Requisites of Matrimonial Agreements: Domestic Relations Law §236(B)

NY Dom Rel Law §236(B)(3) attempts to modernize the New York law applicable to antenuptial and postnuptial agreements to assure fair dealing and to encourage settlement by agreement. Parties are encouraged to "opt out" of the statutory system and to create their own provisions as to property division and maintenance. That privilege was most persuasive in the effort to obtain legislative acceptance and approval of the proposed Equitable Distribution Law.

Thus, critics of court decisions regarding property distribution and the setting of the amount and duration of maintenance have the alternative of negotiating and setting contractual terms that serve in lieu of the court's broad discretion in making the disposition. Which party has "bargaining leverage" depends upon the circumstances of the individual case. It is true that prior court decisions set the frame work for responsible negotiations but the perils of litigation are such that where possible an agreement is the better solution.

As previously noted, the Equitable Distribution Law in NY Dom Rel Law §236(B)(3) applies the same basic rules to antenuptial as well as to postnuptial agreements. For the latter the parties no longer need to be separated, as under former law, for their agreement to be valid. The subject matter for such agreements is set forth in the statute to 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) a 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 NY Gen Oblig Law §5-311, 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 (emphasis supplied)
"(4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of §240 of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision." (July 19, 1980)

Although the permissible area of subject matter has been greatly expanded there are limitations as to the negotiation and contractual terms of antenuptial and postnuptial agreements. Subdivision 3 of the Equitable Distribution Law permits limited freedom of contract but not anarchy.

Acknowledgement of Agreement

Domestic Relations Law §236(B)(3) provides that ([a]n 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.

A proper acknowledgment requires an oral acknowledgment before an authorized officer, and a written certificate of acknowledgment attached to the agreement. An unacknowledged agreement is invalid and unenforceable in a matrimonial action.[1]

Pursuant to the Real Property Law, proper acknowledgment or proof is an essential prerequisite to recording a deed in the office of the county clerk (see, Real Property Law §291). Such acknowledgment or proof, moreover, must meet various specifications. The Real Property Law dictates who may make an acknowledgment or proof (see, Real Property Law §292); before whom such acknowledgment or proof may be made (see, Real Property Law §§298, 299); that an officer taking an acknowledgment must (know[ ] or [have] satisfactory evidence, that the person making it is the person described in and who executed such instrument (Real Property Law §303; see also, Real Property Law §304 [concerning proof by subscribing witness]); that the person taking the acknowledgment or proof must attach a certificate of acknowledgment (see, Real Property Law §306); and the contents of that certificate (see, id.).[2]

A Separation Agreement is not void where it is acknowledged in another state by a New York notary public who is only empowered to certify and receive acknowledgments within New York State, where no objection with regard to the original defect in the certificate of acknowledgment is made within six months. Executive Law §142-a provides, in relevant part that: 1. Except as provided for in subdivision three of this section, the official certificates or other acts of notaries public and commissioners of deeds heretofore or hereafter and prior to the time of their acts appointed or commissioned as such shall not be deemed invalid, impaired or in any manner defective, so far as they may be affected, impaired or questioned by reason of defects described in subdivision two of this section. 2. This section shall apply to the following defects: (a) ineligibility of the notary public or commissioner of deeds to be appointed or commissioned as such; (b) misnomer or misspelling of name or other error made in his appointment or commission; (c) omission of the notary public or commissioner of deeds to take or file his official oath or otherwise qualify; (d) expiration of his term, commission or appointment; (e) vacating of his office by change of his residence, by acceptance of another public office, or by other action on his part; (f) the fact that the action was taken outside the jurisdiction where the notary public or commissioner of deeds was authorized to act. 3. No person shall be entitled to assert the effect of this section to overcome a defect prescribed in subdivision two if he knew of the defect or if the defect was apparent on the face of the certificate of the notary public or commissioner of deeds; provided however, that this subdivision shall not apply after the expiration of six months from the date of the act of the notary public or commissioner of deeds. Executive Law 142-a(2)(f) applies to a certificate of acknowledgment in such a situation. Any objection with regard to the original defect in the certificate of acknowledgment is

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[1] See, Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997); Filkins v. Filkins, 303 A.D.2d 934, 757 N.Y.S.2d 665 (4th Dep't 2003); Real Property Law §§291, 298, 299, 303, 306.

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

waived after six months.[3]

Formal Requirements

Domestic Relations Law §236[B][3] provides: "3. Agreement of the parties. 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. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. 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. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision. "[1]

To be valid and to serve in lieu of equitable distribution, the agreement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.[2]

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[3] See Kudrov v. Kudrov, 12 Misc. 3d 205, 820 N.Y.S.2d 405 (Sup 2005); see also In re Gregory J., 209 A.D.2d 191, 618 N.Y.S.2d 282 (1st Dep't 1994) (appellant waived any objection to the complainant's supporting deposition, which had been notarized by a notary public whose term had expired, where he failed, for one and a half years, to contest the defect).

[1] As amended by Laws of 2003, c. 595, §1, effective September 22, 2003. The amendment added the following sentence: Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter.

[2] NY Dom Rel Law §236(B)(3). In De Jose v. De Jose, 66 N.Y.2d 804, 497 N.Y.S.2d 907, 488 N.E.2d 837 (1985) affirmed the Court of Appeals affirmed the order of the Appellate Division, holding that a separation agreement entered into before July 19, 1980 was governed by former Dom. Rel. L. §236 (now §236(A)), and therefore whether there was compliance with Part B, subdivision 3, regarding "opting out" agreements, was immaterial.

In Gubbins v. Fee, 148 Misc. 2d 47, 559 N.Y.S.2d 625 (Sup 1990), the Supreme Court declared that on antenuptial agreement, wherein the husband agreed to convey title to a house owned by him to he and his bride-to-be after their marriage, is not enforceable because of the provisions of NY Civ R Law §80-a. As the agreement was not acknowledged or proven in the

In Matisoff v. Dobi,[3] the Court of Appeals held that by clearly prescribing acknowledgment as a condition of an agreement pursuant to Domestic Relations Law §236[B][3], with no exception, the Legislature opted for a bright-line rule. It therefore held that an unacknowledged agreement is invalid and unenforceable in a matrimonial action. In this case the parties 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 presently owned or subsequently acquired by either party. It 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. Both parties testified at trial that they had signed the agreement, and neither made any allegation of fraud or duress. The Court of Appeals determined that, in these particular circumstances, the agreement was contrary to the plain language of NY Dom Rel Law §236(B)(3), which recognizes no exception to the requirement of formal acknowledgment. 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 held that the unambiguous statutory language of section 236[B][3], its history, and related statutory provisions establish that the Legislature did not mean for the formality of acknowledgment to be expendable. Domestic Relations Law §236(B)(3) and the Real Property Law do not specify when the requisite acknowledgment must be made. It was unclear whether acknowledgment must be contemporaneous with the signing of the agreement. While the Court had affirmed determinations allowing parties to provide the requisite acknowledgment under similar statutory requirements at a later date, it noted that it had never directly addressed the question whether and under what circumstances the absence of acknowledgment can be cured and decided that it need not resolve this issue in this case. Even assuming, without deciding, that the requisite acknowledgment could be supplied at the time of the matrimonial action, each party's admission in open court that the signatures were authentic did not, by itself, constitute proper acknowledgment under section 236[B][3]. The statute prescribes acknowledgment "in the manner to entitle a deed to be recorded." This requires both that an oral acknowledgment be made before an authorized officer and that a written certificate of acknowledgment be attached.[4] As the

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manner required to entitle a deed to be recorded but was simply notarized, it would not serve as a total or partial "opting-out" agreement in the matrimonial action.

In Rupert v. Rupert, 245 A.D.2d 1139, 667 N.Y.S.2d 537 (4th Dep't 1997), the Appellate Division noted that an agreement may consist of signed and unsigned writings, "provided that they clearly refer to the same subject matter or transaction" (citing Crabtree v. Elizabeth Arden Sales Corporation, 305 N.Y. 48, 55, 110 N.E.2d 551 (1953)). Parole evidence was admissible to show the connection between the writings and defendant's agreement to them.

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

[4] See, NY Real P Law §§291, 306.

Court explained, “[a]n instrument is not ‘duly acknowledged’ unless there is not only the oral acknowledgment but the written certificate also, as required by the statutes regulating the subject.” Because no proper certificate of acknowledgment was attached to the agreement the court held that the postnuptial agreement was invalid.[5]

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[5] In Smith v. Smith, 263 A.D.2d 628, 694 N.Y.S.2d 194 (3d Dep't 1999), the husband commenced action for divorce and sought enforcement of antenuptial agreement. The wife counterclaimed for divorce on ground of constructive abandonment. The Supreme Court dismissed the action for enforcement of antenuptial agreement. The Appellate Division affirmed, holding that clear and convincing evidence established that the wife's signature on antenuptial agreement was not properly acknowledged. The requirement that an agreement between the parties be duly acknowledged has been strictly construed. The Court of Appeals has held that an unacknowledged agreement is unenforceable even though the parties admit to the authenticity of their signatures in open court. Where a document on its face is properly subscribed and bears the acknowledgment of a notary public, there is a presumption of due execution. Therefore there must be clear and convincing evidence that defendant's signature was not properly acknowledged. The evidence strongly suggested that defendant did not actually sign the agreement before the named witness as indicated in the written acknowledgment, there was sufficient evidence supporting the conclusion that the agreement was not acknowledged in accordance with the requirements of Domestic Relations Law §236(B)(3) and was, therefore, unenforceable.

In In re Estate of Sbarra, 17 A.D.3d 975, 794 N.Y.S.2d 479 (3d Dep't 2005), the Appellate Division rejected respondent's argument that, although she signed the separation agreement, she did not acknowledge her signature to the notary public who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. A separation agreement must be properly acknowledged only in order to be enforceable in a matrimonial action. Since respondent did not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement is enforceable in other types of actions despite the alleged insufficiency of the acknowledgment. Since respondent affirmatively alleged in the divorce action that the separation agreement was valid, she was judicially estopped from challenging its validity. Having received the benefit of the separation agreement's provisions for division of marital property in the earlier divorce action, respondent could not assume a contrary position simply because her pecuniary interests had changed. It also rejected her argument that, even if the separation agreement were enforceable and even though the Court of Appeals has now held that a beneficiary can waive his or her rights under a retirement plan established pursuant to the Employee Retirement Income Security Act of 1974 (see Silber v. Silber, 99 N.Y.2d 395, 757 N.Y.S.2d 227, 786 N.E.2d 1263, 30 Employee Benefits Cas. (BNA) 1487 (2003)), the separation agreement did not explicitly identify the benefits being waived. In *Silber v. Silber*, the Court of Appeals held that a designated beneficiary can waive the right to an ex-spouse's pension plan benefits by means of a written agreement so long as the waiver is explicit, voluntary and made in good faith. It found that the separation agreement was sufficiently

explicit. It refers to—and releases respondent's rights “as beneficiary” in—decedent's “retirement benefits” and “life insurance”.

In Penrose v. Penrose, 17 A.D.3d 847, 793 N.Y.S.2d 579 (3d Dep't 2005), the parties 1985 separation agreement was incorporated but not merged into a judgment of divorce. In an “Agreement and Waiver” dated August 2, 1993, plaintiff waived all of her rights under the divorce decree in exchange for specific bequests as then set forth in a will executed by defendant that same day. Defendant agreed not to modify this will without plaintiff's written consent. In 1996, defendant executed a new will which included bequests of $100,000 and a quarter of his residuary estate to plaintiff. She consented to the execution of this new will in writing. Since their divorce, defendant continually provided financial support to plaintiff for food, clothing and health care, as well as payment of her household and car expenses. In addition, he made regular, biweekly $500 cash advances to her. In 2003, plaintiff commenced an application by order to show cause for enforcement of certain terms of the divorce decree. She partially prevailed before Supreme Court, which “decline[d] to address” a statute of limitations argument advanced by defendant. The Appellate Division found that pursuant to the 1993 agreement, plaintiff waived all rights set forth in the judgment of divorce. Her challenges to the validity of this waiver were time barred. Even if the challenges were not time barred, her attempt to enforce the provisions of the 1985 separation agreement was itself time barred. To the extent that CPLR 211(e) now provides for a longer limitations period, it explicitly applies only to orders entered after its effective date of August 7, 1987. Since the parties were no longer married at the time of its execution the 1993 agreement did not have a notarized acknowledgment in order to be valid.

In Kudrov v. Kudrov, 12 Misc. 3d 205, 820 N.Y.S.2d 405 (Sup 2005), the parties entered into a written separation agreement which provided for the equitable distribution of their marital property. On January 21, 1997 the plaintiff commenced an action for divorce which was uncontested and resulted in a judgment of divorce entered July 8, 1997. The agreement was incorporated, but did not merge into the judgment of divorce.

The defendant subsequently moved, in December 2004, to enforce a paragraph of the separation agreement which provided for joint ownership and equal sharing of all profits from two taxi cab corporations which were being managed by the plaintiff. The plaintiff opposed the motion and argued that the separation agreement was void and unenforceable because it failed to comply with acknowledgment requirement of DRL 236(B)(3). The court held that because the separation agreement was acknowledged in Florida by a New York notary, the agreement was void ab initio and unenforceable.

The defendant moved. The Court granted the motion, noting that EL 142-a appears to validate the official certificates and other acts of notaries public despite certain specified defects. The statute was enacted to allow the public to rely on the presumption of validity attached to a notary's certificate. EL 142-a states in relevant part that: 1. Except as provided for in subdivision three of this section, the official certificates or other acts of notaries public and commissioners of deeds heretofore or hereafter and prior to the time of their acts appointed or commissioned as such shall not be deemed invalid, impaired or in any manner defective, so far as they may be

affected, impaired or questioned by reason of defects described in subdivision two of this section. 2. This section shall apply to the following defects: ... (f) the fact that the action was taken outside the jurisdiction where the notary public or commissioner of deeds was authorized to act." Based upon the foregoing language EL 142-a(2)(f) applied to the certificate of acknowledgment. Any objection the plaintiff may have had with regard to the original defect in the certificate of acknowledgment was waived after six months. After reargument, the court held that the separation agreement was valid and enforceable. The plaintiff failed to raise any issue regarding the defective acknowledgment for over eight years and was not now permitted to raise any such infirmity in defense of the defendant's motion to enforce the separation agreement as incorporated into the judgment of divorce.

In Stein v. Stein, 14 Misc. 3d 453, 825 N.Y.S.2d 335 (Sup 2006), the parties were married on September 17, 1997 after they signed a pre-nuptial agreement dated September 16, 1997. In an affidavit submitted in support of her motion, defendant alleged that she signed the Agreement at the home of Steven Elias, Esq., an attorney, in the presence of both Mr. Elias and plaintiff. She maintains that plaintiff did not sign the Agreement at that time. Defendant stated that, at some point, plaintiff "purportedly signed the Agreement and on March 21, 2005, [p]laintiff's attorney of record in this action notarized his signature on a page which is separate from the page on which [her] signature was acknowledged." Plaintiff stated that he signed the agreement at the same time that defendant signed it. He did not recall why his signature was not acknowledged at the time he signed it, but "[i]t may be that [he] intended to have [his] signature acknowledged with a written certification of acknowledgment by [his] attorney the next day, because [his] then attorney, Steve Queller, Esq., was not present on September 16, 1997 when the [A]greement was signed." Plaintiff stated that he came across the Agreement in March 2005 and realized at that time that he had not acknowledged his signature at the time he signed the Agreement. He thereafter contacted Mr. Queller who referred him to his current attorney, Aaron Weitz, Esq. Mr. Weitz submitted an affirmation with respect to the certificate of acknowledgment which was prepared in March 2005. He stated that when plaintiff first came to see him in March 2005, his signature was on the document. However, the document was missing a certificate of acknowledgment of plaintiff's signature by a notary public. On March 21, 2005, plaintiff "reaffirmed his original signature before [Mr. Weitz] and orally acknowledged that the signature was his." Mr. Weitz then proceeded to complete the certificate of acknowledgment as a notary public. The Supreme Court noted that in Matisoff v. Dobi, 90 N.Y.2d 127, 137-138, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997)) the Court of Appeals determined that where a marital agreement governed by DRL 236(B)(3) lacks the requisite certification, such defect cannot be rectified by the admissions of the parties in open court that the signatures on the subject document are indeed authentic. It observed that in D'Elia v. D'Elia, 14 A.D.3d 477, 788 N.Y.S.2d 156 (2d Dep't 2005), the Appellate Division, Second Department held that "[t]he defendant's attempt to cure the acknowledgment defect by submitting a duly-executed certificate of acknowledgment at trial was not sufficient" where "it [was] uncontroverted that the parties' post-nuptial agreement was not properly acknowledged at the time that it was executed". The court granted defendant's motion seeking a declaration that the subject pre-nuptial agreement was invalid and unenforceable. The court found that it was bound to follow the Second Department's

holding in D'Elia that an acknowledgment defect present at the time the agreement was first executed cannot be cured by the submission to the court of a subsequently executed valid certificate of acknowledgment. Plaintiff's signature was not duly acknowledged pursuant to DRL 236(B)(3) contemporaneous to his execution of the Agreement. A certificate of acknowledgment was not generated with respect to such signature until March 21, 2005, almost 7 1/2 years after the original execution of the document. Given the lack of a properly executed contemporaneous certificate of acknowledgment with respect to plaintiff's signature, the Agreement was unenforceable.

In Wetherby v. Wetherby, 50 A.D.3d 1226, 854 N.Y.S.2d 813 (3d Dep't 2008), the parties' opt-out agreement, incorporated, but not merged, into a subsequent judgment of divorce, provided that the parties would share joint legal custody of their minor child, with defendant having primary physical custody and plaintiff receiving liberal parenting time, directed plaintiff to pay all of the minor child's uninsured health expenses and awarded defendant 50% of the marital portion of plaintiff's retirement plan. Thereafter, the parties entered into a mediation agreement modifying the terms of the opt-out agreement whereby they agreed, among other things, that defendant could relocate to Arizona with the minor child in exchange for her waiver of her right to 50% of the marital portion of plaintiff's retirement plan. Following the issuance of a domestic relations order, which directed the payment to defendant of her share of plaintiff's retirement benefits pursuant to the terms of the opt-out agreement, plaintiff moved to enforce the mediation agreement and to set aside the DRO. Defendant filed a cross-motion seeking, among other things, an order declaring the mediation agreement void and directing plaintiff to reimburse her for $1,736 in uninsured health care expenses incurred for the benefit of the minor child. Supreme Court denied plaintiff's motion and partially granted defendant's cross motion, declaring the mediation agreement invalid and unenforceable because it was not duly acknowledged, and directing plaintiff to reimburse defendant for the unpaid health care expenses. The Appellate Division affirmed. The opt-out agreement, having been entered into during the marriage, was subject to the strict standards set forth in Domestic Relations Law 236(B)(3), namely, that an agreement made by the parties either before or during the marriage shall be valid and enforceable "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 opt-out agreement explicitly states that "[n]either this Agreement, nor any provision hereof, shall be amended or modified, or deemed amended or modified, except by an Agreement in writing duly subscribed and acknowledged with the same formality as this Agreement". Thus, the strict formality requirements of Domestic Relations Law 236(B)(3) were equally applicable to any subsequent amendments or modifications to the opt-out agreement, such as the mediation agreement at issue.

The mediation agreement, while signed and notarized, lacked a formal acknowledgment by the parties. As such, Supreme Court properly found the unacknowledged mediation agreement to be invalid and unenforceable.

In Acito v. Acito, 23 Misc. 3d 832, 874 N.Y.S.2d 367 (Sup 2009), aff'd, 72 A.D.3d 493, 898 N.Y.S.2d 133 (1st Dep't 2010), the wife moved for dismissal of the divorce action, based on

the death of defendant the Husband on December 9, 2007. Frank T. D'Onofrio, Jr., the court-appointed guardian for the Husband prior to his death, opposed the Wife's motion and cross-moved for an order substituting the Husband's estate for the Husband as the defendant in this action, and for entry of a judgment of divorce nunc pro tunc. The court granted the Wife's motion and denied Mr. D'Onofrio's cross-motion. The Wife commenced the divorce action by filing a summons and complaint on September 24, 2003. The Husband appeared, but never interposed an answer or counterclaims. At the time of commencement, the Husband and Wife were both 78 years old and their children were all adults. In 2006, a guardianship proceeding under Article 81 of the Mental Hygiene Law was commenced and the Guardianship Court appointed attorney Frank T. D'Onofrio, Jr., as guardian of the Husband's person and property. Paragraph 10 of the Guardianship Commission authorized Mr. D'Onofrio to "prosecute and defend civil proceedings ... and settle and compromise all matters related to such proceedings," including this divorce action, provided, however, that "all settlements are subject to the approval of [the Guardianship Court]." On October 22, 2007, the Wife's attorney and Mr. D'Onofrio advised the court that they had reached agreement in principle on the terms of a divorce settlement. The court then held an inquest on the Wife's grounds for divorce and stated on the record that it would reserve decision, "so that when there is a final approval of the stipulation [of settlement of the divorce by the Guardianship Court], I can then decide the grounds for divorce and then you can submit the papers [for the divorce] to be completed." On December 6, 2007, the Wife, the Wife's attorney, and Mr. D'Onofrio signed a "Stipulation and Order" which contained the terms of their divorce settlement. None of the signatures was notarized or acknowledged. On December 6, 2007, at Mr. D'Onofrio's request, the court "so ordered" the Agreement. On December 9, 2007, the Husband died. The Agreement was never submitted to the Guardianship Court for approval. On April 7, 2008, the Putnam County Surrogate's Court issued temporary letters of administration giving the Husband's son, Gregory Acito, limited authority to collect the assets of the Husband and pay all expenses associated with the preservation of real estate in the Husband's name. On May 30, 2008, the Surrogate's Court issued an order additionally authorizing Gregory Acito to "attempt to finalize the divorce" action. Mr. D'Onofrio, whose authority as Guardian for the Husband lapsed by operation of law upon the Husband's death, was now the attorney for Gregory Acito in the Surrogate's Court proceeding. Noting that the First Department had recently refused to apply the requirements of DRL §236[B][3] to a written agreement entered into during the pendency of a divorce action (Williams v. Williams, 57 A.D.3d 233, 868 N.Y.S.2d 659 (1st Dep't 2008)) Supreme Court noted that the Agreement between the parties was executed in the context of a pending divorce proceeding, and was subject to judicial oversight, even though it was not signed in open court. Under these facts, and in light of the binding precedent, the Court held that the agreement was not subject to the requirements of DRL §236[B][3] and, absent any other considerations, would be enforceable. However, something more than a "mere ministerial act" was required prior to entry of a divorce judgment, because the Agreement was never approved by the Guardianship Court. Since a court-appointed guardian only has the powers conferred on him by the guardianship commission (Mental Hygiene Law §81.20[a][1]), Mr. D'Onofrio's execution of the Agreement did not create a binding divorce settlement until it was approved by the Guardianship Court. Until the Guardianship Court had reviewed and approved the

In *Galetta v Galetta,*[6] a matrimonial action, the Court of Appeals discussed, but

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Agreement, it was not valid. Therefore, the court held that it could not enter a divorce judgment based on the Agreement.

In Arabian v. Arabian, 79 A.D.3d 517, 915 N.Y.S.2d 513 (1st Dep't 2010), the Appellate Division affirmed an order which denied defendant's application to compel arbitration and ordered him to pay $17,000 per month in pendente lite maintenance and child support. Immediately before the parties' wedding ceremony on March 18, 2000, they signed a "Binding Arbitration Agreement" wherein they agreed to submit to the Beth Din of America, Inc., for a binding decision, any dispute over issues relating to a get (religious divorce), premarital agreements or monetary matters. When plaintiff commenced this divorce action, defendant moved for a stay and to compel arbitration. Plaintiff cross-moved for pendente lite support. The parties' agreement, while not unconscionable, was not "acknowledged or proven in the manner required to entitle a deed to be recorded," as required by DRL §236(B)(3). In light of the sweeping language in Matisoff v. Dobi, 90 N.Y.2d 127, 133-134, 136, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997) and the statute's plain terms, it found that the parties' agreement, which addressed matters of substance, fell within the scope of the statute and therefore was not enforceable to the extent it purported to require arbitration of disputes beyond the issue of a get. Defendant had substantial liquid assets. Thus, he showed no exigency which would warrant departure from the general rule that an aggrieved party's remedy for perceived inequities in a pendente lite award is a speedy trial.

In Popowich v. Korman, 73 A.D.3d 515, 900 N.Y.S.2d 297 (1st Dep't 2010), Supreme Court, inter alia, awarded plaintiff a money judgment of $1,844,931 plus statutory interest on her cause of action for repayment of certain loans. The Appellate Division, modified, to vacate the money judgment and dismiss the cause of action for repayment of the loans. It held that Supreme Court erred in concluding that defendant was liable to plaintiff for repayment of the loans. Because the written guaranty required defendant to repay the loans, it was an agreement that makes "provision for the ownership, division or distribution of separate and marital property" (DRL §236(B)(3)). The guaranty was executed by defendant during the marriage, but was not "acknowledged or proven in the manner required to entitle a deed to be recorded." Accordingly, the clear terms of the statute rendered it unenforceable (citing Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997)).

[6] Galetta v. Galetta, 21 N.Y.3d 186, 195-96, 969 N.Y.S.2d 826, 991 N.E.2d 684, 689-90 (2013).

In Gardella v. Remizov, 144 A.D.3d 977, 42 N.Y.S.3d 225 (2d Dep't 2016) the parties to this matrimonial action were married in 2000. In October 2002, the parties entered into a postnuptial agreement, which provided, among other things, that the marital residence and the plaintiff's private medical practice were the plaintiff's separate property. In 2006, the parties entered into a second postnuptial agreement, which provided that four parcels of real property in Florida acquired by the parties during the marriage had been purchased with the plaintiff's separate property, and further addressed the distribution of those four parcels in the event of a divorce. In 2010, the parties entered into a separation agreement, which addressed, inter alia,

issues of maintenance and equitable distribution of the parties' respective assets. At the time, the plaintiff, a neurologist, was earning approximately $600,000 per year, and the defendant, a wine salesman, was earning approximately $40,000. The separation agreement provided, among other things, that the defendant would have no interest in any of the assets acquired during the parties' marriage, including six parcels of real property, the plaintiff's partnership interest in a neurological practice, and the plaintiff's bank and brokerage accounts, and that he waived his right to spousal maintenance. The defendant was not represented by counsel when he executed the separation agreement. In November 2011, the plaintiff commenced the action for a divorce. Supreme Court granted plaintiffs motion for summary judgment dismissing the defendant's counterclaims to set aside the agreement, and denied defendants cross motion for summary judgment on his counterclaims to set aside the agreements, to nullify the 2002 postnuptial agreement for lack of acknowledgment, and for financial disclosure. The Appellate Division found that plaintiff demonstrated her prima facie entitlement to judgment as a matter of law dismissing the defendant's first and second counterclaims, which sought to vacate the separation agreement. However, defendant's submissions were sufficient to raise triable issues of fact as to the validity of the separation agreement. Under the terms of the separation agreement, the defendant relinquished all of the property rights that he acquired during the marriage, including any interest that he may have had in the plaintiff's partnership interest in a neurological practice and the parties' four properties in Florida, as well as any spousal maintenance. Given the vast disparity in the parties' earnings, the evidence that the defendant had no assets of value, and the defendant's documented medical condition which inhibits his future earning capacity, the defendant's submissions were sufficient to create an inference that the separation agreement was unconscionable. In addition, the defendant's evidence indicating that the plaintiff sold almost $1 million in securities in the months preceding his execution of the separation agreement, the value of which were not accounted for in the list of her bank and brokerage accounts therein, raised a triable issue of fact as to whether the plaintiff concealed assets. It held that under these circumstances, the Supreme Court should have exercised its equitable powers and directed further financial disclosure, to be followed by a hearing to test the validity of the separation agreement.

The Appellate Division further found, that the 2006 agreement was valid, and that while the defendant correctly contended that the 2002 postnuptial agreement was not properly acknowledged in the manner required by Domestic Relations Law §236(B)(3) (see Galetta v. Galetta, 21 N.Y.3d 186, 192, 969 N.Y.S.2d 826, 991 N.E.2d 684 (2013), the evidence established that the defendant ratified that agreement by accepting the benefits of it and by waiting more than eight years to seek its nullification. No inquiry into the validity of the 2002 postnuptial agreement or the 2006 postnuptial agreement would be necessary or warranted.

In Matter of Koegel, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2d Dep't 2018), leave to appeal dismissed, 32 N.Y.3d 948, 84 N.Y.S.3d 429, 109 N.E.3d 578 (2018) the Appellate Division observed that in Galetta v. Galetta, 21 N.Y.3d 186, 969 N.Y.S.2d 826, 991 N.E.2d 684 (2013), the Court of Appeals left unanswered the question of whether a defective acknowledgment of a prenuptial agreement could be remedied by extrinsic proof provided by the notary public who

took a party's signature. It held that in this case such proof could remedy a defective acknowledgment.

Prior to their marriage, the decedent and Irene executed a prenuptial agreement in July 1984. At the bottom of the first page, both the decedent and Irene signed the agreement. The second page contained certificates of acknowledgment of each signature, each signed by their respective attorneys as notaries. The decedent's signature was acknowledged by William E. Donovan on July 26, 1984. The acknowledgment read, “On this 26 day of July, 1984, before me personally appeared WILLIAM F. KOEGEL, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be his free act and deed.” Irene's signature was acknowledged by Curtis H. Jacobsen on July 30, 1984. The language of the acknowledgment relating to the Irene's signature stated, “On this 30th day of July, 1984, before me personally appeared IRENE N. LAWRENCE, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be her free act and deed.” Neither acknowledgment attested to whether the decedent or Irene was known to the respective notaries.

Irene moved pursuant to CPLR 3211 (a) (1) and Domestic Relations Law §236 (B) (3) to dismiss the petition to set aside her notice of election on the basis that the acknowledgment of the signatures accompanying the prenuptial agreement omitted required language.” John contended that the phrase “personally appeared” reflected that the signer was “known” to the notary. The two notaries submitted affidavits stating that they respectively knew Irene and the decedent at the time that the agreement was executed. In her answer and supporting affidavit, Irene admitted that she signed the agreement. John claimed that if there had been any technical defect with respect to the acknowledgments, the affidavits cured those defects. John submitted Donovan's affidavit, sworn to February 26, 2015. Donovan stated that, in 1984, he recalled taking the acknowledgment that appeared on page two of the prenuptial agreement and stated that the decedent “did not have to provide me with any identification of who he was because he was well known to me at the time.” John also submitted Jacobsen's affidavit, sworn to February 25, 2015. Jacobsen stated that he recalled that he took the acknowledgment of Irene which appeared on page two of the prenuptial agreement. He explained that Irene did not have to provide identification to him since she was known to him at the time.

The Surrogate's Court denied Irene's motion. The Appellate Divison in an opinion by Justice Austin observed that a proper acknowledgment requires both an oral declaration by the signer of the document made before an authorized officer and a written certificate of acknowledgment, attached to the agreement, endorsed by an authorized public officer attesting to the oral declaration (see Real Property Law §306). An instrument is not duly acknowledged unless there is a written certificate as well as an oral acknowledgment. However, there is no requirement that a certificate of acknowledgment contain the precise language set forth in the Real Property Law. Rather, an acknowledgment is sufficient if it is in substantial compliance with the statute. Pursuant to Real Property Law §309-a (1), “[t]he certificate of an acknowledgment, within this state, of a conveyance or other instrument in respect to real property situate in this state, by a person, must conform substantially with the following form, the blanks being properly filled”: “On the ____ day of ____ in the year ... before me, the

did not determine the question of when a defective acknowledgement can be cured. There, plaintiff Michelle Galetta sought a determination that a prenuptial agreement she and defendant Gary Galetta signed was invalid due to a defective acknowledgment. The Court of Appeals concluded that plaintiff was entitled to summary judgment declaring the agreement to be unenforceable under Domestic Relations Law §236[B][3], and reversed the order of the Appellate Division, which held there was a triable question of fact on that issue. Michelle Galetta and Gary Galetta were married in July 1997. About a week before the wedding, they each separately signed a prenuptial agreement. Neither party was present when the other executed the document and the signatures were witnessed by different notaries public. The parties' signatures and the accompanying certificates of acknowledgment were set forth on a single page of the document. The certificates appeared to have been typed at the same time, with spaces left blank for dates and signatures that were to be filled in by hand. The certificate of acknowledgment relating to Michelle's signature contained the boilerplate language typical of the time. However, in the acknowledgment relating to Gary's signature, a key phrase was omitted and, as a result, the certificate failed to indicate that the notary public confirmed the identity of the person executing the document or that the person was the individual described in the document.

The Court of Appeals, in an opinion by Judge Graffeo, observed that Prenuptial agreements are addressed in Domestic Relations Law §236B(3), which provides: “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

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undersigned, personally appeared ____, *personally known to me* or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.”

The court distinguished this case from Matisoff v Dobi since here, there were certificates of acknowledgment of the signatures of Irene and the decedent, albeit the certificates did not contain the required language for acknowledgment as currently required by the Real Property Law. Given the presence of executed acknowledgments, rather than an absence of any acknowledgment at all, the decision in *Galetta was* on point and instructive. The notaries here, the decedent's law partner and Irene's attorney, actually recalled acknowledging the signatures at issue. In such a situation, the Court of Appeals explained that the confirmation of the identity of the signer, through an affidavit, is sufficient without having to explain how the identity was confirmed. To supplement the allegations of the petition John submitted affidavits which showed that the petition may be meritorious in spite of the documentary evidence. In response to the assertion that the prenuptial agreement was invalid as improperly acknowledged, the affidavits of Donovan and Jacobsen specifically stated that each observed the document being signed, took the acknowledgment in question, and personally knew the individual signer signing before him. In so doing, the defect in the acknowledgment was cured in order to give vitality to the expressed intent of the parties set forth in the prenuptial agreement. Accordingly, the Surrogate's Court properly denied Irene's motion to dismiss the petition.

parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." Judge Graffeo noted that Real Property Law §291, governing the recording of deeds, states that "[a] conveyance of real property ... on being duly acknowledged by the person executing the same, or proved as required by this chapter, ... may be recorded in the office of the clerk of the county where such real property is situated." Thus, a deed may be recorded if it is either "duly acknowledged" or "proved" by use of a subscribing witness. The Court noted in Matisoff that the acknowledgment requirement imposed by Domestic Relations Law §236B(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.

In the certificate of acknowledgment relating to the husband's signature, the "to me known and known to me" phrase was omitted, leaving only the following statement: "On the 8[sic] day of July, 1997, before me came Gary Galetta described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same." Absent the omitted language, the certificate did not indicate either that the notary public knew the husband or had ascertained through some form of proof that he was the person described in the prenuptial agreement. As New York courts have long held that an acknowledgment that fails to include a certification to this effect is defective, the Court agreed with the Appellate Division, which unanimously concluded that the certificate of acknowledgment did not conform with statutory requirements.

Because the certificate of acknowledgment was defective, the Court of Appeals raised the following questions: (1) whether such a deficiency can be cured and, if so, (2) whether the affidavit of the notary public prepared in the course of litigation was sufficient to raise a question of fact precluding summary judgment in the wife's favor. Because the affidavit of the notary was insufficient to raise a question of fact precluding summary judgment the Court held that it did not need to "definitively resolve the question of whether a cure is possible". Judge Graffeo observed that in Matisoff, the Court found it was unnecessary to decide whether the absence of an acknowledgment could be cured. Since Matisoff, the Appellate Divisions have grappled with the "cure" issue, which has largely arisen in cases where a signature was not accompanied by any certificate of acknowledgment and the weight of Appellate Division authority is against permitting the absence of an acknowledgment to be cured after the fact, unless both parties engaged in a mutual "reaffirmation" of the agreement.[7] However, the Court did

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[7] D'Elia v. D'Elia, 14 A.D.3d 477, 788 N.Y.S.2d 156 (2d Dep't 2005) [where postnuptial agreement was not properly acknowledged, defendant's attempt to cure the defect by submitting a duly-executed certificate of acknowledgment at trial was not sufficient]; Filkins v. Filkins, 303 A.D.2d 934, 757 N.Y.S.2d 665 (4th Dep't 2003) [where antenuptial agreement was not acknowledged, plaintiff's attempt to cure defect by having agreement notarized and filed after divorce action had commenced failed "because the agreement was never reacknowledged"]; Schoeman, Marsh & Updike, LLP v. Dobi, 264 A.D.2d 572, 694 N.Y.S.2d 650 (1st Dep't 1999) [legal malpractice action related to *Matisoff* litigation] [parties to divorce action cannot obtain

not need to resolve that issue here. In this case, however, the proof submitted was insufficient. In his affidavit, the notary public did not state that he actually recalled having acknowledged the husband's signature, nor did he indicate that he knew the husband prior to acknowledging his signature. The notary averred only that he recognized his own signature on the certificate and that he had been employed at a particular bank at that time (corroborating the husband's statement concerning the circumstances under which he executed the document). As for the procedures followed, the notary had no independent recollection but maintained that it was his custom and practice "to ask and confirm that the person signing the document was the same person named in the document" and he was "confident" he had done so when witnessing the husband's signature. The affidavit by the notary public in this case merely paraphrased the requirement of the statute—he stated it was his practice to "ask and confirm" the identity of the signer—without detailing any specific procedure that he routinely followed to fulfill that requirement. The Court concluded that even assuming a defect in a certificate of acknowledgment could be cured under Domestic Relations Law §236B(3), defendant's submission was insufficient to raise a triable question of fact as to the propriety of the original acknowledgment procedure. Plaintiff was therefore entitled to summary judgment declaring that the prenuptial agreement was unenforceable.

Open court stipulations

Domestic Relations Law §236[B][3], if literally applied, would appear to foreclose the possibility of a less formal agreement qualifying so as to serve in lieu of equitable distribution. In addition, even though the proffered agreement is invalid, because the requisite formalities were not observed, the court in exercising its equitable discretion regarding property distribution and maintenance may consider and perhaps adopt provisions the parties informally agreed upon but did not reduce to the written form prescribed by subdivision 3.[1]

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retroactive validation of postnuptial agreement]; Anonymous v. Anonymous, 253 A.D.2d 696, 677 N.Y.S.2d 573 (1st Dep't 1998) [where prenuptial agreement was not acknowledged, defect could not be cured by production of acknowledgment that surfaced after matrimonial action had commenced and some 12 years after agreement was signed]).

[1] A similar concept of the "equities of the case" may occur regarding interspousal gifts that are deemed to be marital rather than separate property of the donee spouse. The gift or the invalid agreement may be indicative of what the parties intended or thought was fair and reasonable.

In Hutchings v. Hutchings, 155 A.D.2d 971, 547 N.Y.S.2d 970 (4th Dep't 1989), the Appellate Division, Fourth Department held that as a general rule the value of the marital residence should be fixed as of the time of trial. Here, two years passed since the date of commencement and the trial court did not give any reasons for its selection of that date to value the marital residence and defendant's condominium. This was an abuse of discretion. After the action was commenced, the husband gave his car to his son. The Appellate Division held that trial court erred in distributing the car and assessing its entire value to him. It held that the parties

As we have discussed earlier in this chapter, the Civil Practice Law and Rules 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 writing subscribed by him or his attorney or reduced to the form of an order and entered.[2] This provision applies to any kind of stipulation, including a stipulation of settlement. The general rule is that where the parties enter into a stipulation of settlement during a conference held outside of the courtroom, or in chambers, or during the trial of an action, the stipulation must be dictated on the record in open court in order to be valid.[3]

In addition to the provisions of the Civil Practice Law and Rules relating to the validity of an agreement between parties or their attorneys relating to any matter in an action, the Domestic Relations Law provides 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.[4]

However, when construed in light of the legislative purpose and in *pari materia* with CPLR §2104,[5] the courts in the First Department have held that a stipulation on the

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in effect made a distribution of this item to their own satisfaction, and it should have been excluded from the property subject to distribution.

In Miller v. Miller, 104 A.D.2d 403, 478 N.Y.S.2d 725 (2d Dep't 1984), the husband was earning $30,000 a year at the time of trial, while the wife was unemployed and had no independent income. She stipulated in open court to accept $50 a week maintenance for six months and $100 a week child support for her two children. The marital home was to be sold, and the net proceeds equally divided. A month later, the wife's motion to vacate the stipulation on the grounds of duress and unconscionability was denied by Special Term. The Appellate Division affirmed but remitted the action for a hearing pursuant to NY Dom Rel Law §236(B)(3) "to determine" if the maintenance provision was "fair and reasonable" when made. It stated that the basis for the remitter was that subsequent to the wife's stipulation she was required to seek public assistance. Query: Since the court had already determined that the agreement was not unconscionable when made and refused to vacate the stipulation, why did it remand for another challenge to the validity of the maintenance provisions instead of for modification based on "extreme hardship?"

[2] CPLR 2104.

[3] In Trapani v. Trapani, 147 Misc. 2d 447, 556 N.Y.S.2d 210 (Sup 1990), the Court held that an out of Court transcript taken during a deposition, containing a proposed stipulation of settlement in the transcript, was not a valid stipulation of settlement because it did not meet the requirements of Domestic Relations Law §236[B][3], nor did it comply with CPLR 2104.

[4] Domestic Relations Law §236[B][3].

[5] CPLR 2104 provides:

record in open court may serve in lieu of the prescribed formalities.[6] The First

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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 writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

(As amended by Laws of 2003, c. 64, Part j, §28, effective July 14, 2003 to require that notwithstanding the form of the stipulation of settlement the terms of the stipulation shall be filed by the defendant with the county clerk.)

Compare, NY Fam Ct. Act §425, which provides that "an agreement for support which has been reduced to writing may be submitted to the court for its approval and if approved the court without further hearing may enter an order in the amount agreed upon."

[6] In Sanders v. Copley, 151 A.D.2d 350, 543 N.Y.S.2d 67 (1st Dep't 1989), the Appellate Division 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 in the First Department, NY Dom Rel Law §236(B)(3) should not be interpreted as proscribing an oral stipulation made in open court pursuant to NY CPLR §2104 and that a property settlement in conformance with NY CPLR §2104 need not comply with the formalities "required to entitle a deed to be recorded." It also held that the plaintiff's attorney, who will be called to testify, should be disqualified from representing him at the hearing before the referee.

In Rubenfeld v. Rubenfeld, 279 A.D.2d 153, 720 N.Y.S.2d 29 (1st Dep't 2001), 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 on Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997), 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. 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.

Department has held that Stipulations of settlement in a post divorce context are not governed by Domestic Relations Law §236[B][3]. It has held that Domestic Relations Law §236[B][3] “applies only to agreements entered into outside the context of a pending judicial proceeding”, such as antenuptial agreements. The statute does not restrict the ability of the parties to terminate litigation upon mutually agreeable terms

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In Friedman v. Garey, 8 A.D.3d 129, 779 N.Y.S.2d 44 (1st Dep't 2004), the Appellate Division affirmed an Order which granted plaintiff's motion to enforce the stipulated agreement settling the divorce action. support, and the distribution of the marital assets.

The Supreme Court erred in incorporating into the judgment of divorce the terms of an open-court stipulation allegedly entered into by the parties on January 10, 2000. The record did not reflect that the defendant or her attorney consented to the terms placed on the record by the plaintiff's attorney on January 10, 2000. The purported stipulation was therefore unenforceable. The matter was remitted to the Supreme Court for a de novo determination concerning those issues. The written settlement agreement, although unsigned by defendant, was stipulated to by counsel in open court and was thus binding on the parties. Moreover, defendant implicitly ratified the settlement by accepting substantial sums under its terms, and with respect to her reversal of course on the confidentiality provision at issue, by failing to make formal objection during the months in which various other provisions were being negotiated.

In Storette v. Storette, 11 A.D.3d 365, 784 N.Y.S.2d 34 (1st Dep't 2004), the Appellate Division affirmed a Judgment dissolving the parties' marriage and incorporating the parties' settlement agreement. Plaintiff's open-court stipulation contained all of the material terms of an enforceable agreement, any unstated amounts being objectively ascertainable, and was properly enforced absent a showing of fraud, duress or mistake sufficient to invalidate a contract. It did not avail plaintiff that she refused to sign the subsequent writing embodying the terms of the oral stipulation.

In Allison v. Allison, 41 A.D.3d 519, 838 N.Y.S.2d 168 (2d Dep't 2007), the Appellate Division held that Supreme Court erred in granting the plaintiff's motion to enforce a stipulation of settlement. Although a stipulation of settlement made in open court should be strictly enforced and not lightly cast aside, a party may be relieved of the consequences thereof if that party can demonstrate that its agent lacked authority to enter into the stipulation. The authority of a litigant's attorney “is hardly unbounded ... [W]ithout a grant of authority from the client, an attorney cannot compromise or settle a claim”. Here, it was unclear whether, at the time the defendant's prior attorney entered into a stipulation of settlement of the matter on the record, she had the defendant's authority to do so. Under such circumstances, the Supreme Court should have conducted an evidentiary hearing to determine the merits of the defendant's claim that her prior attorney was not authorized to enter into a binding agreement incorporating the terms agreed to by her prior attorney outside of her presence. Therefore, it remitted the matter to the Supreme Court for a hearing.

especially where the court has exercised its oversight."[7]

The Courts in the Second Depatment have followed the rule of the First Department.[8] The Second Department has also held a preliminary conference

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[7] In Hargett v. Hargett, 256 A.D.2d 50, 680 N.Y.S.2d 526 (1st Dep't 1998), the Appellate Division, First Department refused to apply Domestic Relations Law §236(B)(3) in a post divorce context, affirming an order which denied the defendant's motion to set aside the parties' stipulation of settlement. The parties 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. Although the parties purported to settle the action by entering, in open court, into an oral stipulation of settlement, which 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 Domestic Relations Law §236(B)(3). The Court observed that the statute, by its terms, applies only to agreements "made before or during the marriage" and, accordingly, did not apply to agreements such as the subject stipulation made under judicial supervision in the context of post-marital litigation over financial issues surviving the parties' judgment of divorce.

In Rubenfeld v. Rubenfeld, 279 A.D.2d 153, 720 N.Y.S.2d 29 (1st Dep't 2001), during the trial, a stipulation of settlement was read into the record with schedules listing marital property. After the settlement agreement was incorporated into but not merged with the judgment the wife moved by for an order vacating the stipulation of settlement. The wife, relying on Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997), a Court of Appeals authority addressing a 1981 signed but unacknowledged post-nuptial agreement in light of §236(B)(3),74 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. The Appellate Division held that the formalities of Domestic Relations Law §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 observed that the Court of Appeals has characterized the formalities of subscription and acknowledgment of the written nuptial agreement as a "bright-line rule". The Court held that this was not a nuptial agreement. The *Matisoff* ruling did not hold that Domestic Relations Law §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. Thus, *Matisoff* was distinguishable. 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 Domestic Relations Law §236 generally. Insofar as there was no opting-out agreement, Domestic Relations Law §236(B)(3) did not apply. Since Domestic Relations Law §236(B)(3) was not triggered, its formalities do not govern what is only a stipulation, governed by CPLR 2104, settling the matrimonial action.

[8] Nordgren v. Nordgren, 264 A.D.2d 828, 695 N.Y.S.2d 588 (2d Dep't 1999).

Harrington v. Harrington, 103 A.D.2d 356, 479 N.Y.S.2d 1000 (2d Dep't 1984), held that a stipulation of settlement of property issues, spread upon the record in open court, although not signed, did not impair its validity. The court stated its disagreement with the Fourth Department cases of Giambattista v. Giambattista, 89 A.D.2d 1057, 454 N.Y.S.2d 762 (4th Dep't 1982); and Hanford v. Hanford, 91 A.D.2d 829, 458 N.Y.S.2d 418 (4th Dep't 1982), and concluded: "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 NY CPLR §2104 with respect to matrimonial actions settled in open court' (Puca v. Puca, 115 Misc. 2d 457, 459, 454 N.Y.S.2d 271 (Sup 1982), supra; see also, Josephson v. Josephson, 121 Misc. 2d 572, 577, 469 N.Y.S.2d 285 (Sup 1983)). Therefore, NY Dom Rel Law §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' (Josephson v. Josephson, 121 Misc. 2d 572, 469 N.Y.S.2d 285 (Sup 1983))."

Puca v. Puca, 115 Misc. 2d 457, 454 N.Y.S.2d 271 (Sup 1982), involved a stipulation in open court placed on the record. Thereafter the husband's attorney submitted the judgment and order, which was properly served on opposing counsel, whereupon the wife refused to sign the minutes because the husband had not paid her $216.20, which she claimed the husband owed her. In the court's discussion of NY Dom Rel Law §236(B)(3) it assured there was no doubt that the provision was intended to protect the parties by formalizing the agreement but that it could not perceive that the legislature intended to discourage and impede the established practice as to stipulations, since the parties were fully protected by that established procedure regarding stipulations. It was noted, however, that an informal agreement, other than a stipulation in open court, would not suffice under the statute and that the wife had her legal remedy to collect the $216.20.

See also, Josephson v. Josephson, 121 Misc. 2d 572, 469 N.Y.S.2d 285 (Sup 1983).

Jensen v. Jensen, 110 A.D.2d 679, 488 N.Y.S.2d 189 (2d Dep't 1985), sustained an on the record stipulation involving a property settlement and expressly disapproved contrary decisions from the Third and Fourth Departments.

In Doppelt v. Doppelt, 215 A.D.2d 715, 627 N.Y.S.2d 75 (2d Dep't 1995), the Appellate Division affirmed an order of the Supreme Court which denied the wife's motion to set aside the parties' stipulation of settlement, stating that stipulations of settlement are favored and not lightly cast aside. This is especially so in the case of "open court" stipulations where strict enforcement not only serves the interests of efficient dispute resolution but also is essential to the management of court calendars and the integrity of the litigation process. Absent fraud, overreaching, mistake, or duress, the stipulation will not be disturbed by the court. Where the agreement is fair on its face such that there is no inference of overreaching vacatur is not warranted even if one party failed to disclose financial information unless the undisclosed

stipulation and order which settled an action for a divorce, was valid pursuant to CPLR 2104 although it was not made in open court, where it “was executed in the context of a pending divorce proceeding, and was subject to judicial oversight, even though it was

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information was of such consequence that it had been disclosed the other party would not have executed the agreement. The wife was represented by counsel when she voluntarily and knowingly entered into the stipulation, notwithstanding her suspicions that her husband had converted certain marital property to personal property. There was no evidence to support the wife's contention that she was fraudulently induced or coerced into settling the case or that the court compelled her to enter into the settlement.

In Brennan-Duffy v. Duffy, 22 A.D.3d 699, 804 N.Y.S.2d 399 (2d Dep't 2005), the Appellate Division affirmed an order which denied the defendant's motion to vacate a Stipulation of Settlement. It held that a separation agreement or stipulation of settlement which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability. Judicial review of separation agreements is to be exercised sparingly, with a goal of encouraging parties to settle their differences on their own. It was not the plaintiff's burden to prove that the agreement was fair and reasonable, but rather, it was the defendant's burden to show that the agreement was the result of fraud or overreaching, or that its terms were unconscionable. The fact that the defendant was not represented by independent counsel when the stipulation of settlement was executed did not, without more, establish overreaching or require automatic nullification of the agreement. This is especially true where, as here, the defendant explicitly acknowledged that he was encouraged to retain his own counsel. An agreement will not be overturned merely because, in retrospect, some of its provisions were improvident or one-sided, or because a party had a change of heart.

In Pretterhofer v. Pretterhofer, 37 A.D.3d 446, 829 N.Y.S.2d 601 (2d Dep't 2007), the parties validly entered into a comprehensive open-court stipulation. The plaintiff's conclusory and unsubstantiated assertions to the contrary were inadequate to render the oral stipulation unenforceable, as was her subsequent refusal to prepare and execute a written stipulation to the same effect. Supreme Court properly granted the defendant's motion to the extent of authorizing him to submit the parties' stipulation to the court so that it could be so-ordered.

In Wilson v. Wilson, 35 A.D.3d 595, 826 N.Y.S.2d 416 (2d Dep't 2006), the Appellate Division found that the parties entered into a stipulation of settlement before the Supreme Court. The defendant argued that this was merely “an agreement to agree” which, inter alia, had to be reduced to writing and executed before it could be deemed valid and enforceable. However, “an oral stipulation will be binding if it is spread upon the record in open court.” When the transcript was read in its entirety, it was clear that what was spread upon the record was an oral stipulation and not simply an agreement to agree. The stipulation was not rendered invalid because there was no subsequent written agreement. Furthermore, where an open court stipulation contains all of the material terms of an enforceable agreement, it will be enforced absent a showing of fraud, duress, or mistake sufficient to invalidate a contract.

not signed in open court.[9]

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[9] In Rio v. Rio, 110 A.D.3d 1051, 974 N.Y.S.2d 491 (2d Dep't 2013), the parties were married in 2001. They entered into a separation agreement dated March 11, 2005, which was duly acknowledged. The 2005 separation agreement provided, in part, that the appellant would pay the respondent $500 weekly as maintenance for a period of two years, commencing on March 11, 2005. In 2007, the parties attempted a reconciliation. However, in 2008, the respondent commenced an action for a divorce in Supreme Court. Thereafter, the parties, through separate counsel, negotiated a "Post-Nuptial Agreement," settling the respondent's action. Pursuant to the postnuptial agreement, the appellant was to pay the respondent $300,000. The postnuptial agreement also provided that the parties "hereby revoke any and all agreements ... previously made by the parties."Both parties executed the postnuptial agreement on September 22, 2009, in the presence of two witnesses. Prior to the execution of the postnuptial agreement, the appellant discharged his attorney. The appellant had signed a stipulation discontinuing the respondent's action and his counterclaims the day before the execution of the postnuptial agreement. On the same day that the postnuptial agreement was executed, counsel for the respondent and the appellant signed a stipulation discontinuing with prejudice the respondent's action. In 2010, the appellant commenced this action for a divorce. On December 16, 2010, the parties and their counsel signed a preliminary conference stipulation and order which indicated that, with respect to present maintenance being paid, the respondent was being paid "$1,000 per week to be credited toward $300,000 under postnup. agreement." The respondent subsequently moved for pendente lite relief. In his affidavit opposing the respondent's motion, the appellant acknowledged that he had agreed to pay the respondent $1,000 per week for maintenance. In an order dated January 21, 2011, determining the respondent's motion, the Supreme Court directed the appellant to pay the respondent $1,000 per week as temporary maintenance "as agreed upon in the Stipulation and Order dated December 16, 2010." The appellant thereafter moved, inter alia, for determinations that the postnuptial agreement was not valid and the 2005 separation agreement was valid. Supreme Court determined that the postnuptial agreement was valid and binding on the parties and incorporated, but did not merge, the postnuptial agreement into the judgment. The Appellate Division affirmed. It observed that Domestic Relations Law §236(B)(3) applies only to agreements entered into outside the context of a pending judicial proceeding (Rubenfeld v. Rubenfeld, 279 A.D.2d 153, 158, 720 N.Y.S.2d 29 (1st Dep't 2001)). Moreover, stipulations of settlement are favored by the courts and are not lightly cast aside. Thus, 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" (CPLR 2104). The record established that the parties relied on the duly executed stipulation of settlement, which was denominated as the postnuptial agreement, as a means of resolving the respondent's prior divorce action. The postnuptial agreement was executed while the respondent's action was pending before the Supreme Court. The Supreme Court referred to the appellant's obligations pursuant to the postnuptial agreement in two prior orders. Accordingly, the postnuptial agreement was valid, as it "was executed in the context of a pending divorce proceeding, and was subject to judicial oversight, even though it was not signed in open court" (Acito v. Acito,

23 Misc. 3d 832, 836, 874 N.Y.S.2d 367 (Sup 2009), aff'd, 72 A.D.3d 493, 898 N.Y.S.2d 133 (1st Dep't 2010); see CPLR 2104). Moreover, the appellant relied upon the postnuptial agreement in the preliminary conference order relating to his maintenance obligation in this action. Having done so, he ratified the postnuptial agreement. Supreme Court properly denied that branch of the appellant's motion which was for a determination that the postnuptial agreement was not valid. Inasmuch as the postnuptial agreement provided for the revocation of all prior agreements, the Supreme Court also properly denied that branch of the appellant's motion which was for a determination that the 2005 separation agreement, was valid, since the postnuptial agreement superseded the prior agreement.

In Defilippi v. Defilippi, 48 Misc. 3d 937, 11 N.Y.S.3d 813 (Sup 2015), the parties negotiated a settlement of their divorce action and drafted and executed a written Stipulation of Settlement, dated December 4, 2013. Both parties initialed each page and signed the last page of the Stipulation of Settlement. In addition, both parties executed a sworn and notarized affidavit, appended to the stipulation, attesting that each one had read the Stipulation in its entirety, understood the contents and agreed that it accurately embodied and contained all of the terms of their agreement. Each party attested that they voluntarily entered into the Stipulation of Settlement with the advice of counsel and without duress or coercion or the influence of drugs or alcohol. However, neither the Stipulation of Settlement nor the affidavits contained an acknowledgment that conforms to the requirements of DRL §236(B)(3). The Stipulation of Settlement was incorporated, but not merged, into the Judgment of Divorce. For more than a year after the Stipulation of Settlement was entered into, Plaintiff complied with its terms, including making child support and equitable distribution payments to Defendant. Plaintiff commenced an action seeking to set aside the Stipulation of Settlement. Plaintiff alleged that the Stipulation of Settlement was void ab initio, because DRL §236(B)(3) required it to be "acknowledged or proven in the manner required to entitle a deed to be recorded".

Supreme Court granted Defendants motion to dismiss the action. It found that the Stipulation of Settlement was properly executed in accordance with the law prevailing in the Second Department. In Rio v. Rio, 110 A.D.3d 1051, 973 N.Y.S.2d 921 (2d Dep't 2013) the Second Department upheld the validity of the postnuptial agreement, which revoked a prior separation agreement, specifically finding "that Domestic Relations Law §236(B)(3) does not compel a different result. The court explained that it upheld the stipulation of settlement in that case because "it was executed in the context of a pending divorce proceeding, and was subject to judicial oversight, even though it was not signed in open court'." Rio, supra at 1053-1054 (quoting Acito v. Acito, 23 Misc. 3d 832, 836, 874 N.Y.S.2d 367 (Sup 2009), aff'd, 72 A.D.3d 493, 898 N.Y.S.2d 133 (1st Dep't 2010); citing CPLR 2104). Supreme Court found that Rio reaffirms the Second Department's position that the lack of an acknowledgment consistent with DRL §236(B)(3) does not void a stipulation of settlement terminating a matrimonial action. As both the First and Second Departments have long held, "section 236(B)(3) of the Domestic Relations Law applies only to agreements entered into outside the context of a pending judicial proceeding, such as antenuptial agreements ... [T]he statute [does not restrict] the ability of the parties to terminate litigation upon mutually agreeable terms especially where, as here, the court

The courts in the Third and Fourth Departments have insisted upon subdivision 3 formalities, even though that policy may place form above substance. The rule in the Third Department is that Domestic Relations Law §236[B][3], invalidates oral open court stipulations pursuant to CPLR 2104 which are dictated onto the record, which involve equitable distribution of marital property. However, it has held that the statute only applies to agreements which effect the equitable distribution of marital property. Failure to comply with Domestic Relations Law §236[B][3] does not invalidate agreements and stipulations which involve custody and child support,[10] or those agreements and

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has exercised its oversight and [approved] the stipulation". Sanders v. Copley, 151 A.D.2d 350, 351-52, 543 N.Y.S.2d 67 (1st Dep't 1989). The Court noted that even in did not intend to dispense completely with judicial oversight of a settlement agreement, the Stipulation of Settlement in this case satisfied the requirement for judicial oversight. [A]n acknowledgment is not required to enforce a written stipulation of settlement subscribed by the parties and so ordered by the court ...". Acito, supra, 72 A.D.3d at 494, 898 N.Y.S.2d 133. The parties' Stipulation of Settlement complied with the requirement of CPLR 2104 that it be "in a writing subscribed by [them] ...". Luisi v. Luisi, 244 A.D.2d 464, 464, 664 N.Y.S.2d 346 (2d Dep't 1997) ("CPLR 2104 states that to be enforceable, a stipulation, unless reduced to the form of an order and entered, must be in writing and signed by a party or his attorney."). The Court exercised its oversight when it reviewed the divorce documents and signed the Judgment of Divorce, which incorporated but did not merge the Stipulation of Settlement.

[10] Lischynsky v. Lischynsky, 95 A.D.2d 111, 466 N.Y.S.2d 815 (3d Dep't 1983). Harbour v. Harbour, 243 A.D.2d 947, 664 N.Y.S.2d 135 (3d Dep't 1997).

In Charland v. Charland, 267 A.D.2d 698, 700 N.Y.S.2d 254 (3d Dep't 1999), the Third Department relaxed its restrictive rule, holding that the statute only applies to agreements which effect the equitable distribution of marital property. Here, 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. As such, their stipulations were not marital agreements within the meaning of Domestic Relations Law 236[B][3], but rather agreements by the parties, through their counsel in open court, within the purview of CPLR 2104.

In Higgins v. Higgins, 158 A.D.2d 782, 551 N.Y.S.2d 373 (3d Dep't 1990), the Appellate Division held that the former husband could not seek to vacate a judgment of divorce, granted upon default after an oral stipulation of settlement was placed upon the record, because he failed to move to vacate the default, as required by NY CPLR §5015(a)(1) within one year. It also held that even if the Supreme Court erred in receiving the stipulation into evidence, because NY Dom Rel Law §236(B)(3) and (5) were not complied with, such on error would not deprive the court of subject matter jurisdiction to adjudicate the case.

In Timperio v. Timperio, 232 A.D.2d 857, 648 N.Y.S.2d 773 (3d Dep't 1996), the parties placed an oral stipulation of settlement on the record. However, they failed to execute an "opting out" agreement. On the same day, the wife informed the Supreme Court that she did not know what she had agreed to. Thereafter, the court restored the matter to the calendar and the wife,

represented by new counsel, moved to rescind the oral stipulation and vacate the agreement on the ground that it was not entered knowingly, voluntarily or with full understanding of the consequences. She also pointed out that the stipulation was never accepted by the Supreme Court. The court determined, among other things, that the stipulation was never accepted by the court, that the wife did not understand it, and further, that the stipulation was not executed in accordance with NY Dom Rel Law §240(1), and therefore granted the motion. The Appellate Division held that the Supreme Court did not abuse its discretion in setting aside the oral stipulation. Pursuant to NY Dom Rel Law §236(B)(3) an agreement such as this open court stipulation of settlement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. In this case, after a counsel put the terms of the stipulation on the record each party orally agreed to the terms of the stipulation. Thereafter, the Supreme Court directed them to submit the papers so that it could review them. However, the agreement was not submitted to the court, signed by the parties, or notarized. The parties also failed to execute an opting out agreement at the time the stipulation was placed on the record. In light of the unequivocal manner in which such an agreement must be executed, the Supreme Court properly set aside the oral stipulation.

In Dwyer v. De La Torre, 252 A.D.2d 695, 675 N.Y.S.2d 412 (3d Dep't 1998), the Appellate Division reversed and vacated the order of the Supreme Court, which acted in excess of its authority when it, sua sponte, modified the parties open-court stipulation. Such agreements will be set aside only for good cause. Here, the procedures followed in placing the stipulation on the record met all of the requirements of DRL §236(B)(3), rendering the stipulation binding and enforceable. Furthermore, sufficient cause was not demonstrated to support the sua sponte action.

In Cheruvu v. Cheruvu, 59 A.D.3d 876, 874 N.Y.S.2d 296 (3d Dep't 2009), on the date of trial the parties entered into an oral stipulation on the record in open court resolving all issues. In addition, the parties signed and acknowledged a written affidavit of appearance and adoption of oral stipulation and opt-out agreement, and the husband executed an affidavit acknowledging his understanding of and voluntary agreement to the terms of the settlement placed on the record and his satisfaction with the representation provided by his attorneys. The husband moved to vacate, set aside or modify the stipulation. Supreme Court denied the motion and the stipulation was incorporated, but not merged, into a judgment of divorce. The Appellate Division noted that a stipulation of settlement which is made in open court by parties who were represented by counsel and who unequivocally agree to its terms will not be set aside absent a showing that the stipulation was tainted by mistake, fraud, duress, overreaching or unconscionability. While the agreement appeared to contain generous provisions for the wife and children, it was not manifestly unfair. The husband received a reasonable share of the marital assets. The husband's annual earnings were more than $460,000 (after deductions for Social Security and Medicare), while the wife earned less than $20,000 annually. The husband's tax-deductible maintenance obligation of $4,000 per month for four years was not excessive. It found that the child support provisions of the parties' stipulation were invalid and unenforceable inasmuch as they failed to state the reason or reasons that the amount to which the parties stipulated deviated from the

stipulations made after the parties marriage is dissolved.[11]

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presumptively correct amount of child support pursuant to the Child Support Standards Act. Although the stipulation set forth the parties' respective incomes and recited that the basic child support obligation would be 25% of the first $80,000 of the combined parental income, it then calculated the presumptively correct amount based upon the total parental income and failed to deduct from the husband's income his maintenance payments to the wife. Since the stipulation failed to set forth the reason for the deviation, the child support issue had to be considered de novo.

In Birr v. Birr, 70 A.D.3d 1221, 895 N.Y.S.2d 252 (3d Dep't 2010), Plaintiff commenced the action for divorce in July 2006. On April 27, 2007, the date the action was set for trial, the parties placed an oral stipulation on the record in open court addressing issues of child custody, child support, visitation, spousal maintenance and equitable distribution. The oral stipulation required plaintiff to withdraw his complaint and his custody petition. The oral stipulation also required plaintiff's counsel to prepare a written stipulation incorporating the terms of the oral stipulation and possibly additional terms in the nature of boiler plate that would be typical to a separation agreement that were not read into the record in court. The parties acknowledged on the record their understanding that, upon execution of the written stipulation, its terms would then constitute a legally binding contract. The matter was then adjourned to another date certain for confirmation from counsel that the written stipulation had been executed by both parties and that plaintiff was withdrawing the complaint and custody petition. No written stipulation was ever executed or filed and Supreme Court dismissed the action when the final deadline passed. Thereafter, plaintiff moved to vacate the dismissal and restore the action to the calendar. That motion was granted and, after the action was restored, plaintiff then moved to either have the terms of the oral stipulation “so-ordered” or to have defendant directed to execute a proposed written stipulation circulated by plaintiff's counsel. Supreme Court denied that motion. The Appellate Division affirmed. It held that pursuant to DRL §236(B)(3), an agreement such as this open-court stipulation of settlement must be “in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.” In its view, an oral stipulation placed on the record in open court does not, by itself, satisfy the requirements of the Domestic Relations Law. However, “recitation of an oral stipulation into the record, followed by execution of a written opt-out agreement that stated that the parties adopted the terms of the stipulation ‘as if the same were fully set forth’ therein ... satisfies the requirements of the Domestic Relations Law” (Cheruvu v. Cheruvu, 59 A.D.3d 876, 877, 874 N.Y.S.2d 296 (3d Dep't 2009)). The parties did not execute a written settlement stipulation, and the record on appeal neither contained nor mentioned an executed, written agreement incorporating the terms of the oral agreement. Accordingly, in the context of this matrimonial action, without proof in the record of a valid opt-out agreement, the oral stipulation was unenforceable.

[11] In Penrose v. Penrose, 17 A.D.3d 847, 793 N.Y.S.2d 579 (3d Dep't 2005), since the parties were no longer married at the time of its execution the Appellate Division rejected plaintiff's contention that the 1993 agreement should have had a notarized acknowledgment in order to be valid.

The Fourth Department has held that Domestic Relations Law §236[B][3], invalidates oral open court stipulations, pursuant to CPLR 2104 which are dictated onto the record, which involve equitable distribution of marital property. It has held that the requirements of Domestic Relations Law §236[B][3] pertain to stipulations that affect the equitable distribution of marital property and maintenance, but do not apply to custody stipulations.[12]

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[12] In Giambattista v. Giambattista, 89 A.D.2d 1057, 1057, 454 N.Y.S.2d 762, 763-64 (4th Dep't 1982) an agreement was placed upon the record, accepted by both parties and their counsel and the court then proceeded to hear the evidence and grant the divorces. It was agreed that the judgment of divorce was to be signed after the parties executed the property settlement. While the property settlement was being negotiated, defendant wife's attorney advised her that the settlement was not binding until reduced to writing and signed by the parties before a notary public. The court, in placing the settlement on the record, made the same statement, also stating that the settlement was subject to the court's review to determine if its terms were unconscionable. After the transcript was typed, it was submitted to the parties for signature. The husband executed the stipulation but the wife refused to do so. Thereafter, the court called the parties before it and urged the wife to sign the stipulation. When she refused to do so, the court entered an order granting the divorces, incorporating but not merging the property settlement in the decree and referring all future questions to Family Court. The wife subsequently changed lawyers and moved to vacate the decree, contending that the settlement was not binding on her and that the court's property disposition did not otherwise accord with the provisions of the Equitable Distribution Law. The court denied the motion. The Appellate Division found that the record of the proceedings established that the stipulation was conditional and that the parties and the court did not intend it to be binding until formally executed by both parties. Moreover, the court must make findings and the record must contain evidence to support its decision as required by subdivision 5 of section 236, Part B unless the parties "opt out" under the terms of subdivision 3. This record contained no evidence of the parties' marital assets or relative financial positions and no findings by the court, and since the parties did not execute an agreement as required by subdivision 3, the judgment and order was reversed and the matter remitted to Trial Term for appropriate proceedings to comply with the provisions of section 236 B of the Domestic Relations Law.

In Hanford v. Hanford, 91 A.D.2d 829, 458 N.Y.S.2d 418 (4th Dep't 1982) during the course of the trial, and after extensive negotiations, the parties agreed upon a property settlement which was then recited in open court by counsel and accepted by both parties on the record. The stipulation was reduced to writing thereafter but plaintiff refused to execute it and moved for a mistrial. Her motion was denied and the court granted judgment awarding the parties mutual divorces. The court incorporated the stipulated property settlement into the judgment and its findings of fact without further comment. The Appellate Division held that the action was governed by part B of section 236 of the Domestic Relations Law and since the stipulation did not meet the requirements of subdivision 3 of that part, it may not be considered an "opting out" agreement (see Giambattista v. Giambattista, 89 A.D.2d 1057, 454 N.Y.S.2d 762 (4th Dep't 1982)). Thus, the parties' property rights had to be resolved by the court pursuant to the

provisions of section 236 (part B, subd 5), which direct that the court “shall” determine the respective rights of the parties in their separate or marital property and it shall set forth the factors it considered and the reasons for its decision. Such findings and reasons may not be waived by either party (Domestic Relations Law, §236, part B, subd 5, par g; see 2 Foster-Freed, Law and The Family, 1982 Cumulative Supplement, p 830 *et seq*.). Since the court failed to undertake the investigation required or explain its findings, the judgment could not stand. The judgment, insofar as it determined the property rights of the parties pursuant to the Equitable Distribution Law, was reversed and the matter is remitted to the Trial Justice for appropriate findings of fact and conclusions of law and for further proof on equitable distribution and maintenance if the court is so advised.

In Krupski v. Krupski, 168 A.D.2d 942, 564 N.Y.S.2d 896 (4th Dep't 1990), the Appellate Division held that the Supreme Court erred by setting aside an oral stipulation entered into in open court and simultaneously ratified by written stipulation. This stipulation was a valid “opting out” agreement.

In Conti v. Conti, 199 A.D.2d 985, 605 N.Y.S.2d 597 (4th Dep't 1993), the Appellate Division held that the Supreme Court erred in incorporating the parties' alleged “oral stipulation” into the judgment of divorce. The transcript of the court proceeding did not show that an “opting out” agreement pursuant to NY Dom Rel Law §236(b)(3) was made between the parties regarding maintenance and distribution of property. The Court held that as the statutory requirements of NY Dom Rel Law §236(b)(3) are not met and there was no valid and enforceable “opting out” agreement, the Court must determine the respective rights of the parties in their separate and marital property and provide for a disposition of that property. The Supreme Court should also set forth the factors it considered and the reasons for its decision and this requirement may not be waived by either party or counsel. Further, where a party requests maintenance and there is no valid “opting out” agreement pursuant to NY Dom Rel Law §236(b)(3), the court may award maintenance and the court must set forth the factors it considered and the reasons for its decision with respect to maintenance and this requirement is not waivable. The matter was remitted to the Supreme Court for appropriate findings of fact and conclusions of law and for further proof on equitable distribution and maintenance if the court was so advised.

In Ashcraft v. Ashcraft, 195 A.D.2d 963, 601 N.Y.S.2d 753 (4th Dep't 1993), the Supreme Court, granted a judgment of divorce incorporating an oral stipulation of settlement which was contemporaneously acknowledged in writing by each party as being voluntary. The defendant sought to set aside the judgment and stipulation based upon allegations of unconscionability, unfairness and duress. The Appellate Division affirmed the judgment. It found no support for the Defendant's allegations. Each party was represented by counsel, there was no concealment of assets. The Court upheld the judgment and stipulation as a valid opting out agreement under NY Dom Rel Law §236(B)(3).

In James v. James, 202 A.D.2d 1006, 1006-07, 609 N.Y.S.2d 485, 485-86 (4th Dep't 1994) plaintiff commenced an action for separation on the ground of cruel and inhuman

treatment. On the first day of trial, the parties placed a stipulation on the record in open court disposing of all contested issues including custody, spousal support, responsibility for education expenses of the children and counsel fees. The stipulation did not address equitable distribution. Thereafter, defendant signed an acknowledgment that he understood and accepted the terms of the stipulation. Plaintiff refused to sign the acknowledgment. The court granted a judgment of separation against defendant and incorporated but did not merge the terms of the stipulation in the judgment. The Appellate Division held that the unacknowledged open court stipulation here did not meet the requirements of DRL §236[B][3]. The court was required, therefore, to set forth the factors it considered in reaching its decision concerning maintenance and child support (Domestic Relations Law §236[B][6], [7]). Because the court failed to do so, the judgment that incorporated the terms of the invalid stipulation and determined the contested issues had to be reversed and the matter remitted to Supreme Court for further proceedings on the complaint (*see,* Hanford v. Hanford, 91 A.D.2d 829, 458 N.Y.S.2d 418 (4th Dep't 1982); Giambattista v. Giambattista, 89 A.D.2d 1057, 454 N.Y.S.2d 762 (4th Dep't 1982).

In Sorge v. Sorge, 238 A.D.2d 890, 660 N.Y.S.2d 776 (4th Dep't 1997), the Appellate Division held that Supreme Court properly set aside an oral Stipulation placed on the record by the parties' attorneys that resolved certain temporary issues. The parties were not present when that Stipulation was placed on the record, nor was the Stipulation reduced to writing, signed and acknowledged by the parties. Therefore, it did not meet requirements of the Domestic Relations Law, Section 236(b)(3) and was not valid.

In Youngkrans v. Youngkrans, 245 A.D.2d 1142, 1143, 667 N.Y.S.2d 540, 540 (4th Dep't 1997) the Appellate Division stated that the agreement between the parties concerning the distribution of marital property and maintenance did not comply with Domestic Relations Law §236(B)(3) and was thus invalid.

In Hartloff v. Hartloff, 296 A.D.2d 847, 847-48, 745 N.Y.S.2d 361, 361-62 (4th Dep't 2002) the Appellate Division, inter alia, rejected defendant's contention that the oral stipulation resolving certain financial issues of the parties was invalid. Defendant signed an "affidavit of appearance and adoption of oral stipulation" in which he acknowledged that he was represented by counsel and that the terms of the stipulation were fully explained to him and understood by him. He acknowledged that he freely and voluntarily agreed to the terms of the oral stipulation with the advice of counsel and "without force, fraud or duress." There was no evidence in the record to support defendant's contention that the oral stipulation did not comply with Domestic Relations Law §236(B)(3) (*see generally* Matisoff v. Dobi, 90 N.Y.2d 127, 132-133, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997); Sorge v. Sorge, 238 A.D.2d 890, 890, 660 N.Y.S.2d 776 (4th Dep't 1997) or should otherwise be set aside (*see* Ashcraft v. Ashcraft, 195 A.D.2d 963, 963-964, 601 N.Y.S.2d 753 (4th Dep't 1993); *see generally* Natole v. Natole, 256 A.D.2d 558, 559, 682 N.Y.S.2d 864 (2d Dep't 1998).

In Kelly v. Kelly, 19 A.D.3d 1104, 797 N.Y.S.2d 666 (4th Dep't 2005), defendant argued on appeal that Supreme Court erred in awarding custody of the parties' children to plaintiff. At trial, defendant stipulated to an award of custody to plaintiff, and the court denied his subsequent

request to withdraw that stipulation. Defendant relied on DRL 236(B)(3) in support of his contention that the stipulation was invalid. The Appellate Division held that his reliance was misplaced because the requirements of DRL 236(B)(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. In any event, the court allowed the parties to submit evidence on the issue of custody and the court, independent of defendant's stipulation, determined that the evidence at trial established that the best interests of the children warranted an award of custody to plaintiff. That determination had a sound and substantial basis in the record. It agreed with defendant that there was no basis in the record for the court's restriction of defendant's visitation with the children to New York unless plaintiff agreed in writing to permit defendant to remove the children from New York and vacated the judgment accordingly.

In Tomei v. Tomei, 39 A.D.3d 1149, 834 N.Y.S.2d 781 (4th Dep't 2007), the parties' oral stipulation of settlement on the record in 1996 provided for the distribution of the marital property, including defendant's pension benefits. Neither party executed the stipulation. Two years later, Supreme Court issued a judgment of divorce and a qualified domestic relations order, dividing defendant's pension benefits pursuant to the formula set forth in Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15, 6 Employee Benefits Cas. (BNA) 1053 (1984). When the QDRO was filed with the pension plan administrator in 2002, it was rejected as nonqualifying. The court granted plaintiff's motion to correct and resettle the judgment of divorce and granted plaintiff's motion to amend the QDRO and denied defendant's cross motion to vacate the QDRO. The Appellate Division noted that Domestic Relations Law 236(B)(3) provides that "[a]n 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." Because the unacknowledged oral stipulation of the parties failed to meet the statutory requirements, it was ineffective with respect to the pension benefits, and the court thus was required to distribute them (DRL §236[B][5][a]). Because that did not occur, it reversed and remitted the matter to Supreme Court for distribution of defendant's pension benefits.

In Lewis v. Lewis, 70 A.D.3d 1432, 894 N.Y.S.2d 290 (4th Dep't 2010), Defendant appealed from a judgment of divorce that directed him to pay to plaintiff $750 per month as maintenance for a period of 10 years and granted plaintiff's request for attorney's fees of $6,500. Since the Supreme Court erred in failing to set forth the reasons for its determination to award maintenance to plaintiff the Appellate Division remitted the matter for a new determination with respect to maintenance and to set forth the reasons for its determination. The Court rejected the defendant's contention that the court erred in incorporating the oral stipulation of the parties with respect to child custody into the judgment. In support of his contention, defendant relied upon DRL §236(B)(3), pursuant to which an agreement by the parties in a divorce action is enforceable if the agreement is, inter alia, in writing and subscribed by the parties (see generally CPLR 2104). That reliance was misplaced because the requirements of DRL §236(B)(3) pertain to stipulations that affect the equitable distribution of marital property (Kelly v. Kelly, 19 A.D.3d 1104, 1106, 797 N.Y.S.2d 666 (4th Dep't 2005); see Charland v. Charland, 267 A.D.2d 698, 699,

700 N.Y.S.2d 254 (3d Dep't 1999)). It agreed with defendant, however, that the oral stipulation concerning the distribution of certain items of personal property was improperly incorporated into the judgment. That stipulation was transcribed into the record but was not reduced to writing, subscribed by the parties or acknowledged, as required by DRL §236(B)(3). It therefore further modified the judgment and directed Supreme Court upon remittal to make a new determination with respect to the distribution of the items of personal property following a further hearing, if necessary.

In Piccarreto v. Mura, 39 Misc. 3d 1227(A), 971 N.Y.S.2d 74 (Sup 2012), the defendant husband sought leave to renew his opposition to a child support judgment, granted by this court, based upon "new evidence", i.e., a recently transcribed 1995 court stipulation that the husband argued, constituted a waiver of the plaintiff wife's right to seek child support in the amount set forth in the original judgment of divorce.

According to the evidence the husband sought to put formally before this court, in November 1995 the parties, each represented by counsel, appeared before a Supreme Court justice and agreed to a resolution of the disputes over the children and child support, in which the wife waived her right to child support under the parties original judgment and agreed to a lower amount. The stipulation was taken before the judge, but nothing happened thereafter. The stipulation was not transcribed in 1995 and an affidavit of appearance and the adoption of oral stipulation was not signed by either party. No order, confirming the terms of the stipulation, was ever signed by the Supreme Court judge, nor was any order entered in the Monroe County Clerk's Office. In an application 10 months earlier, the wife sought to recover a judgment for more than 11 years of unpaid child support. The husband alleged that he had appeared before the court in November 1995, after the last filed order, and entered into a stipulation in which his wife waived her right to child support under the original decree, and agreed to a lower amount. The court, without proof of the stipulation, or any order based on it, declined to credit his statements and awarded the wife judgment for unpaid child support. The court issued an order that the judgment of divorce was in full force and effect, and not affected by the November 1995 stipulation for which there was no record. The husband now sought to renew his opposition to the prior motion through CPLR 2221(e) which permits renewal of the husband's opposition if there are "new facts not offered" on the prior motion that would change the prior determination and there is a "reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2), (3). In support of his application, the husband submitted a transcript of the stipulation, dated November 30, 1995. The transcript "discovered" on June 28, 2012-the date the husband's current counsel called the court reporting staff and learned that the recording of the 1995 appearance was still available. The November 30, 1995 transcript was not accompanied by an affidavit of appearance and adoption of oral stipulation. The Court held that it was difficult to characterize the transcript as "newly discovered" evidence that was unknown or unavailable to the husband-or his counsel-on the prior motion. The husband's previous attorney appeared in court with the husband at the time of the stipulation in 1995 and specifically addressed the issue of the payment of child support. But neither the husband, nor the previous attorney undertook any due diligence to find out whether the transcript existed prior to responding to the motion in

In order to prevent oral stipulations dictated onto the record that affect the equitable distribution of marital property from being declared invalid as a consequence of Domestic Relations Law §236[B][3], attorneys in actions in the Third and Fourth Departments have adopted a procedure where after & lan oral stipulation is dictated into the record, the parties execute a written opt-out agreement or an affidavit of adoption of oral stipulation, which states that the parties have adopted the terms of the oral stipulation 'as if it was fully set forth' therein. The courts in the Third and Fourth Departments have held that this procedure satisfies the requirements of the Domestic Relations Law.[13]

late 2011. The husband never asked this court to assist in the search for the transcript. There was no "diligence" by the husband or previous counsel to locate this evidence prior to the wife's motion. The Court held that fact that the husband's prior counsel was able, after new counsel had been retained, to rummage through an old file and find an indication that the stipulation might exist did not suffice to transform the known stipulation from 1995 into "newly discovered evidence" in 2012.

[13] Cheruvu v. Cheruvu, 59 A.D.3d 876, 877, 874 N.Y.S.2d 296 (3d Dep't 2009). Birr v. Birr, 70 A.D.3d 1221, 895 N.Y.S.2d 252 (3d Dep't 2010).

See Piccarreto v. Mura, 39 Misc. 3d 1227(A), 971 N.Y.S.2d 74 (Sup 2012) ("The stipulation was not transcribed in 1995 and an affidavit of appearance and the adoption of oral stipulation was not signed by either party."