STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-700

IN THE MATTER OF MATTHEW KAMIL AND ROBIN KAMIL

REPLY BRIEF OF RESPONDENT, ROBIN KAMIL

APPEAL FROM 7TH CIRCUIT – FAMILY DIVISION – DOVER

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I. Contemporaneous Execution of a Prenuptial Agreement is Required under New York Law.

In his reply brief, Mr. Kamil attempts to draw distinctions between several New York decisions cited by Ms. Kamil in her brief and this case. Although there are certain factual differences between the cases cited by Ms. Kamil and this case, the fact remains that New York courts have made it clear that a contemporaneous execution and acknowledgment is required for a prenuptial agreement to be considered valid. No New York Court has issued a contrary opinion that a contemporaneous acknowledgement and execution is not required for prenuptial agreements.

In *Smith*, the Court's analysis did not turn on the factually incorrect nature of the acknowledgment, but on the fact that the agreement was not signed in the presence of a notary public, as was the case in this case.

> Inasmuch as the foregoing strongly suggests that defendant did not actually sign the agreement before Mac Cue as indicated in the written acknowledgment, there is clear and convincing evidence supporting Supreme Court's conclusion that the agreement was not acknowledged in accordance with the requirements of Domestic Relations Law § 236 (B) (3) and is, therefore, unenforceable. Contrary to plaintiff's claim, this is not a case involving a mere technical defect in the acknowledgment. Rather, the discrepancies

> involved go to the very issue of whether the agreement was, in fact, signed by defendant in the presence of a notary public and, given the strict construction of this requirement, it may not be overlooked. *Smith v. Smith*, 263 A.D.2d 628, 630 (N.Y. Supreme Ct. App. 3rd Dept. 1999).

With respect to *Stein*, the quote cited by Mr. Kamil in his reply brief is dicta and a quote from another decision. Crucially, the court's holding states the lack of contemporaneous execution and acknowledgment as the only reason for ruling the prenuptial agreement to be invalid, such as is the case in this case.

> Here, it is undisputed that plaintiff's signature was not duly acknowledged pursuant to DRL § 236(B)(3) contemporaneous to his execution of the Agreement. Rather, a certificate of acknowledgment was not generated with respect to such signature until March 21, 2005, almost 7 ½ years after the original execution of the document. Accordingly, given the lack of a properly executed contemporaneous certificate of acknowledgment with respect to plaintiff's signature, the court finds that the subject

Agreement is unenforceable. *Stein v. Stein*, 14 Misc. 3d 453, 460 (Sup. Ct. 2006).

Mr. Kamil's cited quote from *Matisoff* also comes from dicta, and is a quote from another decision specifically with respect to the recording of a deed. *Matisoff v. Dobi*, 681 N.E.2d 376, 381 (1997). The Court in *Galetta* noted that the acknowledgment requirement imposed by Domestic Relations Law § 236(B)(3) is onerous and, in some respects, more exacting than the burden imposed when a deed is signed. *Galetta v. Galetta*, 991 N.E.2d 684, 687 (2013). "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" *Id.*

In *Schoeman*, which involved a legal malpractice claim filed by the losing party in *Matisoff* against his attorneys, the Court held that the client would not prevail even if the client had asked the court to cure a defect in the acknowledgment of the signature in the prenuptial agreement due to the requirement that there be a contemporaneous acknowledgment. *Schoeman, Marsh & Updike, LLP v. Dobi*, 264 A.D.2d 572, 574 (1999).

Where New York law requires a contemporaneous execution and acknowledgment, this Court should affirm the Trial Court's decision invalidating the parties' prenuptial agreement.

II. Ms. Kamil complied with the preservation doctrine with respect to Issue #1: The Harvey & Eileen Kamil 2012 Irrevocable Trust and Mr. Kamil was required to disclose the Trust under Shafmaster.

Ms. Kamil properly preserved this issue by allowing the Trial Court to consider it via two Motions for Reconsideration, one of which included a signed affidavit by Ms. Kamil discussing her knowledge of the Harvey & Eileen Kamil 2012 Irrevocable Trust (hereinafter referred to as "the Trust") and an attached unsigned draft of the Trust. (Ms. Kamil's Appendix Page 16-31; 68-103). It is well settled law that issues not presented to the Trial Court prior to its decision may be preserved for appeal by allowing the Trial Court to consider the issue in a motion for reconsideration. *Dukette v. Brazas*, 166 N.H. 252, 255 (2014).

Ms. Kamil also preserved this issue by filing a motion to compel and obtaining an order that Mr. Kamil "produce all requested documentation in his possession and to exercise his best efforts to obtain all other requested documentation." (Ms. Kamil's Appendix Page 3-9). There is no indication in the record that he made any attempt to comply with this order. Instead, he maintained that his interest in the Trust is too remote to constitute marital property and thus he had no duty of disclosure. *Id.* at 11-13. As a result, the Trial Court had nothing to work with regarding division of his interest in the Trust. Further Trial Court proceedings are needed to address this issue.

Furthermore, Mr. Kamil's claimed distinction between failure to disclose an increase in valuation of an asset within the sole knowledge of a party

and failure to disclose an asset within the sole knowledge of a party is one without a difference.

As in *Shafmaster*, here a party has sole knowledge and control of an asset; Ms. Kamil has had no right to obtain the signed Trust document herself. She only learned about it, as she states in her affidavit in the record, by finding it on a computer, unsigned. *Id.* at 81. Mr. Kamil acknowledges the Trust exists, it is irrevocable and he is a beneficiary. *Id.* at 11-12. The unsigned trust document states he is a trustee. Nowhere in the record does he deny that he is a trustee. If, as he claims, he has no right to a copy of the signed Trust document, he would be expected to have stated that he is not a trustee of the Trust in support of his argument that he cannot get a signed copy of it. The fact that there is no such statement in the record makes it reasonable to assume he is, as the unsigned trust document states. Mr. Kamil's argument is circular, amounting to the following: I understand the Trust is a generation skipping trust and so I do not have a vested interest in it; as a result, my interest does not constitute marital property and, therefore, I do not have to disclose the Trust document. Mr. Kamil should not be allowed to deny disclosure of what appears to be a marital asset, and a significant one. Accordingly, there should be further proceedings to determine what should be done to produce a signed copy of the Trust.

Further, nowhere in the record does Mr. Kamil state that the unsigned trust document is not, in fact, the actual Trust document. Mr. Kamil does not deny the existence of the Trust; he just states he understands that it is a generation skipping Trust. However, the unsigned Trust document at issue is clearly not such. If there were another Trust document that does not vest

in Mr. Kamil a primary remainder interest, there would be no reason for him not to have produced that document.

Under the unsigned Trust document, Mr. Kamil is both a trustee and a beneficiary. *Id.* at 82-84. With those statuses, he has the right and ability to inform and account, and to receive a complete copy of the Trust instrument. *See* Fla. Stat. Ann. § 736.0813. (Full text of statute in Ms. Kamil's Appendix, Page 108.) Mr. Kamil's incorrect "lay understanding" does not excuse him from failing to disclose a marital asset subject to equitable division. Furthermore, without even considering the question of his being a trustee of the Trust, Mr. Kamil's position that he is only a remainder beneficiary who would only receive a benefit if he were predeceased by his children is unavailing; he is still considered to be a qualified beneficiary under the Florida Trust Code who is entitled to receive a complete copy of the Trust Instrument.

> (16) "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:
>
> (a) Is a distributee or permissible distributee of trust income or principal;
>
> **(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or**
>
> (c) Would be a distributee or permissible distributee of trust income or principal if the

trust terminated in accordance with its terms on that date. Fla. Stat. Ann. § 736.0103 (16).

Consequently, Mr. Kamil is a qualified beneficiary under Florida Trust Law, even if he is only a remainder beneficiary, as he asserts. As a result, where he was entitled to a copy of the Trust and refused to produce it, he violated the Trial Court's order compelling him to use his best efforts to obtain requested documentation, which included the Trust Document.

Where the Trust is an irrevocable trust naming Mr. Kamil as a beneficiary, his interest has vested and it needs to be considered a marital asset subject to division. *See Flaherty v. Flaherty*, 138 N.H. 337 (1994) (holding that an interest in an irrevocable trust was property subject to division in divorce). The fact that Ms. Kamil absented herself from the trial proceedings does not change the fact that the Trust was a marital asset subject to disclosure and equitable division.

III. Ms. Kamil complied with the preservation doctrine with respect to the other issues raised in her appeal.

As discussed above, a motion for reconsideration satisfies the preservation doctrine for issues not considered by the Trial Court prior to it issuing its decision. *Dukette*, 166 N.H. at 255. Consequently, where Ms. Kamil's motions for reconsideration raised the issues not discussed or considered by the Trial Court at trial and in its final order, she has properly preserved these issues for appeal.

CONCLUSION

Where New York law requires a contemporaneous execution and acknowledgment before a notary public for a prenuptial agreement to be considered valid, the Trial Court's decision to invalidate the prenuptial agreement should be affirmed.

Ms. Kamil's issues have been properly preserved for appeal due to the filing of motions for reconsideration. Furthermore, Mr. Kamil failed to comply with his obligations in failing to disclose the Harvey and Eileen Kamil 2012 Irrevocable Trust in which it appears he was a trustee and he has admitted he is a beneficiary with a vested interest, because the Trust is irrevocable, which needs to be equitably divided.

CERTIFICATION

Pursuant to Supreme Court Rule 16(10), I hereby certify that on this day a copy of this brief has been served via the Court's Electronic Filing System to Michael Keefe, counsel for Matthew Kamil

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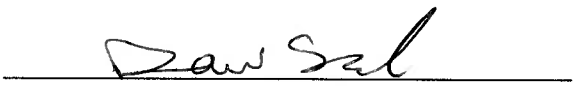
CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 16(11), I hereby certify that this reply brief does not exceed 3,000 words, exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.



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