ENFORCEABILITY OF OPEN COURT STIPULATIONS IN MATRIMONIAL ACTIONS[1]

Elliott Scheinberg

DRL §236B(3) provides that pre and post nuptial agreements must satisfy three procedural formalities: (i) they must be in writing, (ii) subscribed by the parties, and (iii) acknowledged in a manner which entitles a deed to be recorded. Since soon after the advent of equitable distribution there has been an ongoing rift between the upstate and downstate Departments with respect to the enforceability of open court stipulations dictated into the record in matrimonial actions.

The Third Department, with two inexplicable departures from its Departmental rule,[2] and the Fourth Departments have consistently held that a failure to strictly comply with the aforementioned formalities is fatal to an agreement's vitality and, thus, unenforceable.[3] The First and Second Departments,[4] however, have held that DRL §236B(3) never abrogated the judicially favored method of litigation termination under CPLR §2104 which provides in pertinent part: "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."[5] (This firm inter-Departmental entrenchment of ideologies regarding strict adherence to statutory procedure notwithstanding, the First, Second, and Third Departments have selectively and unpredictably either required or not required compliance with the clear statutory directive set forth in DRL §240(1-b)(h) regarding the

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[1]N.Y.L.J., Dec. 1, 2004; **Cited:** McKinney's Consolidated Laws of New York Annotated: (1) DRL §236; (2) Darren L. v. Donna L, 5 Misc.3d 1023(A), 799 N.Y.S.2d 159 (N.Y.Sup. 2004); and (3) McCarthy v. McCarthy, 5/22/2009 NYLJ 27 (col. 1).

[2] Smith v. Smith, 650 N.Y.S.2d 842, 233 A.D.2d 830 (3rd Dept., 1996), and De Gaust v. De Gaust, 237 A.D.2d 862, 655 N.Y.S.2d 670 (3rd Dept., 1997).

[3] Hanford v. Hanford, 91 A.D.2d 829, 458 N.Y.S.2d 418 (4th Dept. 1982); Youngkrans v. Youngkrans, 245 A.D.2d 1142, 667 N.Y.S.2d 540 (4th Dept., 1997); Lischynsky v. Lischynsky, 95 A.D.2d 111, 466 N.Y.S.2d 815 (3d Dept. 1983); Harbour v. Harbour, 243 A.D.2d 947, 664 N.Y.S.2d 135 (3rd Dept., 1997), lv to appeal dismissed, 92 N.Y.2d 845, 699 N.E.2d 434, 677 N.Y.S.2d 74 (1998).

[4] Harrington v. Harrington, 103 A.D.2d 356, 479 N.Y.S.2d 1000 (2nd Dept., 1984); Lukaszuk v. Lukaszuk, 304 A.D.2d 625, 757 N.Y.S.2d 479 (2nd Dept., 2003); Sanders v. Copley, 151 A.D.2d 350, 543 N.Y.S.2d 67 (1st Dept., 1989); Rubenfeld v. Rubenfeld, 279 A.D.2d 153, 720 N.Y.S.2d 29 (1st Dept., 2001).

[5] Hallock v. State, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 (1984), "...strict enforcement [of open court stipulations] not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process.

mandatory provisions to be recited in child support opt-out provisions.[6])

Although it was believed that the Court of Appeals, in *Matisoff v. Dobi*,[7] would resolve this issue with finality, such was not the case. In *Matisoff* the parties signed an agreement one month into their marriage but never had it acknowledged. During trial neither party denied having signed the agreement and neither alleged fraud. The parties also agreed that they maintained separate finances in every detail throughout the marriage keeping with their unacknowledged agreement.

The husband sought to make the unacknowledged agreement enforceable by cleverly offering the wife's trial testimony as a late date retroactive acknowledgment of the agreement. The wife insisted that strict compliance with §236B(3) was the statutory sine qua non. The trial court ruled the agreement unenforceable on the ground that their joint admissions during trial regarding the authenticity of their signatures could not vitiate the failed compliance with the procedural formalities.

The First Department reversed holding that the omitted acknowledgment was a curable peccadillo and "did not constitute an absolute bar" to enforcement. The centerpiece behind the Appellate Division's reversal was the fulfillment of the legislative purpose behind acknowledgments, to wit, the "prevent[ion of] fraud and overreaching in marital contracts" none of which had been alleged. The appellate court, also, noted that the agreement was acknowledged and ratified in the daily activities and property relations of the parties throughout their marriage.[8]

The Court of Appeals reversed based on the plain language of the statute declaring the procedural formalities a bright line necessary to establish predictable results. The high court's seeming discomfort with its own ruling was subtly conveyed in its selection of quotes from a century

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[6] **Enforced**: Vernon v. Vernon, 239 A.D.2d 108, 656 N.Y.S.2d 634 (1st Dept., 1997); Tolchin v. Freeman, 275 A.D.2d 452, 713 N.Y.S.2d 67 (2nd Dept., 2000), Sievers v. Estelle, 211 A.D.2d 173, 626 N.Y.S.2d 592 (3rd Dept., 1995); **Not Enforced**: Woods v. Velez-Shanahan, --- N.Y.S.2d ----, 2003 WL 22234979 (2nd Dept., 2003), Gonsalves v. Gonsalves, 212 A.D.2d 932, 622 N.Y.S.2d 989; Walton v. Crane, 295 A.D.2d 279, 744 N.Y.S.2d 36 (1st Dept., 2002).

[7] Matisoff v. Dobi, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).

[8] ibid; It is noteworthy that although the Court of Appeals rejected the finding about the parties' daily management of their daily finances as determinative, it, nevertheless, instructed the Appellate Division to consider the very same fact on remand: "Although the equitable factors raised by defendant cannot save the unacknowledged agreement, they may be relevant to the Appellate Division's review of the award." On remand (Matisoff v. Dobi, 242 A.D.2d 495, 663 N.Y.S.2d 526 (1st Dept.,1997) the Appellate Division, in seeming resentment of its treatment at the appeals level wrote a rather sternly worded decision which rejected its original theory of the case which the Court of Appeals reversed and now suggested it use on remand – odd scenario, n'est-ce pas?

plus old case, *Chamberlain v. Spargur*[9]:

> We are warned on the one side that the strict letter of the law is not to master its obvious spirit and intent; and on the other that we are judges and not legislators, and must not assume to make exceptions or insert qualifications, however justice may seem to require it. Both warnings are just and sanctioned by authority, and must have their influence upon our judgment.

The Court also cited *In re Warren's Estate*[10] which espoused a chronic reality: "It is not novel in the law, however, to find a harsh result where statute or public interest requires strict and full compliance with certain formalities before rights may be predicated." The "harsh" result to the contrary notwithstanding, the Court of Appeals invalidated the *Matisoff* agreement nonetheless.

Statutory Construction

Matisoff never squarely addressed the issue of open court stipulations and the inter-Departmental divide persists along prior lines. The issue, however, merits review through the lens of the principles of statutory construction. The first principle suggests that since the DRL's naissance is the result of legislative fiat all procedural steps must be followed rigidly with no deviation especially when the statute is clear and unambiguous.[11] However, competing principles underscore that courts must look beyond the strict letter of the statute so as to implement the legislative intent even when the statute is clear and unambiguous[12]:

a. it is a well settled fundamental principle of statutory construction that "[t]he Legislature is presumed to know what statutes are in effect when it enacts or amends new laws and does not act in a vacuum"[13] – the Legislature was most assuredly aware of CPLR §2104 when it enacted DRL §236B(3);

b. sound principles of statutory interpretation generally require examination of a

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[9] 86 N.Y. 603, 1881 WL 13025 (1881).

[10] 16 A.D.2d 505, 229 N.Y.S.2d 1004 (2nd Dept., 1962).

[11] Pajak v. Pajak, 56 N.Y.2d 394, 397, 437 N.E.2d 1138, 1139, 452 N.Y.S.2d 381, 382 (1982); Brady v. Brady, 64 N.Y.2d 339, 346, 476 N.E.2d 290, 294, 486 N.Y.S.2d 891, 895 (1985).

0. New York Statutes §§230, 112, 96, 76, 111, 191, and 194; *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975); *Sutka v. Conners*, 73 N.Y.2d 395, 538 N.E.2d 1012, 541 N.Y.S.2d 191 (1989).

[13] People ex rel. Sibley on Behalf of Sheppard v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981); Thomas v. Bethlehem Steel Corporation, 95 A.D.2d 118, 466 N.Y.S.2d 808 (3rd Dept., 1983).

statute's legislative history and context to determine its meaning and scope[14]; and

c. "Where the interpretation of a statute is well settled and accepted across the State, it is as much a part of the enactment as if incorporated into the language of the act itself...Consequently, any intention to change such a well-established rule must emanate from the Legislature and may not be imputed to the Legislature in the absence of a clear manifestation of such intent..."[15] The cases are legion with respect to the supportive interpretation received by CPLR §2104.

The Court of Appeals' has, also, stated that "literalism is no substitution for reasoned interpretation as regards statutory construction":

> Absence of facial ambiguity is...rarely, if ever, conclusive. The words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold... [quoting from the U.S. Supreme Court]...'Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."[16]

Thus, decisional authority and the principles of statutory construction are dispositive of the dispute between the proponents of rigid statutory compliance versus those who point to the Legislature's ability during the past near quarter century (the enactment of DRL §236B) to have specifically curtailed the impact of CPLR §2104 on DRL §236B(3) had it so desired – but has not. Examples of remedial legislation targeted exclusively at imperfections in the DRL demonstrate the Legislature's lack of reluctance to craft laws limited to the matrimonial arena when deemed necessary:

(i) the prohibition against reverse partial summary judgment in matrimonial actions only; CPLR §3212(e) was enacted in 1984 to curb a perceived procedural ill which accorded a seeming unfair advantage to husbands seeking expeditious exits from their marriages "without paying the piper";

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[14] New York State Bankers Ass'n v. Albright, 38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975); Sutka v. Conners, 73 N.Y.2d 395, 538 N.E.2d 1012, 541 N.Y.S.2d 191 (1989); Price v. Price, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986); Comment to NY Statutes §191; NY Statutes §124; NY Statutes §72.

[15] Knight-Ridder Broadcasting Inc. v. Greenberg, 70 N.Y.2d 151, 518 N.Y.S.2d 595, 511 N.E.2d 1116 (1987).

[16] Raritan Development Corp. v. Silva, 91 N.Y.2d 98, 689 N.E.2d 1373, 667 N.Y.S.2d 327 (1997).

(ii) CPLR §211(e)'s specific application to support, alimony, and maintenance; and

(iii) enforcement proceedings in CPLR §5241 and §5242 stemming from matrimonial actions.

Furthermore, in *In re Nurse's Estate*[17] the Court of Appeals permitted the judicial imprimatur received in open court as a flexible and intelligent alternative of satisfying the EPTL's otherwise clear and unambiguous mandate that inter vivos transfers be acknowledged in a manner which entitles a deed to be recorded – just like §236B(3) – because such imprimatur acted in lieu of the actual acknowledgment. The linchpin in *Nurse* was that the undisputed purpose behind acknowledgments, to protect a document against fraud, overreaching or other chicanery[18], is accomplished when an agreement is reached under judicial auspices. The doctrine of in pari materia[19] also applies to these statutes. In essence, the Court of Appeals held that open court stipulations are equivalent to acknowledgments, the precise view of the downstate Departments with respect to CPLR §2104.[20]

Accordingly, it is submitted that there is ample wisdom supported by both statutory and decisional authority to uphold the validity of open court stipulations in divorce actions; that the Legislature did not abrogate the application of CPLR §2104 when it enacted DRL §236B(3).

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[17] 35 N.Y.2d 381, 321 N.E.2d 537, 362 N.Y.S.2d 441 (1974).

[18] Rubenfeld v. Rubenfeld, 279 A.D.2d 153, 720 N.Y.S.2d 29 (1st Dept., 2001).

[19] New York Statutes §221,Comment: "In pari materia"...means upon the same matter or subject. The phrase is applied particularly to statutes or general laws, usually enacted at different times but with reference to the same subject matter, that is, statutes which relate to the same person or thing, or to the same class of persons or things, and which are not in substance inconsistent with each other. New York Statutes §221(b): In accordance with general rules of construction, statutes which are in pari materia are to be construed together as though forming part of the same statute.

[20] Harrington v. Harrington, 103 A.D.2d 356, 479 N.Y.S.2d 1000 (2nd Dept., 1984); "The parties are fully protected by the procedures enumerated herein above, having both been duly sworn, having had an opportunity to consult with their attorneys, and having freely, on the record, consented to such agreement under the supervision of the court." Puca v. Puca, 115 Misc.2d 457, 454 N.Y.S.2d 271 (N.Y.Sup., 1982).