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CPLR 2104 vs. DRL §236B(3): A 37-Year Departmental Procedural Rift, Part I

This column reviews a recent decision in a rapidly approaching four-decade old departmental schism as to whether the time-honored legislative method for settling cases by way of on-the-record-open-court agreements (per CPLR 2104) supersedes the three procedural requirements in Domestic Relations Law §236B(3) to create enforceable marital (prenuptial and postnuptial) agreements.

By **Elliott Scheinberg** | June 28, 2021

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Procedure is an intricate element of jurisprudence; cases, at all levels, are lost for noncompliance. Under the New York State Constitution, the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature. N.Y. Const. art. VI, §30; *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 (1986). Nevertheless, valid procedure in one department may be invalid in another, e.g., E. Scheinberg, "CPLR 5513(a): Whose Service of the Order or Judgment Starts the 30-Day Limitation Period? (https://www.law.com/newyorklawjournal/2019/02/04/cplr-5513a-whose-service-of-the-order-or-judgment-starts-the-30-day-limitation-period/)," NYLJ (Feb. 5, 2019).

This column reviews *McGovern v. McGovern*, 186 A.D.3d 988 (4th Dep't 2020), another decision in a rapidly approaching four-decade old departmental schism as to whether the time-honored legislative method for settling cases by way of on-the-record-open-court agreements, per CPLR 2104, a statute anchored in the judicial policy of calendar management (*Hallock v. State*, 64 N.Y.2d 224, 230 (1984)), supersedes the three procedural requirements in Domestic Relations Law §236B(3) to create enforceable marital (prenuptial and postnuptial) agreements. See E. Scheinberg, Contract Doctrine and Marital Agreements in New York (NYSBA, 2 vols., 4th ed. 2020).

Amplifying this discussion is CPLR 101, which provides, in pertinent part: "The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."

'McGovern': The facts. The McGoverns settled their divorce action, in open court, by way of an on-the-record oral stipulation of settlement, which provided, inter alia, for the distribution of marital property. Although the stipulation contemplated the signing of a written agreement, defendant-wife later refused to sign. Supreme Court, nevertheless, issued a judgment of divorce that incorporated the stipulation without merging it into the judgment, thereby rendering the agreement separately viable and enforceable.

Keeping with the Fourth Department's multi-decade precedence (to be discussed in Part II), that "in matrimonial actions ... an open court stipulation is unenforceable absent a writing that complies with the requirements for marital settlement agreements ... [and] more particularly, to be valid and enforceable, marital settlement agreements must be 'in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded' (§236[B][3])," the majority (186 A.D.3d at 989) reversed, vacated the judgment and held the stipulation invalid and unenforceable except for those branches that granted the divorce and granted the wife the right to resume the use of a prior surname. The matter was remitted for a new determination.

Notably, neither the majority nor the dissent (discussed below) gave short shrift to the contemplated written agreement. While "it is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing signed by both of them, they are not bound and may not be held liable until it [is] written and signed" (*Jordan Panel*

Sys. Corp. v. Turner Const. Co., 45 A.D.3d 165, 166 (1st Dep't 2007), the Court of Appeals, in *Mun. Consultants & Publishers v. Town of Ramapo*, 47 N.Y.2d 144, 148-49 (1979), noted the exception:

> Generally, where the parties contemplate that a signed writing is required there is no contract until one is delivered ... This rule yields, however, when the parties have agreed on all contractual terms and have only to commit them to writing. When this occurs, the contract is effective at the time the oral agreement is made, although the contract is never reduced to writing and signed. Where all the substantial terms of a contract have been agreed on, and there is nothing left for future settlement, the fact, alone, that it was the understanding that the contract should be formally drawn up and put in writing, did not leave the transaction incomplete and without binding force, in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed.

See also *Attestor Value Master Fund v. Republic of Argentina*, 940 F.3d 825, 842 (2d Cir. 2019); *223 Sam v. 223 15th St.*, 161 A.D.3d 716 (2d Dep't 2018) .

CPLR 2104. CPLR 2104 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."

Diarassouba v. Urban, 71 A.D.3d 51, 56 (2d Dep't 2009), citing *Dolgin Eldert*, 31 N.Y.2d 1 (1972), held:

> The open-court exception to CPLR 2104 was created in order to codify the previously existing practice of enforcing oral stipulations that were made in open court in the course of judicial proceedings ... Notably, these oral stipulations were recorded by some type of formal entry ... Extending the open-court exception of CPLR 2104 beyond its intended purpose, so as to include settlements that are not formally recorded on the court record or elsewhere, would create "issues of fact and credibility among the parties, the presiding Justice, and the court clerk" ... As a result, it would not only become more difficult to ascertain the facts, but would also be detrimental to the integrity of the court and its litigation process.

"The rule had always been that oral stipulations or concessions made in open court, despite statutory or rule requirements for writings, would be enforced over the objection of lack of a subscribed writing." *Dolgin*, 31 N.Y.2d at 9.

DRL §236(B)(3), the three procedural formalities to validate a marital agreement; an intentionally 'onerous' statute. DRL §236(B)(3) provides, in pertinent part:

> 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 of 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 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 article.

In *Matisoff v. Dobi*, 90 N.Y.2d 127, 134 (1997), the Court of Appeals stressed that the procedural formalities in §236(B)(3) are purposefully onerous to protect important marital rights:

> DRL §236(B) does not incorporate the safeguards of the Statute of Frauds. Rather, it prescribes its own, more onerous requirements for a nuptial agreement to be enforceable in a matrimonial action. In particular—by contrast to the Statute of Frauds–Domestic Relations Law §236(B)(3) mandates that the agreement be acknowledged.
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> We have concluded that, under a similar statute specifically requiring a writing to be acknowledged, admission to the contract does not save an unacknowledged agreement. Thus, where the statute governing a spouse's waiver of elective share required that the waiver be in writing, subscribed and acknowledged, an unacknowledged agreement was held invalid even though the challenging party conceded having signed the agreement.
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> * * *
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> Acknowledgment, moreover, serves a valid purpose apart from prevention of fraud. Marital agreements within §236(B)(3) encompass important personal rights and family interests. As we explained with regard to the similar prerequisites for proper execution of a deed of land:
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> "When [the grantor] came to part with his freehold, to transfer his inheritance, the law bade him deliberate. It put in his path formalities to check haste and foster reflection and care. 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" (Chamberlain v. Spargur, 86 N.Y. at 607...).

In *Galetta v. Galetta*, 21 N.Y.3d 186, 192 (2013), the Court of Appeals, again, emphasized the deliberate onerousness of §236(B)(3) as compared with still another statute:

> We noted in Matisoff that 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 ... 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.

"Legislation imposes onerous requirements for a nuptial agreement to be enforceable in a matrimonial action ... [which] serves to prevent fraud, but perhaps more importantly . . . highlights to the parties the weighty personal choices to relinquish significant property or inheritance rights." *Rubenfeld v. Rubenfeld*, 279 A.D.2d 153, 157 (1st Dep't 2001).

'Open court' 'is a technical term in the law'. *Dolgin* offers an explanation of what constitutes "open court": "The term "open court" as it has been used since ancient times and as, it will be suggested, it is used in CPLR 2104, is a technical term in the law. It refers to a judicial proceeding in a court, whether held in public or private, and whether held in the courthouse, a courtroom, or any place else, so long as it is, in an institutional sense, a court convened, with or without a jury, to do judicial business. Typically, in a court of record an open court has in attendance a clerk who makes entries of judicial events in a docket, register, or minute book, and in modern times there is a court reporter, who makes a record of all the proceedings."

"Open court," as used in CPLR 2104, "is a technical term that refers to the formalities attendant upon documenting the fact of the stipulation and its terms, and not to the particular location of the courtroom itself." *Popovic v. N.Y. City Health & Hosps.*, 180 A.D.2d 493 (1st Dep't 1992).

"The 'open court' requirement is satisfied by transcribed proceedings in chambers." *Sontag v. Sontag*, 114 A.D.2d 892, 893 (2d Dep't 1985) (citing *Dolgin*), appeal dismissed, 66 N.Y.2d 554 (1986). "If the agreement of settlement was complete when dictated into the record and assented to by the parties or by their attorneys acting within the authority delegated to them, then it is binding notwithstanding the fact that the record was actually made in the judge's chambers rather than in the courtroom (CPLR 2104 ...)." *Bernstein v. Salvatore*, 62 A.D.2d 945, 946 (1st Dep't 1978); *Owens v. Lombardi*, 41 A.D.2d 438, 439-40 (4th Dep't 1973).

"An oral stipulation of settlement that is made in "open court" and stenographically recorded becomes enforceable (CPLR 2104) as a contract binding on all the parties and is governed by general contract principles for its interpretation and effect." *Am. Bridge Co. v. Acceptance Ins. Co.*, 51 A.D.3d 607, 609 (2d Dep't 2008); *Fukilman v. 31st Ave. Realty*, 39 A.D.3d 812 (2d Dep't 2007). "The transcript of the proceedings serves to establish the terms of the settlement and avoid conflicting claims of what the parties intended," *Owens v. Lombardi*, 41 A.D.2d 438 (4th

Dep't 1973), appeal denied, 33 N.Y.2d 515 (1973). "A stenographic record alone, created in a judicial setting outside of the justice's presence in front of the justice's law clerk in chambers, is insufficient." *Conlon v. Concord Pools, Ltd.*, 170 A.D.2d 754 (3d Dep't 1991).

"Even before full reporting in open court became universal in courts of record, the formality, publicity, and solemnity of an open court proceeding marked it as different from the preliminary atmosphere attached to informal conferences elsewhere. Moreover, the proceedings in open court would always have some formal entries, if only in the clerk's minutes, to memorialize the critical litigation events. In the latter days, it has also meant an available full transcript beyond dispute and the fallibility of memory." *Dolgin*, 31 N.Y.2d at 10. An attempted disavowal of a dictated settlement before the order is signed and entered does not defeat an otherwise valid agreement *Owens*, 41 A.D.2d at 440.

"Entry of a stipulation of settlement in the minute book of the clerk of the court satisfies the 'open court' requirement of CPLR 2104." *Deal v. Meenan Oil Co.*, 153 A.D.2d 665 (2d Dep't 1989). In *Popovic v. N.Y. City Health & Hosps.*, 180 A.D.2d 493 (1st Dep't 1992), the First Department gave effect to stipulations that were in substantial compliance with CPLR 2104 where the agreement was recorded in the court's minutes: "We are cognizant of 22 NYCRR 202.26(f) which requires that a stipulation of settlement agreed upon at a pre-trial conference must be recorded in the court's minutes. We construe this Rule permissively to deem compliance upon entry in the court's own records and the Central Clerk's computer." See also *Greenidge v. City of N.Y.*, 179 A.D.2d 386 (1st Dep't 1992); see *Venuti v. Booth Memorial Med. Ctr.*, 204 A.D.2d 715 (2d Dep't 1994) ("The record contains no evidence that a binding settlement agreement was ever made. There is no written agreement or stipulation evincing the purported settlement, nor is there any transcript of it. There are no notations in any court clerk's minute book, docket or register, nor is there any other documentary record of a settlement agreement.")

Diarassouba, 71 A.D.3d at 55, stated:

> The definition of "open court" is often determinative on the issue of whether the parties agreed to a settlement [citing Dolgin] ... In addition to an agreement among the parties, courts require a formal entry of some kind, onto the stenographic record, or elsewhere, even "if only in the clerk's minutes, to memorialize the critical litigation events."
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> Relying on this definition, courts have held that notations on trial calendars or records indicating a settlement do not comport with the requirements of CPLR 2104 ... (Avaltroni v. Gancer, 260 A.D.2d 590; Lamuraglia v. New York City Tr. Auth., 255 A.D.2d 365; Johnson v. Four G's Truck Rental, 244 A.D.2d 319). Other insufficient notations include those in a clerk's docket card (Kalomiris v. County of Nassau, 121 A.D.2d at 368) ... If not reduced to a writing signed by the parties or in an order, the open court requirement also is not satisfied in locations without a Justice presiding (Kushner v. Mollin, 144 A.D.2d 649), and it is not satisfied during less formal stages of litigation, such as a pretrial conference.

In his Practice Commentaries, McKinney's Practice Commentaries, CPLR 2104:2 (1997), Prof. Vincent Alexander writes:

> Obviously, open court encompasses proceedings that transpire in the courtroom in the presence of the judge and are recorded by a court stenographer. Beyond this, a review of the case law suggests that two fundamental components make up the concept of open court: (1) presence of a judge, and (2) memorialization of the proceedings in an official court record. The presence of a stenographer without the judge, however, is not open court. Kushner v. Mollin, 1988, 144 A.D.2d 649, 535 N.Y.S.2d 41 (2d Dep't). See also Conlon v. Concord Pools, Ltd., 1991, 170 A.D.2d 754, 565 N.Y.S.2d 860 (3d Dep't) (stenographic recording of settlement in front of judge's law clerk in chambers was insufficient); Trapani v. Trapani, 1990, 147 Misc. 2d 447, 556 N.Y.S.2d 210 (Sup. Ct. Kings Co.) (stipulation of settlement made during deposition and recorded by stenographic reporter did not satisfy CPLR 2104).
>
> Some cases have suggested that the presence of a court reporter, like that of a judge, is essential. See Gonyea v. Avis Rent A Car System, Inc., 1981, 82 A.D.2d 1011, 1012, 442 N.Y.S.2d 177, 178 (3d Dep't) (purpose of having stenographer is to assure "irrefutable proof of the agreement"); Kolodziej v. Kolodziej, 1976, 54 A.D.2d 228, 388 N.Y.S.2d 447 (4th Dep't) (stenographic transcript provides proof of substance and fact of parties' agreement). Recently, courts have excused the absence of a stenographic record if the terms of a stipulation, recited in the presence of a judge, are memorialized by other forms of official documentation. In the Second Department, entry of the agreement in the clerk's minute book will suffice. See, e.g., Deal v. Meenan Oil Co., 1989, 153 A.D.2d 665, 544 N.Y.S.2d 672 (2d Dep't).

In *In re Estate of Janis*, 210 A.D.2d 101 (1st Dep't 1994), the First Department, citing *Dolgin*, addressed the necessity of a transcription or entry into a court record in order for a settlement to comply with CPLR 2104: "The personal notes of the Surrogate relating to the purported agreement, not to mention those of the parties' respective attorneys, would not satisfy CPLR 2104 ..."; *Gustaf v. Fink*, 285 A.D.2d 625, 626 (2d Dep't 2001) ("Notations made by the trial judge on the court file, during the pretrial conference, even when considered in conjunction with the subsequent computer entries made by the office of the clerk of the Supreme Court pursuant to some later notification to that office by the judge, do not constitute a sufficient memorialization of the terms of the alleged settlement in the court's official records to satisfy the open court requirement as set forth in CPLR 2104.")

The only record of the settlement, in *Zambrana v. Memnon*, 181 A.D.2d 730 (2d Dep't 1992), was a notation made by the court in its personal file: "SBT ($200,000) Disposed," "SBT" apparently meaning "settled before trial." The Appellate Division affirmed the vacatur of the oral stipulation as unenforceable and restored the matter to the trial calendar; the court's notation did not constitute a sufficient or adequate memorialization of the terms of the settlement to satisfy the "open court" requirement of CPLR 2104.

"The notation on a judge's calendar that a case was 'settled' does not constitute a sufficient memorialization of the terms of the alleged settlement so as to satisfy the open-court requirement of CPLR 2104." *Andre-Long v. Verizon*, 31 A.D.3d 353 (2d Dep't 2006).

Arbitration as 'open court'. There are three exceptions to this body of law: *Neiman v. Springer*, 89 A.D.2d 922 (2d Dep't 1982); *Buckingham Mfg. Co. v. Frank J. Koch*, 194 A.D.2d 886 (3d Dept1993); *Kleinmann v. Bach*, 239 A.D.2d 861 (3d Dep't 1997), which held that stipulations during the course of an arbitration proceeding have open court status.

Part II will examine the history of the departmental rift.

Part III, the concluding segment, will address: unacknowledged agreements as being enforceable in other nonmatrimonial actions; the nonapplicability of §236B(3) to post judgment agreements; and the nonapplicability of §236B(3) to agreements between married parties and fertility clinics.

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New York Law Journal

CPLR 2104 vs. DRL §236B(3): A 37-Year Departmental Procedural Rift, Part II

Part I of this three-part column reviewed a recent decision in an old departmental schism as to whether the time-honored method for settling cases by way of on-the-record-open-court agreements supersedes the three procedural requirements in Domestic Relations Law §236B(3) to create enforceable marital agreements. Part II studies the history of the departmental rift and examines the dissent in that recent decision.

By **Elliott Scheinberg** | August 04, 2021

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Part I (https://www.law.com/newyorklawjournal/2021/06/28/cplr-2104-vs-drl-%c2%a7236b3-a-37-year-departmental-procedural-rift-part-i/)examined the issues raised in *McGovern v. McGovern,* 186 A.D.3d 988 (4th Dep't 2020); the dichotomy between CPLR 2104 and DRL §236B(3) regarding marital agreements; and what constitutes "open court". Part II studies the history of the departmental rift, including exceptions, and examines the dissent in *McGovern.*

The history of the departmental rift; the Second Department. Beginning in or about 1982, a schism evolved between the Second Department and the Third and Fourth Departments with regard to the validity and enforceability of agreements that had been dictated into the record in open court but never reduced to a writing, subscribed to by the parties and duly acknowledged in a manner entitling a deed to be recorded pursuant to §236B(3).

The Second Department was the first to hold that a marital agreement read into the record in open court, sans procedural compliance with §236B(3), is a valid and enforceable contract.

In reliance on two Fourth Department decisions, *Giambattista v. Giambattista*, 89 A.D.2d 1057 (4th Dep't 1982) and *Hanford v. Hanford*, 91 A.D.2d 829 (4th Dep't 1982), which held that noncompliance with the procedural formalities in §236B(3) constituted an absolute bar to its enforcement, the wife, in *Harrington v. Harrington*, 103 A.D.2d 356 (2d Dep't 1984), moved to vacate an agreement shortly after it had been read into the record. The Second Department rejected her contention (103 A.D.2d at 360-61):

> We [] do not believe that "the legislative intent [in enacting §236B(3)] was to discourage or impede the accepted and expeditious practice of entering into stipulations in open court to settle matrimonial disputes without the necessity of a full trial" ... and we conclude that "the Legislature did not intend to abrogate CPLR 2104 with respect to matrimonial actions settled in open court" ... Therefore, [DRL §236B(3)] should not be utilized to prohibit an oral stipulation made in open court, but should be more reasonably interpreted "as encouraging agreements between the parties before and during the marriage provided that they are in writing and properly subscribed and acknowledged or entered into in open court."

The Second Department further declined to follow the reasoning in the Third Department, in *Lischynsky v. Lischynsky*, 95 A.D.2d 111 (3d Dep't 1983). *Harrington*, 103 A.D.2d at 359), looked to pre-equitable distribution law as it pertained to settlements dictated into the record:

> Without question, prior to the enactment of the Equitable Distribution Law (Domestic Relations Law, §236, part B, eff. July 19, 1980), a stipulation entered into in open court was binding and enforceable ... and that principle has been reaffirmed subsequent to the enactment of the Equitable Distribution Law ... We hold that an oral stipulation of settlement with respect to property issues in a matrimonial action, if spread upon the record and found to be fair and reasonable by the court, is not to be disturbed absent a showing of one of the "traditional" grounds for vacatur, e.g., fraud, duress, mistake or overreaching.

The First Department. In *Sanders v. Copley*, 151 A.D.2d 350, 351-53 (1st Dep't 1989), the First Department, citing *Harrington*, rejected the upstate courts, aligning instead with the Second Department:

> It is our opinion that [DRL §236B(3)] applies only to agreements entered into outside the context of a pending judicial proceeding, such as ante nuptial agreements. We do not construe the statute as restricting the ability of the parties to terminate litigation upon mutually agreeable terms especially where, as here, the court has exercised its oversight and so ordered the stipulation. Rather, the provisions of CPLR 2104 govern agreements between the parties to a lawsuit or their attorneys in regard to "any matter" in the action (Harrington v. Harrington, supra, 103 A.D.2d 356, 360-361 ...).
>
> To hold otherwise ignores substantial precedent and violates "[t]he policy of our law to promote settlements" ... The Court of Appeals has observed that "courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes" (Mitchell v. New York Hosp., 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148 ... citing Salesian Soc. v. Village of Ellenville, 41 N.Y.2d 521, 525–526, 393 N.Y.S.2d 972 ...). The court has further stated: "Stipulations of settlement are favored by the courts and not lightly cast aside (Matter of Galasso, 35 N.Y.2d 319, 321, 361 N.Y.S.2d 871 ...). This is all the more so in the case of "open court" stipulations (Matter of Dolgin Eldert Corp., 31 N.Y.2d 1, 10, 334 N.Y.S.2d 833 ...) within CPLR 2104, where strict enforcement 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" (Hallock v. State of New York, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, ...). Generally, therefore, a stipulation will only be set aside for good cause, "such as fraud, collusion, mistake, accident or some other ground of the same nature" (Matter of Frutiger, 29 N.Y.2d 143, 150, 324 N.Y.S.2d 36 ...).

The First and Second Departments continue to so hold.

The Third and Fourth Departments require compliance with the procedural formalities. The Third Department as of 1983 (*Lischynsky*) and the Fourth Department, as of 1982 (*Giambattista*) continue to hold that anything short of strict compliance with the three procedural formalities in §236B(3), including on-the-record-open-court settlements, invalidates the agreement. *Cheruvu v. Cheruvu*, 59 A.D.3d 876, 877 (3d Dep't 2009), held that recitation of an oral stipulation into the record followed by execution of a written opt-out agreement stating that the parties adopted the terms of the stipulation "as if the same were fully set forth therein, satisfies the requirements in §236B(3)."

In *Tomei v. Tomei*, 39 A.D.3d 1149 (4th Dep't 2007), the parties placed an oral stipulation of settlement on the record that provided for the distribution, inter alia, of the defendant's pension benefits. Neither party executed the stipulation. Two years later, Supreme Court issued a judgment of divorce and a QDRO dividing the defendant's pension benefits. In their appeals the parties addressed only the propriety of the stipulation of settlement with respect to the defendant's pension benefits. The stipulation was held ineffective because of the

parties' noncompliance with the three procedural formalities in §236B(3), thereby requiring the court to distribute the pension benefits. Also, *Keegan v. Keegan*, 147 A.D.3d 1417, 1417–19 (4th Dep't 2017).

The dissent in 'McGovern'. Without directly referencing CPLR 2104, Justice John Curran dissented, relying on CPLR 5511, aggrievement and other nonmatrimonial decisions from the Fourth Department that address aggrievement in support of his position that the appeal should have been dismissed on the foundational requirement that, for there to be a justiciable controversy, the appellant must be aggrieved: "Inasmuch as defendant's contentions with respect to the judgment were resolved by the parties' oral stipulation that was incorporated but not merged into the judgment of divorce, dismissal of this appeal is required because defendant is not aggrieved by that to which she stipulated"; that "defendant's proper remedy was to move to vacate the stipulation and appeal from the ensuing order, assuming that Supreme Court denied her motion."

Inherent in Justice Curran's dissent is the applicability of CPLR 2104 to marital agreements entered into in open court; plainly, absent CPLR 2104, CPLR 5511 could not be applicable.

Three noteworthy decisions from the Third Department. In 1983, in *Manning v. Manning*, 97 A.D.2d 910 (3d Dep't 1983), the Third Department held that "an open court stipulation need not be reduced to a writing and signed by a party or his attorney nor reduced to the form of an order and entered for the agreement to be binding." In 2000, in *Uhl v. Uhl*, 274 A.D.2d 915 (3d Dep't 2000), the parties stipulated in open court to settlement of all claims, including equitable distribution. The Third Department held, "Where a stipulation of settlement in a matrimonial action is placed on the record in open court and is fair on its face, it will not be set aside unless there is proof of fraud, duress, overreaching or unconscionability." *Uhl* does not state whether the parties signed a memorandum following the recitation into the record.

In *Grunfeld v. Grunfeld*, 123 A.D.2d 64 (3d Dep't 1986), however, following a four-day trial, the court identified and affixed a value to items of separate and marital property, and permitted the parties to devise the method of achieving the division of property, which method, in effect, left one party with substantially all of the property and the other with virtually all of the debt. The Third Department drew a distinction, concluding that the case was not controlled by the procedural formalities in §236B(3) because the stipulation was not a substitute for the court's mandatory findings under DRL §236B(5)(a) but, rather, their private attempt to effectuate a distribution of property based upon those findings. See E. Scheinberg, Contract Doctrine and Marital Agreements in New York (NYSBA, 2 vols., 4th ed. 2020).

The Third and Fourth Departments have also held that §236(B)(3) only applies to property distribution and not to custody agreements. That the four specifically enumerated categories in §236B(3) are not exhaustive but rather broadly sweeping as to *any* issue raised under the banner of a matrimonial action is evidenced by the plain language in §236B(3)(3): "provision for the amount and duration of maintenance *or other terms and conditions of the marriage relationship* ..." Nevertheless, in *Charland v. Charland*, 267 A.D.2d 698 (3d Dep't 1999), the Third Department held that the procedural formalities apply to

property distribution but not to agreements "that relate to the value of marital property (and debt), equitable distribution of which was determined by the court, custody, and the manner in which child support is to be calculated. As such, the stipulations were not marital agreements within the meaning of DRL §236(B)(3), but rather agreements by the parties, through their counsel in open court, within the purview of CPLR 2104."

Although §236B(3)(4) specifically includes custody agreements, two decisions from the Fourth Department held otherwise. *Kelly v. Kelly*, 19 A.D.3d 1104 (4th Dep't 2005), appeal dismissed, 5 N.Y.3d 847 (2005), citing *Charland*, affirmed a custody award because the parties had so stipulated during the trial: "[T]he requirements of DRL §236B(3) pertain to stipulations which effect the equitable distribution of marital property ... Here, the stipulation pertained to custody and was binding pursuant to CPLR 2104." Same ruling in *Lewis v. Lewis*, 70 A.D.3d 1432 (4th Dep't 2010).

These rulings are inconsistent with the statutory scheme: Section 236B(3) states that it applies to matrimonial actions. CPLR 105(p) defines matrimonial actions: "The term 'matrimonial action' includes actions for a separation, for an annulment or dissolution of a marriage, for a divorce, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce and for a declaration of the validity or nullity of a marriage."

The sole predicate to the applicability of the three procedural formalities to any of the four categories "or other terms and conditions of the marriage relationship" is inclusion in the context of a matrimonial action. CPLR 105(p) specifically excludes Family Court proceedings. Accordingly, a husband and wife battling custody, child support or maintenance in Family Court can simply enter into a stipulation, no acknowledgment required. So much for statutory consistency. (Otto von Bismarck said: "Laws are like sausages, it is better not to see either being made.")

Part III, the concluding segment, addresses: unacknowledged agreements as being enforceable in other nonmatrimonial actions; the nonapplicability of DRL §236B(3) to post judgment agreements; and the enforceability of agreements between married parties and fertility clinics notwithstanding noncompliance with the statute.

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CPLR 2104 vs. DRL §236B(3): A 37-Year Departmental Procedural Rift, Part III

Part I and II of this three-part column explored a departmental rift and a recent decision as to whether the method for settling cases by way of on-the-record-open-court agreements supersedes the three procedural requirements in Domestic Relations Law §236B(3) to create enforceable marital agreements. This final part addresses: unacknowledged agreements; the lack of the nonapplicability of DRL §236B(3) to post judgment agreements; and agreements between married parties and fertility clinics.

By **Elliott Scheinberg** | September 09, 2021

Elliott Scheinberg. Courtesy photo

This article is in honor and in memory of Angela Susan Scheinberg, to whom I was married on 9/11. Angela was a paradigm of kindness, virtue and integrity.

Part I (https://www.law.com/newyorklawjournal/2021/06/28/cplr-2104-vs-drl-%c2%a7236b3-a-37-year-departmental-procedural-rift-part-i/) examined the issues raised in *McGovern v. McGovern*, 186 A.D.3d 988 (4th Dep't 2020); the dichotomy between CPLR 2104 and DRL §236B(3) regarding marital agreements; and what constitutes "open court". Part II studied the history of the departmental rift; and exceptions and challenging rulings.

This concluding segment addresses: unacknowledged agreements as being enforceable in other actions; the lack of the nonapplicability of DRL §236B(3) to post judgment agreements; (see E. Scheinberg, Contract Doctrine and Marital Agreements in New York (NYSBA, 2 vols., 4th ed. 2020)); agreements between married parties and fertility clinics.

Unacknowledged agreements remain enforceable in other actions. The prevailing erroneous belief assumes that once an agreement has been disqualified for noncompliance with §236B(3), it remains forever invalid and unenforceable. The contrary is, however, true; such an agreement retains absolute viability and enforceability in nonmatrimonial actions and proceedings, such as surrogate court and other plenary proceedings.

Singer v. Singer, 261 A.D.2d 531 (2d Dep't 1999) involved an action to recover damages for breach of contract arising from a separation agreement. The Appellate Division noted that, notwithstanding the fact that the agreement "would not be enforceable as an 'opting out' agreement in a matrimonial action because it was not acknowledged," it was, nevertheless, upheld as an independent contract in a plenary action: "the action was commenced to recover damages [] for breach of contract. Since the appellant's companion action for a divorce had been dismissed prior to the trial of the action at bar, we find no impediment to enforcement in a contract action of the provisions of the parties' agreement insofar as it concerns their personal property and certain monetary obligations."

In *Wetherby v. Wetherby*, 50 A.D.3d 1226, 1227 (3d Dep't 2008), the Third Department held: "[W]e recognize that an unacknowledged agreement which is not merged into a judgment of divorce may be enforceable in actions other than one for divorce (Rainbow v. Swisher, 72 N.Y.2d 106, 109 ... (1988); Matter of Sbarra, 17 A.D.3d 975, 976 (2005) ..."; *Geiser v. Geiser*, 115 A.D.2d 373 (1st Dep't 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 (DRL §176(6)) 'as to the parties themselves, the instrument ... may be effective without any acknowledgment ... and may be the proper basis for other action.'"); see also *Moran v. Moran*, 77 A.D.3d 443 (1st Dep't 2010) ("Plaintiff properly commenced a plenary action to enforce the separation agreement [regarding the agreed-upon sale of the marital residence], 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.")

Evidentiary value of an unacknowledged agreement. In *Parkinson v. Parkinson*, 295 A.D.2d 909 (4th Dep't 2002), the plaintiff overcame her burden of establishing that certain real property was her separate property as a gift from her mother exclusively to her, notwithstanding the fact that title had been placed in the names of both parties during the marriage on the advice of the family's estate lawyer. The plaintiff's mother had purchased the property with her own funds and resided there until her death. The defendant admitted that the mother asked that title to the property be transferred into the plaintiff's name alone because the mother wanted the plaintiff to have the property inasmuch as the plaintiff had no retirement fund of her own. The transfer was made. A document signed by the defendant acknowledged that the property was the plaintiff's separate property. Although not sufficient to meet the requirements of DRL §236B(3), the document, nevertheless, provided additional evidence that the plaintiff's mother intended to give the property only to the plaintiff.

The three procedural formalities in §236B(3) do not apply to post judgment agreements. The three procedural formalities are exclusively applicable to marital agreements during the duration of the marriage and terminate upon the conclusion of the marriage following a divorce. "There is no legal impediment to formerly married parties entering into a contract. Usual contract rules apply in determining whether the contract was valid at its inception." *Didley v. Didley*, 194 A.D.2d 7, 10-11 (4th Dep't 1993)).

In *Hargett v. Hargett*, 256 A.D.2d 50 (1st Dep't 1998), lv. to appeal dismissed, 93 N.Y.2d 919 (1999)), the parties had obtained a judgment of divorce in Georgia in 1991. Thereafter, plaintiff, having reserved the right to do so, commenced an action for equitable distribution of the marital property in New York. Although the parties seemingly settled the action by entering into an oral stipulation of settlement in open court, which stipulation was then so-ordered, defendant moved to set aside the stipulation on the ground that it was not in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded in accordance with §236(B)(3). The First Department held: "[§236(B)(3)], by its terms, applies only to agreements 'made before or during the marriage' and, accordingly, does not apply to agreements such as the subject stipulation made under judicial supervision (CPLR 2104) in the context of post-marital litigation over financial issues surviving the parties' judgment of divorce (Sanders v. Copley, 151 A.D.2d 350, 351-352 ... ; cf., Matisoff v. Dobi, 90 N.Y.2d 127 ...)."

The parties, in *Penrose v. Penrose*, 17 A.D.3d 847 (3d Dep't 2005), executed a separation agreement that was incorporated but not merged into a judgment of divorce. Thereafter, in a written agreement, plaintiff waived all her rights under the divorce decree in exchange for specific bequests set forth in a will executed by defendant that same day. Defendant agreed not to modify the will without plaintiff's written consent. Years later, defendant executed a new will to which plaintiff consented in writing. Plaintiff subsequently challenged the validity of her waiver. The Appellate Division, citing *Hargett* and §236(B)(3), held: "since the parties were no longer married at the time of its execution we reject plaintiff's contention that the 1993 agreement should have had a notarized acknowledgment in order to be valid."

In *Schaff v. Schaff*, 172 A.D.3d 1421 (2d Dep't 2019), the parties entered into a separation agreement, which was incorporated but not merged into their judgment of divorce. The agreement provided that no modification or waiver of any of its terms would be valid unless in writing, signed by both parties. Defendant subsequently moved to modify the child support provisions of the judgment of divorce based on two written post judgment agreements that modified the separation agreement. Both writings were held enforceable because the parties were no longer married at the time of their executions, for which reason the writings did not require certificates of acknowledgment in order to be enforceable.

Uncertain of how the Court of Appeals may rule on this issue when it does, the best practice in the meantime is to err on the side of caution and to reduce all recorded open-court settlement stipulations to writings that comply with §236(B)(3), such as in the Fourth Department, which uses a document called Affidavit of Adoption and Option Agreement.

'K.G. v. J.G.', §236(B)(3) and agreements with fertility clinics. In *K.G. v. J.G.*, NYLJ, June 15, 2021, Justice H. Patrick Leis III, Supreme Court, Suffolk County, ruled on a question of first impression that §236(B)(3) is inapplicable to a contract between a third party, here, a fertility clinic (RMA), and married parties embroiled in a divorce action regarding the disposition of embryos. RMA required both parties to sign various preprinted contracts, which covered the parties as well as RMA's own liability concerns. Justice Leiss noted that §236(B)(3) speaks only of agreements between married parties, without any mention of agreements between married parties on the one side and third-party service providers on the other.

K.G. relied on *Kass v. Kass*, 91 N.Y.2d 554 (1998), wherein the Court of Appeals "definitively [and "encouragingly"] ruled on the disposition of embryos in an agreement between married parties and a third-party fertility clinic": The Court of Appeals unequivocally stated that 'agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding and enforced in any dispute between them' ... Written agreements also provide the certainty needed for effective operation of IVF programs ... (id at 565). ... For this Court to disregard the agreement ... would totally disregard the specific guidelines in *Kass*."

K.G. postulated that *Kass*'s failure to reference §236(B)(3) was not because of oversight but rather because the agreement involved the third-party clinic.

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