LETTER TO THE EDITOR

Title, Conclusion of Recent Matrimonial Law Column Misleading

In this letter to the editor, Joel R. Brandes seeks to correct the misleading title of and conclusion reached in a recently published matrimonial column.

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By Joel R. Brandes | July 10, 2024 at 10:08 AM

[Editor's note: This letter was submitted in response to the column "Email Exchanges in Divorce Litigation Carry Immense Risk", which the New York Law Journal published on June 28, 2024.]

I am writing to correct the misleading title and impression conveyed by the author of an article that appeared in the Outside Counsel column of the July 1, 2024, issue of the New York Law Journal. In that article, titled "Email Exchanges in Divorce Litigation Carry Immense Risk", the author discussed the decision of the Supreme Court, Westchester County, in *J.G. v. L.G.*, (83 Misc.3d 1205(A), 2024 WL 2839243 (Table), 2024 N.Y. Slip Op. 50659(U) (Sup. Ct., 2024), an unreported disposition.

In *J.G. v. L.G.,* supra, the husband filed a motion requesting that emails between counsel be deemed a binding settlement agreement as to the disposition of the marital residence. An email containing the plaintiff's settlement offer was sent to Defendant's counsel.

A few days later, a paralegal from the office of the defendant's counsel responded to the offer by email stating, "We are in receipt of your email below and we will agree to this." In opposition to the motion, the defendant's counsel asserted that "no binding agreement exists as the counsel emails both include "Without Prejudice: Not to be Used in Litigation"; there was no open court agreement and no signed agreement or court order; that the agreement was subject to written confirmation, and all material terms were not set forth."

The Supreme Court granted the motion, although the purported email agreement was neither signed by the parties nor acknowledged.

The Supreme Court held that there was a binding agreement with regard to the marital residence. It cited CPLR 2104, which provides that "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered."

This was not an open court agreement, nor was it signed by the parties and acknowledged or reduced to the form of an order and entered. No statute or other authority allows attorneys to sign nuptial agreements for their clients.

The court pointed out that email exchanges between counsel have been held to constitute a binding settlement agreement. It cited three Appellate Division First Department, commercial cases where the court held that a binding settlement agreement existed between the plaintiff and defendants when the attorneys exchanged emails and counsel confirmed the agreement by email (*Matter of Philadelphia Insurance Indemnity v. Kendall*, 197 AD3d 75, 80, 151 N.Y.S.3d 392 [1st Dept. 2021]*); Rawald v. Dormitory Authority of the State of New York,* 199 AD3d 477, 478, 156 N.Y.S.3d 201 (1st Dept. 2021)); *Guice v. PPC Residential*, 212 AD3d 577 [1st Dept 2023]).

It noted that found that the email messages here were in accord with those cases. It held that with regard to an email exchange where the words “without prejudice” are used, in determining if the e-mails evidence a binding agreement the courts have turned to the intent and mutual understanding ascertained from the clear language of the communications. It found that the email sent by defendant’s counsel was not a proposal, but a clear confirmation that defendant would accept the proposed settlement. It rejected the defendant’s argument that her email and the response from the plaintiff’s counsel accepting the stipulation should not be binding due to the inclusion of the words “Without Prejudice; Not to Be Used in Litigation” within the “subject” portions.

The court found this assertion to be both disingenuous and unpersuasive, as it contradicted the clear and unambiguous language set forth within her the email of defendant’s counsel, wherein she referred to the terms she crafted as “this stipulation.”

The author of the article states that he cannot understand how emails override the requirements of Domestic Relations Law 236 (B)(3) but then warns the reader that “[u]ntil we have more clarity on what constitutes a binding agreement, I suggest we all proceed with even more caution in our daily email exchanges.”

The title of the article and this conclusion create the impression that under New York law a binding agreement in a matrimonial action can be entered into by email between counsel. The author of the letter appears to accept this unreported Supreme Court decision as controlling authority.

The authors’ suggestion does not reflect the law in New York applicable to nuptial agreements in matrimonial actions as construed by the Court of Appeals in *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997). An email exchange between counsel cannot override the requirements of Domestic Relations Law §236 (B)(3), which requires that a nuptial agreement be signed (or proven in the manner required to entitle a deed to be recorded) and duly acknowledged.

In *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997) the Court of Appeals observed that Domestic Relations Law §236(B)(3), requires that a nuptial agreement be signed and duly acknowledged, (or proven in the manner required to entitle a deed to be recorded), to be valid and enforceable in a matrimonial action. It held that there are no exceptions and specifically rejected the argument that the Legislature intended that some agreements, though unacknowledged, could be enforceable, observing that the history of Domestic Relations Law §236(B)(3) did not reflect that intent.

The Court of Appeals noted that Domestic Relations Law §236(B), does not incorporate the Statute of Frauds. Rather, “it prescribes its own, more onerous requirements for a nuptial agreement to be enforceable in a matrimonial action. In contrast to the Statute of Frauds, Domestic Relations Law §236(B)(3) mandates that the agreement be acknowledged.”

The Court of Appeals observed that the formality of acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights or to resolve important issues concerning child custody, education, and care. It held that “by clearly prescribing acknowledgment as a condition, with no exception, the Legislature opted for a bright-line rule.” It concluded that an unacknowledged agreement is invalid and unenforceable in a matrimonial action.

In *Matisoff v. Dobi*, the court held that each party’s admission in open court that the signatures were authentic did not, by itself, constitute proper acknowledgment under Domestic Relations Law §236(B)(3). For that reason, it was unnecessary to decide whether and under what circumstances the absence of an acknowledgment could be cured.

In *Galetta v. Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826, 991 N.E.2d 684 (2013) the Court of Appeal pointed out that in *Matisoff v. Dobi*, it observed that the statute recognizes no exception to the requirement that a nuptial agreement be executed in the same manner as a recorded deed and "that the requisite formality explicitly specified in Domestic Relations Law §236B(3) is essential."

The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent cases presenting similar facts should be decided in conformity with the earlier decision. (*People v. Bing*, 76 NY2d 331, 337-38, 558 NE2d 1011 (1990)). Stare decisis requires that the decisions of the Court of Appeals that have not been invalidated by changes in statute, decisional law or constitutional requirements must be followed by all lower appellate courts, such as the appellate division and the appellate term (*Warnock v. Duello*, 30 AD3d 818, 816 NYS2d 595 (3d Dept 2006)) and by all courts of original jurisdiction. (*Battle v. State*, 257 AD2d 745, 682 NYS2d 726 (3d Dept 1999)).

In contrast, unpublished decisions or opinions have no precedential value other than the persuasiveness of their reasoning. (*Yellow Book of NY L.P. v Dimilia*, 188 Misc. 2d 489,729 N.Y.S.2d 286 (Dist.Ct., 2001); (citing Binimow, Precedential Effect of Unpublished Opinions, 2000 A.L.R.5th 17); *Eaton v. Chahal*, 146 Misc. 2d 977, 983, 553 N.Y.S.2d 642, 646 (Sup. Ct. 1990) ("[U]nreported decisions…although entitled to respectful consideration, are not binding precedent").

J.G. v L.G., supra, did not involve an open court stipulation. The Supreme Court did even consider the precedent established by the Court of Appeals in *Matisoff v. Dobi*, supra. The decision relied on the commercial cases the court cited and CPLR 2104 to support its determination, although there was no open court stipulation dictated on the record before a judge or duly signed by the parties and acknowledged. Its reasoning is not persuasive. It ignored or overlooked the doctrine of stare decisis and the Court of Appeals decision in Matisoff v Dobi (90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997)).

This unreported disposition has no precedential value. The author's conclusion does not reflect the current law in New York applicable to nuptial agreements in matrimonial actions. Under the doctrine of stare decisis, the Court of Appeals decision in *Matisoff v. Dobi* is the law of New York. It is a precedent that the Supreme Court was bound to follow but failed to do so.

Contrary to the title of the article, email exchanges in divorce litigation carry no risks, let alone an "immense risk". They are of no greater risk than letters mailed to counsel. Nor does an email exchange between counsel override the requirements of Domestic Relations Law §236 (B)(3).

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