Galetta v. Galetta: Methodology of Acknowledgment vs. Evidence of a Lengthy Decision with No Contributions to Substantive Law

By Elliott Scheinberg

Domestic Relations Law § 236B(B)(3) provides that an agreement made before or during the marriage must comply with three procedural formalities to be valid and enforceable in a matrimonial action. Such agreement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.

The Elements of a Proper Acknowledgment Derive from Three Statutes in the Real Property Law

Three provisions of the Real Property Law must be read together to discern the requisites of a proper acknowledgment:[1]

- RPL § 292:[2] the party signing the document must orally acknowledge to the notary public or other officer that he or she in fact signed the document;
- RPL § 303:[3] an acknowledgment may not be 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
- RPL § 306: the notary or other officer must 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 RPL § 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.

Matisoff v. Dobi, Galetta v. Galetta

Notwithstanding long and ample statutory and decisional authority, including that from the Court of Appeals, that allows rectification of late date or otherwise imperfect acknowledgments,[4] the Court of Appeals has, in the past two decades, harshly treated flawed acknowledgments in marital agreements, having twice denied enforceability of correctable acknowledgments. The first case was *Matisoff v. Dobi*.[5] The second, *Galetta v. Galetta*,[6] is more troubling and the subject of this article.

Galetta arose from exceptionally unique circumstances. Although the husband had gone to a notary to have the prenuptial agreement properly acknowledged, his right to enforce the agreement was upended by a typographical error on the acknowledgment page, which error had originated in the attorney's office, and by an unforgiving high court. The husband did not attempt a late date cure of the acknowledgment, but rather only sought to submit evidence that the notary had fully complied with the statutory requirements.

The Purpose of the Acknowledgment

"Generally, [an] acknowledgment serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person."[7] *In re Maul's Estate*,[8] cited in *Matisoff* in support of late-date acknowledgments, states: "The acknowledgment is an authentication or verification of the signature of the petitioner…. It establishes merely that the petition was 'duly signed.' It proves the identity of the person whose name appears on the petition, and that such person signed the petition."

The acknowledgment and record also secure title, prevent fraud in conveyancing, and furnish proof of due execution of conveyances.[9] Concern over fraud was also expressed in *People ex rel. Erie Railroad Co. v. Board of Railroad Commissioners*:[10] "The purpose of an acknowledgment is to require greater formality in the execution of an instrument, and by not only requiring greater formality, but by thus obtaining an official act of a disinterested person, prevent, so far as possible, the perpetration of fraud." Other courts have stated that the purpose of an acknowledgment is not to facilitate the recording of an instrument, but rather to establish an authentication of an act and the identity of the actor to prevent fraud.[11]

Interestingly, *Matisoff* underscored that "DRL § 236(B)(3) refers *only* to the recordation requirements for deeds,"[12] which suggests concern over the administrative process necessary to protect the sanctity of land titles, rather than concern over hasty transfers by grantors. The acknowl-

edgment process is identical for deeds, wills, and marital agreements.

The Facts

In *Galetta,* the plaintiff-wife moved for a summary judgment determination that the parties' prenuptial agreement was invalid due to the husband's defective acknowledgment. Each party had separately signed the agreement before a different notary public.

The acknowledgment associated with the husband's signature was defective because the key phrase "to me known and known to me"—validating that the notary confirmed the identity of the person executing the document to also be the individual described in the document—had been inadvertently omitted during the typing of the document by his attorney's office. The signatures and the certificates of acknowledgment were set forth on a single page, and "appear to have been typed at the same time."[13] Absent the omitted language, the certificate did not indicate either that the notary knew the husband or had ascertained through some form of proof that he was the person described in the agreement. The certificate of acknowledgment thus had not even complied with the statutory "substantial compliance" requirement,[14] because the certificate failed, as required by RPL § 306, to "stat[e] all the matters required to be done, known, or proved on the taking of such acknowledgment or proof."

The husband submitted an affidavit from his notary, a bank employee where he then did business, who averred that it was his custom and practice, prior to acknowledging a signature, to confirm the identity of the person named in the document. The notary's affidavit stated that he presumed that he had similarly followed that practice before acknowledging the husband's signature.[15] Supreme Court denied the wife's motion.

In a divided decision, 3-2, the Appellate Division affirmed.[16] The majority held that the deficiency could be cured after the fact and that the notary's affidavit raised a triable question of fact as to proper acknowledgment. The dissenters deemed the defect fatal, that the notary's affidavit was insufficient to raise a question of fact to the possibility of a cure.

Critical to *Galetta* was that the husband had taken all steps within *his* power to have the agreement properly acknowledged; the husband was not trying to cure any omissions attributable to either him or the notary but rather only sought to prove that the notary had, in fact, complied with the two-step process.

The Fourth Department noted that, while *Matisoff* specifically declined to resolve the issue "whether and under what circumstances the absence of acknowledgment can be cured,"[17] the Court of Appeals observed that courts have been divided on the issue.[18] The Appellate Division emphasized that defects in an acknowledgment required by EPTL 5-1.1-A(e)(2) [referencing EPTL 5-1.1(f)(2)], concerning waivers of the spousal right of election, which may be cured; the Appellate Division drew a parallel between the Domestic Relations Law and the EPTL underscoring that "the language of the EPTL contains the same 'restrictive acknowledgment language as the Domestic Relations Law discuss[ed] in the Matisoff case.'"[19]

In 2002, the Fourth Department, in *Filkins v. Filkins*,[20] reiterated the ruling, in *Arizin v. Covello*,[21] a 1998 New York County decision which upheld late date acknowledgments, thereby "implicitly endors[ing] the possibility that a defect in a technically improper acknowledgment c[an] be cured."[22] Critically, the agreement, in *Filkins,* had no written certificate of acknowledgment attached to the parties' prenuptial agreement for which reason the agreement could not be cured "by [first] having the agreement notarized and filed after commencement of [the] divorce action [] because the agreement was never reacknowledged."[23]

The Court of Appeals

The Court of Appeals reversed the majority opinion in the Fourth Department, declared the agreement invalid, and granted the wife's motion for summary judgment.[24] The Court, effectively: (1) denied the husband due process by disallowing the application of a settled principle of evidence; (2) incorrectly applied its own precedent authority regarding the standard to defeat a motion for summary judgment; and (3) conflated methodology and rules of evidence.

The Court, referencing *Matisoff*, emphasized that an unacknowledged agreement is invalid because "the statute recognizes no exception to the requirement that a nuptial agreement be executed in the same manner as a recorded deed and 'that the requisite formality explicitly specified in Domestic Relations Law § 236(B)(3) is essential.'"[25] The Court compared the situation in *Galetta* to those in *Matisoff*:

> In *Matisoff*, a case where the parties had not attempted to have their signatures acknowledged, defendant husband *similarly* contended that the lack of certificates of acknowledgment had been cured by testimony both the husband and wife presented at the matrimonial trial admitting that the signatures were authentic and that the postnuptial agreement had not been signed under fraud or duress.[26]

The word "similarly" is of concern because the acknowledgment in *Galetta*, unlike that in *Matisoff,* was contemporaneous with the execution of the agreement. Mr. Galetta did all he could have done and asked no more than to prove that the notary had complied with the required two-prong process.[27]

Furthermore, as in *Matisoff*, the Court, again, declined to "definitively resolve the question whether a cure is possible because, *similar* to what occurred in *Matisoff*, the proof submitted here was insufficient."

The "Bade Deliberate, Check Haste, and Foster Reflection" Concern

Citing *Matisoff, Galetta* noted two "important purposes"[28] "fulfilled" by an acknowledgment:

- It proves the identity of the person whose name appears on an instrument and authenticates the signature of such person.
- It also "necessarily imposes on the signer a measure of deliberation in the act of executing the document. Just as in the case of a deed where the law puts in the path of the grantor 'formalities to check haste and foster reflection and care… [h]ere, too, the formality of an acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care.'"

Matisoff quoted *Chamberlain v. Spargur*,[29] an 1881 decision, involving the sale of real property, where the Court of Appeals explained that the purpose of the formalities was to direct the grantor who was parting with his freehold to "check haste and foster reflection and care."[30]

> It required him not only to sign, but to seal, and then to acknowledge or procure an attestation, and finally to deliver. Every step of the way he is warned by the requirements of the law not to act hastily, or part with his freehold without deliberation.[31]

Additional objectives of the acknowledgment process are to secure title, prevent frauds in conveyancing, furnish proof of due execution of conveyances,[32] and prevent overreaching.[33]

It is, however, most seldom that a seller of a home, the "grantor," does not engage counsel. Logic dictates that, since "bade deliberate" is the driving fuel behind the acknowledgment process, if the mere formalities of a pro se appearance before a notary who is not an attorney and unqualified to offer legal guidance instills deliberation, reflection, and awe, per *Chamberlain* and *Matisoff*, representation by counsel must certainly qualify as exponential compliance with the "bade deliberate" admonition, irrespective of whether counsel is the ultimate notary.

Who Should Have Standing to Assert a Defective Acknowledgment?

The history of the "bade deliberate" concern invites the further question: who *should* have standing to raise the issue of a defective acknowledgment? The aforementioned authority unequivocally makes clear that the acknowledgment process was intended to shield the grantor against his own "haste" in the conveyance of land, not the haste of the other party; notably, the caselaw expresses no concern about the conveyee of the property. Because settled law prohibits a party from asserting the rights of another,[34] Mrs. Galetta and Ms. Matisoff should have been precluded from inherently arguing that their husbands had not deliberated.

Is the Acknowledgment in DRL § 236B(3) "Onerous and in Some Respects More Exacting Than the Burden Imposed When a Deed is Signed"? The Implications of an Unacknowledged Agreement as Between the Parties

Galetta, referencing *Matisoff*, states: "the acknowledgment requirement imposed by DRL § 236(B)(3) is onerous and, in some respects, more exacting than the burden imposed when a deed is signed."[35] This is so, *Galetta* says, because "although an unacknowledged deed cannot be recorded (rendering it invalid against a subsequent good faith purchaser for value) it may still be enforceable between the parties to the document (i.e., the grantor and the purchaser). The same is not true for a nuptial agreement which is unenforceable in a matrimonial action, even when the parties acknowledge that the signatures are authentic and the agreement was not tainted by fraud or duress."

Caselaw, however, holds that a marital agreement that is defective due to the absence of an acknowledgment nevertheless remains viable and enforceable in other non-matrimonial litigation between the parties themselves.[36] Does *Galetta sotto voce* reverse these cases?

The Methodology of Acknowledgment by a Subscribing Witness; Methodology Is Unrelated to Proffering Evidence of Compliance

The Legislature provides that a deed or instrument of conveyance may also be alternatively acknowledged by a person who witnessed such execution and who simultaneously subscribed the conveyance as a witness[37]—even the notary who acknowledged the signature may be a subscribing witness.[38] Nevertheless, statute and its own precedent notwithstanding, the Court of Appeals infused an evidentiary condition into RPL § 291:[39] "Because this case involves an attempt to use the acknowledgment procedure, we focus on that methodology."[40]

The methodology of an acknowledgment is wholly distinct from any rule of evidence. It is illogical to condi-

tion the introduction of evidence upon methodology. Compliance with methodology creates a jural right, evidence does no more than to prove that the jural act of the methodology had been properly complied with. There is no foundation that supports the notion that statutory intent is violated when a party is given an opportunity to present evidence of proper compliance.[41]

Nor is methodology of acknowledgment statutorily resistant to either cure or the submission of evidence to establish compliance with the statute. Nothing in the statutory scheme even remotely suggests a contrary conclusion—the canons of statutory construction forbid the extension and expansion of words to include that which the Legislature could have said but did not.[42]

The converse is, however, true: the statutory scheme shows that the Legislature has always preserved the opportunity to prove a proper acknowledgment. The decisional authority cited in *Matisoff* referenced an estate matter where a defective acknowledgment was cured by way of the testimony of a subscribing who testified under compulsion per RPL §305, land conveyances.[43]

It is, therefore, unreasonable to posit that the Legislature would only allow the production of evidence of a proper acknowledgment based on the methodology of acknowledgment.

The Court Conceded That the Typographical Error Did Not Mean That the Notary Had Not Fully Discharged His Task

The *Galetta* Court's concession that the defective acknowledgment, attributable to the typographical error, did not signify that the notary had failed to "to engage in the formalities required when witnessing and acknowledging a signature"[44] defeats the notion that the aforementioned "important purposes" are somehow transgressed when a party is given an opportunity to establish evidence of proper compliance with a statute. To the contrary, the Court said, "it may well be that the prerequisites of an acknowledgment occurred but the certificate simply failed to reflect that fact."[45]

Nevertheless, the Court unreasonably sealed the evidentiary door to the submission of evidence at trial because of a perceived future concern that "parties would be permitted to conform the certificate to reflect that their agreement had been properly acknowledged years earlier."[46] This reasoning is sustained by a seemingly irrefutable *ab initio* presupposition of collusion, which is defensively impervious to any quantum evidence.

"Flexible" Standard Applied to Party Opposing Summary Judgment Motion

CPLR 3212(b) provides that summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." In *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*,[47] the Court of Appeals summarized the rule regarding summary judgment motions:

> [T]he moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact"… If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party " 'to establish the existence of material issues of fact which require a trial of the action'… Viewing the evidence "in the light most favorable to the non moving party," if the nonmoving party, nonetheless, fails to establish a material triable issue of fact, summary judgment for the movant is appropriate…

In the landmark decision on summary judgment motions, *Zuckerman v. City of New York*,[48] the Court of Appeals held that "to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' [CPLR 3212, subd. (b)]. Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form."[49] The Court, however, underscored that, although the opponent to "a summary judgment motion must make his showing by producing evidentiary proof in admissible form…the rule with respect to defeating a motion for summary judgment is more flexible, for the opposing party, as contrasted with the movant."[50]

Prof. David Siegel[51] capsulized summary judgment thus:

> The grant means that the court, after going through the papers pro and con on the motion, has found that there is no substantial issue of fact in the case and therefore nothing to try… It does not deny the parties a trial; it merely ascertains that there is nothing to try. Rather than resolve issues, it decides whether issues exist. As is often said of the motion, issue finding rather than issue determination is its function[52]… If an issue is arguable, trial is needed and the case may not be disposed of summarily.[53] "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."[54]

Citing Siegel,[55] the Second Department, in *Daliendo v. Johnson*,[56] held: "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

Under the circumstances, an issue existed once the court conceded that the error in the acknowledgment was attributable to no more than a typographical error and that such error did not mean that the notary had failed "to engage in the formalities required when witnessing and acknowledging a signature," which was further supported by the notary's averment. There was thus a sufficient and necessary basis to deny the wife's motion for summary judgment and dispatch the matter to the trial court for further determination.

The Court of Appeals Declined to Apply the Settled Rule of Evidence of Custom and Practice

"Custom and practice evidence draws its probative value from the repetition and *unvarying* uniformity of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time relevant to the litigation."[57] So said *Galetta*.

While acknowledging its own precedent authority that a party can rely on custom and practice to spackle evidentiary gaps "where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances thereby creating a triable question of fact as to whether the practice was followed on the relevant occasion,"[58] and notwithstanding the notary's statement that he makes inquiry into a person's identity, the Court, nevertheless, rejected the notary's averments as "too conclusory to fall into this category."[59]

But *Galetta* observed that a notary might vary the method, "depending on the circumstances":

> any number of methods a notary might use to confirm the identity of a signer he or she did not already know, such as, requiring that the signer to display at least one current form of photo ID (a driver's license or passport). *It is, also, possible that a notary might not employ any regular strategy but vary his or her procedure for confirming identity depending on the circumstances*.[60]

But the Court of Appeals cited its precedent authority, *Rivera v. Anilesh*,[61] and stated:

> Custom and practice evidence draws its probative value from the repetition and *unvarying uniformity* of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time…

However, in 1977, in *Halloran v. Virginia Chemicals Inc.*,[62] the Court of Appeals held:

> Evidence of habit or regular usage, if properly defined and therefore circumscribed, involves more than unpatterned occasional conduct, that is, conduct however frequent *yet likely to vary from time to time depending upon the surrounding circumstances*; it involves a repetitive pattern of conduct and therefore predictable and predictive conduct.

The Court is not only not keeping with its own precedence but is also not internally consistent in the same decision.

Nevertheless, with the same stroke of the pen, the Court conflictingly emphasized that the notary's affidavit did not "describe a specific protocol that the notary repeatedly and invariably used." This could have been fleshed out during trial.

Moreover, although having conceded that the notary "understandably had no recollection of an event that occurred more than a decade ago,"[63] for which reason the notary relied upon custom and practice evidence, the Court, nonetheless, simultaneously faulted his affidavit for "not stat[ing] that he actually recalled having acknowledged the husband's signature, nor that he knew the husband prior to acknowledging his signature. The notary averred only that he recognized his own signature on the certificate and corroborated the husband's statement concerning the circumstances under which he executed the document" at the bank.[64] These statements conflict: if the notary had remembered his having taken the acknowledgment, the husband would not have had to resort to the indirect route of custom and practice, especially if he may have resorted to different methods.

The Court, also, stated that "the affidavit by the notary public…merely paraphrased the requirement of the statute—he stated it was his practice to ask and confirm the identity of the signer—without detailing any specific procedure that he routinely followed to fulfill that requirement." The notary had averred that he was "confident" that he "ask[ed] and confirm[ed] that the person signing the document was the same person named in the document."[65] Averring compliance with a statute by reciting the full elements complied with constitutes an affirmative defense sufficient to defeat a motion for summary judgment. This is especially in light of the fact that the notary recognized his own signature, and the Court's concession of an apparent typographical error.

Denying Mr. Galetta the Opportunity to Prove the Notary's Compliance Under These Circumstances Denied Him Due Process

Under the unique circumstances of *Galetta*, summary determination, which barred the husband from doing no more than submitting evidence of the notary's full compliance with the statute, denied him due process[66] and vacated a valid agreement, a most unfortunate outcome in light of the caselaw that "the function of the officiating person in taking the acknowledgment of a party to an instrument and certifying thereto is ministerial/administrative and not judicial."[67]

CPLR 2309(c), Real Property Law § 299–a

In a line of cases arising from CPLR 2309(c), which states that an out-of-state oath or affirmation is valid in New York if it is "accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state"[68] (regarding certificates of conformity),[69] the First, Second, and Third Departments have routinely allowed *nunc pro tunc* cures as a matter of course.[70]

In *Indemnity Insurance Corp., Risk Retention Group v. A 1 Entertainment LLC*,[71] decided about one month after *Galetta*, the First Department, without acknowledging *Galetta*, upheld a late date cure of an acknowledgment in a 2309(c) matter: "Courts are not rigid about this requirement. As long as the oath is duly given, authentication of the oath giver's authority can be secured later, and given *nunc pro tunc* effect if necessary."[72] Therein the plaintiff-insurer had submitted an affidavit of its vice president of claims, which had been sworn to before an out-of-state notary, but lacked the authenticating certificate required by CPLR §2309(c).

Indemnity Insurance Corp quoted *Matapos Tech. Ltd. v. Cia. Andina de Comercio Ltda*,[73] which included a late date cure of the "certification required by CPLR and Real Property Law § 299–a."[74] The affidavit, in *Matapos*, had also been sworn to before a notary in Maryland, but lacked the authenticating certificate required by CPLR 2309(c).

In *Smith v. Allstate Ins. Co.*,[75] the Second Department held that the "omission" of an "accompan[ying] certificate authenticating the authority of the notary who administered the oath (CPLR 2309[c]), [] was not a fatal defect."[76]

Conclusion

It was undisputed that Mr. Galetta had gone to a notary and had therefore complied with the "bade deliberate" admonition to the best of his ability; there was nothing more for him to have done. The process itself had to be completed by the notary. Under these unique circumstances, which were further complicated by Mr. Galetta's counsel's and the notary's collective failures to spot the typographical error in the acknowledgment, it was unreasonable not to have to permitted Mr. Galetta to call the notary as a witness during trial to confirm that the notary had properly carried out his charge that day. Mr. Galetta was penalized for the inadvertent omissions of his attorney and the notary.

The decision is draconian, unreasonably unforgiving, and adds nothing new to existing substantive law, essentially leaving matters as they were after *Matisoff*. In the aftermath of this lengthy decision, all that remains clear is the Court's continuing refusal to "definitively resolve the question whether a [late date] cure is possible,"[77] notwithstanding the fact that prior precedent authority holds otherwise.

The rigidity of and resistance to curing or even confirming the acknowledgment process survives as an anachronistic relic that has outlived its purpose. It is time to legislatively amend the harsh body of decisional authority and render it consonant with the legislative intent so as to specifically allow late date cures or, at least, late date evidence of compliance.

Endnotes

1. *Galetta v. Galetta*, 21 NY3d 186 (2013).
2. § 292. By whom conveyance must be acknowledged or proved:

   > Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

3. § 303. Requisites of acknowledgments

   > An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument.

4. The historical development and application of this point of law in other cases is fully developed in E. Scheinberg, Contract Doctrine and Marital Agreements in New York, Chapter 4, which is a blueprint of how to defend an imperfect acknowledgment from attack.
5. 90 N.Y.2d 127, 135 (1997), analyzed in detail in Chapter 4, E. Scheinberg, Contract Doctrine and Marital Agreements in New York.
6. 21 N.Y.3d 186 (2013).
7. *Matisoff*, 90 N.Y.2d at 133.
8. 176 Misc. 170 (Sur. Ct., Erie Co.), *aff'd*, 262 A.D. 941 (4th Dept 1941), *aff'd*, 287 N.Y. 694 (1942); *In re Kazuba*, 9 Misc. 3d 1116(A) (Sur. Ct., Nassau Co. 2005).
9. *Armstrong v. Combs*, 44 N.Y.S. 171 (3d Dept 1897).
10. 105 A.D. 273 (3d Dept 1905). *See Van Cortlandt v. Tozer*, 17 Wend. 338 (N.Y. Sup. Ct. 1837) (regarding a brief history of the practice on acknowledgments in New York).
11. *Hazell v. Bd. of Elections*, 224 A.D.2d 806 (3d Dept 1996); *Garguilio v. Garguilio*, 122 A.D.2d 105 (2d Dept 1986).
12. *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997); *cf., Hazell v. Bd. of Elections*, 224 A.D.2d 806 (3d Dept 1996) (The function of the acknowledgment is not to facilitate the recording of an instrument but rather to establish an authentication of an act and the identity

of the actor to prevent fraud, citing RPL § 298-303; *Garguilio v. Garguilio*, 122 A.D.2d 105 (2d Dept 1986); *see Bristol v. Buck*, 201 App. Div. 100, *aff'd*, 234 N.Y. 504 (1922).

13. *Galetta*, at 190.

14. See discussion of *Weinstein v. Weinstein*, 36 A.D.3d 797 (2d Dept 2007), Chapter 4, "Agreement Acknowledged Using Pre-1997 Amendment Language Held in Substantial Compliance with the Statute," E. Scheinberg, Contract Doctrine and Marital Agreements in New York.

15. *Galetta*, 21 N.Y.3d at 190.

16. *Galetta v. Galetta*, 96 A.D.3d 1565 (4th Dept 2012).

17. *Galetta*, 96 A.D.3d at 1567.

18. *Id.*

19. *Id.*

20. 303 A.D.2d 934 (4th Dept 2003).

21. 175 Misc. 2d 453, 457 (Sup Ct. NY Co., 1998).

22. *Galetta*, 96 AD3d at 1567.

23. *Galetta*, 96 AD3d at 1567.

24. 21 N.Y.3d 186 (2013).

25. *Galetta*, 21 N.Y.3d 186 at 191.

26. *Galetta*, 21 N.Y.3d 186 at 194-95.

27. "[T]hat an oral acknowledgment be made before an authorized officer and that a written certificate of acknowledgment (as evidence that the named declarant made the requisite declaration] be attached," *Matisoff*, at 137.

28. *Galetta*, 21 N.Y.3d at 191-92.

29. 86 N.Y. 603 (1881).

30. *Chamberlain*, at 607.

31. *See Fasano v. DiGiacomo*, 49 A.D.3d 683 (2nd Dept 2008), quoting Senate Introducer Mem. in Support, Bill Jacket, L. 1997, child. 139, at 8) (In enacting EPTL 7-1.17, the Legislature recognized that "[s]ome degree of formality helps the parties involved realize the serious nature of the instrument being executed and reduces substantially the potential for foul play").

32. *People ex rel. Erie Railroad Co. v. Board of Railroad Commissioners*, 105 A.D. 273 (3d Dept 1905); *Armstrong v. Combs*, 15 A.D. 246 (3rd Dept 1897); *Hazell v. Board of Elections*, 224 A.D.2d 806 (3rd Dept 1996); *Garguilio v. Garguilio*, 122 A.D.2d 105 (2nd Dept 1986).

33. *In re Nurse*, 35 N.Y.2d 381 (1974).

34. *Socy. of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991); *Cardo v. Bd. of Managers, Jefferson Vil. Condo 3*, 67 A.D.3d 945 (2nd Dept 2009); *Lyman Rice, Inc. v. Albion Mobile Homes, Inc.*, 89 A.D.3d 1488 (4th Dept 2011); *People v. Jenkins*, 290 A.D.2d 573 (3rd Dept 2002).

35. *Galetta*, 21 N.Y.3d at 192, quoting *Matisoff*, at 134-35.

36. *In re Estate of Sbarra*, 17 A.D.3d 975 (3rd Dept 2005) (The agreement was held acknowledged by way of judicial estoppel in a nonmatrimonial action even though the wife had not acknowledged it:

> Respondent asserts that, although she signed the separation agreement, she did not acknowledge her signature to the notary public who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. We cannot agree. A separation agreement must be properly acknowledged only in order to be enforceable in a matrimonial action (Domestic Relations Law § 236[B][3]; *Matisoff v. Dobi*, 90 N.Y.2d 127, 135, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997)). Since respondent does not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement is enforceable in other types of actions despite the alleged insufficiency of the acknowledgment (*Rainbow v. Swisher*, 72 N.Y.2d 106, 109, 531 N.Y.S.2d 775, 527 N.E.2d 258 (1988); *Singer v. Singer*, 261 A.D.2d 531, 532, 690 N.Y.S.2d 621 (1999); *Geiser v. Geiser*, 115 A.D.2d 373, 374, 495 N.Y.S.2d 401 (1985)). Moreover, since respondent affirmatively alleged in the divorce action that the separation agreement was valid, she is judicially estopped from now challenging its validity. Having received the benefit of the separation agreement's provisions for division of marital property in the earlier divorce action, respondent may not now assume a contrary position here simply because her pecuniary interests have changed.).

Wetherby v. Wetherby, 50 A.D.3d 1226, n. 2 (3rd Dept 2008); *Moran v. Moran*, 77 AD3d 443 (1st Dept 2010) (Plaintiff properly commenced a plenary action to enforce the separation agreement, since no matrimonial action was then pending. The court did not improvidently exercise its discretion by denying defendant's request, made after it had rendered an oral decision on the motion, to transfer this case to the matrimonial part presiding over the divorce action that she commenced during the pendency of this motion. However, following remand, if the divorce action is still pending, this matter should be reassigned to the matrimonial part in the interests of judicial economy and efficiency.); *Geiser v. Geiser*, 115 A.D.2d 373 (1st Dept 1985) ("While a separation agreement which has not complied with the legislative mandate as to acknowledgment would not constitute the basis for a divorce action (Domestic Relations Law § 170[6]) 'as to the parties themselves, the instrument…may be effective without any acknowledgment…and may be the proper basis for other action.'"); *Singer v. Singer*, 261 A.D.2d 531 (2d Dept 1999); *Mojdeh M. v. Jamshid A.*, 36 Misc. 3d 1209(A) (Sup Ct. Kings Co. 2012).

37. RPL § 292; see RPL § 304:

> When the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and if his place of residence is in a city, the street and street number, if any thereof, and that he knew the person described in and who executed the conveyance. The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance.

See *In re Maul's Estate*, 176 Misc. 170, 172 (Sur. Court, Erie Co.), *aff'd*, 262 A.D. 941(4th Dept 1941), *aff'd*, 287 N.Y. 694 (1942); *In re Green*, 16 Misc. 3d 1113(A) (Sur. Court, Suffolk Co. 2007); RPL § 306.

38. *In re Estate of Menahem*, 16 Misc. 3d 1125(A) (Sur. Court, Kings Co. 2007), *aff'd*, 63 A.D.3d 839 (2nd Dept 2009), citing *In re Felicetti*, N.Y.L.J., Jan. 22, 1998, p. 31, choice of law. 3 (Sur. Court, Nassau Co.) (motion to dismiss based on invalidity of waiver of right of election as a result of improper acknowledgment denied because notary could supply necessary proof as subscribing witness); *Estate of Beckford*, 280 A.D.2d 472 (2nd Dept 2001) (deposition testimony of the attorney who notarized the spouse's signature on the prenuptial agreement created an issue of fact as to whether waiver of right of election is valid)).

39. RPL § 291:

> [A] conveyance of real property…on being duly acknowledged by the person executing the same, or proved as required by this chapter…may be recorded in the office of the clerk of the county where such real property is situated.

40. *Galetta*, 21 N.Y.3d at 191.

41. In *In re Saperstein*, 254 A.D.2d 88 (1st Dept 1998), the surviving husband brought an application for permission to file late notice of election against the estate of his deceased wife. The surrogate dismissed the application. The Appellate Division affirmed the

dismissal because proof of execution prepared after the wife's death by the attorney who had signed the husband's waiver of the right to elect as the subscribing witness was sufficient to establish the validity of the waiver:

> While there was no acknowledgment by the subscribing spouse during the decedent's lifetime—and any attempt to manufacture such an acknowledgment post mortem would be ineffective…the waiver is nonetheless susceptible of being "proved" in the manner required for the recording of a conveyance of real property, as set forth in Real Property Law § 304. The proof of execution prepared after the decedent's death by the attorney who signed the waiver as a subscribing witness is sufficient to comply with Real Property Law § 304…As the subject waiver was, accordingly, valid, petitioner's application to elect against his spouse's estate was properly dismissed.

42. N.Y. Statutes § 94 (Stat.), comment:

> The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction.
>
> Words will not be expanded so as to enlarge their meaning to something which the Legislature could easily have expressed but did not…
>
> A statute should not be extended by construction beyond its express terms or reasonable implications to its language.

43. RPL § 305, Compelling Witnesses to Testify:

> On the application of a grantee in a conveyance, his heir or personal representative, or a person claiming under either of them, verified by the oath of the applicant, stating that a witness to the conveyance, residing in the county where the application is made, refuses to appear and testify concerning its execution, and that such conveyance can not be proved without his testimony, any officer authorized to take, within the state, acknowledgment or proof of conveyance of real property may issue a subpoena, requiring such witness to attend and testify before him concerning the execution of the conveyance. A subpoena issued under this section shall be regulated by the civil practice law and rules.

44. *Galetta*, 21 N.Y.3d at 196-97.

45. *Galetta*, 21 N.Y.3d at 197.

46. *Id.*

47. 26 N.Y.3d 40 (2015).

48. 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

49. *Zuckerman*, at 562.

50. *Id.*

51. Siegel, NY Practice § 278 (5th ed).

52. Citing *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957); *Esteve v. Abad*, 271 A.D. 725, 727 (1st Dept. 1947).

53. Citing *Barrett v. Jacobs*, 255 N.Y. 520 (1931).

54. Citing *Daliendo v. Johnson*, 147 A.D.2d 312 (2nd Dept 1989); also *Barr v. Albany County*, 50 NY2d 247 (1980).

55. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 7B, CPLR C3212:1, at 424.

56. 147 A.D.2d 312 (2nd Dept 1989).

57. *Galetta*, 21 N.Y.3d at 197-198. Habit means a person's regular practice to act or behave in the same way in the same or similar circumstances. One's habit or custom of doing or not doing an act in question increases or diminishes the probability of the act being done (Farrell, Richardson on Evidence (11th ed, 4-601); Martin, Capra, Rossi, New York Evidence Handbook (2d ed.), § 4.8.3 citing 1McCormick § 195, at 686-687; Martin, § 4.8.3, at 206-07: "Although closely related to a character trait, a habit is more restrictively defined: the focus is on a narrows set of circumstances, and the conduct in those circumstances must be almost invariable."; Barker and Alexander, New York Practice Series, Evidence in New York State and Federal Courts, § 4.12: "Sometimes it is difficult in civil cases to distinguish between character evidence and evidence of habit."

Halloran v. Virginia Chemicals Inc., 41 NY2d 386 (1977):

> Evidence of habit or regular usage, if properly defined and therefore circumscribed, involves more than unpatterned occasional conduct, that is, conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances; it involves a repetitive pattern of conduct and therefore predictable and predictive conduct.
>
> * * *
>
> Because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again, evidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions.

Also see generally Barker and Alexander, § 4:41:

> Character, on the other hand, goes to a person's general personality traits such as peacefulness or violence, carefulness or carelessness, honesty or dishonesty, sobriety or drunkenness. When a person is characterized as having a habit of carelessness, the word "habit" is really being used to show the person's general trait.

58. *Galetta*, 21 N.Y.3d at 197; *Rivera v. Anilesh*, 8 NY3d 627 (2007):

> In *Halloran v. Virginia Chems.*, 41 N.Y.2d 386, 391, 393 N.Y.S.2d 341, 361 N.E.2d 991 (1977), we explained that evidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again.

See Barker and Alexander, New York Practice Series, Evidence in New York State and Federal Courts, § 4:42. New York—Business and professional habit.

59. *Galetta*, 21 N.Y.3d at 197.

60. *Galetta*, 21 N.Y.3d at 198:

> [F]or example, a notary who works in a bank, law firm or other similar institution might occasionally rely on another employee who knew the signer to vouch for the signer's identity.

61. 8 N.Y.3d 627, 634 (2007).

62. 41 N.Y.2d 386 (1977).

63. *Galetta*, 21 N.Y.3d at 198.

64. *Galetta*, 21 N.Y.3d at 197.

65. *Id.*

66. *People by Abrams v. Apple Health and Sports Clubs, Ltd., Inc.*, 80 N.Y.2d 803 (1992) (The Supreme Court has stated that due process

requires an opportunity to be heard "at a meaningful time and in a meaningful manner" (*Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62). The opportunity must be appropriate to the nature of the case (*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865). The concept of due process is flexible, however, and calls for the procedural protection the particular situation demands (*Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18).); *Weeks Marine Inc. v. City of New York*, 291 A.D.2d 277, 737 N.Y.S.2d 92 (1st Dept 2002); *State v. Farnsworth*, 75 A.D.3d 14, 900 N.Y.S.2d 548 (4th Dept 2010).

67. *In re Warren's Estate*, 16 A.D.2d 505 (2nd Dept), aff'd, 12 N.Y.2d 854 (1962); *In re Howland's Will*, 284 A.D. 306 (4th Dept 1954) ("The taking of an acknowledgment is an administrative rather than a judicial act."); *Lynch v. Livingston*, 6 N.Y. 422 (1852); *Albany Co. Sav. Bank v. McCarty*, 149 N.Y. 71 (1896) ("It is settled in this state that the act of taking and certifying an acknowledgment is not judicial, but ministerial, in character; and this accords with the rule in most of the states."); *Armstrong v. Combs*, 44 N.Y.S. 171 (3d Dept 1897); Chapter IV, The Role and Purpose of an Acknowledgment, Contract Doctrine and Marital Agreements in New York.

68. CPLR 2309(c):

> An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

69. *Midfirst Bank v. Agho*, 121 A.D.3d 343 (2nd Dept 2014):

> A certificate of conformity speaks to the manner in which a foreign oath is taken, whereas a certificate of authentication speaks to the vested power of the individual to administer the oath… CPLR 2309(c) requires that even when a notary is the foreign acknowledging officer, there must still be a "certificate of conformity" to assure that the oath was administered in a manner consistent with either the laws of New York or of the foreign state. In other words, a certificate of conformity is required whenever an oath is acknowledged in writing outside of New York by a non–New York notary, and the document is proffered for use in New York litigation.

70. *Fredette v. Town of Southampton*, 95 A.D.3d 940 (2nd Dept 2012); *Fuller v. Nesbitt*, 116 A.D.3d 999 (2nd Dept 2014); *Mack Cali Realty, L.P. v. Everfoam Insulation Sys., Inc.*, 110 A.D.3d 680 (2nd Dept 2013); *Nandy v. Albany Med. Ctr. Hosp.*, 155 A.D.2d 833 (3rd Dept 1989) (Ideally, both pages of an out-of-State affidavit should be accompanied by a certificate authenticating the authority of the one who administered the oath. Rejecting the document, however, would only result in further delay because it can be given nunc pro tunc effect once properly acknowledged (*Raynor v. Raynor*, 279 App. Div. 671; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2309:3, at 267).); *Moccia v. Carrier Car Rental, Inc.*, 40 A.D.3d 504 (1st Dept 2007); *Sparaco v. Sparaco*, 309 AD2d 1029 (3rd Dept 2003).

71. 107 A.D.3d 562 (1st Dept 2013); *Hall v. Elrac, Inc.*, 79 AD3d 427 (1st Dept 2010) ("Plaintiff's claim that the affidavit was not in admissible form because it was signed outside New York State but notarized by a New York notary, without providing a certificate of conformity as required by CPLR 2309(c) and Real Property Law § 299–a, is unpreserved…In any event, as long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary.").

72. Indem. Ins. Corp., 107 A.D.3d at 563; *Midfirst Bank v. Agho*, 121 A.D.3d 343 (2nd Dept 2014) ("The Appellate Division, Second Department, has typically held, since 1951, that the absence of a certificate of conformity is not, in and of itself, a fatal defect. The defect is not fatal, as it may be corrected nunc pro tunc…or pursuant to CPLR 2001, which permits trial courts to disregard mistakes, omissions, defects, or irregularities at any time during an action where a substantial right of a party is not prejudiced.").

73. 68 A.D.3d 672 (1st Dept 2009).

74. RPL § 299-a, Acknowledgment to conform to law of New York or of place where taken; certificate of conformity (referring to RPL § 299, Acknowledgments and proofs without the state, but within the United States or any territory, possession, or dependency thereof].

75. 38 A.D.3d 522 (2nd Dept 2007); *also Gonzalez v. Perkan Concrete Corp.*, 110 A.D.3d 955 (2nd Dept 2013); *Matos v. Salem Truck Leasing*, 105 A.D.3d 916 (2nd Dept 2013); *U.S. Bank Nat. Ass'n v. Dellarmo*, 94 A.D.3d 746 (2nd Dept 2012); *Recovery of Judgment, LLC v. Warren*, 91 A.D.3d 656 (2nd Dept 2012); *Betz v. Daniel Conti, Inc.*, 69 A.D.3d 545 (2d Dept 2010).

76. Internally citing: "(CPLR 2001; *Sparaco v. Sparaco*, 309 A.D.2d 1029, 765 N.Y.S.2d 683; *Nandy v. Albany Med. Ctr. Hosp.*, 155 A.D.2d 833, 548 N.Y.S.2d 98; see also Siegel, Practice Commentaries, McKinney's Cons. Laws. of N.Y., Book 7B, CPLR C2309:3)."

CPLR 2001 addresses "mistakes, omissions, defects and irregularities":

> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

77. *Galetta*, at 197.

Elliott Scheinberg is a Fellow of the American Academy of Matrimonial Lawyers and is Co-Chair of its Amicus Committee. He is the author of the two volume treatise, *Contract Doctrine and Marital Agreements in New York*, NYSBA (3d ed, 2 vols, to be published 2016). He is also a member of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction.

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