LAW AND THE FAMILY

"Parties Stipulations Revisited"

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CIVIL PRACTICE LAW AND RULES 2103 governs stipulations made between the parties to an action or proceeding, It provides that "... 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."

The parties to a lawsuit have the right to stipulate with regard to the conduct of the litigation so long as they do not violate public policy. They have the right to stipulate to extend time limitations, waive their rights and "chart their own course," [FN1] although they may not consent to confer subject matter jurisdiction on the court. [FN2] An attorney has the authority to manage the conduct of the litigation on behalf of his client and has the authority to make certain procedural or tactical decisions. [FN3] However, he may not settle or compromise a client's case without the consent of the client, [FN4] and a settlement negotiated by an attorney without authority from his client is not binding. Nevertheless, an attorney who does not have "actual authority" to settle a case may bind his client if he has "apparent authority." [FN5]

Stipulations

A stipulation is a contract and will be enforced according to its terms, in accordance with the intent of the parties. [FN6] A stipulation, other than one made on the record in open court, must be in writing and signed by the parties or their attorneys to be binding. [FN7]Stipulations will be set aside only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident. They may be enforced or vacated by a motion in

the action, rather than by the commencement of a plenary action, unless the parties have unequivocally terminated the action. [FN8]

Domestic Relations Law (DRL), 236 (B)(3), which governs matrimonial agreements provides, in part, that 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."

Prior to the 1997 Court of Appeals decision in Matisoff v. Dobi [FN9] the First and Second Departments, [FN10] sustained the validity of open court stipulations in lieu of signed and acknowledged settlement agreements, but the Third and Fourth Departments refused to do so. [FN11]

In Matisoff v. Dobi, the Court of Appeals held that a written post-nuptial agreement that was signed by the parties but not acknowledged is unenforceable. The agreement was concededly unacknowledged and, therefore, did not comply with the terms of DRL 236(B)(3). Defendant argued that literal compliance with the statutory requirement of acknowledgment is not required so long as the purpose of that requirement is satisfied. The Court of Appeals held that the unambiguous statutory language of DRL 236(B)(3), its history and related statutory provisions, establish that the Legislature did not mean for the formality of acknowledgment to be expendable. The Court of Appeals held that DRL 236(B)(3) requires the invalidation of any nuptial agreement not acknowledged in the manner of a recordable deed. Recognizing that such a "bright line" rule might produce of harsh results, the Court nonetheless expressed the view that it was of paramount importance that the enforceability of nuptial agreements be consistent and predictable. It held that the validity of such agreements should not be made to depend upon subsequent fact-sensitive inquiries respecting the parties' original motivations or their post- contractual economic relations during marriage.

Case Law

While Matisoff v. Dobi would appear to invalidate open court stipulation in matrimonial actions the Second Department held otherwise in Nordgren v. Nordgren, [FN12] where the stipulation was made on the record in open court between counsel with the parties present. It found that, "there is nothing in Matisoff v. Dobi, ... which indicates that the Court of Appeals intended to abrogate the well-settled law of Rule 2104 of the Civil Practice Law and Rules."

In Charland v. Charland, [FN13] the Third Department rejected defendants' assertion that reversal was mandated because the Supreme Court's determinations as to custody, child support and equitable distribution improperly relied on the open court stipulations by the parties, which did not conform to the requirement of DRL236(B)(3) in that they were not "in writing, subscribed by the parties and acknowledged or proven in the manner required to entitle a deed to be recorded." It found that DRL236(B)(3) pertains to stipulations that effect the equitable distribution of marital property and because the parties stipulations related to the value of certain marital property (and debt); equitable distribution, which was determined by the court; custody; and the manner in which child support was to be calculated, they 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.

Recently, in Rubenfeld v. Rubenfeld [FN14], the First Department adopted the reasoning of the Third Department. During the second day of trial, the attorneys informed the court that the parties were negotiating a property settlement. After two days of negotiations, a stipulation of settlement was read into the record with schedules listing marital property, separate properties of the spouses and a list establishing distribution of personal property. During allocution, both parties, on the record and under oath, stated that they had an adequate opportunity to discuss the terms of the stipulation, that they understood its terms and that they had no reservations regarding settling the actions according to those terms. Both parties expressed satisfaction with their respective attorneys and their representation. Each party acknowledged his and her entry into the agreement on a knowing and voluntary basis and that the settlement agreement set forth the entire agreement of the parties.

The wife than sought a judgment of divorce on the grounds of constructive abandonment, and her motion that the settlement agreement be incorporated into but not merged with the judgment was granted. The day the judgment of divorce was signed the wife, who now had new counsel, moved for an order vacating the stipulation of settlement.

Relying onMatisoff v. Dobi, supra, the wife challenged the validity of the stipulation on the basis that it was neither subscribed nor acknowledged nor provable in the manner required to record a deed. She also argued that the specific formalities required by DRL 236(B)(3) overrode the general authority conferred by CPLR 2104 allowing for in-court settlement by stipulation. She also contended

that she had not understood the stipulation and had expected to be provided with a written agreement for her review setting forth the results of the in-court negotiations. The day after the judgment of divorce was granted, the wife started asserting several rights under the stipulation of settlement.

Motion Denied

The IAS court denied her motion to vacate the stipulation. It was not persuaded by the applicability of a statute that imposes formalities on ante-and post-nuptial economic agreements to a stipulation entered in open court with all necessary formalities of such a stipulation to settle a divorce action. The husband subsequently moved to enforce the stipulation and judgment. The wife cross-moved to direct the simultaneous distribution of various assets at a fair market value, including that residence, as contrasted with the $1 million value established in the agreement.

The husband's motion was granted in part. The wife's cross-motion was denied.

The First Department held that the case was readily resolved by reference to the precise terms of DRL 236(B)(3) and by considering what Matisoff, does not say. It noted that the policy and evidentiary concerns underlying enactment of DRL 236(B)(3), given effect by strict judicial application of the statute, were inapplicable to the present circumstances. Thus, it held that the formalities of DRL 236(B)(3), by the statute's terms and its legislative intent, do not govern an oral agreement entered on the record in open court during a matrimonial action intended to settle that action.

It discussed the history of DRL 236, which it stated generally constitutes our Equitable Distribution Law, enacted in 1980, and is designed to impose cohesion on the apportionment of responsibilities and property upon the dissolution of a marriage. It noted that the present action was not commenced with a view to enforcing an extant agreement. The agreement was entered as a means of settling the extant divorce action. It held that the major flaw of the wife's argument was that this was not a nuptial agreement. It pointed out that the wife relied principally on Matisoff, but distinguished, Matisoff, which it stated does not squarely address DRL 236(B)(3). It explained that in Matisoff, the wife, who had the greater financial resources, had initially urged that the parties enter the agreement at the time of their marriage. They entered and signed a written agreement providing for a distribution of assets in the event of a divorce, but the agreement remained unacknowledged. By the

time of the divorce, though, the husband's income significantly exceeded that of the wife, and he sought to enforce the terms of the agreement.

The Court of Appeals held that the terms of the statute were to be given full effect as written the requirement of a written contemporaneous acknowledgment was mandatory rather than permissive.

The Matisoff ruling, though, did not hold that DRL 236(B)(3) applies to a different class of agreement, one terminating litigation, which was never within the contemplation of the Legislature in enacting the Equitable Distribution Law.

On this basis it distinguished Matisoff. Here, the wife commenced an action for a divorce. That action was not commenced in part to give effect to an existing agreement regarding distribution of assets. Hence, there was no opting-out agreement providing an alternative to the distribution of assets otherwise addressed in DRL 236 generally. Insofar as there was no opting-out agreement, DRL 236(B)(3) does not apply. Since DRL 236(B)(3) is not triggered, its formalities do not govern what is only a stipulation, governed by CPLR 2104, settling the matrimonial action.

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FN(1) Osterling v. Osterling, 126 AD2d 965, 511 NYS2d 989 (4th Dept.,1987)

FN(2) Murray v. Murray, 123 Misc2d 37, 472 NYS2d 555.

FN(3) Gorham v. Gale, 7 Cos 739; Gaillard v. Smart, 6 Cow 385; Hallock v. State,64 NY 224, 458 NYS2d 510 (1984).

FN(4) Hallock v. State, supra; Kellogg v. Gilbert, 10 Johns. 220; Jackson v. Bartlett, 8 Johns. 361; Slavin v. Polyak, 99 AD2d 466, 470 NYS2d 38 (2d Dept.,1984)

FN(5) Hallock v. State, supra, held that on open court stipulation of settlement was binding despite the clients prior disapproval, where the client created the impression that the attorney was authorized to act.

FN(6) Davis v. Sapa, 100 AD2d 1005, 484 NYS2d 568 (3rd Dept., 1985); Kraker v. Roll, 100 AD2d 424, 474 NYS2d 567 (2nd Dept., 1988).

FN(7) Kahn v. Friedlander, 90 AD2d 868, 456 NYS2d 482; Dobbins v. Erie County, 58 AD2d 733, 395 NYS2d 865.

FN(8) Teitelbaum Holdings Ltd v. Gold, 48 NY2d 51, 421 NYS2d 556.

FN(9) 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376.

FN(10) Sanders v. Copley, (1989 1st Dept.) 151 App Div 2d 350, 543 NYS2d 67; Harrington v. Harrington, (2nd Dept.) 103 Ad2 356, 479 NYS2d 1000. See also, Joseph son v. Joseph son, 121 Misc. 2d 572, 469 NYS2d 285.

FN(11) Lischynsky v. Lischynsky, (3d Dept) 95 AD2d 111, 466 NYS2d 815: Harbor v. Harbor, (3d Dept) 243 AD2d 947 lv dismissed 92 NY2d 845: and Hanford v. Hanford, (4th Dept.) 91 AD2d 829, 458 NYS2d 418.

FN(12) 264 AD2d 828, 695 N.Y.S.2d 588 (2d Dept.,1999). See also Natole v. Natole, 256 AD2d 558.

FN(13) 267 AD2d 698, 700 NYS2d 254 (3d Dept., 1999)

FN(14) 279 AD2d 153, 720 NYS2d 29 (1st Dept., 2001)

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