Enforcement of Unacknowledged Marital Agreements
By Bari Brandes Corbin and Evan B. Brandes

In Matisoff v Dobi[1] the Court of Appeals observed that to be valid and enforceable in a matrimonial action, Domestic Relations Law § 236(B) (3) requires that a nuptial agreement must be signed and duly acknowledged (or proven in the manner required to entitle a deed to be recorded). It held that there are no exceptions and specifically rejected the argument that the Legislature intended some agreements, though unacknowledged, to be enforceable, observing that the history of Domestic Relations Law § 236(B) (3) did not reflect such an intent. The Court noted that Domestic Relations Law § 236(B) does not incorporate the Statute of Frauds. Rather, "it prescribes its own, more onerous requirements for a nuptial agreement to be enforceable in a matrimonial action. In particular—by contrast to the Statute of Frauds– Domestic Relations Law § 236(B) (3) mandates that the agreement be acknowledged." The Court of Appeals observed that the formality of acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care. It held that "by clearly prescribing acknowledgment as a condition, with no exception, the Legislature opted for a bright-line rule. It concluded that an unacknowledged agreement is invalid and unenforceable in a matrimonial action. "

Yet, in a recent divorce action, where the wife sought to enforce a written and signed prenuptial agreement which required the payment of money to the bride from

[1] Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997).

the groom, [2] the Supreme Court, upon the authority of Matisoff v Dobi, [3] held that the agreement was not enforceable in the matrimonial action because it was not acknowledged as required by Domestic Relations Law § 236[B] [3]. However, the Court correctly observed that the wife could bring a separate plenary action seeking enforcement of the unacknowledged agreement as an independent contract. Allowing a party to an unsigned or unacknowledged marital agreement to enforce it as an independent contract in a separate plenary action, but not allowing that party to enforce it in a matrimonial action, appears to be an anomaly created by the Legislature when it specified in Domestic Relations Law § 236[B] [3] that only agreements that complied with its provisions "shall be valid and enforceable in a matrimonial action." In this article we will explain which prenuptial and nuptial agreements may be enforced in a separate plenary action, even though they are not signed or acknowledged, and not "valid and enforceable in a matrimonial action." [4]

To be valid certain agreements between engaged couples and spouses must be in writing and acknowledged. For example, a waiver or release of all rights in the estate of the other spouse, or a waiver or release of a right of election against any last will or testamentary provision, must be in writing, subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property. [5] Other types of agreements between such persons need not be acknowledged. Conveyances and contracts concerning real

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[2] Mojdeh M. v. Jamshid A., **2012 WL 2732169 (N.Y.Sup.)**
[3] Matisoff v. Dobi, supra
[4] Domestic Relations Law § 236[B] [3].

property must be in writing, but need not be acknolwedged.[6] An estate or interest in real property, other than a lease for not more than one year, cannot be assigned, "unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person . . . assigning . . . the same, or by his lawful agent, authorized by writing."[7]

In a breach of contract action by a former wife against her former husband, the Appellate Division, Second Department held that the parties' unacknowledged separation agreement was enforceable as an independent contract, although it would not be enforceable as an "opting out" agreement in a matrimonial action, because the action was commenced to recover damages, *inter alia*, for breach of contract.[8] Since the wife's companion action for divorce was dismissed prior to the trial of the breach of contract action, the Appellate Division found there was no impediment to enforcement of the agreement's provisions in a contract action insofar as it concerned the parties' personal property and certain monetary obligations.

In Matter of Sbarra,[9] the Appellate Division, Third Department rejected the former wife's argument on appeal that the parties' unacknowledged separation agreement was unenforceable as a waiver of her rights to the former husband's pension plan and other assets. It held that while a separation agreement must be properly acknowledged in order to be enforceable in a matrimonial action, since the former wife did not deny that she signed the separation agreement, and it survived the judgment of divorce, the agreement was enforceable in other actions despite the alleged insufficiency of the

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[5] EPTL 5–1.1(f) (2), and 5-1.1A (e) (2).
[6] See General Obligations Law § 5-703 (1) and (3).
[7] Real Property Law § 291.
[8] Singer v Singer, 262 AD2d 531, 690 NYS2d 621 (2d Dept 1999)

acknowledgment.

Thus, an agreement between a husband and wife, or persons engaged to be married, which is not signed and acknowledged in the form to entitle a deed to be recorded, may be valid and enforceable in a breach of contract or partition action, even though it is not "valid and enforceable in a matrimonial action." However, these agreements must meet the other requirements imposed by law, such as a writing or memorandum.

Any agreement for support between the parties must be reduced to writing and submitted to the Family Court or to a support magistrate for approval. [10]

A waiver by a spouse of her rights under an employee's ERISA employee benefit plan is not effective unless, among other things, it is in writing, and is witnessed by a plan representative or a notary public, among other requirements.[11] The waiver is effectuated by the participant electing to designate a beneficiary or beneficiaries other than the spouse. Such election, however, will only be enforceable if the spouse of the participant consents in writing to the election, the election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of

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[9] 17 A.D.3d 975, 794 N.Y.S.2d 479 [3 Dep't. 2005]

[10] Family Court Act §425. Emerson v. Emerson, 83 A.D.2d 971, 442 N.Y.S.2d 815 (3d Dep't 1981) (reversal of an original support order was required where the husband was not advised of his right to counsel, and no agreement was reduced to writing and submitted for court approval.)

[11] 29 USCA § 1055 (2); Alfieri v. Guild Times Pension Plan, 446 F.Supp.2d 99 (E.D.N.Y.2006) (Waiver of surviving spouse benefits was not valid under ERISA, where surviving spouse signed waiver at home, notary signed waiver at employer's office but not in presence of surviving spouse, there was no acknowledgment in notarization, and surviving spouse's signature was not witnessed by plan representative or notary public.)

further consent by the spouse), and the spouse's consent acknowledges the effect of the election and is witnessed by a plan representative or a notary public.[12]

The Statute of Frauds in General Obligations Law §5-701 (a) provides, in part, that "a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . . 2. Is a special promise to answer for the debt, default or miscarriage of another person; 3. Is made in consideration of marriage, except mutual promises to marry; 5. Is a subsequent or new promise to pay a debt discharged in bankruptcy; . . . 9. Is a contract to assign or an assignment, with or without consideration to the promisor, of a life or health or accident insurance policy, or a promise, with or without consideration to the promisor, to name a beneficiary of any such policy . . ."

Thus, an agreement between a husband and wife, that the husband will pay the debts of the wife or name the wife the beneficiary of any life or health or accident insurance policy must be in writing, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

A antenuptial agreement appears to be enforceable in actions other than a matrimonial action even though it is not in writing and acknowledged in accordance with Domestic Relations Law § 236[B][3]. Prior to the adoption of Domestic Relations Law §236[B][3], the validity of an antenuptial agreement was determined by the Statute of Frauds, which provides that an agreement "made in consideration of marriage," other than mutual promises to marry, is void unless "some note or memorandum thereof be in

[12] ERISA Sec. 205(c) (2) (A)-(iii).

writing, and subscribed by the party to be charged therewith." [13] For example, an oral agreement to make a will in consideration of marriage violates of the Statute of Frauds and is unenforceable. [14] However, oral agreements that violate the Statute of Frauds are enforceable where the party to be charged admits they have entered into the contract. [15]

The requirement in General Obligations Law §5-701(a) that antenuptial property settlements be in writing, can be satisfied where the terms are set forth in letters between the parties. It does not matter that the entire agreement is not contained in one letter. All of the letters together may be considered for the purpose of ascertaining what the agreement is, provided the letters are all connected and related to each other.[16]

Additionally, an agreement may consist of signed and unsigned writings. [17] The Statute of Frauds is also satisfied where the writing constituting the antenuptial agreement is signed by duly authorized agents of the prospective spouses in their presence. [18]

An agreement between former spouses who are not married at the time they execute the agreement, such as an agreement modifying the provisions of their separation agreement, is enforceable in all kinds of actions including a matrimonial action, even if it is not acknowledged. There is no requirement that the former spouses

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[13] General Obligations Law § 5–701[a] [3]; see, Matter of Goldberg, 275 N.Y. 186, 9 N.E.2d 829.

[14] Re Goldberg's Estate, 275 NY 186, 9 NE2d 829 (1937)

[15] See Cohon & Co. v. Russell, 23 N.Y.2d 569, 574, 297 N.Y.S.2d 947; General Obligations Law 5-701 (3) (b)

[16] Peck v Vandemark, 99 NY 29, 1 NE 41 (1885).

[17] Crabtree v. Elizabeth Arden Sales Corporation, 305 N.Y. 48, 55, 110 N.E.2d 551 (1953); Rupert v. Rupert, 245 A.D.2d 1139, 667 N.Y.S.2d 537 (4th Dep't 1997)

agreement comply with Domestic Relations Law §236 [B] [3] since that statute only governs agreements between persons who are married to one another.[19]

General Obligations Law § 15-301 (1) provides: "1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." However, the case law prior to 1997 holds that a marital agreement can be modified by an oral agreement which has been fully executed [20] because the Statute of Frauds in General Obligations Law §15-301(1) [21] does not preclude proof of executed oral modifications, even where the agreement contains a clause prohibiting oral modifications.[22] The subsequent determination of the Court of Appeals in Matisoff v Dobi[23] appears to abrogate that rule in a matrimonial action.

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[18] Hurwitz v Hurwitz , 216 App Div 362, 215 NYS 184 (1926)

[19] Penrose v Penrose, 17 A.D.3d 347, 793 N.Y.S.2d 579 (3d Dep't 2005).

[20] Hadden v Dimick, 48 NY 661 (1872) ; Leidy v Procter, 226 App Div 322, 235 NYS 101 (1929); Vandemortel v Vandemortel, 204 Misc 536, 120 NYS2d 112 (1953).

[21] General Obligations Law § 15-301 (1).

[22] Savino v Savino, 146 App Div 2d 766, 537 NYS2d 247 (2d Dept 1989); Scally v Scally,151 App Div 2d 869, 542 NYS2d 844 (3d Dept 1989).

[23] Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997)