce action, the husband's acknowledgment was ineffective and the nuptial agreement unenforceable. The only remedy under the circumstances was for the parties to reaffirm the agreement's terms, which did not occur in this case.

Matter of Koegel, the companion case, presented the issue of whether a defective acknowledgment may be overcome by proof of the occurrence of the events anticipated by the statutory mandates.

Irene and William Koegel executed a nuptial agreement approximately one month before their marriage. The agreement provided that neither party would claim any part of the other's estate and that they both waived their respective elective or statutory share. Both parties signed the agreement. Irene's signature was acknowledged by her lawyer and William's signature was acknowledged by his law firm partner. The certificates of acknowledgment followed the statutory requirements in all but one respect: both lawyers failed to attest that the signer was known to them, although that was the case.

William passed away during the marriage. His son John filed a petition to probate will, which provided that the parties had entered the antenuptial agreement, that "[t]he bequests to and other dispositions for the benefit of [Irene] contained in this Will [we]re made by [him] in recognition of and notwithstanding said antenuptial agreement," and that the will controlled in case of any inconsistencies, but in all other respects the "antenuptial agreement shall be unaffected by this Will." Irene invoked her surviving spouse elective share pursuant to Estates, Powers and Trusts Law 5-1.1-A. John, as executor of William's estate, filed a petition to invalidate Irene's election and for a declaration that she was not entitled to the statutory share based, in part, on her express waiver of her elective rights in the antenuptial agreement. Irene responded that neither her nor William's

signature was acknowledged in accordance with the statutory requirements. Therefore, the agreement was unenforceable, and she was entitled to her elective share. Irene also moved to dismiss the petition to set aside her notice of election pursuant to CPLR 3211 (a) (1) and DRL § 236 (B) (3). In opposition to Irene's motion, John argued, that the antenuptial agreement complied with the then-applicable EPTL 5-1.1 requirements and substantially complied with the other relevant statutory mandates. He submitted separate written affirmations from the lawyers who had acknowledged the signing. Irene's lawyer stated that he recalled taking her acknowledgment of her signature and that she did not need to provide proof of identification because she was known to him at the time based on their prior professional relationship. William's lawyer stated the same with respect to William and his signature, and also explained the basis of his professional knowledge of William's identity. Surrogate's Court denied Irene's motion. The Appellate Division affirmed and concluded that the defect could be and was cured by the Executor's submissions. Surrogate's Court granted John's motion for summary judgment and the Appellate Division affirmed.

Justice Rivera noted that EPTL 5-1.1-A provides that the waiver of the surviving spouse's elective share must "be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property." EPTL 5-1.1-A [e] [2]. Given the similarity in language between DRL § 236 (B) (3) and the EPTL, and the respective conditions that the nuptial agreement and spousal waiver accord with the recording statutes, the Court held that its analysis of DRL § 236 (B) (3) applied with equal force to Irene's appeal. However, the different context in which the signatures here were acknowledged was dispositive and led it to conclude the antenuptial agreement and its statutory spousal share waiver were enforceable.

In Matter of Koegel, the acknowledgments of each party were made contemporaneously with the signing of the nuptial agreement, but the certificates of acknowledgment were defective because the parties' lawyers failed to include in their certificates the undisputed fact that the signer was personally known to them at the time of signing. The Court held that where, as here, the signatories have satisfied the prerequisites for a valid certificate of acknowledgment and the defect in the certificate of acknowledgment is occasioned by the notary's or other official's error and not by a flaw in the parties' actual signing and acknowledgment, a reaffirmation of the agreement terms is unnecessary. This defect in the certificate may be overcome, with extrinsic evidence of the official's personal knowledge or proof of identity of the signer. The signature and acknowledgment may satisfy the statutory mandates if extrinsic evidence supports "that the acknowledgment was properly made in the first instance" even if the certificate fails to "include the proper language" due to the notary's or other official's error. Only in those limited cases where the parties signed and properly acknowledged the agreement can they later seek to present evidence of their prior timely compliance.

Conclusion

Non-compliance with the signature acknowledgment requirements of Domestic Relations Law § 236 (B) (3) renders a nuptial agreement unenforceable unless it is reaffirmed by the parties. The signatures must be acknowledged contemporaneously within a reasonable time of signing.

Where the signatories have satisfied the prerequisites for a valid certificate of acknowledgment and the defect in the certificate of acknowledgment is occasioned by the notary's or other official's error, the defect may be overcome, if extrinsic evidence supports that the acknowledgment was properly made in the first instance.

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