COURT OF APPEALS NO. APL-2021-00017

TO BE ARGUED BY:
ANDREW D. HIMMEL, ESQ.
TIME REQUESTED: 20 MINUTES

State of New York
Court of Appeals

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.

REPLY BRIEF FOR RESPONDENT-APPELLANT

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Date Completed: June 18, 2021

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

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OTHER AUTHORITIES

Respondent-Appellant Irene Lawrence Koegel ("Irene") hereby submits her reply brief in further support of her appeal.

A. Petitioner-Respondent has avoided the central issue on appeal regarding the curability of materially defective acknowledgments

Petitioner-Respondent John B. Koegel ("John") has provided an extensive historical survey but has sidestepped the core issue on appeal: Should the courts impinge upon the legislative function and permit cures of materially defective certificates of acknowledgment? John's brief focuses instead on "subscribing witness" cases, and avoids the "acknowledgment" procedure, which is the only method before this Court, and the only method addressed by *Galetta v. Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013).

A brief summary of New York law is necessary to place John's brief in proper context. Prenuptial agreements and right of election waivers must be executed in the same manner as a recorded deed.[1] As *Galetta* recognized, Real Property Law §291 provides for two methods: The acknowledgment procedure and the subscribing

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[1] This requirement is set forth in mirror provisions of the Domestic Relations Law ("DRL") and the Estate Powers and Trusts Law ("EPTL"). See DRL §236(B)(3), requiring marital agreements to be "acknowledged or proven in the manner required to entitle a deed to be recorded . . ." and EPTL 5-1.1-A(e)(2, requiring waivers of right of election to be "acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property." Contrary to John's suggestion, Irene has not "changed gears" by "chronically citing" the EPTL provision, given that an identical analysis regarding proper execution applies to prenuptial agreements under the DRL and right of election waivers under the EPTL. Notably, the Second Department in the 2018 decision addressed the issues with respect to both DRL §236(B)(3) and EPTL 5-1.1-A(e)(2). *Koegel*, 160 A.D.3d 11, 21 (fn.4).

witness procedure. The acknowledgment procedure compels the officer to execute a certificate "stating all the matters required to be done, known, or proved" and to endorse or attach that certificate to the document. RPL §306.

The subscribing witness method, set forth in RPL §304, requires no acknowledgment. Instead, the execution is proved by a "subscribing witness." Section 304 sets forth three requirements for a valid subscribing witness statement:

(i) the subscribing witness "must state his own place of residence, and if his place of residence is in a city, the street and street number";

(ii) the witness must state that he knew the person described in and who executed the conveyance; and

(iii) the proof "must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance."

Turning to *Galetta*, this Court found that the defect in the acknowledgment, which is identical to the defect in this case, was material and substantial, in that it violated the command of RPL §306. However, *Galetta* did not reach a determination as to whether the substantial defect in an acknowledgement certificate could be remedied, as the affidavit provided was insufficient to constitute a cure in any event. Galetta, 21 N.Y.3d at 197.

The material defect in this case, as with the material defect in *Galetta*, relates solely to the acknowledgment method, not the subscribing witness method. Indeed, in the seven year history of

this litigation, neither the Surrogate's Court nor the Second Department has ever evaluated this matter as a subscribing witness case. Further, John (prior to his Court of Appeals brief) has never contended or suggested that the Prenuptial Agreement can be validated through the subscribing witness method.

In any event, John cannot pursue validation through the RPL §304 subscribing witness method given that the 2015 affidavit of the notary who took Irene's 1984 acknowledgment (Curtis Jacobsen) fails to satisfy two of the three mandatory provisions of RPL §304, namely (i) the affidavit fails to state Jacobsen's place of residence and (ii) the affidavit fails to state that the officer was personally acquainted with Jacobsen or had satisfactory evidence as to his identity. See February 12, 2015 affidavit of Curtis Jacobsen (the "Jacobsen Affidavit"), ROA p. 256.

Therefore, as with *Galetta*, the only method of validation of the Prenuptial Agreement before this Court is the acknowledgment procedure. *Galetta*, 21 N.Y.2d at 196, fn. 3. And the only issue to be decided by this Court (left open explicitly by *Galetta*) is whether - under the acknowledgment procedure - materially defective certificates can be cured through extrinsic evidence. Further, this Court has never sanctioned the use of extrinsic evidence to cure a materially defective certificate in an acknowledgment case.

B. The subscribing witness method is not a cure, and does not support the argument for a cure, of a materially defective acknowledgement certificate.

After a long recitation of legislative history and a litany of cases, John makes the following assertion:

> 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 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.

In essence, John's broad claim seeks to conflate the two methods of validating a document, by suggesting that the subscribing witness method either constitutes a cure, or supports an argument for allowing a cure, of a defective acknowledgment. This is an inexact description of New York law and not supported by John's case citations.

A more precise description is that two separate, distinct and co-equal statutory methods exist for validating a prenuptial agreement or election waiver. See *Galetta*, 21 N.Y.3d at 191.[2] If a prenuptial agreement or election waiver can be validated through the "subscribing witness" procedure, then the waiver is valid not because of any cure, but because an explicit statutory provision (i.e., RPL §304) has provided an alternate avenue for validation.

[2] "Thus, a deed may be recorded if it is either 'duly acknowledged" or 'proved' by use of a subscribing witness. Because this case involves an attempt to use the acknowledgment procedure, we focus on that methodology." *Galetta*, 21 N.Y.3d at 191.

None of the cases cited by John directly address the central issue in this case regarding the acknowledgment method and the proper role of the judiciary in allowing for cures of materially defective certificates where the legislature has not provided for such a cure. Instead, John's citations primarily relate to subscribing witness cases, which are inapplicable as noted in Point A, *supra*.

For example, John cites *Matter of Maul*, 176 Misc. 170, 26 N.Y.S.2d 847 (Sur Ct Erie Co. 1941), *aff'd* 262 A.D. 941, 29 N.Y.S.2d 429 (2d Dep't), *aff'd* 287 N.Y. 694 (1942), which involved the allowance of proof by a subscribing witness concerning an instrument waiving the wife's right of election. John tracks the impact of *Maul*, leading to the 1947 amendments which codified the two approaches for validating a document. But this Court in *Galetta* recognized that the case before it involved the acknowledgment procedure and rejected the husband's attempt to cite *Maul* as support, finding that *Maul* "involve[d] proving a signature through use of subscribing witnesses, a different procedure governed by other provisions of the Real Property Law." *Galetta*, 21 N.Y.2d at 196, fn. 3.

Matter of Stoeger, 30 Misc. 2d 1090, 220 N.Y.S.2d 603 (Sur Ct Nassau Co. 1961), *modified* 17 A.D.2d 986, 234 N.Y.S.2d 537 (2d Dep't. 1962), another subscribing witness case cited by John, involved an agreement which "complie[d] with the formalities of

execution required by the statute . . ." based on the presentation of a subscribing witness statement. *Stoeger* contains no discussion of the curability of a materially defective acknowledgment under the acknowledgment method, the issue before this Court.[3]

John also cites the unpublished case of *Matter of Felicetti*, N.Y.L.J., January 22, 1998, at 27, col. 6 (Sur Ct Nassau Co. January 22, 1998) (copy attached hereto), where the Nassau Surrogate allowed proof of a subscribing witness with regard to the waiver of an elective share. While the acknowledgment in *Felicetti* was defective, the case did not turn on the acknowledgment's curability. Instead, the Surrogate simply allowed the waiver to be validated by the alternate subscribing witness method. Indeed, the decision itself explicitly recognized that it was not addressing the curability of a defective acknowledgment: "Whether or not the defective certificate can be cured, there appears to be no impediment to the notary supplying the necessary proof as a subscribing witness (*Matter of Maul*, *supra*)." N.Y.L.J., January 22, 1998, at 27, col. 6.

The remaining cases cited by John follow this familiar pattern, in that they focus on the subscribing witness method or

[3]The Second Department on appeal struck that part of the Surrogate's decision precluding the widow from asserting her statutory right of election, finding that the prenuptial agreement failed to contain clear and unmistakable language of waiver. *Estate of Stoeger*, 17 A.D.2d 986, 234 N.Y.S.2d 537 (2d Dep't. 1962). *Stoeger* was a case addressing arguably ambiguous language in a waiver, not a case focusing on the curability of a facially and materially defective certificate under the acknowledgment method.

are otherwise inapplicable. See, e.g., *Matter of Saperstein*, 254 A.D.2d 88, 678 N.Y.S.2d 618 (1st Dep't. 1998) (subscribing witness statement provided pursuant to RPL §304 suffices as one of the two recognized methods for proving a waiver); *Matter of Seviroli*, 44 A.D.3d 962, 844 N.Y.S.2d 115 (2d Dep't. 2007) (subscribing witness statement in compliance with RPL §304 constituted sufficient proof); *Matter of Stegman*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (Sur Ct Bronx Co. 1964) (waiver was effective because it was validated by the subscribing witness method); *Matter of Beckford*, 280 A.D.2d 472, 720 N.Y.S.2d 176 (2d Dep't. 2001) (deposition testimony of attorney who signed prenuptial agreement as subscribing witness created issue of fact); *Matter of Menahem*, 63 A.D.3d 839, 880 N.Y.S.2d 500 (2d Dep't. 2009) (prenuptial agreement was validly executed and acknowledged by surviving spouse in substantial compliance with the statutory requisites of EPTL 5-1.1-A(3)(2)); *Matter of Doman*, 58 A.D.3d 625, 871 N.Y.S.2d 642 (2d Dep't. 2009) (wife waived elective share in a validly-executed postnuptial agreement which was acknowledged in substantial compliance with the statutory requirements of EPTL 5-1.1-A(e)(2)); *Matter of Palmeri*, 75 Misc. 2d 639, 348 N.Y.S.2d 711 (Sur Ct Westchester Co. 1973), *aff'd* 45 A.D.2d 726 (2d Dep't. 1974), *aff'd* 36 N.Y.2d 895 (1975)(missing acknowledgments can be supplied by the taking in court of an acknowledgment of a notary public as a subscribing witness pursuant to RPL §304).

With the foregoing as background, it is helpful to look again at John's broad claim (excerpted at page 4 of this brief) that New York courts "consistently consider whether extrinsic evidence . . . cures . . . a materially defective certificate." This contention is flawed. As noted above, subscribing witness statements do not cure defective acknowledgments; they simply constitute a separate path to validation which was not pursued or argued in this case. It is notable that John cites no case law where a materially defective acknowledgment was "cured" other than through a subscribing witness statement which, as noted above, is really no cure at all. Further, the 2015 Jacobson Affidavit (written more than 30 years after the 1984 Prenuptial Agreement was signed) cannot be considered a subscribing witness statement as it is defective in two material respects under the requirements of RPL §304.[4] See discussion in Section A, *supra*.

As such, John's brief provides no relevant opposition to the core point made by Irene in her initial brief that, in the absence

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[4] A handful of cases, decided before *Galetta* and cited by John, have imprecisely stated that defective certificates of acknowledgments can be cured by subscribing witness statements. *Matter of Doman*, 16 Misc. 3d 1113(A), 847 N.Y.S.2d 896 (Sur Ct. Suffolk Co. 2007); *Matter of Menahem*, 13 Misc. 3d 1226(A), 831 N.Y.S.2d 348 (Sur Ct Kings Co. 2006). It is respectfully submitted that the validity of waivers in these cases did not turn on the generalized curability of defective acknowledgments, but instead were upheld based on the availability of and compliance with the statutory subscribing witness procedure set forth in RPL §304. Further, none of these decisions expressly identified the defect as material and substantial, and both were affirmed not on the basis of availability of cure, but instead on the grounds that the acknowledgments were executed in "substantial compliance" with statutory requirements. (See appellate citations of *Doman* and *Menahem* *supra*.) Notably, *Galetta* found that the defective language of the acknowledgment was not in substantial compliance with the Real Property Law. *Galetta*, 21 N.Y.3d at 194.

of legislative authority, courts do not permit cures of material defects, i.e., those defects that constitute substantial deviations from statutory requirements.

C. Allowing judicial cures of materially defective certificates of acknowledgment undermines public policy

New York courts have long understood the public policy importance of judicial deference to legislative enactments. See, e.g., *Messersmith v. American Fidelity Co*., 232 N.Y. 161 (1921)("The public policy of this state when the legislature acts is what the legislature says that it shall be . . ."") (Cardozo, J.). As Irene argued in her initial brief, this Court should adhere to the plain language of DRL §236(B)(3) and EPTL §5-1.1-A(e)(2), as well as the relevant incorporated provisions of the Real Property Law, which do not provide for cures of defective acknowledgments, as such adherence "promotes the goals of clarity, efficiency and judicial economy . . ." *Larchmont Pancake House v. Board of Assessors*, 33 N.Y.3d 228, 100 N.Y.S.2d 680 (2019). See also *Matter of Deffner*, 281 A.D. 798, 119 N.Y.S.2d 443 (4th Dep't. 1953), *aff'd* 305 N.Y. 783 (1953)("Our courts have repeatedly held that a widow's right of election may be waived only by strict conformity with the statute.").

The *Galetta* dicta upon which John relies is not to the contrary. This Court stated in *Galetta* that a strong case could

be made "for *a rule permitting evidence* to be submitted after the fact to cure a defect in a certificate of acknowledgment" where required language is omitted. *Galetta*, 21 N.Y.2d at 197 (emphasis added). This Court analogized such a rule to one allowing the certificate to conform to subsequently submitted evidence. Id.

The adoption of any such rule, however, should be left to the legislature, and not created by the courts, as is the case in other areas of New York law. See, e.g., *Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 998 N.Y.S.2d 740 (2014)(under CPLR 3025(c), courts may permit pleadings to be amended before or after judgment to conform them to the evidence); *Matter of Alexander Z.,* 129 A.D.3d 1160, 11 N.Y.S.3d 288 (3rd Dep't. 2015)(procedure for submission of postpetition proof to amend petition to conform to the evidence set forth in New York Family Court Act §1051(b)).

John, by contrast, has limited his reading of the *Galetta* dicta to embrace only judicial rule making. But the better approach is to defer to the legislature to codify whatever part of the *Galetta* dicta the legislature finds persuasive and appropriate.

John further argues that a refusal by this Court to allow cures of materially defective certificates might promote consistency, but would be consistently unfair. But the obverse of John's argument is more compelling: If general unfairness is sufficient to loosen statutory requirements, then the central

goals of certainty and predictability would be undermined. As this Court observed in *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997): "'It is not novel in the law . . . to find a harsh result where statute or public interest requires strict and full compliance with certain formalities before rights may be predicated' *Matter of Warren*, 16 A.D.2d at 507 . . ."

But in any event, precluding cures in acknowledgment cases neither results in significant unfairness nor results in a "windfall" for the surviving spouse. The invalidation of an elective share waiver does not result in total forfeiture, but instead a reversion to the statutory norm of one-third of the net estate to the surviving spouse. EPTL §5-1.1-A(a). The beneficiaries of Decedent's will would receive most of what was bequeathed to them, subject to the Irene's one-third statutory share, a legislatively determined equitable portion of a decedent's property.[5] This hardly offends equity.

John also minimizes the concern expressed in Irene's initial appellate brief that allowing cures would result in a procession of cases involving fact patterns competing to qualify as post-execution cures. John points to the limited number of cases in this area, and also argues that only a limited number of ways exist for an acknowledgment to be defective.

[5] Irene, who was married to the Decedent for almost 30 years, would additionally have certain dispositions of property passing to her from Decedent credited toward the satisfaction of her elective share.

As an initial matter, the limited number of cases in this area probably results from the clarity of the requirements for a waiver and the absence of cases from this Court allowing the use of extrinsic evidence to cure defective acknowledgments. Put differently, most practitioners get it right because they follow the strict but clear statutory requirements. But allowing cures of materially defective acknowledgments would open up avenues of challenges, an unwelcome result in an area of law where predictability and certainty are important goals.

As to John's contention that only a limited number of ways exist to create a defective acknowledgment, this is probably untrue and certainly irrelevant. As this Court recognized in *Galetta*, three different provisions of the Real Property Law must be read together to discern the requisites of a proper acknowledgment, RPL §§292, 303 and 306. This creates the possibility of multiple ways to run afoul of the requirements for drafting a proper acknowledgment.

But even if John is correct, it is difficult to understand the relevance of the contention. Statutory requirements should not be relaxed simply because there are fewer ways to violate them. If it is an important principle of judicial functioning to defer to the legislature and preclude cures that are statutorily unavailable, then this principle applies where there is only one way or multiple ways to violate the statute.

In the end, John's brief is fatally deficient, because it fails to cite any authority confronting Irene's central argument on appeal:

(1) In the absence of legislative authority, this Court has rarely, if ever, sanctioned the use of extrinsic evidence to cure documents that are materially defective due to their substantial deviations from statutory requirements.

(2) In light of the foregoing, this Court has never sanctioned the use of extrinsic evidence in acknowledgment cases to cure materially defective certificates due to their substantial deviation from RPL §306.[6]

D. In the event the Court invalidates the certificate of acknowledgment, this Court should not remit the case for adjudication of the executor's other defenses

John requests this Court to remit the case to the Surrogate's Court in the event of invalidation to adjudicate the defenses of laches, equitable estoppel and ratification. Yet in the event of invalidation, the Prenuptial Agreement would be null and void *ab initio* and entitled to no legal effect. See e.g. *Faison v. Lewis*, 25 N.Y.3d 220, 10 N.Y.S.3d 185 (2015) (legal nullity at its

[6] John's concluding footnote comments that acknowledgments attached to recorded deeds are presumed to be valid after ten years, according to RPL §306. The suggestion is that the defective acknowledgment in this case might similarly be considered valid, given that it was executed in 1984. This suggestion, never before raised and not seriously advanced as it is presented only in a parting footnote, assumes that DRL and EPTL incorporated wholesale the provisions of RPL §306. DRL 236(B)(3) and EPTL 5-1.1-A(e)(2), however, speak only to the "manner required" for the recording of a deed and do not incorporate other provisions of the Real Property Law in general or RPL §306 in particular.

creation is never entitled to legal effect because "[v]oid things are as no things . . .," citing *Marden v. Dorthy*, 160 N.Y. 39 (1899)). Irene cannot be held responsible for failing to challenge a document which, if invalidated by this Court, would be deemed never to have existed.

CONCLUSION

For the reasons set forth herein and in Irene's initial appellate brief, it is respectfully requested that this Court reverse the 2020 Second Department Order and the 2018 Second Department Order and grant Irene's motion pursuant to CPLR 3211(a) to dismiss the Petition on the grounds that the Prenuptial Agreement is defective and unenforceable and that therefore Irene's Notice of Election is valid, entitling Irene to her statutory spousal elective share pursuant to EPTL §5-1.1-A, together with attorney's fees, costs and disbursements and such other relief as this Court deems just and proper.

Dated: New York, New York
June 17, 2021

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 500.13(c)that the foregoing brief was prepared on a computer using Microsoft Word:

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DB

In re Felicetti

Surrogate's Court of New York, Nassau County

January 22, 1998, Published

No Number in Original

Reporter
1998 NYLJ LEXIS 6670 *

MATTER OF ETHEL ***FELICETTI***, DEC'D

(MATTER OF ETHEL FELICETTI, DEC'D, NYLJ, Jan. 22, 1998 at Pg. 27, (col. 6))

Core Terms

certificate, acknowledgment, notary, cured, defective certificate, subscribing witness, election, surviving spouse, documentary evidence, motion to dismiss, waiver of rights, cause of action, notary public, real property, unacknowledged, acknowlegment, certifying, conveyance, corrected, endorsed, grandson, appears, argues, notice, cases, fails, venue

Judges: [*1] Surrogate Radigan

Opinion

MATTER OF ETHEL FELICETTI, DEC'D

Court Decisions

Second Judicial Department

Nassau County

Surrogate's Court

This is a motion by the surviving spouse of the decedent pursuant to *CPLR 3211(a)(1)* and *3211(a)(7)* to dismiss a petition by the co-executors seeking to deny his right of election based on an alleged waiver of such right, on the grounds that (1) documentary evidence demonstrates that the waiver is void on its face and (2) the petition fails to state a cause of action.

A waiver of a right of election must be acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property (*EPTL 5-1.1*-A[e][2]). The surviving spouse argues that the acknowlegment is defective in that there are no words of aknowledgment contained in the certificate of acknowledgment endorsed on the waiver. The certificate contained in the waiver reads:

On the 21st day of January 1992 before me personally came Ethel Felicetti [and] Frederick Hardy, to me known and known by me to be the persons described in the foregoing instrument, and he [sic] executed the same in my presence.

There are two distinct parts to an acknowledgment: the oral declaration of the signer of the document and the

certificate, **[*2]** made generally by a notary public (*Rogers v. Pell, 154 NY 518*; *Garguilio v. Garguilio, 122 AD2d 105*). The certificate, stating, all the matters required to be done,known, or proved on the taking of such acknowledgment must be endorsed on, or attached to the document (Real Property Law, sec. 306). Since the certificate fails to evidence that the surviving spouse acknowledged his signature to the notary, it is materially defective.

The notary, who is also a grandson of the decedent and co-executor of this estate, while denying that the certificate is defective, argues that the certificate may presently be corrected to evidence the fact that the acknowledgment was properly taken or, in the alternative, he may supply proof of execution as a subscribing witness to the document (see, RPL, secs. 292, 304).

It appears that the cases make a fairly clear distinction between documents which contain a defective certificate and those which contain no certificate at all. It is clear that where a waiver of a right of election is unacknowledged, it is invalid (*Pacchiana v. Pacchiana, 94 AD2d 721*, citing *Matter of Warren, 16 AD2d 505*, affd. *12 NY2d 854*). However, in *Rogers v. Pell, (supra)* the leading case on the requirements of an acknowledgment, the Court of Appeals held that a certificate which contained reference to a venue outside the jurisdiction of the **[*3]** certifying officer was defective but could be cured by proof at a hearing that it was, in fact, taken within the certifying officer's jurisdiction. While the Court of Appeals has recently held that it has never directly addressed the question whether and under what circumstances the absence of acknowledgment can be cured (*Matisoff v. Dobi, 90 NY2d 127*), the case involved an unacknowledged postnuptial agreement and not a defective certificate that under the Rogers v. Pell case may be cured by correctly reflecting the true facts after a hearing (see also, *Linderman v. Hastings Card & Paper Co., 38 App Div 488* [defective certificate of acknowledgment can be cured where it is proved that the instrument was in fact properly acknowledged]; Camp v. Buxton, 34 Hun. 511 [defective certificate could be cured by later corrected certificate of acknowlegment]).

Adding to the weight of this view is the fact that mandamus lies to compel a notary public to correct a defective certificate (*People ex rel. Sayville Co. v. Kempner, 49 App Div 121*) and *RPL sec. 305* which provides the procedure for compelling a subscribing witness to give proof of due execution, all of which obviously would occur at some point following execution of the document.

The further claim that the certificate is defective because the notary is a grandson of the decedent and therefore, interested in the **[*4]** transaction as a potential distributee of the decedent finds no support in the cases. While a notary, who is a party to a conveyance or interested therein, may not take an acknowledgement (*People ex rel. Erie R.R. Co. v. Board of Railroad Com'rs, 105 App Div 273*; *Armstrong v. Combs, 15 App Div 246*), a notary is not disqualified merely by reason of his relationship to one of the parties (*Remington Paper Co. v. ODougherty, 81 NY 474*). Moreover, the purported interest of the notary as a potential

distributee of the decedent is of no consequence, since the living have no heirs (*Matter of Warren,supra*; *Merker v. Merker, 26 Misc2d 362*, affd *12 AD2d 763*; *Matter of Young, 204 Misc 92*).

In any event, proof by a subscribing witness has been permitted with regard to the waiver of an elective share subsequent to its execution (*Matter of Maul, 176 Misc 170*, affd 262 App div 941, affd *287 NY 694*). The Court of Appeals in its recent case of *Matisoff, (supra)* refers to its affirmance of the Maul case in the context of the comment that it has never directly passed on the issue of curing an absent acknowledgment. Nevertheless, it does not indicate any disapproval of the result reached in Maul. Whether or not the defective certificate can be cured, there appears to be no impediment to the notary supplying the necessary proof as a subscribing witness (*Matter of Maul, supra*). Accordingly, the motion to dismiss on the basis of documentary evidence (*CPLR 3211[a][1]*) is denied. Since the petition specifically alleges that the waiver **[*5]** is acknowledged, the motion to dismiss for failure to state a cause of action (*CPLR 3211[a][7]*) is likewise denied.

One further comment should be made. The certificate fails to indicate a venue and would require proof as in the Rogers v. Pell case, supra, of that fact. The respondent's time to answer is extended to 10 days after service of a notice of entry of the order (*CPLR 3211[f]*).

Settle order on notice.

New York Law Journal

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