

‘I Affirm. I Swear.’ The Pandemic Has Transformed NY’s Notarization Requirements—Or Has It?

By Harriet Newman Cohen | July 26, 2024

Although the pandemic is, relatively speaking, in our rearview mirror, its influence over the law remains ever-present. With that backdrop, Harriet Newman Cohen took a look at changes in the New York notarial laws and their reach in the field of family law.



I began writing my memoir in 2018, which is now with my agent. The practice was so different when I started to write, it seems almost unrecognizable. Paper drafts were piled high on the windowsills. Adversaries berated each other loudly on the telephone. The stress these interactions induced was palpable. And then came the pandemic.

Zoom arrived. The windowsill piles disappeared. The offices became virtually paperless. Fax machines became obsolete. Phones stopped ringing—replaced by zoom meetings—and documents began to speak for themselves: *Redline v. Redline*. No more yelling. Virtual meetings and virtual court appearances. Midnight NYSCEF filings. The possibility of automatic service, except to commence a matrimonial action. Lawyers could breathe again. More productivity. An amazing new world.

Necessity being the mother of invention, some formalities had to be dropped or varied in the face of the pandemic. In particular, notarization. Emergency statutes were enacted. Employees began to work remotely and grew to like it. Virtual and remote arrangements, previously unheard of, became the norm.

And then the pandemic was over. And some of the pandemic norms became the new norms. For example, in October 2023, it was decided that, as of Jan. 1, 2024, lay people could henceforth affirm, on penalties of perjury, that their statements were true. CPLR §2106 (2024). The expense and inconvenience of finding a notary was eliminated. Zoom-witnessed signatures became the norm as a much more user-friendly approach was ushered in. The language had to be precise. An unintended but welcome byproduct of the need to conduct business when quarantine and lock-down were obviating face to face meetings. The new post-pandemic world.

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The New York Notary Law: 19 NYCRR 182

The regulations promulgated by the New York Secretary of State, 19 NYCRR 182, i.e., the Notary Public License Law, now incorporate amendments from 2022 and 2023 to the notarial law provisions of New York's Executive Law. The amendments, effective Jan. 25, 2023, most notably authorize New York notaries public to notarize sworn documents online remotely. This is a sea change to a vetting and authorization process that goes back to the 1600's—in the colonies. Notarization, except during the pandemic, always had to be face to face, failing which there were dire consequences for the notary, for the public, and for any attorneys who may have suborned perjury.

For the public, these amendments have been a gift. For the notaries, not so much. Their whole practice has been upended—it is no longer business as usual, and, to make matters worse, the notary must record the method they use to confirm the identity of the signatory for each act and keep their notarization records for 10 years. These new and onerous regulations have been the subject of criticism. *See NYCBA Report on the New York Notary Law (2023).*

Before the passage of the amended CPLR §2106, only licensed attorneys, physicians, osteopaths and dentists were permitted to utilize the streamlined process of submitting affirmations instead of having to find notaries public to witness their sworn signatures on affidavits. All other individuals were burdened with obtaining notarizations from state-appointed officials who witnessed important document signings and verified signers' identities to help deter fraud. Today, the public can

affirm on penalties of perjury that what they are signing is true except in certain delineated situations.

Even affidavits of service that commence lawsuits and are so necessary to prevent fraud have been transformed into affirmations of service. Lawyers will recall their law professors introducing them to the figure of speech, “sewer service,” to describe the heinous act, most particularly connected with debt collectors, of intentionally failing to serve the defendant while pretending otherwise. Such misconduct led to a spike in default judgments in consumer credit cases in New York. “They threw the summons into the sewer,” the professors would intone. The sworn affidavit of service in front of a notary public was intended to curtail such practices.

Affirmations: CPLR §2106

Effective as of Jan. 1, 2024, CPLR §2106 provides as follows:

The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ___ day of ____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

The relaxed rule even reaches outside of the United States, Puerto Rico, the Virgin Islands, or any territory subject to United States jurisdiction, where the affirmation that must be used is as follows:

I affirm this ___ day of ____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature) CPLR §2106(b).

The language, “I affirm...under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law...” is the warning that is being relied upon to deliver the message that there will be serious consequences for perjury.

Application of 19 NYCRR 182 and CPLR §2106 to Matrimonial Documents

Does the same relaxation apply in matrimonial actions and, if so, are there any exceptions? The answer is yes, and yes. Motions can now be submitted based on client affirmations instead of notarized affidavits, “in lieu of and with the same force and effect as an affidavit.” However, in order for the affirmation to substitute effectively for the affidavit, the language employed must be precise. Do not deviate even though the

statute reads, “[s]uch affirmation shall be in *substantially* the following form” (emphasis added).

Pleadings must be verified, and there is no relaxation of the pre-pandemic rules there. CPLR §3020. A verification is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged information and belief, and that as to those matters the deponent believes it to be true. This is the language that must be employed. There are policy reasons for not changing the verification requirements. It’s all about gravitas.

The transformation of affidavits into affirmations and the relaxation of notarizations also do not apply to DRL §236(B)(3) agreements. 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.”

DRL §236(B)(3) marital agreements encompass such important personal rights and family interests that acknowledgements of the agreement must remain formal to a “T” in order to underscore the weighty personal choices that are made in these agreements, such as to relinquish significant property or inheritance rights, or resolve important issues concerning child custody, education and care. “In the manner of a deed.” That is the standard by which the validity of the acknowledgement of a DRL §236(B)(3) agreement is judged.

“To have and to hold.” The boilerplate found on deeds back to historic colonial days and earlier that emphasized that rights to valuable land were being transferred. Anybody handling a real estate transfer knows that we must not deviate from the traditional acknowledgment form. DRL §236(B)(3) agreements are no less formidable.

The formalities are intended to impress upon the signatories the consequences of the document that is being executed. That is the import of the holding of the Court of Appeals, in *Matisoff v. Dobi*, 90 N.Y.2d 127 (N.Y. 1997), which ruled that absent the formality that permits a deed to be recorded, DRL §236(B)(3) agreements will be deemed invalid. That admonition applies to prenuptial agreements, postnuptial agreements, and separation agreements—agreements that are at the heart of matrimonial law. Since cohabitation agreements are not covered by Article 13 Section 236 of the Domestic Relations Law, these formalities do not apply to them.

Would the post-pandemic winds of change affect the matrimonial-related agreements within the ambit of *Matisoff v. Dobi*? *Anderson v. Anderson*, 37 N.Y.3d 444 (N.Y. 2021), answers the question with a resounding, “No.” And don’t forget that when DRL §236(B)(3) agreements are signed outside of New York, they shall only be treated as if signed within New York “if accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation... (CPLR §2309).

In *Anderson*, the parties signed a postnuptial agreement—a DRL § 236(B)(3) agreement—a month after their wedding, and while the wife’s signature was acknowledged simultaneously with her signing, the husband’s signature was not acknowledged until seven years later, just before he filed for divorce. Citing *Matisoff v. Dobi* with approval, the Court of Appeals removed any doubt but that such relaxations would not apply to DRL § 236(B)(3) agreements. Not only must the formalities of *Matisoff v. Dobi* be adhered to, but the signature has to have been acknowledged contemporaneously—i.e., within a reasonable time of the signing.

Quoting *Matisoff*, the *Anderson* court stated, “Given the purpose of the signing and acknowledgment requirements, the DRL’s ‘obvious spirit and intent’ must be understood to require an acknowledgement 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.” *Anderson* at 452.

Consequently, the *Anderson* court held that the parties’ postnuptial agreement was invalid and unenforceable because the acknowledgment failed to comply with the DRL §236(B)(3) requirements. Strict construction remains the lesson of the day.

In 2023, in *Khan v. Hasan*, 219 A.D.3d 1420 (2d Dep’t 2023), the Second Department affirmed the Nassau County Supreme Court’s determination that the parties’ Islamic marriage agreement was unenforceable because it did not comply with the statutory acknowledgment requirements.

In *Khan*, the parties’ religious certificate of marriage was signed but not acknowledged by two witnesses and an Imam. The agreement provided

that in the event of divorce, the husband would pay to the wife a lump sum of \$50,000. The Supreme Court set aside the agreement on the husband's motion. The Second Department affirmed on the grounds that the Supreme Court was correct in its determination that the agreement's lack of proper acknowledgment rendered it unenforceable.

Notably, though, a less stringent standard was applied to a DRL §236(B)(3) agreement during the pandemic.

In *Ryerson v. Ryerson*, 2023 Westlaw 7201028 (3rd Dept. Nov. 2, 2023), at a time when out of necessity the use of audio-visual technology for the remote execution of notarial acts required by state law was authorized (see Executive Order [A. Cuomo] No. 202.7 [9 NYCRR 8.202.7]), the parties met at the wife's house to execute the separation agreement and contacted a notary public via video conference. After executing the agreement, the parties conveyed to the notary that they had no access to a scanner or facsimile machine to electronically transmit the document to the notary, as required by Executive Order No. 202.7. The notary instructed the wife to mail the agreement back to him, and the husband did not object to this proposed solution. A few days later, the notary received the agreement in the mail, reviewed it, acknowledged the parties' signatures and mailed a copy of the agreement to each of them.

The husband's subsequent attempt to invalidate and hold the agreement unenforceable as not having been signed in precise compliance with Executive Order No. 202.7 based on the fact that the parties mailed the document to the notary rather than scanning and faxing it failed. The minor variation in which the agreement was sent to the notary was not held to have deprived the notary of authority, or to have tainted the

notarial process, there being no substantive defect in the acknowledgment itself. Now that the pandemic is over, will the same rule of reason apply?

As an aside, although CPLR §2104 stipulations can and do deal with serious matrimonial and family court matters, even the transfer of property rights and custody issues, they do not require the formality of DRL §236(B)(3) agreements. CPLR §2104 provides that “[a]n 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.”

On June 18, 2024, in a CPLR §2104 stipulation case, the Second Department treated the matter with the gravitas the subject matter required and remitted the matter to the Family Court for a hearing and a new determination where a custody order awarding physical custody to the father based on a CPLR §2104 stipulation did not contain all of the material terms and a manifestation of mutual consent, the terms of the settlement were not placed on the record, and there was no writing subscribed by the parties. The mother’s averral that she did not consent to the terms of the custody order had been of no avail to her below.

Contrast that with *J.G. v. L.G.*, 2024 Slip Op 50659(U) (Sup. Ct., Westchester County, June 3, 2024), where the court found that an email exchange between lawyers concerning a proposed settlement affecting the disposition of a marital residence constituted a CPLR § 2104 stipulation that the wife could not retract. The email exchange was held to be sufficient to constitute a binding CPLR §2104 stipulation between

the parties, citing *Matter of Philadelphia Insurance Indemnity v. Kendall*, 197 A.D.3d 75 (1st Dept. 2021).

Suffice it to say that there is much more predictability in DRL §236(B)(3) agreement cases than those that come down under CPLR §2104. Practitioners, be wary.

Conclusion

New York law has moved with the times and has relaxed certain formalities. But not all. Formalities are still required for pleadings and DRL § 236(B)(3) agreements. The policy reasons underlying these two divergent paths are sound. It remains to be seen what the future will hold.

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