LAW AND THE FAMILY

No Safe Harbor for Open-Court Stipulations

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IN OUR VIEW, open-court settlements of matrimonial actions should be enthusiastically encouraged since it is to the advantage of all concerned, especially our courts. However, since the enactment of the Equitable Distribution Law in 1980 there has been an ongoing dispute between the judicial departments regarding the validity of oral "opting-out" agreements made on the record in open court.

> Domestic Relations Law (DRL) §236(B)(3) provides, in 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.

This provision, if literally applied, would appear to foreclose the possibility of a less formal agreement qualifying to serve in lieu of equitable distribution.

Validity Sustained

> However, since 1980, when the provision was construed in light of the legislative purpose and pari materia with Civil Practice Law and Rules §2104,[1] the courts in the First and Second Departments have held that a stipulation on the record in open court may serve in lieu of the prescribed formalities, and they have sustained the validity of stipulations in lieu of formal agreements.
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> In *Sanders v. Copley* [2] the First Department affirmed an order of the Supreme Court that declined to vacate a stipulation of settlement but directed a reference to determine the circumstances under which it was executed. It held that DRL §236(B)(3) should not be interpreted as proscribing an oral stipulation made in open court pursuant to CPLR §2104 and that a property settlement conforming with CPLR §2104 need not comply with the formalities "required to entitle a deed to be recorded."
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> In *Harrington v. Harrington* [3] the Second Department held that the validity of a stipulation of settlement of property issues, spread upon the record in open court, although not signed, was not impaired. The court stated its disagreement with the Fourth Department cases of *Giambattista v. Giambattista* [4] and *Hanford v. Hanford* [5]:

We also do not believe that "the legislative intent [in enacting §236(B)(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, Dom. Rel. L. §236(B)(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" (* * *)."

During this time, the courts in the Third and Fourth Departments have insisted on Subdivision 3 formalities, finding no exception to the strict requirements of the statute.6
In *Matisoff v. Dobi*,7 decided last year, the Court of Appeals held that a written post-nuptial agreement that was signed by the parties but not acknowledged is unenforceable.
Plaintiff Louise Matisoff and defendant Stephen J. Dobi were married in 1981. Because of defendant's two prior unsuccessful marriages, plaintiff wished to protect her real property and other assets in the event that their marriage failed. At her urging the parties made a post-nuptial agreement one month after marrying.
At the time, plaintiff was a real estate saleswoman in the New York cooperative apartment market, and defendant was an advisor to the Commissioner of the New York City Department of Cultural Affairs. Each earned about $40,000 annually. The agreement provided that the parties waived any rights of election pursuant to the Estates, Power and Trusts Law "and other rights accruing solely by reason of the marriage" with regard to property currently owned or subsequently acquired by either one.
The agreement specified that "neither party shall have nor shall such party acquire any right, title or claim in and to the real and personal estate of the other solely by reason of the marriage of the parties." The agreement was drafted by an attorney friend of plaintiff and signed by both plaintiff and defendant. The document was not acknowledged by the parties or anyone else.
By the time the divorce action was commenced in 1992, defendant's annual salary had risen to more than $400,000. Plaintiff continued to earn about $40,000. Defendant sought to enforce the post-nuptial agreement as a bar to any claim of entitlement by plaintiff to his property acquired before or during the marriage. Plaintiff contended that the agreement was invalid because it was not acknowledged as required by DRL §236B(3). Both parties testified at trial that they had signed the agreement. Neither made any allegation of fraud or duress.
Supreme Court deemed the agreement unenforceable, concluding that admissions by the parties, during the trial, that the signatures on the agreement were genuine failed to validate the unacknowledged agreement.
The Appellate Division reversed. It concluded that the terms of the post-nuptial agreement "were acknowledged and ratified in the daily activities and property relations of the parties throughout the marriage."

Contrary to Law's Plain Language

The Court of Appeals determined that the agreement was contrary to the plain language of DRL §236B(3), which recognizes no exception to the requirement of formal acknowledgment. After considering, "the unambiguous statutory language of §236(B)(3), its history and related statutory provisions," as well as relevant policy concerns, the court concluded that it was bound to enforce what it determined to be the clear intent of the Legislature to establish a bright-line rule.

The parties' oral acknowledgment of the authenticity of their signatures, subsequently made on the record in open court, did not satisfy the statutory mandate. It therefore reversed, holding that the requisite formality explicitly specified in DRL §236B(3) is essential to the validity of the agreement.[8]

In *Harbour v. Harbour*,[9] reported after *Matisoff*, the parties agreed during the divorce trial on the distribution of their marital property whereby defendant was to receive, among other things, sole ownership of the marital residence and was to pay plaintiff for her interest in it. A stipulation was then placed on the record in open court by plaintiff's attorney, who indicated that in consideration for the assets plaintiff was to transfer to defendant, including her interest in the marital home, defendant would relinquish his interest in certain joint accounts and also pay plaintiff $38,000.

Adverting to the parties' understanding that plaintiff was to be reimbursed for $7,000 of her separate property that had been applied toward the purchase price of the house, the attorney expressly stated that this amount was "included in the $38,000."

Plaintiff maintained that the $7,000 was to be paid in addition to the $38,000 and that she and her attorney discovered the error the following day upon reviewing their notes of the settlement conference. When defendant did not respond to a letter pointing out the claimed error, and requesting payment of the additional $7,000, plaintiff moved for vacatur of the stipulation on the ground of mistake. Her motion was denied and a cross motion by defendant to enforce the stipulation was granted.

Thereafter, plaintiff again moved to vacate the stipulation, contending that it was unenforceable because of the parties' failure to execute a valid "opting out" agreement as mandated by DRL §236(B)(3). Although aware of the Third Department's holding in *Lischynsky v. Lischynsky*,[10] Supreme Court, Albany County, believing it would be inequitable to permit plaintiff to disavow her earlier in-court representation that she had intended to "opt out" of the equitable distribution statute, declined to vacate the stipulation. Instead, the court ordered the parties to sign and acknowledge the requisite written "opting out" agreement nunc pro tunc.

No Exception

The defendant conceded on appeal that a strict application of *Lischynsky* to the case would require reversal of Supreme Court's order denying plaintiff's second motion and urged the Third Department to overrule that case. The court rejected this argument in light of the decision in *Matisoff v. Dobi* noting that the Court of Appeals, applying the same statutory provision in a slightly different context, found compliance with the prescribed formalities, including written acknowledgment, indispensable to the creation of a valid, enforceable marital contract, without exception.

The court held that "[E]quivalent reasoning leads us to conclude that the order" here, directing plaintiff to execute a written "opting out" agreement based on a similar oral

averment, cannot be upheld. To rule otherwise would, in essence, transform that oral representation, which does not comply with the explicit formalities specified in the statute, into a binding act, in direct contravention of the legislative intent." As the parties had not validly "opted out" of the statutory scheme governing the distribution of marital property, the stipulation was unenforceable and was set aside.

It appears that as a consequence of the Court of Appeals holding in *Matisoff v. Dobi* the upstate rule will prevail. Until *Harbour* is reviewed by the Court of Appeals, and the dispute between the Departments is resolved, caution should be exercised by counsel before succumbing to the temptation to enter into an open-court stipulation of settlement.

Notes

(1) CPLR §2104 provides: "An agreement between parties or their attorneys relating to a matter in an action, other than one made between counsel in open court, is not binding upon a party unless it be in writing by him or his attorney or reduced to the form of an order and entered."
(2) 1st Dept. 1989, 151 AD2d 350.
(3) 2d Dept. 1984, 103 AD2d 356. *Jensen v. Jensen* (2d Dept. 1985) 110 AD2d 679, sustained an on-the-record stipulation involving a property settlement and expressly disapproved contrary decisions from the Third and Fourth Departments.
(4) 4th Dept. 1982, 89 AD2d 1057.
(5) 4th Dept. 1982, 91 AD2d 829.
(6) See *Lischynsky v. Lischynsky,* 95 AD2d 111 (3d Dept. 1983) and *Hanford v. Hanford,* 91 AD2d 829 (4th Dept. 1982).
(7) 90 NY2d 127 (1997).
(8) The court noted that DRL §236B(3) and the Real Property Law do not specify when the requisite acknowledgment must be made and that it has never directly addressed whether and under what circumstances the absence of acknowledgment can be cured and decided. It need not resolve this issue.
(9) 664 NYS2d 135 (3d Dept. 1997).
(10) 95 AD2d 111.
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