To be Argued by:
SUSAN PHILLIPS READ, ESQ.
(Time Requested: 10 Minutes)

APL-2021-00017
Appellate Division, Second Department Docket No. 2019-03605
Surrogate's Court, Westchester County, File No. 2014-452/A

Court of Appeals

of the

State of New York

In the Matter of

JOHN KOEGEL AS EXECUTOR OF THE ESTATE OF
WILLIAM F. KOEGEL, A/K/A WILLIAM FISHER KOEGEL,

Deceased,

PURSUANT TO SCPA 1421

JOHN B. KOEGEL,

Petitioner-Respondent,

– against –

IRENE LAWRENCE KOEGEL,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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PRELIMINARY STATEMENT

After decedent William F. Koegel (Decedent) died in 2014, Respondent-Appellant Irene Lawrence Koegel (Ms. Koegel) filed a notice of election against his will (R 113-114).[1] But in 1984, nearly 30 years before Decedent's death, Ms. Koegel had entered into a prenuptial agreement (the Agreement) with Decedent, which consisted solely of mutual waivers of the spousal right of election (R 117-118).[2] This appeal involves the validity and enforceability of Ms. Koegel's waiver.

The certificates of acknowledgment accompanying Decedent's and Ms. Koegel's spousal waivers neglected to recite, as required at the time by Estates, Powers & Trusts Law § 5-1.1 (f) (2),[3] that the notary either knew the signer or had ascertained through some form of proof that the signer was the person described in the signer's waiver (R 118). In fact, each notary already knew the signer: Ms. Koegel's waiver was notarized by her personal attorney, Curtis H. Jacobsen (Jacobsen); Decedent's waiver was notarized by his longtime law partner, William E. Donovan (Donovan). Respondent-Petitioner John B. Koegel, Decedent's elder

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[1]The letter "R" followed by a number refers to the page(s) in the Record on Appeal.

[2]The term "waiver of the spousal right of election" is sometimes shortened in this brief to "spousal elective waiver," "spousal waiver," or simply "waiver."

[3]Section 5-1.1 (f) (2) was subsequently superseded by and renumbered Estates, Powers & Trusts Law § 5-1.1-A (e) (2). Section 5-1.1-A applies in the case of decedents dying after August 31, 1992 (*see* L 1992, ch 595).

son and the executor of Decedent's estate (the Executor), submitted affidavits in this Surrogate's Court proceeding from Jacobsen (R 256) and Donovan (R 254-255) in which each explained that (and how) he already knew Ms. Koegel and Decedent, respectively, before executing the certificates of acknowledgment. Both recalled taking the acknowledgment.

Ms. Koegel does not dispute anything in the notaries' affidavits. She has never denied the undeniable: that Jacobsen was her personal lawyer and that, of course, she knew him and he knew her when she signed her spousal waiver in his presence. Instead, she contends that the affidavits are irrelevant because the complained-of omission in the certificates is material and therefore fatal or, stated another way, that the omission is not curable with extrinsic evidence from the notary as a matter of law, even though the omitted fact (that each notary knew the signer) is true and undisputed.

To support the bright-line rule that she advocates, Ms. Koegel heretofore has relied exclusively on Domestic Relations Law § 236 (B) (3) and this Court's decisions in two matrimonial actions involving that provision; namely, *Matisoff v Dobi*, 90 NY2d 127 (1997), and *Galetta v Galetta,* 21 NY3d 186 (2013) (R 20, 474-480; *see* Ms. Koegel's Memorandum of Law in Support of Motion for Leave to Appeal, dated Nov. 3, 2020 [Ms. Koegel's MOL for Leave]). In her brief on this appeal, however, she has switched gears. Ms. Koegel now makes new

arguments and also for the first time mentions Estates, Powers & Trusts Law § 5-1.1-A (e) (2), although she chronically just lumps it together with Domestic Relations Law § 236 (B) (3) (*see* Brief for Respondent-Appellant, dated April 19, 2021 [Ms. Koegel's Brief] at pp 1-2, 3, 5, 10, 16, 17 and 19; *compare* "Question Presented for Review" in Ms. Koegel's MOL for Leave at 9 *with* "Question Presented" in Ms. Koegel's Brief at 5).

In sum, Ms. Koegel now principally contends that the Court of Appeals may not allow extrinsic evidence to establish the notary's compliance with the substantive requirements of an acknowledgment of a spousal waiver without specific legislative authorization, despite anything said in *Galetta* to indicate otherwise. Specifically, the Court in *Galetta* left open the door to curing a material deficiency in a certificate of acknowledgment for a matrimonial agreement to opt out of equitable distribution where "due to no fault of [the parties to the agreement], the certificate . . . was defective or incomplete" (*Galetta*, 21 NY3d at 196). Relatedly, the Court went out of its way to describe what a cure would entail: i.e., evidence demonstrating "that at the time the document was signed the notary or other official did everything he or she was supposed to do, other than include the proper language in the certificate" (*id.* at 197 [*emphasis added*]).

Ms. Koegel does not dispute that this is exactly what happened here. But for the Court to endorse the rule suggested in *Galetta*, she now avows, would amount

to an impermissible exercise of the judicial function to effect a de facto statutory amendment or to redraft legislation (Ms. Koegel's Brief, Points II and III).[4]

The bright-line rule that Ms. Koegel espouses, whatever her purported rationale, is inconsistent with both the legislative history of section 5-1.1-A (e) (2) of the Estates, Powers & Trusts Law, and the weight of judicial precedent applying that provision. Section 5.1-1-A (e) (2) is the only statute actually applicable in this case: this is an estate proceeding, not a matrimonial action subject to Domestic Relations Law § 236 (B) (3) (*see* Domestic Relations Law § 236 [B] [2] [a]).

Matisoff and *Galetta* offer guidance, though, because of the textual and substantive similarity of sections 236 (B) (3) and 5-1.1-A (e) (2).[5] Ms. Koegel's proposed bright-line rule is uncalled for by *Matisoff* and contrary to *Galetta*'s clear direction. Critically, her rule would be bad public policy, yielding an unfair result in every single case by creating windfalls for surviving spouses who knowingly agreed to waivers. And these windfalls would always come at the expense of the testator's blameless beneficiaries.

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[4]Point I of Ms. Koegel's brief spends several pages arguing that the omissions in the certificates are material defects. But the Executor did not dispute this in his motion for summary judgment.

[5]Domestic Relations Law § 236 (B) (3) is a much more recent statute. As discussed later, the Legislature adopted Decedent Estate Law § 18 (9), the forerunner of Estates, Powers & Trusts Law § 5-1.1-A (e) (2), in 1929 (*see* L 1929, ch 229), a full 50 years before enacting Domestic Relations Law § 236 (B) (3), a part of the Equitable Distribution Law (L 1980, ch 281).

Finally, because the courts below upheld the spousal waiver, they did not reach the Executor's other defenses to Ms. Koegel's notice of election; namely, laches, equitable estoppel and ratification (R 90, 93, 461-468). Accordingly, in the event the Court decides that Ms. Koegel's waiver is invalid and unenforceable, this proceeding must be remitted to Surrogate's Court for its consideration and disposition of the Executor's preserved unadjudicated defenses to Ms. Koegel's notice of election.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The question presented on this appeal is whether Surrogate's Court may consider extrinsic evidence from the notary to establish the validity and enforceability of a waiver of the spousal right of election when a material fact is omitted from the recitations in the certificate of acknowledgment prepared by the notary pursuant to Estates, Powers & Trusts Law § 5-1.1-A (e) (2).

COUNTERSTATEMENT OF THE NATURE AND FACTS OF THE CASE

I. The Agreement

Decedent and Ms. Koegel were mature adults when they married on August 4, 1984 (R 86). Ms. Koegel was 54 years old; Decedent was 60 years old and only five years away from retirement (R 166). Both had been recently widowed, Decedent for the second time (R 240, 244). Decedent was the father of two adult sons from his first marriage, and Ms. Koegel was the mother of three children from

her previous marriage, one of whom still lived at home (R 244-245). In the week before their wedding, Decedent and Ms. Koegel separately signed the Agreement (R 240, 251).

The first paragraph of the two-page Agreement states that both parties "desire that their said marriage shall not in any way change their pre-existing legal right, or that of their respective children and heirs, in the property belonging to each of them at the time of said marriage or thereafter acquired" (R 117 [*emphasis added*]). The second paragraph provides that in consideration of the mutual covenants set out in the Agreement, each of the parties agreed "to make no claim as a surviving spouse to any part of the estate of the other" (*id.*). This provision of the Agreement waived the spousal right of election. Pursuant to the Estates, Powers & Trusts Law, a spouse's waiver or release of the spousal right of election, to be effective, must be made during the lifetime of the other and 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" (Estates, Powers & Trusts Law § 5-1.1-A [e] [2] [*emphasis added*]).

When the acknowledgment method is used to validate a conveyance for recording, the signer must orally acknowledge to a public officer (usually a notary public) that he or she, in fact, signed the relevant instrument, and the public officer must know or have satisfactory evidence that the signer is the person described in

and who signed the document (*see* Real Property Law §§ 292, 303). The signer's oral acknowledgment to the public officer is a formality intended to impress upon the signer the seriousness of his or her act; the public officer's confirmation of the signer's identity protects against fraud.

Additionally, Real Property Law § 306 requires the public officer to execute a certificate of acknowledgment to memorialize that these two requirements have been met, and to indorse or attach the certificate to the instrument. This Court long ago held that "[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" (*Rogers v Pell*, 154 NY 518, 529 [1898], quoted in *Matisoff*, 90 NY2d at 138).[6]

The notary who acknowledged Decedent's signature was Donovan, his longtime law partner at Rogers & Wells, a large New York City law firm at the time (R 253). The notary who acknowledged Ms. Koegel's signature was

[6] *Rogers v Pell* involved an assignment for the benefit of creditors, which the Assignment Act of 1877 required to be "duly acknowledged before an officer authorized to take the acknowledgment of deeds" in order to be effective. As noted, the Court held that a written certificate was required in addition to the oral acknowledgment. In *Rogers*, however, the certificate accompanying the assignment was insufficient on its face because it appeared to have been executed in a venue outside the jurisdiction of the public officer. The Court determined that the assignment could be upheld, despite the certificate's facial insufficiency, by proof at a new trial that the instrument was, in fact, executed within the proper jurisdiction (*see also Linderman v Hastings Card & Paper Co.,* 38 App Div 488, 489 [2d Dept 1899] [commenting on *Rogers*]).

Jacobsen, an attorney who had worked on the estate of Ms. Koegel's late husband (R 252). Ms. Koegel was co-executor of her late husband's estate. She also retained Jacobsen as independent counsel to represent her in connection with the Agreement (R 142, 153, 202). Donovan and Jacobsen, however, neglected to recite in their respective certificates of acknowledgment that Donovan knew Decedent and that Jacobsen knew Ms. Koegel (R 118).

Ms. Koegel concedes that she read the Agreement before she signed it; she did not have any questions or make any comments regarding the Agreement (R 139, 146, 154). She did not ask Decedent or anyone else for more time to consider the Agreement before signing it (R 152-154, 203). Ms. Koegel subsequently complained that her hand-picked attorney was incompetent and did not fully advise her of her spousal right of election, and that she had only five days before the wedding to sign the Agreement (R 241). She admits, however, that she well understood that, by virtue of the Agreement, she and Decedent would be maintaining separate funds and assets, and that "what was mine was mine and what was his was his" (R 199-200; *see also* R 206).

II. The Parties' Financial Status Before and During Marriage

Before she married Decedent, Ms. Koegel knew that he was the head of the litigation department in a large New York City law firm, owned a spacious house in Scarsdale, New York, was a member of a country club, owned an interest in a

parcel of property in Somers, New York and was the beneficiary of a trust fund (R 163-166). For her part, Ms. Koegel had inherited from her late husband the marital home in Chappaqua, New York, which she sold in 1985 for $435,000 (R 172, 217); she also inherited, outright or in trust, a total gross estate of $651,571.49 (R 217-222).[7]

Throughout their marriage, Decedent and Ms. Koegel separately maintained the assets that each brought to the marriage and the fruits of those assets (R 152). Decedent paid the couple's day-to-day expenses and all the carrying charges (e.g., taxes, any mortgage payments, the costs of maintenance and insurance) on the Scarsdale house, and he alone purchased and paid similar expenses (e.g., taxes, condominium charges) for a condominium in Somers, New York, where he and Ms. Koegel resided after Decedent sold the Scarsdale house (R 165, 168-169, 205). The only major purchase for which Ms. Koegel shared costs with Decedent was a condominium apartment in Vero Beach, Florida (R 182-183).

Because she was spared having to pay living expenses for 29 years, Ms. Koegel was freed up to invest the sizeable resources that she possessed when she and Decedent married. And she did, maintaining a separate investment account

[7]For perspective, $435,000 in 1985 dollars is the equivalent of $962,738 in 2014, the year of Decedent's death; and $651,571 in 1984 dollars is the equivalent of $1,498,993 in 2014 (*see* https://www.dollartimes.com/inflation/, last accessed May 17, 2021). The record does not disclose how much equity Ms. Koegel had in the Chappaqua house when she sold it; nor does the record disclose her late husband's net estate. But there is no doubt that she inherited a tidy sum.

that totaled approximately $885,000 at or around the time of Decedent's death (R 364-389).[8] Ms. Koegel was also freed up to spend her separate funds during Decedent's lifetime however she alone saw fit, including to provide substantial financial assistance to two of her adult children (R 171-172, 176-179, 183-186).

III. Decedent's Last Will and Testament

Decedent executed his last will and testament in 2008 (R 107). Notwithstanding the Agreement and explicitly recognizing its existence as well as the dispositions that he had made to Ms. Koegel during his lifetime (R 99-100), Decedent left her his 50% ownership interest in the Florida condominium, together with his personal property located there, subject to any mortgage indebtedness outstanding at the date of his death (R 92). Decedent's 50% interest had a date-of-death value of $275,000 (*id.*).

Decedent also bequeathed to Ms. Koegel an exclusive lifetime possessory interest in the Somers, New York condominium, with a date-of-death value of $628,285 (and almost all of his personal property located there, with a date-of-death value of $29,660) (R 92, 101), and a car worth about $10,500 (R 92, 100). Upon Decedent's death, Ms. Koegel additionally received the benefits of an IRA, an annuity and a pooled income trust (R 92).

[8]This investment account was disclosed during discovery pursuant to a stipulation between the parties by which Ms. Koegel produced certain of her financial records (R 267, para. 7).

Ms. Koegel has complained that these bequests were meager and unfair because Decedent's estate likely exceeded $5 million (R 125), yet he had not left her "enough money to take care of" the Somers and Florida properties (R 206, 241); and that she was "paying all the bills" for the Somers condominium when she only had a lifetime possessory interest (R 207). As a result, when she dies, remarries or moves out, the Somers property is to be sold "with none of the proceeds going to [her or her estate], and instead all of such proceeds going to [Decedent's] children" (R 241).

Decedent's will recites that his testamentary dispositions in favor of Ms. Koegel were made in reliance on the continuing validity of the mutual provisions of the Agreement in which they waived their respective spousal elective rights, keeping their properties separate from one another and the offspring of their previous marriages (R 99). Along the same lines, Decedent made no bequests to Ms. Koegel's children "not because of any lack of love or affection for them, but in the expectation that adequate provision will be made for them by their mother" (R 100).

For her part, Ms. Koegel, consistent with the Agreement, bequeathed nothing whatsoever to Decedent or his family in her will (R 390). She merely gave Decedent a six-month option to purchase all of her right and interest in the Florida condominium and all its contents for $400,000, less an amount equal to one-half of

any outstanding mortgage indebtedness (R 392). As noted earlier, Decedent, by contrast, left his half-interest in the Florida condominium to Ms. Koegel outright.

Decedent died over seven years ago on February 3, 2014 (R 250). On July 29, 2014, Ms. Koegel filed a notice of election notwithstanding the waiver that she had signed almost 30 years earlier to the day (R 113-114). Ms. Koegel had never before objected to the Agreement to anyone; she had never voiced any dissatisfaction to Decedent during his lifetime; she had never indicated to him that she intended to contest the Agreement or the will or to file a notice of election (R 159, 192). As she testified at her deposition, she understood when she signed the spousal waiver in 1984 that "what was mine was mine and what was his was his" (R 199-200; *see also* R 206).

IV. This Estate Proceeding

A. The Petition, Answer and Motion to Dismiss Based on *Galetta*

On December 10, 2014, the Executor commenced this proceeding pursuant to Surrogate's Court Procedure Act § 1421 to set aside Ms. Koegel's notice of election (R 113-114). The Executor asserted in the petition that Ms. Koegel's notice of election was barred by the Agreement; i.e., her spousal waiver (R 86-88, paras. 10-12, 16-20; R 93, para. 31), and the doctrines of laches (R 90, para. 26) and estoppel (R 93, para. 30). The petition alleged Decedent's reliance on the

Agreement's vitality when ordering his affairs and bestowing divers financial benefits on Ms. Koegel during his lifetime (R 89, paras. 21-22).

In February 2015, Ms. Koegel filed her answer and objections to the Executor's petition, asserting two affirmative defenses (R 121-127). The first affirmative defense alleged that the Agreement was

> defective, invalid and unenforceable pursuant to Galetta v Galetta (citation omitted), in that, *inter alia*, the certificate of acknowledgment accompanying the (Agreement) omitted requisite language reciting that the officials taking the acknowledgments knew the signatories or ascertained through some form of proof that the signors (sic) were the persons described as required by DRL § 236 (B) (3) (R 123-124).[9]

In her second affirmative defense and objection, Ms. Koegel asserted that the Agreement was invalid and unenforceable on account of alleged examples of unfairness (R 124-125).

Concomitantly, Ms. Koegel moved to dismiss the petition and for judgment declaring the prenuptial agreement invalid on the basis of documentary evidence (the Agreement) and her *Galetta*-based affirmative defense (R 240). In opposition

[9]A waiver of the spousal elective right is effective whether "[u]nilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses" (Estates, Powers & Trusts Law § 5-1.1-A [e] [3]). Because a waiver may be unilateral, the logical corollary is that the validity of a decedent's waiver where the agreement is bilateral in form has no bearing on the validity of the surviving spouse's waiver (*see Matter of Abady*, 76 AD3d 525, 527 [2d Dept 2010]). Of course, a matrimonial agreement to opt out of equitable distribution does not work in the same way; it is always bilateral in form. In *Galetta* the nuptial agreement was challenged by the wife, whose own signature was accompanied by a proper certificate of acknowledgment, based on the material defect in the certificate for her husband's signature.

to the motion, the Executor submitted the Jacobsen and Donovan affidavits to show compliance with the conditions that *Galetta* had strongly suggested would amount to a cure of a materially defective certificate of acknowledgment (R 243-256). The Executor did not cross-move for summary judgment.

Applying the usual standard for a motion to dismiss, Surrogate's Court denied Ms. Koegel's motion on June 23, 2015 (R 259). Specifically, the Surrogate ruled that

> [g]iving [Ms. Koegel] every favorable inference . . . [she] has failed to sustain her burden of demonstrating that the facts as plead[ed] by [the Executor] do not fit within any recognized legal theory, the Court of Appeals having specifically left open the question of whether a defective acknowledgment can be cured as set forth in *Galetta v Galetta*, 21 NY3d 186 (R 263-264).

Ms. Koegel appealed.

B. The Executor's Motion for Summary Judgment on Ms. Koegel's Affirmative Defense of Unfairness

While Ms. Koegel's appeal was pending in the Appellate Division, the parties completed discovery and the Executor moved for summary judgment to dismiss Ms. Koegel's second affirmative defense and objection of unfairness (R 265-279). Surrogate's Court granted the motion on September 22, 2016, finding that Ms. Koegel "can prove no set of facts demonstrating a fact-based, particularized inequality with regard to the [A]greement," citing *Matter of Grieff*,

92 NY2d 341 (1988); and that there were no disputed facts warranting a trial (R 43). Ms. Koegel did not appeal.

C. The Appellate Division's Opinion and Order of February 7, 2018

On February 7, 2018, the Appellate Division handed down its opinion and order on Ms. Koegel's appeal, holding that "a defective acknowledgment of a prenuptial agreement [may] be remedied by extrinsic proof provided by the notary public who took a party's signature" (*Matter of Koegel*, 160 AD3d 11, 12 [2d Dept 2018]; R 14-15). The Court concluded that *Matisoff* was not to the contrary, as Ms. Koegel argued, since *Matisoff* involved the complete absence of any certificate of acknowledgment (160 AD3d at 27; R 24); and recognized that the situation here, where the notaries knew the signers and recalled acknowledging their signatures, was totally unlike *Galetta*, where the husband laid an inadequate evidentiary foundation for the admission of habit evidence (*see Guido v Fielding,* 190 AD3d 49 [1st Dept 2020]; Guide to NY Evid rule 4.13, Habit) . Instead, the Court reasoned, the facts here fit the hypothetical described in *Galetta* to support a rule permitting evidence to be submitted after the fact to cure a defect in a certificate of acknowledgment (*Matter of Koegel*, 160 AD3d at 27; R 27). Accordingly, the Appellate Division affirmed the Surrogate's denial of Ms.

Koegel's motion to dismiss the petition, which was premised wholly on *Galetta* and Domestic Relations Law § 236 (B) (3).[10]

Thereafter, Ms. Koegel unsuccessfully moved in the Appellate Division for permission to appeal its nonfinal order of February 2018 to this Court (R 45). Her subsequent motion asking this Court for leave to appeal was dismissed for non-finality on September 13, 2018 (R 46).

D. The Executor's Motion for Summary Judgment on Ms. Koegel's Affirmative Defense Based on *Galetta*

The Executor promptly moved in Surrogate's Court on October 1, 2018 for summary judgment on his petition, asking the Surrogate to dismiss Ms. Koegel's remaining affirmative defense and objection; i.e., the allegation that her waiver was invalid on account of defective certificates of acknowledgment per *Galetta* and Domestic Relations Law § 236 (B) (3) (R 79-80). He asked the Surrogate to declare that Ms. Koegel's notice of election was invalid and that she was not entitled to take any elective share of Decedent's estate (R 468-469). The Executor advanced both the Appellate Division's prior nonfinal order of February 2018 and his other affirmative defenses (laches, equitable estoppel and, additionally, ratification) to support the motion (R 461-468).

[10]The Appellate Division seems to have assumed or to have implicitly decided that the rule for cure with extrinsic evidence is or should be the same for defective certificates attached to spousal waivers and defective certificates attached to agreements to opt out of equitable distribution.

On February 5, 2019, Surrogate's Court granted the Executor summary judgment. The Court determined that the Agreement was valid and enforceable, based solely on the Appellate Division's prior nonfinal order of February 2018, and found that the Donovan and Jacobsen affidavits cured the missing language in the certificates (R 53-54).

Ms. Koegel then took a second appeal to the Appellate Division (R 65). On June 17, 2020, the Appellate Division affirmed the Surrogate's February 2019 order solely on the basis of the doctrine of law of the case (*see Matter of Koegel*, 184 AD3d 764 [2020]; R 11). On July 21, 2020, Ms. Koegel asked the Appellate Division for leave to appeal its June 2020 order to this Court; the Appellate Division denied her motion on October 5, 2020 (R 57).

On November 3, 2020, Ms. Koegel asked this Court for leave to appeal the Appellate Division's June 17, 2020 order in order to bring up for review its prior nonfinal order of February 7, 2018. The Court granted permission on February 11, 2021 (36 NY3d 905 [2021]; R 10). The jurisdictional predicate for the Court's review of the Appellate Division's prior nonfinal order would be CPLR 5602 (a) (1) (i) and CPLR 5501 (a) (1) (*cf.* Ms. Koegel's Brief at p 4).

ARGUMENT

I. LEGISLATIVE HISTORY AND THE WEIGHT OF PRECEDENT SUPPORT THE VALIDITY AND ENFORCEABILITY OF A SPOUSAL WAIVER WHERE A NOTARY KNEW THE SIGNER, AND WITNESSED THE SIGNING OF AND SUBSCRIBED HIS OR HER NAME TO THE WAIVER

A. Decedent Estate Law §18 (9), *Matter of McGlone and Matter of Maul*

The Commission to Investigate Defects in the Laws of Estates, a blue-ribbon advisory group to the Legislature headed by Surrogate James T. Foley, recommended substantial changes in New York's law of inheritance in 1928. The Legislature later adopted many of the Foley Commission's recommendations, which Governor Franklin D. Roosevelt signed into law as Chapter 229 of the Laws of 1929 (*see* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family*, 112 Yale L J 1641, 1682-1700 [2003] for a discussion of the Foley Commission's efforts and resulting legislative reform).

Among its most important features, this legislation abolished common law dower and curtesy[11] in New York as of September 1, 1930 (*see* Real Property Law §§ 190, 189), and created a new right of election for a surviving spouse. In

[11]Dower was the interest that a wife acquired, by virtue of marriage, in one-third of her husband's real property; curtesy provided a surviving husband with a life estate in the wife's real property if children were born to the couple (*see generally Terwilliger v Terwilliger*, 103 Misc 2d 371, 371-373 (Sup Ct, Dutchess County 1980).

general, the new Decedent Estate Law § 18 provided for a surviving spouse to elect to take an intestate share in the assets of the deceased spouse in lieu of the provisions made for the survivor by the deceased spouse's will. Concomitantly, Decedent Estate Law § 18 (9) authorized the waiver of this new spousal elective right and, as pertinent to this appeal, required that a waiver, to be effective, had to be "subscribed [by the maker] and duly acknowledged" (*emphasis added*).[12]

Matter of McGlone, 171 Misc 612 (Sur Ct, Kings County 1939) was the first major case to deal with section 18 (9)'s requirement that a waiver must be "duly acknowledged." McGlone involved the validity and enforceability of a written renunciation of inheritance rights signed by a bride-to-be in 1922, two days before her marriage. Because the husband executed a codicil to his will after August 31, 1930, his testamentary disposition was brought within section 18's purview. The renunciation or waiver had been subscribed by the maker but not acknowledged before the husband's death, and the Surrogate determined that the absence of an acknowledgment (among other infirmities) invalidated the waiver. He therefore sustained the widow's spousal elective right.

[12]This is the same phrase (i.e., "duly acknowledged") interpreted by the Court in *Rogers v Pell*, referenced at p 7 and p 7, n 6, above, to allow extrinsic evidence to establish the validity and enforceability of an assignment where the certificate of acknowledgment was insufficient on its face.

The Appellate Division reversed on the ground that by overriding the preexisting agreement between the spouses, section 18 violated the Contracts Clause of the Federal Constitution and the Due Process Clause of the State Constitution (*id.*, 258 App Div 596 [2d Dept 1940]). This Court disagreed with the Appellate Division's constitutional analysis and agreed with the Surrogate that the absence of an acknowledgment rendered the waiver invalid and unenforceable (*id.* 284 NY 527, 532-533 [1940], *affd sub nom. Irving Trust Co. v Day*, 314 US 556 [1942]).

The next important case to grapple with the requirement for an acknowledgment for a spousal waiver was *Matter of Maul*, 176 Misc 170 (Sur Ct, Erie County 1941). There, the decedent executed a will in January 1935, by which he left the bulk of his estate to his two brothers, whom he named executors. He married his wife in 1939 and, on the day of their marriage, he executed a codicil providing for her, and she executed an instrument reciting that she had read the codicil and waived her spousal elective right. As was the case in *Matter of McGlone*, there was no acknowledgment attached to the waiver, and the surviving spouse argued that therefore her waiver had not been "duly acknowledged" and was ineffective to bar her right of election.

But this time, the waiver was witnessed by two individuals who affixed their signatures to the instrument. In the Surrogate's view, this was a critical fact

distinguishing *Matter of Maul* from *Matter of McGlone* and ultimately leading to a different result (*id.* at 171).

In 1947, as now, the Real Property Law provided for two equally acceptable methods to validate a conveyance: (1) the acknowledgment method, discussed earlier; or (2) the subscribing-witness method, consisting of proof by a person who knew the signer, witnessed the signer execute the conveyance and signed his or her name to the conveyance at the same time (*see* Real Property Law §§ 292, 304). The notary's certificate of proof states that the subscribing witness made these representations to the notary and the subscribing witness's place of residence; and that the notary "is personally acquainted with [the subscribing witness], or has satisfactory evidence that he [or she] is the same person, who was a subscribing witness to the conveyance" (*id.* §§304, 306). Section 305 of the Real Property Law authorizes issuance of a subpoena to compel a subscribing witness to testify concerning the execution of a conveyance.

The Surrogate in *Matter of Maul* took the position that

> [i]t has been and still is the law that conveyances may be legally executed if properly attested by subscribing witnesses and that when proven and certified as to execution in the manner provided in the Recording Acts are entitled to record. This applied to . . . instruments releasing dower and it should apply to waivers of the right of election" (*Matter of Maul*, 176 Misc at 174).

The Surrogate therefore issued a subpoena pursuant to Real Property Law § 305; the subscribing witness answered the questions to demonstrate compliance with

Real Property Law § 304; and the Surrogate attached to the spousal waiver the certificate required by Real Property Law § 306. He then determined that the surviving spouse had no right of election to take an elective share of the decedent's estate.

The Appellate Division affirmed, with one Justice dissenting (*see id.*, 262 App Div 941 [4th Dept 1941]). The majority relied on an opinion of this Court that had allowed proof by subscribing witnesses when a statute specified acknowledgment before a notary public, as well as on section 11 of the General Construction Law, also cited by the Surrogate. Then, as now, this provision authorizes acknowledgment or proof of writings by any officer authorized to take the acknowledgment or proof of a deed of real property to entitle it to be recorded. The dissenting Justice took the view that the statute authorized only an acknowledgment by the signer of the waiver, citing *Rogers v Pell* and *Matter of McGlone*. On an appeal as of right, this Court affirmed with no opinion (*id.*, 287 NY 694 [1942]).

B. The Law Revision Commission's Report and Chapter 379 of the Laws of 1947

The Law Revision Commission subsequently reviewed Decedent Estate Law § 18 (9) and made recommendations to the Legislature for improvements (*see* NY Law Rev Comm Report, Legis Doc No 65 (H) (1946), included in Bill Jacket, L 1947, ch 379). As relevant here, the Law Revision Commission stated as follows

with respect to section 18 (9)'s direction for a spousal waiver to be "duly acknowledged":

> The requirement of an acknowledgment has been upheld even as to a waiver executed prior to September 1, 1930 [citing *Matter of McGlone*]. In one particular only has this requirement been eased. Under the provisions of General Construction Law, § 10 and § 11, the statutory requirement of "acknowledgment" has been held to be satisfied by the instrument being "witnessed" and duly "proved" by the witnesses [citing *Matter of Maul*]. This is a liberalization of the statutory text which should not remain hidden in a judicial decision, but should be explicitly set forth in the text of the statute (*id.* Bill Jacket at 20-21 [*emphases added*]).

The Law Revision Commission therefore recommended that the words "duly acknowledged" be deleted from section 18 (9) and that the following be substituted: "A waiver or release to be effective under this subdivision [9] shall be subscribed by the maker thereof and either acknowledged or proved in the manner required for the recording of a conveyance of real property." The Legislature amended the statute accordingly and so essentially codified *Matter of Maul*'s holding as recommended by the Law Revision Commission (*see* A. Matthew Broughton, Jr., *Amendment of the Decedent Estate Law Clarifying Waiver of the Spouse's Right of Election Against a Will*, 22 St. John's L Rev 170, 174 [1947]).

There have been many amendments to the spousal waiver provision in the years since 1947. Two multi-year blue-ribbon advisory groups headed by distinguished Surrogates have been established and asked by legislators to review

and recommend changes to New York's law of inheritance.[13] And the Legislature has adopted many amendments on the recommendation of these groups. But during the seven decades since 1947, there has never been a recommendation and the Legislature has never acted to change in any meaningful way the acknowledged-or-proved language enacted in 1947. There certainly has never been any proposal to amend the law to create anything like Ms. Koegel's bright-line rule.

C. Decisional Law Since 1947

Since the Legislature's amendment of Decedent Estate Law § 18 (9) in 1947, New York courts have consistently considered whether extrinsic evidence in a particular case cures the lack of a certificate of acknowledgment or a materially

[13]The Legislature in 1961 created the Temporary Commission for the Modernization, Revision and Simplification of the Law of Estates for the purpose of correcting the defects in the laws relating to estates and their administration (*see* L 1961, ch 731). This Commission was headed by Surrogate John D. Bennett. Its work culminated in creation of the Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act, which combined provisions from the Decedent Estate Law, Real Property Law, Personal Property Law and Surrogate's Court Act, and made numerous substantive changes in New York law (*see* L 1966, ch 952). In 1990, the Senate and Assembly Judiciary Committees authorized formation of the EPTL-SCPA Legislative Advisory Committee (EPTL-SCPA Committee), co-chaired by Surrogates C. Raymond Radigan and Louis D. Laurino. Surrogate Radigan chaired the subcommittee focusing on article 5 of the Estates, Powers & Trusts Law (*see* 13 Warren's Heaton, Surrogate's Court Practice, App 1.01 (First Report of EPTL-SCPA Legislative Advisory Committee [Advisory Committee Report]). Surrogate Bennett authored *Matter of Stoeger*, 30 Misc 2d 1090 (Sur Ct, Nassau County 1961); Surrogate Radigan authored *Matter of Felicetti*, NYLJ, Jan. 22, 1998, at 31, col 3 (Sur Ct, Nassau County 1998). Both cases are mentioned later in the text and support the Executor's position on this appeal.

defective certificate where a witness (including a notary-witness) knew the signer, observed the signer execute the spousal waiver and subscribed the document of waiver. This is apparent from an examination of relevant caselaw, including *Matter of Stoeger* (waiver complies with formalities of execution required by statute even though the acknowledgment by the subscribing witness took place a number of years after waiver's execution) (citing *Matter of Maul* and 1947 amendment to the Decedent Estate Law); *Matter of Stegman*, 42 Misc 2d 273 (Sur Ct, Bronx County 1964) (no certificate of acknowledgment, but waiver signed by attorney present at waiver's execution may supply necessary proof as subscribing witness); *Matter of Beckford*, 280 AD2d 472 (2d Dept 2001) (deposition testimony of attorney who notarized the spouse's signature on the spousal waiver created an issue of fact about the challenged waiver's validity); *Matter of Felicetti* (where certificate is materially defective because of failure to state that the surviving spouse acknowledged his signature to the notary, court allows grandson opportunity to supply proof of execution as a subscribing witness and also allows proof of venue per *Rogers v Pell*); *Matter of Saperstein*, 254 AD2d 88 (1st Dept 1998) (no certificate of acknowledgment, but attorney who signed waiver as subscribing witness may supply necessary proof); *Matter of Seviroli*, 9 Misc 3d 1116(A) (Sur Ct, Nassau County 2005) *affd* 44 AD3d 962 (2d Dept 2007) (where oral acknowledgment disputed, attorney-notary who signed the document may

supply necessary proof as subscribing witness); *Matter of Menahem*, 13 Misc 3d 1226(A) (Sur Ct, Kings County 2006), *affd* 63 AD3d 839 (2d Dept 2009) (an improper certificate of acknowledgment or subscribing witness statement may be corrected); *Matter of Green*, 16 Misc 3d 1113(A) (Sur Ct, Suffolk County 2007), *affd sub nom. Doman*, 58 AD3d 625 (2d Dept 2009) (defective certificate of acknowledgment may be cured by subsequent proof from notary as subscribing witness); *see also Matter of Palmeri*, 75 Misc 2d 639 (Sur Ct, Westchester County 1973), *affd* 45 AD2d 726 (2d Dept 1974), *affd* 36 NY2d 895 (1975) (noting that, in cases of spousal waivers, missing acknowledgments have been cured by taking the subscribing witness's testimony in court) .

Sometimes there is a failure of proof (*see Matter of Henken*, 150 AD2d 447 [2d Dept 1989] [when questioned at trial, subscribing witness was unable to recall when he signed the instrument or whether he was physically present when agreement was signed by surviving spouse]). And sometimes, there is <u>neither</u> a certificate of acknowledgment affixed to the waiver <u>nor</u> a subscribing witness's signature (*see Matter of Howland*, 284 App Div 306 [4th Dept 1954]; *Matter of Warren*, 16 AD2d 505 [2d Dept 1962], *affd* 12 NY2d 854 [1962], and *Matter of Kucera*, 73 Misc 2d 456 [Sur Ct, Erie County 1973]).

Both *Matisoff* and *Galetta* recognized the continued vitality of this line of precedent. *Matisoff* observed that this Court had affirmed "determinations

allowing parties to provide the requisite acknowledgment under similar statutory requirements at a later date" (*emphasis added*), citing *Matter of Maul* (spousal waiver), *Matter of Stegman* (spousal waiver) and *Matter of Palmeri* (acknowledgment of renunciation under article 4 of the Estates, Powers & Trusts Law).

In the end, the Court in *Matisoff* did not need to resolve the timing of the acknowledgment of the opt-out agreement; specifically, "[e]ven 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)" (*Matisoff*, 90 NY2d at 137 [*emphasis added*]; *see Anderson v Anderson*, 186 AD3d 1000 [4th Dept 2020], appeal pending [APL-2020-00145]). *Matisoff* held that an opt-out agreement missing a certificate of acknowledgment is invalid and unenforceable in a matrimonial action, basing this result on the language and legislative history of the Equitable Distribution Law (90 NY2d at 130).

The Court's reference in *Galetta* to precedents under Estates, Powers & Trusts Law § 5-1.1-A (e) (2) is best understood in the context of the Appellate Division's decision in that case. The Appellate Division had observed that "[i]t is well settled that defects in an acknowledgment required by EPTL 5-1.1-A (e) (2) . . ., concerning waivers of the spousal right of election may be cured," citing this

Court's dicta in *Matisoff* as well as *Matter of Maul, Matter of Saperstein* and, generall*y, Rogers v Pell* (*Galetta v Galetta*, 96 AD3d 1565, 1567 [4th Dept 2012]). The Appellate Division then continued that "[i]nasmuch as the language of the EPTL contains the same restrictive acknowledgment language as the Domestic Relations Law under discussion in the *Matisoff* case, we conclude that the same reasoning should apply to Domestic Relations Law § 236 (B) (3) and the defects in the acknowledgment required by that section may be cured" (*id.* [internal quotation marks omitted] [internal citation omitted]).

When Mr. Galetta made this argument on appeal, the Court forcefully disagreed, stating that the cited estate cases involved proving a signature through subscribing witnesses, "a different procedure governed by other provisions of the Real Property Law," and did not involve the Domestic Relations Law or the acknowledgment method (*Galetta*, 21 NY3d at 196, n 3). And, in fact, the line of precedent in New York law permitting a subscribing witness to cure a defective certificate did not help Mr. Galetta because he was a stranger to his notary.[14]

[14]The different judicial treatment of acknowledgments for matrimonial agreements to opt out of equitable distribution and those for spousal waivers has not been lost on the matrimonial bar. Years before the Court's decision in *Galetta*, one prominent matrimonial lawyer lamented, "The question remains. Why should the result be different when the statutory provisions are virtually identical?" (Myrna Felder, *Missing Acknowledgments: Can They Be Cured?*, NYLJ, Feb. 10, 1999 at 29, col 5).

II. THE *GALETTA* DICTA

In *Galetta,* the Court went out of its way to articulate the parameters of a rule to cure a material defect in a certificate of acknowledgment. Specifically, *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," or put another way, that "at the time the document was signed the notary or other official did everything he or she was supposed to do, other than include the proper language in the certificate," which is akin to permitting "parties who properly signed and acknowledged the documents years before . . . to conform the certificate to reflect that fact" (*Galetta*, 21 NY3d at 197; *see also*, *People ex rel. Sayville Co. v Kempner*, 49 App Div 121 [1st Dept1900] [where certificate of acknowledgment was defective in failing to state that the person making the acknowledgment was the person described in and who executed the document, mandamus lies to compel the correction of this mistake because the notary's duty in making the certificate was purely ministerial] [*emphasis added*], cited in *Galetta*, 21 NY3d at 194; *Matter of Felicetti* at *3 ["Adding weight to this view (that a defective certificate of acknowledgment may be cured) is the fact that mandamus lies to compel a notary public to correct a defective certificate"]). In other words, there was a paperwork error: the notary, in fact, fulfilled all the

substantive obligations imposed upon him or her by the acknowledgment method, although the verbiage in the certificate did not reflect this.

This is the rule that the Appellate Division adopted in its February 2018 opinion and order in this case; it is the rule for which this Court said in *Galetta* that a "compelling argument" and "strong case" could be made (*Galetta*, 21 NY3d at 196, 197). And Surrogate's Court found that the affidavits of Jacobsen and Donovan were sufficient here to cure the defects in the certificates pursuant to this rule because they were based on personal knowledge of the signer and actual observation of the signing (R 53).

The rule adopted by the Appellate Division, which tracks this Court's dicta in *Galetta*, is at least as stringent as the longstanding practice in the estates and trusts area of validating a spousal elective waiver through extrinsic evidence provided by a subscribing witness.[15] Unlike the subscribing-witness method, the

[15]Ms. Koegel digresses in a long footnote into the topic of the curability of materially defective certificates of acknowledgment for deeds, which she implies are not curable with extrinsic evidence (Ms. Koegel's Brief at 20, n 3). Nothing cited in her footnote supports this proposition: (1) *80P2L LLC v U.S. Bank Trust, N.A.*, 2019 NY Slip Op 32604(U) (Sup Ct, NY County 2019), attached to Ms. Koegel's brief, involves a missing certificate, not a defective one; (2) the two sentences within the internal quotation marks in the footnote come from *Smith v Tim*, 14 Abb N Cas 447, 1884 NY Misc LEXIS 228 (Ct Common Pleas 1884), and cite to cases from the states of West Virginia, Missouri, Texas and Vermont; i.e., not New York; *Smith* itself simply holds that a conveyance with a defective certificate of acknowledgment is not entitled to be recorded; and, finally, (3) the three remaining cases hold the same as *Smith* and/or that a purchaser will not be compelled to accept defective title that can be cured only by resort to parol evidence.

cure outlined in *Galetta* does not require the notary to have known the signer of the document.

III. MS. KOEGEL'S PROPOSED BRIGHT-LINE RULE IS BAD PUBLIC POLICY

Ms. Koegel insists that only a bright-line rule will do: If there is a material defect on the face of the certificate of acknowledgment attached to a spousal waiver, the waiver is invalid and unenforceable. She claims that the rule outlined in *Galetta* would "inject an unwarranted level of unpredictability and uncertainty into the statutory framework" (Ms. Koegel's brief at 20). While there is a place in the legal firmament for bright-line rules, no possible justification exists for Ms. Koegel's particular bright-line rule, which would yield only unjust results with no discernible offsetting benefit.

Keep in mind that her rule is not geared to those instances where a spousal waiver was induced by fraud or overreaching. Where that is the case, the spousal waiver is invalid and unenforceable on those grounds. Instead, Ms. Koegel's bright-line rule would bestow a windfall on a surviving spouse who knowingly gave a spousal waiver, as is the case here (i.e., Ms. Koegel understood that "what was mine was mine and what was his was his" when she signed and acknowledged the waiver [R 199-200; *see also* R 206]). And that windfall would always redound to the detriment of a testator's blameless beneficiaries, quite often an earlier family, as is also the case here (*see* Naomi Cohn, *What's Wrong about the Elective*

Share Right?, 53 UC Davis L Rev 2087 [2020] [empirical analysis shows that elective share disputes arise in relatively few reported cases, and typically involve a subsequent spouse challenging a will that leaves property to the children of a decedent's first marriage]).

In sum, while Ms. Koegel's proposed bright-line rule would produce consistent results, those results would be consistently unfair. And there is little risk that the Court's adoption of the rule suggested in *Galetta* would produce "a procession of case law involving fact patterns competing to qualify as post-execution cures" (Ms. Koegel's Brief at pp 3, 20). For one thing, there are very few mistakes that may render the certificate materially defective; basically, the certificate may neglect to recite that the signer made the requisite oral acknowledgment to the public officer, or may neglect to recite that the public officer knew the signer or ascertained through some form of proof that the signer was the person described in the instrument. Or a question of venue may arise on the face of the certificate (*see Rogers v Pell* and *Matter of Felicetti*).

The most common by far of these mistakes has been the omission from the certificate of verbiage to memorialize that the public officer knew the signer or took measures to make sure that the signer and the individual named in the instrument were the same person. When this material defect occurs, the evidentiary showing necessary to establish compliance with the underlying

substantive requirement is not complicated. The executor may submit evidence to demonstrate to the factfinder that (1) the public officer, in fact, already knew the signer or (2) remembered what happened when he or she took the acknowledgment; or (3) the executor may lay a proper foundation for the introduction of habit evidence, permitting the factfinder to draw an inference that the public officer followed his or her habit to establish the signer's identity when taking the acknowledgment (*see Guido*, 190 AD3d at 55 ["[w]here habit evidence is admitted, it only establishes that the claimed behavior or conduct was persistent and repeated in similar circumstances [and] cannot be the basis for judgment as a matter of law" [internal citation omitted]). In the first situation, where the public officer already knew the signer, this straightforward fact would normally be easy to prove, easily proved and usually admitted, as is the case here.

Ms. Koegel also calls for a bright-line rule because that is what the Court did in *Matisoff*. But unlike *Matisoff*, a bright-line rule in this context is not necessary to keep the courts clear of messy litigation to resolve ambiguous issues of intent or complicated fact-finding such as the parties' "original motivation or subsequent economic relationship during the marriage" (*Matisoff*, 90 NY2d at 136).

Next, there is little probability of increased litigation absent the Court's adoption of the bright-line rule advanced by Ms. Koegel. Section 309-a of the Real Property Law, adopted by the Legislature in 1997, sets out failsafe model

form certificates of acknowledgment or proof, which the legislation's proponents promoted as necessary to dispel the confusion then reigning about what a proper notarial certificate needed to say (*see* Memorandum in Support of Legislation at 000007, and letter from the National Notary Association, dated June 24, 1997, at 000015, Bill Jacket, L 1997, ch 179). The number of spousal waivers drafted prior to the adoption of this statute (the waiver here dates from 1984) is steadily dwindling and with it, the likelihood of future disputes like this one or those described in Section I. (C.) of the Argument in this brief.

Finally, throughout this litigation Ms. Koegel has relied on the Domestic Relations Law § 236 (B) (3). But significant differences in the design and structure of the Estates, Powers & Trusts Law and the Equitable Distribution Law are likely to make the consequences of her bright-line rule potentially more severe for a decedent's beneficiaries than would be the case if a marriage had ended by divorce rather than death.[16]

If an opt-out nuptial agreement is invalidated because of a material defect in the certificate of acknowledgment, a judge in the matrimonial action makes a distributive award based on numerous factors, some of which assume the

[16]These differences "troubled" several members of the EPTL-SCPA Committee when they performed their review and analysis of article five for the Senate and Assembly Judiciary Committees. In the end, the Committee concluded that eliminating these two troubling features of the Estates, Powers & Trusts Law could only be accomplished with radical reforms well outside its remit (*see* n 13 above, Advisory Committee Report).

continued existence of both parties. The pot of money subject to this distributive award includes the assets of both spouses, with the exclusion of assets owned by a spouse before the marriage (and their fruits), or "separate property." At least in theory, the result may be little different than it would have been if the agreement had been enforced, although that obviously would not have been the expectation of the party challenging the agreement.

The situation is quite different for the award of an elective share. Notably, the Estates, Powers & Trusts Law does not distinguish between assets acquired during the marriage and separate property; the statute does not consider the size of the estate of the surviving spouse. And the statute prescribes a standard formula for computing the elective share amount; the judge does not have discretion to take equitable factors into consideration as in the case of a divorce (*cf. Matisoff*, 90 NY2d at 136 ["Many of the equitable factors . . . will continue to be relevant to the trial court's award of property, maintenance and the like, as well as to appellate review of such award"]). If the will leaves less than one-third of the decedent's estate to the surviving spouse (the operating assumption where a notice of election is filed), the decedent's blameless beneficiaries (family, friends, charitable organizations) will always be affected negatively financially if a spousal waiver is not enforced since each beneficiary will have to contribute ratably toward the elective share.

IV. CONSIDERING EXTRINSIC EVIDENCE OF SUBSTANTIVE COMPLIANCE IS NOT JUDICIAL OVERREACH

A. The Purported Effect of the Absence of Statutory Language Authorizing Cure

Ms. Koegel now argues that a court may not consider extrinsic evidence to uphold a spousal waiver for two reasons: (1) this Court's "finding" in *Galetta* that the same defect as in the present case "is material and substantial, involving a 'core component' of a certificate of acknowledgment" (*emphasis added*); and (2) "the absence of any legislative provision allowing for the cure of such substantial defects, compel a finding that the defective certificate of acknowledgment in this case is not susceptible to cure" (Ms. Koegel's Brief at 16 [*emphasis added*]; *see also id.* at 10-11, 17).

First, *Galetta*'s reference to a "core component" comes in a discussion where the Court contrasts the facts in that case with those of a case where the certificate's language did not precisely track the language of the model form in Real Property Law § 309-a (1). In the latter circumstance, the Court stated, "the deviation" was one of "form but not substance" whereas "[t]he same is not true here where a core component of a valid acknowledgment was not referenced in the certificate" (*Galetta*, 21 NY3d at 194 [*emphasis added*]). In short, the Court referred to an acknowledgment's substantive requirement for the public officer to

ensure the identity of the signer as a "core component," not the verbiage in the certificate to memorialize that this substantive requirement had been fulfilled.

This statement comes in the paragraph after the Court cited *Sayville*, which called this same specific error of omission a "mistake" that a notary may be compelled to correct by mandamus because "the making of the certificate [is] purely ministerial" (*Sayville*, 49 App Div at 122). Further, Ms. Koegel's core-component argument has to be viewed in light of the numerous statements in *Galetta* strongly indicating that a nuptial agreement entered into pursuant to Domestic Relations Law § 236 (B) (3) is valid and enforceable in a matrimonial action where extrinsic evidence shows that the substantive requirements of an acknowledgment have been met, albeit not reflected in the certificate's verbiage.

Ms. Koegel also lists provisions in a number of statutes where the Legislature uses the word "cure," and claims that the absence of the word "cure" in the Estates, Powers & Trusts Law means that a spousal waiver is invalid and unenforceable if the accompanying certificate is materially defective. There are several responses to this.

First, the statutory provisions that Ms. Koegel lists cover a variety of topics and encompass a variety of legislative schemes with individual legislative histories and purposes and bodies of judicial interpretation. They do not all use the word "cure" in the same sense. None of them seems to use the word "cure" in the sense

intended in *Galetta*: consideration of extrinsic evidence to show compliance with a statute's substantive requirements.

Next, this Court has always viewed the cure of a defective certificate of acknowledgment to be a matter of judicial competence. As long ago as 1898, in the leading case of *Rogers v Pell*, the Court held that a certificate referring to a venue outside the jurisdiction of the certifying officer was thereby defective but could be cured by proof at trial that it was, in fact, taken within the certifying officer's jurisdiction (*see* p 7, n 6). The notion that the question of cure is for the courts to decide is inherent in *Matisoff* and *Galetta*. Otherwise, *Galetta* would have been a much shorter opinion. The Court would not have been put to the trouble of analyzing the shortcomings in the evidence of cure and explaining in detail the circumstances making a "strong case" for a cure.

Finally, Ms. Koegel does not discuss Estates, Powers & Trusts Law § 5-1.1-A (e) (2) and its legislative history at all; she does not cite a single case construing or applying this provision or its predecessor, Decedent Estate Law § 18 (9). The Legislature is presumed to be aware of decisional law, and the New York courts have for decades upheld spousal waivers that are unacknowledged or include a defective certificate by the simple expedient of extrinsic evidence from a subscribing witness that he or she knew the signer and observed the actual signing of the waiver (*see Pouch v Prudential Ins. Co. of Am.*, 204 NY 281, 287 [1912]

["Where . . . a statutory provision has received judicial construction, which has been long acquiesced in, . . . such construction should be adhered to, and . . . it should be left to the Legislature to amend the law if a change should be deemed necessary"]).

This body of law was, in fact, kicked off by the Legislature's amendment of section 18 (9) of the Decedent Estate Law in 1947, which essentially codified the holding of *Matter of Maul*. The blue-ribbon panels that advised the Legislature about statutory revisions to spousal elective rights well understood the relevant New York law on the point: the chair of the Bennett Commission and the co-chair of the EPTL-SCPA Advisory Committee each authored an opinion contributing to this body of decisional law (*see* n 13 above).

B. The Purported Rewriting of the Statute

In addition to insisting that the Legislature must and has not explicitly authorized the courts to "cure," Ms. Koegel contends, as a reworking of the same argument, that the Court's adoption of the *Galetta* dicta would amount to judicial usurpation of the legislative function (Ms. Koegel's Brief at 17). She then cites several cases where a court stated that the particular construction or interpretation requested by a party in that particular case would effectively rewrite whatever statute was at the heart of that particular litigation. None of these cases has anything to say about whether the Court is being asked here to rewrite the Estates,

Powers & Trusts Law with respect to the validity and enforceability of a spousal waiver, which it clearly is not (*see* discussion at Section I. of the Argument in this brief).

V. IN THE EVENT THE COURT HOLDS THE WAIVER TO BE INVALID AND UNENFORCEABLE, THIS CASE MUST BE REMITTED TO SURROGATE'S COURT FOR ADJUDICATION OF THE EXECUTOR'S OTHER DEFENSES TO MS. KOEGEL'S NOTICE OF ELECTION

The Executor has interposed and carefully preserved defenses to Ms. Koegel's notice of election in addition to the spousal waiver; namely, laches,[17] equitable estoppel and ratification (R 90, 93, 451, 461-466). Because the lower courts upheld the validity of the spousal waiver, they did not decide these defenses (*see also* R 13). Accordingly, in the event the Court determines that Ms. Koegel's spousal waiver is invalid and unenforceable, this proceeding must be remitted to Surrogate's Court for its consideration and disposition of the Executor's remaining preserved and unadjudicated defenses to Ms. Koegel's notice of election.

CONCLUSION

When parties set down their agreement in a clear and complete document, New York courts will enforce their writing according to its terms. This is a

[17]Interestingly, if the defective certificate of acknowledgment had been attached to a recorded conveyance rather than a spousal waiver in the summer of 1984, it would have been cured by lapse of time 27 years ago (*see* L 1981, ch 111; Real Property Law § 306 [stating that all instruments that have been recorded for at least 10 years are conclusively presumed to be properly acknowledged]).

bedrock principle of New York law. Here, the Agreement's terms were quite clear, as was the parties' intent: to make sure that their later-in-life marriage did not "in any way change their pre-existing legal right, or that of their respective children and heirs, in the property belonging to each of them at the time of said marriage or thereafter acquired" (R 117 [*emphasis added*]).

Ms. Koegel knowingly entered into the Agreement (she understood that "what was mine was mine and what was his was his," R 199-200; *see also* R 206), which for 29 years preserved her estate for her children, free from any claims from her husband or his estate in the event she predeceased him. Having received the full benefit of her bargain, she now seeks to renege. And what is her justification? The certificates of acknowledgment omit language expressly stating that the notary knew the signer or ascertained through some form of proof that the signer was the person described in the Agreement.

But as the Jacobsen and Donovan affidavits show (and as is undisputed) each notary knew the signer whose signature he acknowledged and was present at the signer's execution of the Agreement. In sum, the certificates of acknowledgment are defective because of what amounts to a clerical error of omission. The notaries, in fact, complied with the underlying substantive requirement; they simply mistakenly left out the recitation in the certificate to memorialize their compliance.

Ms. Koegel advocates for a bright-line rule to make this mistake fatal and thus render her perfectly well-understood and freely given spousal waiver invalid and unenforceable even though she reaped the benefits of Decedent's waiver for the duration of their marriage. As explained in this brief, the bright-line rule that Ms. Koegel asks the Court to endorse leads only to unfair windfalls, and has no warrant in New York law.

Further, precedent originating in *Matter of Maul* and the Legislature's consequent amendment of Decedent Estate Law § 18 (9) permits extrinsic evidence to validate spousal waivers accompanied by materially defective certificates in those situations where a witness who knew the surviving spouse observed the surviving spouse sign the waiver and also subscribed the document himself or herself. That is what happened here.

Finally, the Appellate Division in this case adopted and the Surrogate applied the rule that *Galetta* strongly suggested was appropriate where a materially defective certificate of acknowledgment accompanies an agreement to opt out of equitable distribution; namely, courts may consider extrinsic evidence to show whether "the prerequisites of an acknowledgment occurred but the certificate simply failed to reflect that fact," meaning that "at the time the document was signed, the notary or other official did everything he or she was supposed to do, other than include the proper language in the certificate" (*Galetta*, 21 NY3d at

197). This is not a novel rule. Since at least the time of this Court's decision in *Rogers v Pell*, New York courts have allowed extrinsic evidence to uphold the validity and enforceability of documents where a required certificate of acknowledgment was materially defective, but the underlying substantive requirements had, in fact, been met.

For all these reasons, as elaborated in this brief, the Executor respectfully requests the Court to affirm the June 2020 Decision and Order of the Appellate Division.

Dated: West Sand Lake, New York
June 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 500.13(c)(1)

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this Brief, the total word count for all printed text in the body of the Brief exclusive of material omitted under Rule 500.13(c)(3), is 10,722 words.

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Dated: June 1, 2021

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