State of New York
Court of Appeals

OPINION

No. 78
Candy Anderson,
Respondent,
v.
Jack E. Anderson,
Appellant.

No. 79
In the Matter of William F. Koegel, &c.

John B. Koegel,
Respondent;
Irene Lawrence Koegel,
Appellant.

Case No. 78:

Lyle T. Hajdu, for appellant.
Barbara A. Kilbridge, for respondent.

Case No. 79:

Andrew D. Himmel, for appellant.
Susan Phillips Read, for respondent.

RIVERA, J.:

In these appeals, we are presented with two permutations of the central issue of whether non-compliance with the signature acknowledgment requirements of Domestic Relations Law (DRL) § 236 (B) (3) renders a nuptial agreement irrevocably unenforceable.

Anderson presents the question left open in *Matisoff v Dobi* (90 NY2d 127 [1997]), specifically whether the acknowledgment must be contemporaneous with the signing of the agreement in order to comply with DRL § 236 (B) (3). We conclude that the signature must be acknowledged contemporaneously within a reasonable time of signing. Because in *Anderson* the wife signed and acknowledged the agreement the month after the wedding, while the husband delayed nearly seven years before acknowledging his signature and did so shortly before he commenced a divorce action, the husband's acknowledgment is ineffective and the nuptial agreement unenforceable. The only remedy under the circumstances was for the parties to reaffirm the agreement's terms, which did not occur in this case.

In *Matter of Koegel*, the acknowledgments of each party were made contemporaneously with the signing of the nuptial agreement, but the certificates of acknowledgment were defective. The parties' lawyers failed to include in the respective certificates the undisputed fact that the signer was personally known to them at the time of signing. Where, as here, the signatories have satisfied the prerequisites for a valid certificate of acknowledgment—i.e., the defect in the certificate of acknowledgment is occasioned by the notary's or other official's error and not by a flaw in the parties' actual signing and acknowledgment—a reaffirmation of the agreement terms is unnecessary. Thus, this defect in the certificate may be overcome, as here, with extrinsic evidence of the official's personal knowledge or proof of identity of the signer.

I.

DRL § 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." As the Court has previously explained, Real Property Law sections 292, 303, and 306 "must be read together to discern the requisites of a proper acknowledgment" (*Galetta v Galetta*, 21 NY3d 186, 192 [2013]) for the purposes of DRL § 236 (B) (3). Specifically, section 292 "requires that the party signing the document orally acknowledge to the notary public or other officer that [they] in fact signed the document" (*id.*), section 303 requires that the notary or other officer taking the acknowledgment "knows or has satisfactory evidence[] that the person making it is the person described in and who executed such instrument" (*id.*, quoting Real Property Law § 303), and section 306 "compels the notary or other officer to execute 'a certificate . . . stating all the matters required to be done, known, or proved' and to endorse or attach that certificate to the document" (*id.*, quoting Real Property Law § 306).

"Generally, acknowledgment serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person" (*Matisoff*, 90 NY2d at 133). The acknowledgment also "necessarily imposes on the signer a measure of deliberation in the act of executing the document" (*Galetta*, 21 NY3d at 192). And because "[m]arital agreements within [DRL] section 236 (B) (3) encompass important personal rights and family interests[,] . . . the formality of acknowledgment underscores the weighty

personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care" (*Matisoff*, 90 NY2d at 136). Put another way, a couple's decision to be bound by the terms of a nuptial agreement is necessarily based on their understanding of each other's respective economic status and their future as a couple at the time they sign the agreement, and the formalities are intended to impress upon the signatories the consequences at the moment of affirmation. To serve their intended purpose, these formalities must be completed close in time to when each party weighs the consequences of their respective decisions and signs.

The parties' compliance must be confirmed in a manner adequate under the law. The certificate of acknowledgment establishes that the "signer made the oral declaration compelled by Real Property Law § 292" and the "notary or other official either actually knew the identity of the signer or secured 'satisfactory evidence' of identity ensuring that the signer was the person described in the document" (*Galetta*, 21 NY3d at 192). Thus, a properly executed certificate is the means by which the parties document that past events comply with the statutory requirements.[1]

II.

Anderson v Anderson

[1] Because both *Anderson* and *Koegel* involve solely the acknowledgment procedure as set forth in the Real Property Law, we limit our analysis here to that methodology and its requirements.

Timely Acknowledgment Ensures the Consequences of the Agreement Are Meaningfully Impressed Upon the Signatories

A.

Candy Anderson signed and acknowledged a nuptial agreement with Jack Anderson the month after their wedding. It is undisputed that regardless of when Jack signed the agreement, his signature was not acknowledged until nearly seven years later, shortly before he commenced a divorce action and in anticipation of Candy's divorce filing. With full knowledge that Candy intended to end the marriage, and after his attorney informed him that his signature had not been acknowledged as required by DRL § 236 (B) (3), Jack at last attempted to validate the agreement and appeared before a notary public where he orally acknowledged that the signature on the agreement was his. Jack commenced formal divorce proceedings five days later.

Candy then filed for divorce and, in an ancillary action, moved for summary judgment to set aside the nuptial agreement. Supreme Court denied the motion. On Candy's appeal, a majority of the Appellate Division reversed and concluded that because Jack's signature had not been contemporaneously acknowledged and the parties had not reaffirmed the agreement when the signature was acknowledged, the agreement was invalid and unenforceable (*see Anderson v Anderson*, 186 AD3d 1000, 1002-1003 [4th Dept 2020]). Two Justices would have held that because DRL § 236 (B) (3) is silent on this question, the Court was without authority to impose such requirements (*id.* at 1003 [Curran and Troutman, JJ., dissenting]).

Jack appeals as of right based on the dual dissent below (*see* CPLR 5601 [a]) and contends that DRL § 236 (B) (3) requires only that an agreement be signed and acknowledged in the manner required to record a deed, regardless of when this is done. In his view, since there is no dispute that the nuptial agreement was acknowledged before the commencement of the divorce proceeding, the acknowledgment complies with the statutory requirements. In response, Candy asserts that the acknowledgment here was ineffective and that, in *Matisoff* (90 NY2d 127), we held that an unacknowledged nuptial agreement is not valid and that DRL § 236 (B) (3) recognizes no exceptions to its requirements. She further argues that requiring contemporaneous acknowledgment places couples and their legal advisors on clear notice of the prerequisites to ensure a valid nuptial agreement.

B.

A court is not at liberty to permit a post hoc remedy to an unacknowledged nuptial agreement. The legislature has expressed the mandatory nature of the acknowledgment requirement by "the unambiguous statutory language of DRL § 236 (B) (3), its history and related statutory provisions" (*Matisoff*, 90 NY2d at 135). Moreover, the acknowledgment requirement is "onerous" and "more exacting than the burden imposed when a deed is signed" because, unlike an unrecordable, unacknowledged deed, which may be enforced against the grantor and grantee, an unacknowledged nuptial agreement is unenforceable against the parties to the agreement, "even when the parties acknowledge that the

signatures are authentic and the agreement was not tainted by fraud or duress" (*Galetta*, 21 NY3d at 192, citing *Matisoff*, 90 NY2d at 134-135).

While the complete absence of an acknowledged signature is a fatal defect rendering a nuptial agreement ineffective and unenforceable, in *Matisoff* we noted that "[DRL] § 236 (B) (3) and the Real Property Law do not specify when the requisite acknowledgment must be made in relation to the party's signature. It is therefore unclear whether acknowledgment must be contemporaneous with the signing of the agreement" (*Matisoff*, 90 NY2d at 137). That open question is squarely presented in *Anderson*.

As is obvious from our reservation of the question in *Matisoff*, our view then, as it is now, is that statutory silence is not dispositive of the timing question. Thus, we must apply our well-established rules of interpretation to resolve the issue. "In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention" (*Rodriguez v City of New York*, 31 NY3d 312, 317 [2018] [quotations and citation omitted]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 92). Given the purpose of the signing and acknowledgment requirements, the DRL's "obvious spirit and intent" must be understood to require an acknowledgment that is reasonably close temporally to the period when the signing parties have considered the consequences of the nuptial agreement and decided to be bound by its terms (*Matisoff*, 90 NY2d at 133, quoting *Chamberlain v Spargur*, 86 NY 603, 606 [1881]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes §§ 71, 96). Indeed, the legislature intended to allow only those nuptial agreements that contained terms that were "*Fair* and

Reasonable" (Sponsor's Mem, Bill Jacket, L 1980, ch 236 [emphasis in original]). The affirmation solemnizes the consequences of signing the nuptial agreement. Thus, a rule recognizing a reasonable time frame for compliance with the acknowledgment requirement furthers that purpose. Because a nuptial agreement is not enforceable until both parties have signed and their signatures have been duly acknowledged, a significant delay between a signature and acknowledgment calls into question whether there was a shared understanding of the relevant circumstances.

We therefore hold that an acknowledgment must be executed contemporaneously, although not necessarily simultaneously, with the party's signing of the agreement. Otherwise, the document must be treated as legally and functionally unacknowledged. Requiring that signatures and acknowledgments be formalized within a reasonable time period does not force an acknowledgment to occur at the moment that a party signs the document or at the same time the other party signs and acknowledges the document. While necessary to effectuate the legislative purposes of the acknowledgement requirement, this approach does not preclude execution in counterparts and accounts for a reasonable delay between signing and acknowledgment, which might be occasioned by circumstances unrelated to a party's knowing delay or intent to gain leverage over the other party. For example, a brief lapse in time between the signing and the acknowledgment before a notary or other official is reasonable when the official is not immediately available, such as during holidays and vacations or a party suffers from an illness or is unable to obtain time off from work.

A document that depends on an untimely acknowledgment is the legal and functional equivalent of an unacknowledged document. However, in a case involving such a document, the parties are not without a remedy. When there is an excessive delay rendering an acknowledgment ineffective and the agreement therefore unenforceable, the parties are free to reaffirm their agreement, again based on the information available to them at that time. To comply with DRL § 236 (B) (3), reaffirmation would require that both parties must again sign and acknowledge the agreement. The rule thus places the parties on a fair and equal footing in deciding whether to be bound by the agreement—either initially or at some future date if the agreement is unenforceable because of the delay.

Contrary to Jack's claims, this rule is not at odds with the statute. If we adopted the rule advocated by Jack, we would encourage a party to withhold acknowledgment and would allow that party to wait until they can reassess the terms based on changed economic standing and unanticipated events. Permitting Jack's unreasonably delayed commitment would be at odds with the purpose of an antenuptial agreement under which both parties consider terms that are designed based on their respective personal and professional lives at the time of execution and their predictions of their future together, and not on actual events that transpire years into the marriage, including later economic success or failure.

Nor are we persuaded by Jack's argument that a temporal limitation is unworkable and creates confusion. We need not set forth the outer boundaries of the time in which the signature must be acknowledged. In those cases where an acknowledgment is challenged as too late to be compliant with DRL § 236 (B) (3), and the parties have not reaffirmed the

agreement, resolution of the challenge requires the same exercise of judicial decisionmaking as with any other disputed issue presented to a court. In such cases, a court may consider as relevant factors in its determination the length of the delay, whether the signer or a third party caused the delay, and whether the signer is motivated to comply with the statutory mandates because of changed circumstances in the marriage or an impending divorce action. These factors are not exhaustive, but represent the type of considerations that evince a strategic or unreasonable delay, rather than delay due to unintended circumstances.

Applying this rule to the facts of *Anderson*, at the time the parties attempted to execute their nuptial agreement—the month after their marriage—only Candy had signed and had her signature acknowledged by a notary public. Jack did not have his signature acknowledged until after Candy informed him that she was filing for divorce, and shortly before he made it to the courthouse before her to file his own divorce action. Thus, when the parties were considering the "weighty personal choices to relinquish significant property or inheritance rights" and the various issues concerning familial arrangements (*Matisoff*, 90 NY2d at 136) based on what they knew one month into their marriage, only Candy had gone through the formalities that she believed bound her. By failing to timely acknowledge his signature, Jack was able to revisit the agreement years later and thereby delay his decision whether to be bound by it, a decision he was then able to make with the benefit of hindsight and full knowledge of the parties' respective economic positions shortly before filing for divorce.

Indeed, by retaining unilateral power to validate the agreement years later if he so chose, Jack sought the benefit of what he and Candy did not bargain for—an option without time limit and which he alone could exercise, including shortly before the commencement of a divorce action (*see Anderson*, 186 AD3d at 1002; *see also Stein v Stein*, 14 Misc 3d 453 [Sup Ct, Kings County 2006]).[2] Put another way, while Candy believed she was entering into a contract based on a shared understanding of the relevant facts, that understanding was essentially lacking as the circumstances were quite different seven years later when Jack finally attempted to formalize the agreement by acknowledging his signature. Thus, "it is evident that one of the purposes of the acknowledgment requirement—to impose a measure of deliberation and impress upon the signer the significance of the document—has not been fulfilled" (*Galetta*, 21 NY3d at 196).

Under these circumstances, the acknowledgment failed to comply with the requirements of DRL § 236 (B) (3). Therefore, the Appellate Division properly concluded that the nuptial agreement is invalid and unenforceable, and that Candy was entitled to summary judgment.

[2] In *Stein*, Supreme Court similarly reasoned that "[g]iven that the intent of the parties, as reflected within the 'four corners' of the Agreement itself, was to create an enforceable *bilateral agreement*, and not one only enforceable upon the exercise of an option by a putative optionee, the enforcement of such Agreement, in the absence of a contemporaneous certificate of acknowledgment by plaintiff, would run counter to the 'insistence upon the formalities mandated by the Legislature . . . that the parties have contemporaneously demonstrated the deliberate nature of their agreement'" (*Stein*, 14 Misc 3d at 461 [emphasis added], quoting *Schoeman, Marsh & Updike, LLP v Dobi*, 264 AD2d 572, 573 [1st Dept 1999] [emphasis added]).

III.

Matter of Koegel

A Defective Certificate of Acknowledgment is Not Always Fatal

A.

Irene and William Koegel executed a nuptial agreement approximately one month before their marriage. The agreement provided that neither party would claim any part of the other's estate and that they both waived their respective elective or statutory share. They further confirmed that they entered the agreement with knowledge of the "approximate extent and probable value of the estate of the other" (*Matter of Koegel*, 160 AD3d 11, 13 [2d Dept 2018], *lv dismissed* 32 NY3d 948 [2018]). Both parties signed the agreement, and their signatures were acknowledged—in the case of Irene by her lawyer and in the case of William by his law firm partner. The certificates of acknowledgment followed the statutory requirements in all but one respect: both lawyers failed to attest that the signer was known to them, although that was undeniably the case.

William passed away during the marriage. His son John filed a petition to probate William's last will and testament, which provided that the parties had entered the antenuptial agreement, that "[t]he bequests to and other dispositions for the benefit of [Irene] contained in this Will [we]re made by [him] in recognition of and notwithstanding said antenuptial agreement," and that the will controlled in case of any inconsistencies, but in all other respects the "antenuptial agreement shall be unaffected by this Will."

Irene invoked her surviving spouse elective share pursuant to Estates, Powers and Trusts Law (EPTL) 5-1.1-A. In turn, John, as executor of William's estate, filed a petition to invalidate Irene's election and for a declaration that she was not entitled to the statutory share based, in part, on her express waiver of her elective rights in the antenuptial agreement. Irene objected and responded that although she had signed the agreement and acknowledged her signature before a lawyer known to her based on his prior representation of her in an unrelated matter, neither her nor William's signature was acknowledged in accordance with the statutory requirements. Therefore, the agreement was unenforceable, and she was entitled to her elective share. Irene also moved to dismiss the petition to set aside her notice of election pursuant to CPLR 3211 (a) (1) and DRL § 236 (B) (3).

In support of his opposition to Irene's motion, John argued, as relevant here, that the antenuptial agreement complied with the then-applicable EPTL 5-1.1[3] requirements and substantially complied with the other relevant statutory mandates. He also submitted separate written affirmations from the lawyers who had acknowledged the signing. Irene's lawyer stated that he recalled taking her acknowledgment of her signature and that she did not need to provide proof of identification because she was known to him at the time based on their prior professional relationship; William's lawyer stated the same with respect to

[3] After Irene and William signed the agreement, EPTL 5-1.1 was superseded by and renumbered EPTL 5-1.1-A. 5-1.1-A applies in the case of decedents dying after August 31, 1992 (*see* L 1992, ch 595) and thus applies here since William died in 2014.

William and his signature, and also explained the basis of his professional knowledge of William's identity. Surrogate's Court denied Irene's motion.

On appeal, the Appellate Division upheld the decision of Surrogate's Court and concluded that the defect here could be and was cured by the Executor's submissions (*see Koegel*, 160 AD3d at 27). Surrogate's Court thereafter granted John's motion for summary judgment and the Appellate Division affirmed, based on its prior decision under the law of the case doctrine (*see* 184 AD3d 764 [2d Dept 2020]). We granted Irene's motion for leave to appeal (36 NY3d 905 [2021]), which brings up for review the Appellate Division's prior nonfinal order (*see* CPLR 5501 [a] [1], 5602 [a] [1] [i]).

In support of her claim that the waiver of her elective share set forth in the antenuptial agreement is unenforceable, Irene argues, as she did below, that the certificate of acknowledgment was materially defective because the acknowledgment omitted mandatory language attesting that the notary public knew the signer or ascertained through some form of proof that the signer was the person described. According to Irene, there is no legislative authorization to permit a cure of minor or technical defects, let alone a material defect. John counters that *Galetta* strongly suggested that extrinsic evidence should be admissible to show that "the prerequisites of an acknowledgment occurred but the certificate simply failed to reflect that fact" (21 NY3d at 197), and such is the case here as established by his proof.

B.

EPTL 5-1.1-A provides that the waiver of the surviving spouse's elective share must "be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property" (EPTL 5-1.1-A [e] [2]). Given the similarity in language between DRL § 236 (B) (3) and the EPTL, and the respective conditions that the nuptial agreement and spousal waiver accord with the recording statutes, our analysis of DRL § 236 (B) (3) applies with equal force to Irene's appeal. However, the different context in which the signatures here were acknowledged is dispositive and leads us to conclude the antenuptial agreement and its statutory spousal share waiver are enforceable.

Unlike *Anderson*, *Koegel* involves defective written certificates of acknowledgment. As we have previously stated, "New York courts have long held that an acknowledgment that fails to include a certification . . . is defective" (*Galetta*, 21 NY3d at 193, citing *Fryer v Rockefeller*, 63 NY 268 [1875] [holding, under prior Real Property Law § 303, that acknowledgment of the deed that did not establish signer's identity and relationship to document was invalid] [remaining citations omitted]). In *Galetta* we noted that the lack of an acknowledgment means that the intended purpose, "to impose a measure of deliberation and impress upon the signer the significance of the document[,] . . . has not been fulfilled" (21 NY3d at 196). This failure thus justifies the "sound" rule "precluding a party from attempting to cure the absence of an acknowledgment through subsequent submissions" (*id.*). In dicta, *Galetta* raised the possibility that a defective, as opposed to an

absent, acknowledgment could be cured, recognizing the compelling argument that in a case "where the signatures on the prenuptial agreement are authentic, there are no claims of fraud or duress, and the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgment was defective or incomplete" (*id.*), the agreement should be upheld. Resolution of Irene's appeal requires that we answer the question hypothesized in *Galetta*: whether a defective acknowledgment may be overcome by proof of the occurrence of the events anticipated by the statutory mandates.

We now adopt the reasoning posited in *Galetta* and hold that the defect identified there and presented in this appeal may be overcome with adequate evidence that the statutory requirements were met, even if the acknowledgment is not properly documented in the first instance. This limited remedy avoids invalidating a nuptial agreement when the parties have done all that the DRL requires of them. In other words, the signature and acknowledgment may satisfy the statutory mandates if extrinsic evidence supports "that the acknowledgment was properly made in the first instance" even if the certificate fails to "include the proper language" due to the notary's or other official's error (*Galetta*, 21 NY3d at 196-197).

Permitting the parties to overcome this defect is not prohibited by the DRL, and, in fact, furthers the legislative purpose behind New York's nuptial agreement formalities by holding parties to their agreements when they signed and had their signature acknowledged before a person who knows them or who has proof of their identification. Contrary to

counsel's suggestion, we do not devalue the certification requirement, nor will parties be able to avoid the statutory mandates. We hold that only in those limited cases where the parties signed and properly acknowledged the agreement can they later seek to present evidence of their prior timely compliance. Moreover, since 1997, New York has provided an acknowledgment form that ensures compliance when followed, meaning the specific defect identified in this appeal should appear infrequently (*see* Real Property Law § 309-a; *Galetta*, 21 NY3d at 193 n 1).

Here, Irene's and William's respective acknowledgments were defective, as opposed to absent. The affidavits of the notaries who actually witnessed the signatures—which were not rebutted—showed that the parties' attempt to comply with the acknowledgment requirement was defective "due to no fault of their own" (*Galetta*, 21 NY3d at 196), because the signatories did everything they were supposed to do and complied with the formalities, even though the acknowledgment certificates failed to articulate that compliance in writing. In this instance, allowing proof of the personal knowledge of the signers merely allows John "to conform the certificate to reflect th[e] fact" (*Galetta*, 21 NY3d at 197) of the actual events. Since Irene admitted that the lawyer to whom she acknowledged her signature was known to her because he had previously represented her, and the lawyer's affidavit confirmed that she was known to him based on their professional relationship, the evidence overcame the non-compliance with the statutory mandates. Therefore, the Appellate Division properly concluded that the nuptial agreement was enforceable, as was the waiver of her elective share found therein.

IV.

In *Anderson*, the order of the Appellate Division should be affirmed, with costs.

In *Koegel*, the order of the Appellate Division appealed from and the prior Appellate Division order brought up for review should be affirmed, with costs.

For No. 78: Order affirmed, with costs. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Fahey, Garcia, Wilson, Singas and Cannataro concur.

For No. 79: Order appealed from and prior Appellate Division order brought up for review affirmed, with costs. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Fahey, Garcia, Wilson, Singas and Cannataro concur.

Decided December 16, 2021