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.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS WITH SUPPORTING PAPERS

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Date Completed: November 3, 2020

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

COURT OF APPEALS
STATE OF NEW YORK
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In the Matter of William F. Koegel, also known as William Fisher Koegel, deceased. John B. Koegel, petitioner-respondent; Irene Lawrence Koegel, respondent-appellant.	Appellate Division Second Department Docket No. 2019-03605 Westchester County Surrogate's Court File No. 452/14

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PLEASE TAKE NOTICE that upon the accompanying (1) Memorandum of Law in Support of respondent-appellant's Motion for Leave to Appeal to this Court, (2) Opinion and Order of the Appellate Division, Second Department dated June 17, 2020 (the "2020 Second Department Order"); (3) The Decision and Order on Motion of the Appellate Division, Second Department dated October 5, 2020 denying the motion of respondent-appellant for leave to appeal to the Court of Appeals from the Second Department Order; (4) the Record on Appeal in the Appellate Division, Second Department; (5) the Briefs in the Appellate Division, Second Department, and all the other proceedings had hereto, respondent-appellant Irene Lawrence Koegel will move this Court, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, 12207, on November 16, 2020 at 10:00 in the morning of that day, pursuant to CPLR 5602(a)(1) and 22 NYCRR 500.22, for an order granting her leave to appeal the 2020 Second Department Order to the New York Court of Appeals on the

grounds that this case involves an issue of state-wide importance concerning whether or not a certificate of acknowledgment accompanying a nuptial agreement which is defective due to noncompliance with New York Domestic Relations Law §236(B)(3) can be cured. The Court of Appeals in *Galetta v. Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013) left this question open.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served and filed in the Court of Appeals with proof of service by the return date of this motion.

Dated: New York, NY
November 3, 2020

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COURT OF APPEALS
STATE OF NEW YORK
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In the Matter of William F. Koegel, also known as William Fisher Koegel, deceased. John B. Koegel, petitioner-respondent; Irene Lawrence Koegel, respondent-appellant.	Appellate Division Second Department Docket No. 2019-03605 Westchester County Surrogate's Court File No. 452/14

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RESPONDENT-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

Pursuant to CPLR 5602(a)(1) and 22 NYCRR 500.22, respondent-appellant Irene Lawrence Koegel ("Irene") respectfully submits this memorandum of law in support of her motion for leave to appeal the June 17, 2020 Opinion and Order of the Appellate Division, Second Department (the "2020 Second Department Order") to this Court.

Preliminary Statement

This case involves an issue of public importance concerning whether or not a certificate of acknowledgment accompanying a nuptial agreement which is defective due to noncompliance with New York Domestic Relations Law §236(B)(3) can be cured. The Court of Appeals in *Galetta v. Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826

(2013) left this question open. As discussed herein, this case merits review by the Court of Appeals pursuant to 22 NYCRR Part 500.22(b)(4).

The 2020 Second Department Order is also a final determination of the action, within the meaning of the New York Constitution (NY Const., Art. VI, §3(b)) and CPLR 5602 (a)(1), in that the 2020 Second Department Order completely disposes of the action.

Exhibits Annexed Hereto

The following exhibits are annexed hereto.

Exhibit A: February 7, 2018 Opinion and Order of the Second Department

Exhibit B: June 17, 2020 Opinion and Order of the Second Department

Exhibit C: October 5, 2020 Decision and Order of the Second Department

Exhibit D: Notice of Appeal, with Order Appealed From

Pursuant to Rule 500.22(c), the following materials are separately submitted herewith:

a. Record on Appeal in the Second Department.

b. Second Department Brief of Respondent-Appellant Irene Lawrence Koegel

c. Second Department Answering Brief of Petitioner-Respondent John B. Koegel.

d. Second Department Reply Brief of Respondent-Appellant Irene Lawrence Koegel.

e. Papers submitted in connection with Petitioner-Respondent's motion for summary affirmance and the June

17, 2019 order of the Second Department denying such motion.

f. Motion papers of Respondent-Appellant Irene Lawrence Koegel seeking leave from the Second Department to appeal the 2020 Second Department Order to this Court.

g. Papers of Petitioner-Respondent John B. Koegel in opposition to the motion seeking leave from the Second Department to appeal the 2020 Second Department Order to this Court.

h. Reply memorandum of Respondent-Appellant in further support of motion to the Second Department seeking leave to appeal the 2020 Second Department Order to this Court.

Statement of Procedural History

Irene, 91, and the decedent William F. Koegel ("Decedent"), were married on August 4, 1984, and remained married until the death of Decedent on February 3, 2014. See Petition to Set Aside Spousal Election ("Petition"), Record on Appeal ("ROA") pp. 23-58. Prior to their marriage, on or about July 30, 1984, Irene and the Decedent executed a prenuptial agreement (the "Prenuptial Agreement"). The Prenuptial Agreement consisted of two pages. ROA pp. 55-56. The first page contained the signatures of Irene and Decedent. The second page contained a certificate of acknowledgment of both signatures, each signed by different notaries public. Id.

The certificate of acknowledgment was defective in that it omitted language stating that the official indicate that he or she knew or had ascertained that the signer was the person described

in the document. This defect was identical to the defect of the acknowledgment addressed by this Court in *Galetta*, a defect resulting in an acknowledgment which *Galetta* found not to be in substantial compliance with statutory requisites.

Decedent left a Last Will and Testament dated December 18, 2008 (the "Will") which was admitted to probate by Decree of the Surrogate's Court, Westchester County on March 21, 2014. ROA pp. 36-50. Letters Testamentary were issued to Petitioner-Respondent John Koegel ("John") on March 21, 2014. ROA pp. 49-50. Thereafter, Irene served a Notice of Election on John pursuant to EPTL §5-1.1-A, and filed same with the Surrogate's Court on August 21, 2014. ROA pp. 51-53.

On or about December 15, 2014, John commenced a proceeding by way of petition pursuant to §1421 of the New York Surrogate's Court Procedure Act ("SCPA") to set aside Irene's spousal election pursuant to EPTL §§5-1.1-A. ROA, pp. 23-58. Irene interposed an Answer to the Petition (ROA, pp. 59-65) setting forth two affirmative defenses: (i) that the certificate of acknowledgment accompanying the Prenuptial Agreement was defective due to the omission of statutorily required language pursuant to DRL §236(B)(3); and (ii) that the Prenuptial Agreement was invalid and unenforceable on the grounds of unfairness, duress and inequitable conduct. Id.

By motion dated February 7, 2015, Irene moved to dismiss the Petition and for judgment declaring the Prenuptial Agreement invalid, entitling Irene to her spousal elective share pursuant to New York Estates Powers and Trusts Law ("EPTL") §5-1.1-A on the ground that the acknowledgment of the signatures accompanying the Prenuptial Agreement was defective pursuant to Domestic Relations Law §236(B)(3). By decision and order dated June 23, 2015 (the "2015 Surrogate's Court Order"), the Surrogate's Court, Westchester County (Walsh, Acting Surrogate) denied the motion to dismiss the Petition. ROA pp. 197-202.

Thereafter, Irene appealed the 2015 Surrogate's Court Order to the Second Department. During the pendency of that appeal, by decision and order dated September 22, 2016 (the "2016 Surrogate's Court Order"), the Surrogate's Court granted in part the motion of John for summary judgment. ROA pp. 348-357. The Surrogate's Court granted John's motion to the extent of dismissing the second affirmative defense in Irene's Answer. The 2016 Surrogate's Court Order stated that John's motion "addresses only the second affirmative defense [claiming unfairness], while the first [claiming defect] is currently the subject of an appeal in the Appellate Division, Second Department." Id.

By decision and order dated February 7, 2018 (the "February 2018 Second Department Order"), the Second Department affirmed the 2015 Surrogate's Court Order denying Irene's motion pursuant to

CPLR 3211(a)(1) and Domestic Relations Law §236(B)(3) to dismiss the Petition. *Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2d Dep't. 2018). As a result, both affirmative defenses in the Answer to the Petition were dismissed, the first affirmative defense by virtue of the February 2018 Second Department Order affirming the 2015 Surrogate's Court Order on the grounds that defective acknowledgments can be cured (and that the affidavits of the notaries public cured the acknowledgment's defects) and the second affirmative defense claiming unfairness by virtue of the 2016 Surrogate's Court Order dismissing such defense.

By decision and order dated April 26, 2018 (the "April 2018 Second Department Order"), the Second Department denied the motion of Irene for leave to appeal the February 2018 Second Department Order to the Court of Appeals. ROA, p. 382. Thereafter, by order dated September 13, 2008 (the "2018 Court of Appeals Order"), this Court denied Irene's motion for leave to appeal the February 2018 Second Department Order to this Court, on the ground that the February 2018 Second Department Order "does not finally determine the proceeding within the meaning of the Constitution." *In re Koegel*, 32 N.Y.3d 948, 84 N.Y.S.3d 429 (2018). ROA, p. 387.

On October 3, 2018, John moved for summary judgment in the Surrogate's Court pursuant to CPLR 3212. ROA pp. 17-18. On February 5, 2019, the Surrogate's Court granted John's motion for summary judgment (the "2019 Surrogate's Court Order), finding that

the defects in the Prenuptial Agreement were curable and that the affidavits of the notaries public cured such defects. See 2019 Surrogate's Court Order, ROA pp. 7-16. On February 14, 2019, John served notice of entry of the Surrogate's Court 2019 Order. ROA p. 16. On March 14, 2019, Irene served the Notice of Appeal to the Second Department of the Surrogate's February 2019 Order. ROA pp. 1-6.

On April 8, 2019, John moved before the Second Department for summary affirmance of the 2019 Surrogate's Court Order for the reasons stated in the February 2018 Second Department Order. Irene answered on April 18, 2019 by consenting to John's motion for summary affirmance. On June 17, 2019, the Second Department denied John's motion for summary affirmance. Copies of the papers submitted in connection with John's motion for summary affirmance, and the June 17, 2019 Second Department order denying such motion, are included with the Rule 500.22(c) separate submission.

Thereafter, Irene perfected her appeal of the 2019 Surrogate's Court Order and the appeal was fully submitted to the Second Department. The Second Department in the 2020 Second Department Order affirmed the 2019 Surrogate's Court Order, on the ground that the issue of whether extrinsic evidence could cure a defect in the acknowledgment of a prenuptial agreement had been previously raised and decided against Irene on the prior appeal. *Matter of Koegel*, 184 A.D.3d 764, 126 N.Y.S.3d 153 (2d Dep't.

2020). As noted above, the Second Department held in the prior appeal (*Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2d Dep't. 2018)) that defects in the acknowledgment of a prenuptial agreement were curable and that the affidavits of the notaries public effected a cure of the Prenuptial Agreement.

On July 21, 2020, Irene moved before the Second Department for leave to appeal the 2020 Second Department Order to this Court. See Rule 500.22(c) separate submission. John served opposition papers to Irene's motion (Id.) and Irene served reply papers (Id.). By decision and order dated October 5, 2020, the Second Department denied Irene's motion for leave to appeal to this Court. Exhibit C hereto.

On October 5, 2020, John served the October 5, 2020 Second Department decision and order with notice of entry on Irene by overnight mail. Exhibit C hereto.

In light of the foregoing, and pursuant to CPLR 2103(b)(6) and CPLR 5513(b), Irene has until November 5, 2020 to make this motion. As such, this motion is timely.

Jurisdictional Statement

The Court of Appeals denied Irene's previous application for leave to appeal to the Court of Appeals on the ground that the

February 2018 Second Department Order did not finally determine the proceeding within the meaning of the Constitution. At this stage, however, there is no question that the 2020 Second Department Order finally determines this proceeding. The Surrogate's Court grant of summary judgment in the Surrogate's February 2019 Order, affirmed by the Second Department in the 2020 Second Department Order, "disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action . . ." *Burke v. Crosson*, 85 N.Y.2d 10, 623 N.Y.S.2d 524 (1995).

Thus, this Court has jurisdiction over this motion and the proposed appeal because this action originated in the Surrogate's Court, Westchester County, and the 2020 Second Department Order granting John's summary judgment motion constitutes a final order within the meaning of the New York Constitution (NY Const., Art. VI, §3(b)) and CPLR 5602 (a)(1), in that the 2020 Second Department Order completely disposes of the action.

Question Presented For Review

Can a certificate of acknowledgment accompanying a nuptial agreement which suffers from a material defect due to noncompliance with New York Domestic Relations Law §236(B)(3) be cured.

Leaveworthiness of the Question Presented for Review

The legal and policy implications surrounding the interpretation of prenuptial agreements have long been central concerns of both the legislature and this Court. As such, the statewide significance of this case is plain, meriting this Court's review.

This Court in *Galetta v. Galetta*, 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013) left open the issue of whether a defective acknowledgment can be cured. The Second Department, in finding that the defect in the acknowledgment was cured by the affidavits of the notaries public, in effect ruled that defective acknowledgments can be cured in the first place and thus addressed the question left open by *Galetta*.

Questions on appeal which merit review by the Court of Appeals involve issues that "are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." Rules of the Court of Appeals, §500.22(b)(4).

In this case, whether or not defective acknowledgments can be cured represents an issue of public importance. First and foremost, this Court in *Galetta* expressly identified this issue as remaining open. The *Galetta* Court stated that it "need not definitively resolve the question of whether a cure is possible because, similar to what occurred in *Matisoff*, the proof [of cure] submitted here was insufficient."

Further, the Court of Appeals has recognized that questions concerning prenuptial agreements are of public importance. See, e.g., *Matisoff v. Dobi*, 90 N.Y.2d 127, 136, 659 N.Y.S.2d 209 (1997)("Certainly, consistent and predictable enforcement is desirable with regard to such important marital agreements.").

An appeal is not necessarily leaveworthy, or of public importance, solely because it may involve a question of law left open by the Court of Appeals. But the particular issue left open by *Galetta* concerns not some stray principle of law but instead a question of statewide importance, namely, the enforceability of nuptial agreements and the application of New York Domestic Relations Law ("DRL") §236(B)(3). This Court in *Matisoff v. Dobi*, 90 N.Y.2d 127, 136, 659 N.Y.S.2d 209 (1997) noted the centrality of these concerns.

As discussed at length in *Matisoff*, the legislature enacted a comprehensive statutory scheme that overhauled the law governing the validity and enforceability of nuptial agreements, further

underscoring the public importance of this area. Prior to the enactment of the Domestic Relations Law in 1980, the validity of nuptial agreements was determined by the Statute of Frauds. Yet, as *Matisoff* noted, DRL §236(B)(3) did not incorporate the safeguards of the Statute of Frauds. Instead, the Legislature went out of its way to create "more onerous requirements for a nuptial agreement to be enforceable. . ." *Matisoff*, 659 N.Y.S.2d at 213.

Viewed in this context, whether or not a materially defective certificate of acknowledgment can be cured represents a question of public importance. Indeed, *Galetta* observed that the appellate divisions "have grappled with the 'cure' issue" in cases involving absences of certificates of acknowledgments. 969 N.Y.S.2d at 831. The availability of cures in cases involving defective certificates presents an equally important question ripe for resolution by the state's highest court.

In papers below opposing Irene's motion for leave to appeal before the Second Department, John did not challenge the importance of clear guidelines regarding marital agreements, but instead contended that the absence of cases since 2013 addressing the issue left open by *Galetta* undermines the leaveworthiness of the appeal.

This Court in *Seawright v. Board of Elections*, 35 N.Y.3d 227, 127 N.Y.S.3d 45 (2020) recently addressed a similar contention

that an appeal concerning untimely filings under the Election Law was not leaveworthy because it was "based on extraordinary and unusual facts" that are "unlikely to re-appear in our lifetimes . . ." This Court stated that even if the asserted unlikelihood of recurrence was true, this would not undermine "the important goals of fairness and equality that are served when we resolve 'conflict[s] among the departments of the Appellate Division.' (22 NYCRR 500.22(b)(4))."

Similarly, in this case, the absence of cases implicating the issue left open by *Galetta* in the relatively short period between 2013 and the present does not undermine the public goal of "consistent and predictable enforcement . . . with regard to such important marital agreements." *Matisoff v. Dobi*, 90 N.Y2d 127, 659 N.Y.S.2d 209 (1997).

This is particularly true concerning the availability of cures in marital agreements, an issue that - according to *Galetta* - the Appellate Divisions "have grappled with" in cases where a signature was not accompanied by any certificate of acknowledgment. In such cases, the Court of Appeals stated that "one of the purposes of the acknowledgment requirement - to impose a measure of deliberation and impress upon the signer the significance of the document - has not been fulfilled." *Galetta*, 21 N.Y.3d at 196.

In *dicta*, *Galetta* recognized that an argument could be made for the allowance of cures regarding defective acknowledgments (as opposed to the complete absence of an acknowledgment). But the court left this question open, leaving the lower courts to grapple with either engaging in fact-intensive inquiries regarding whether or not a particular case merits the allowance of cures or applying a clear and unambiguous bright-line test "'requir[ing] strict and full compliance with certain formalities before rights may be predicated'", *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997)(citations omitted).

As a result, considerable uncertainty prevails. In the Fourth Department *Galetta* case (96 A.D.3d 1565, 947 N.Y.S.2d 260 (4th Dep't. 2012)), a closely divided panel split between allowing for cures of defective acknowledgments (majority) and precluding such cures in all circumstances (dissenting opinion). This Court in *Galetta* disagreed with the Fourth Department regarding the sufficiency of facts supporting cure, without addressing the Fourth Department's underlying ruling allowing for cures.

The Second Department now allows for the cure of defective acknowledgments, while the First and Third Departments have yet to address the issue in the marital context. However, some courts outside the Second Department have cast doubt on the availability of cures concerning defective acknowledgments in regard to the conveyance of real property, which is relevant to the analysis in

this case, given that the New York Domestic Relations Law requires that marital agreements be executed with the same formality as a recorded deed pursuant to Real Property Law §291. *Galetta*, 21 N.Y.2d at 191.

For example, in *80P2L LLC v. U.S.Bank Trust, N.A.,* 2019 N.Y. Misc. LEXIS 4825, *Index* # 153849/2015, 2019 NY Slip Op 32604 (U)(Sup. Ct. New York Co. 2019), the court stated: "'Where a proper certificate of acknowledgment is essential to the validity of a conveyance, a defective certificate cannot be aided or cured by parol testimony. Nor so as to make the record of a defectively acknowledged instrument constructive notice.'"), quoting *Smith v. Tim*, 14 Abb. N. Cas. 447, 1884 N.Y. Misc. LEXIS 228 (Ct. Common Pleas 1884). See also *Carolan v. Yoran*, 104 A.D. 488, 93 N.Y.S. 935 (1st Dep't. 1905)("an acknowledgment which did not state that the person who appeared before the notary was known to the notary to be the person described in and who executed the instrument was not sufficient to entitle the instrument to be recorded . . ."*)* *citing* *Paolillo v. Faber*, 56 A.D. 241, 67 N.Y.S. 638 (1st Dep't. 1900)(acknowledgment defective where notary taking acknowledgment did not state that the person who appeared before him was known to him to be the person described in document); *Moran v. Stader*, 52 Misc. 385, 103 N.Y.S. 175 (City Court of NY, Special Term 1907) (defective certificate of acknowledgment not cured by resort to parol evidence).

The Court of Appeals' "'major functions . . . include the duty uniformly to settle the law for the entire State and finally to determine its principles'", *Matter of City of New York v. 2305-07 Third Ave., LLC*, 142 A.D.3d 69, 35 N.Y.S.3d 69 (1st Dep't. 2016), quoting *Matter of Miller*, 257 N.Y. 349 (1931). The Court of Appeals can bring immediate clarity to the question of whether or not defective acknowledgments in marital agreements can be cured, an issue it left open in *Galetta*.

In opposition papers before the Second Department to Irene's motion for leave to appeal, John speculated on the course of this litigation should this Court rule that defects are not curable, contending that continued litigation would involve addressing other defenses asserted by John. Yet such speculation is not a valid consideration for leaveworthiness. If the question of curability of defective acknowledgements stands on its own as an important public issue for the Court of Appeals to address, its importance is not diminished because, in any particular case, the lower court on remand may have to address additional and unrelated issues.

Finally, in opposition papers below, John questioned whether this Court possesses jurisdiction to review the question of law regarding the curability of acknowledgments because this Court based its decision on the "law of the case" doctrine. This contention is incorrect. CPLR 5501(a)(1) states that an appeal

from a final judgment brings up for review 'any non-final judgment or order which necessarily affects the final judgment." *Perrotta v. New York*, 107 A.D.2d 320, 486 N.Y.S.2d 941 (1st Dep't. 1985). Further, "the law of the case rule has no 'binding force on appeal since the appellate court is not a co-ordinate, but a higher tribunal.' Id., citing *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1975). See also *Osorio v. Kenart Realty, Inc.*, 45 Misc.3d 5, 977 N.Y.S.2d 553 (2d Dept. App. Term 2013)(appeal from judgment brings up for review prior order, pursuant to CPLR 5501(a)(1), and is not precluded by law of the case doctrine).

Dated: New York, New York
November 3, 2020

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Exhibit A

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D53443
G/hu

Argued - October 28, 2016

____AD3d____

JOHN M. LEVENTHAL, J.P.
CHERYL E. CHAMBERS
LEONARD B. AUSTIN
HECTOR D. LASALLE, JJ.

2015-06583

OPINION & ORDER

In the Matter of William F. Koegel, also known as William Fisher Koegel, deceased. John B. Koegel, petitioner-respondent; Irene Lawrence Koegel, respondent-appellant.

(File No. 452/14)

APPEAL by Irene Lawrence Koegel, in a probate proceeding in which John B. Koegel petitioned pursuant to SCPA 1421 to invalidate her notice of spousal election made pursuant to Estates, Powers and Trusts Law § 5-1.1-A and for a declaration that she was not entitled to an elective share of the estate of William F. Koegel, also known as William Fisher Koegel, from an order of the Surrogate's Court (Thomas E. Walsh, Acting Surrogate), dated June 23, 2015, and entered in Westchester County, which denied her motion to dismiss the petition pursuant to CPLR 3211(a)(1) and Domestic Relations Law § 236(B)(3).

Himmel & Bernstein, LLP, New York, NY (Andrew D. Himmel of counsel), for respondent-appellant.

McCarthy Fingar LLP, White Plains, NY (Robert M. Redis of counsel), for petitioner-respondent.

AUSTIN, J.

In *Galetta v Galetta* (21 NY3d 186), the Court of Appeals left unanswered the question of whether a defective acknowledgment of a prenuptial agreement could be remedied by

Ex. 15

extrinsic proof provided by the notary public who took a party's signature. For the reasons that follow, we conclude that such proof can remedy a defective acknowledgment. Accordingly, we affirm the order of the Surrogate's Court, which denied the appellant's motion to dismiss a petition to invalidate her notice of spousal election.

I.

The appellant, Irene Lawrence Koegel (hereinafter Irene), and the decedent were married on August 4, 1984. The decedent had been widowed twice before marrying Irene. Irene had been widowed in July 1983. Irene and the decedent were married for more than 29 years at the time of the decedent's death on February 2, 2014.

A. Prenuptial Agreement

Prior to their marriage, the decedent and Irene executed a prenuptial agreement (hereinafter the agreement) in July 1984.

The agreement provided in the first paragraph that both the decedent and Irene desired that their 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."

Pursuant to the second paragraph, the decedent and Irene agreed "[i]n consideration of said marriage and of the mutual covenants set out herein," that they would not make a claim as a surviving spouse on any part of the estate of the other. Further, they irrevocably waived and relinquished "all right[s] to . . . any elective or statutory share granted under the laws of any jurisdiction."

Further, as per the third paragraph, the decedent and Irene declared that their execution of the agreement was not "induced by any promise or undertaking made by or on behalf of the other to make any property settlement whatsoever." They acknowledged that they entered the agreement knowing the "approximate extent and probable value of the estate of the other."

At the bottom of the first page, both the decedent and Irene signed the agreement. The second page contained certificates of acknowledgment of each signature, each signed by their respective attorneys as notaries. The decedent's signature was acknowledged by William E. Donovan on July 26, 1984. The acknowledgment read, "On this 26 day of July, 1984, before me personally appeared WILLIAM F. KOEGEL, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be his free act and deed." Irene's signature was

acknowledged by Curtis H. Jacobsen on July 30, 1984. The language of the acknowledgment relating to the Irene's signature stated, "On this 30th day of July, 1984, before me personally appeared IRENE N. LAWRENCE, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be her free act and deed." Neither acknowledgment attested to whether the decedent or Irene was known to the respective notaries.

B. Decedent's Last Will and Testament

In his last will and testament executed December 18, 2008, the decedent stated that he was married to Irene, that there were no children of their marriage, and that he had two sons by a prior marriage. He also stated that, prior to his marriage to Irene, they entered into an "antenuptial agreement dated July 26, 1984," and that "[t]he bequests to and other dispositions for the benefit of [Irene] contained in this Will [we]re made by [him] in recognition of and notwithstanding said antenuptial agreement."

The will provided that its provisions would control in the event of an inconsistency between it and those of the antenuptial agreement, but that the antenuptial agreement would be otherwise unaffected by the will. The decedent noted that he had made other dispositions in favor of Irene, "including but not limited to . . . designat[ing] her as the beneficiary of certain retirement benefits payable at [his] death."

The decedent bequeathed to Irene, in the event that she survived him, all of his automobiles, his interest in a condominium apartment in Vero Beach, Florida, subject to any outstanding mortgage and all of its contents, his condominium in Somers, New York, and all of its contents and the contents of their storage unit.

The will provided that Irene was to have the condominium in Somers for her exclusive use and occupancy, free of any rent, until her interest terminated upon remarriage, if the premises ceased to be her principal residence, or if she died. She was required to pay all carrying costs with respect to this property. Upon termination of Irene's interest, the property was to be sold and the proceeds distributed to his then living issue.

The decedent also made other specific bequests concerning personal property and sums of money to other individuals and the Hitchcock Presbyterian Church. The remainder of his estate was to be divided among his issue who survived him. The decedent's son, the petitioner, John E. Koegel (hereinafter John), was appointed as the executor of the decedent's estate.

The will was witnessed by three individuals who stated that the decedent declared the

document to be his last will and testament. The subscribing witnesses executed a separate affidavit, sworn to before a notary on December 18, 2008, in which they swore that, inter alia, the decedent was of sound mind, memory, and understanding and had indicated to them that he had read the will and the contents expressed his wishes as to how his estate was to be distributed.

C. Decree Admitting Will to Probate and Letters Testamentary and Notice of Election

John filed a petition to probate the decedent's last will and testament, and the Surrogate's Court granted the petition. Letters testamentary were issued to John on March 21, 2014.

On August 21, 2014, Irene filed with the court a notarized notice of election signed July 29, 2014. Irene stated that, as the decedent's surviving spouse, she was exercising her right of election pursuant to Estates, Powers and Trusts Law § 5-1.1-A "to take [her] share of the Decedent's estate to which [she was] entitled pursuant to said statute."[1]

D. Subject Petition to Set Aside the Spousal Election

In December 2014, John filed a petition to invalidate Irene's notice of election and for a declaration that she was not entitled to an elective share of the decedent's estate. John alleged that Irene was represented by counsel at the time she freely entered into the prenuptial agreement, pursuant to which she waived her right to assert an elective share against the decedent's estate. He also alleged that Irene was knowledgeable about the decedent's assets and had reasonable and sufficient time to make inquiries about his finances if she wished to do so prior to entering into the prenuptial agreement.

John asserted that Irene accepted the benefits of the prenuptial agreement during the marriage without ever raising questions about its validity or fairness. Thus, he claimed, she was barred by the doctrine of laches from contesting the terms of the prenuptial agreement.

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[1] Estates, Powers and Trusts Law § 5-1.1-A provides in part that:

"(a) Where a decedent dies on or after September first, nineteen hundred ninety-two and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

. . .

"(2) The elective share, as used in this paragraph, is the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate."

John contended that Irene received substantial benefits from the decedent under the will, which included a possessory interest in the Somers condominium, with a date-of-death value of $628,285, and its contents (appraised value of $29,660); a 50% interest in the Vero Beach condominium, having a 50% date-of-death value of $275,000, and its contents; sole interest in an IRA, having a principal value of $116,497; an annuity having a principal balance at death of $129,004; lifetime benefits from a charitable remainder trust benefitting Williams College, having a date-of-death principal value of $131,129; an automobile valued at $10,500; and a 50% interest in a boat valued at $1,250 at the time of the decedent's death.

E. Answer and Objections

In her answer and objections to the petition, Irene admitted that she signed the agreement, but denied that either her signature or the decedent's signature was duly acknowledged in accordance with applicable statutes. As for Jacobsen's representation of her at the time the prenuptial agreement was executed, she admitted that Jacobsen was known to her by virtue of his prior representation of her regarding the settlement of her first husband's estate.

For her first affirmative defense and objection, Irene asserted that the prenuptial agreement was defective, invalid, and unenforceable pursuant to *Galetta v Galetta* (21 NY3d 186), because the acknowledgments omitted language expressly stating that the notaries knew the signers or had ascertained, through some sort of proof, that the signers were the persons described as required by Domestic Relations Law § 236(B)(3).[2]

II.

A. Irene's Motion to Dismiss the Petition

Irene moved pursuant to CPLR 3211(a)(1) and Domestic Relations Law § 236(B)(

[2] For her second affirmative defense and objection, Irene maintained that the prenuptial agreement was invalid and unenforceable due to the absence of financial disclosure concerning the decedent's net worth and because it was executed under duress only five days before the wedding. She maintained that the agreement was also invalid because her attorney did not fully advise her on the right of spousal election, which she was waiving pursuant to the terms of the agreement, and the fact that the decedent's law firm, where he was a partner, drafted the agreement. Moreover, Irene contended that the agreement was not enforceable because the decedent's estate was worth in excess of $5 million and she, as the decedent's wife of 29 years, was only left a used car worth $10,000, a life estate in the Somers condominium for which she was responsible for all of the carrying charges yet, upon the sale of that property, none of the proceeds would go to her, and a 50% ownership in the Vero Beach condominium worth $275,000, which had an outstanding $86,000 mortgage for which she was responsible. Irene further contended that the agreement was invalid because the accounts on which she was named the beneficiary would only net an income of $3,700 per month, while the monthly payments on the two condominiums totaled $6,400.

to dismiss the petition to set aside her notice of election on the basis that the acknowledgment of the signatures accompanying the prenuptial agreement omitted required language. In her affidavit in support of the motion, Irene recalled that she retained Jacobsen, whom she had used to handle the estate of her first husband.

B. John's Opposition

In opposition to Irene's motion, John argued that the form of the 1984 acknowledgments was proper and complied with the then-applicable requirements of EPTL 5-1.1, and substantially complied with the current requirements for acknowledgments through the use of the phrase "personally appeared." John contended that the phrase "personally appeared" reflected that the signer was "known" to the notary.

In any event, John noted that the two notaries, Jacobsen and Donovan, submitted affidavits stating that they respectively knew Irene and the decedent at the time that the agreement was executed and pointed out that Irene, in her answer and supporting affidavit, admitted that she signed the agreement and knew Jacobsen from his representation of her as the co-executor of her first husband's estate and had retained him to represent her with respect to the prenuptial agreement. John claimed that if there had been any technical defect with respect to the acknowledgments, the Jacobsen and Donovan affidavits cured those defects.[3]

In further opposition to Irene's motion, John submitted Donovan's affidavit, sworn to February 26, 2015. Donovan stated that, in 1984, he was a partner at Rogers & Wells, of which the decedent was also a partner. He recalled taking the acknowledgment that appeared on page two of the prenuptial agreement and stated that the decedent "did not have to provide me with any identification of who he was because he was well known to me at the time."

John also submitted Jacobsen's affidavit, sworn to February 25, 2015, in opposition to Irene's motion. Jacobsen stated that, in 1984, he was an attorney with Spengler Carlson Gubar Brodsky & Frischling, which had represented the estate of Irene's first husband, of which Irene was the co-executor. He recalled that he took the acknowledgment of Irene which appeared on page two of the prenuptial agreement. He explained that Irene did not have to provide identification to him since she was known to him at the time.

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[3] John also asserted that it would be inequitable for the court to permit Irene to declare a 30-year old agreement to be invalid when Irene received all the benefits of the agreement. John maintained that the decedent fully performed his obligations under the agreement and relied upon its validity in making his will.

C. The Order Appealed From

In an order dated June 23, 2015, the Surrogate's Court denied Irene's motion. The court stated that:

> "Giving [John] every favorable inference, the court finds that [Irene] has failed to sustain her burden of demonstrating that the facts as plead[ed] by [John] do not fit within any recognized legal theory, the Court of Appeals having specifically left open the question whether a defective acknowledgment can be cured as set forth in *Galetta v Galetta*, 21 NY3d 186."

Irene appeals from this order denying her motion.

III.

A. The Parties' Contentions on Appeal

Irene contends that, in *Galetta*, the Court of Appeals viewed the language in an acknowledgment in which a notary states that he or she knew the signer or ascertained his or her identity through some form of proof as a core component of a valid acknowledgment. She argues that the absence of such language in both acknowledgments in the subject prenuptial agreement rendered the agreement defective. She maintains that, pursuant to *Galetta*, this is so even in the absence of fraud, duress, or inequity.

Irene contends that the holding in *Galetta* is consistent with a prior decision of the Court of Appeals in which the Court found that Domestic Relations Law § 236(B)(3) recognizes no exception to the requirements that there be a proper acknowledgment (*see Matisoff v Dobi*, 90 NY2d 127). She notes that, in *Matisoff*, the Court of Appeals stated that the legislative history and related statutory provisions established that the Legislature did not intend for the formality of acknowledgments to be expendable or ignored.

Irene further asserts that the importance of uniformity and predictable enforcement mandates that prenuptial agreements which do not include proper acknowledgments are not valid. She claims that, as a matter of public policy, courts should not allow parties the ability to cure defective acknowledgments because to do so would dilute the statute.

Irene also contends that this Court, in *D'Elia v D'Elia* (14 AD3d 477), rejected a party's ability to cure a defective acknowledgment. She asserts that the First and Fourth Departments have also found that a defective acknowledgment cannot be fixed at a later point in time.

In response, John argues that the situations presented in *Matisoff* and *Galetta* are

different from this matter in that those cases involved matrimonial actions involving two living parties as opposed to the case at bar, an estate proceeding commenced after one of the parties to the prenuptial agreement had died. John contends that neither *Galetta* nor *D'Elia* holds that a technical defect in a contemporaneous acknowledgment cannot be cured.

John notes that, in *Matisoff*, the prenuptial agreement was not acknowledged at all, which was also the situation in the First and Fourth Department cases cited by Irene. He points out that here, Irene and the decedent were represented by counsel and there were contemporaneous acknowledgments of the properly executed prenuptial agreement. As a result, he maintains that *Matisoff* is not similar to the case at bar since, here, there would be no need for a new acknowledgment of the agreement in order to validate it.

John further maintains that *Galetta* does not establish a bright-line rule prohibiting a defective acknowledgment from being cured. He points out that, in *Galetta*, the notary's affidavit submitted by the party seeking to cure the defect was deficient since the notary did not personally know the party whose acknowledgment he took and the notary could not categorically swear that he was certain he took the appropriate steps to ascertain the identity of the party acknowledging the agreement. Also, the notary could only swear that he recognized his own signature, that he was employed at a bank at the time he executed the acknowledgment, and that he presumed that he followed his usual course and practice in taking acknowledgments although he had no independent memory of it.

John points out that both Donovan and Jacobsen swore that they each personally knew the parties whose acknowledgment they took when the prenuptial agreement was executed in 1984. Jacobsen had previously represented Irene prior to representing her in connection with the execution of the prenuptial agreement and Donovan was a law partner of the decedent.

John maintains that Irene failed to meet her burden in demonstrating that the facts set forth in the petition did not fall within any recognized legal theory. He further maintains there is a strong public policy allowing individuals to decide their marital affairs through agreements.

In reply, Irene states that "prior to the enactment of the Domestic Relations Law in 1980, the validity of an antenuptial agreement was determined by the Statute of Frauds." Citing *Matisoff*, she notes that the Legislature, in enacting Domestic Relations Law § 236(B)(3), decided to create a more onerous requirement in order for a nuptial agreement to be enforceable. She maintains that, given this background, courts should not dispense with the substantive statutory requirements constituting a valid acknowledgment, as this Court recognized in *D'Elia*.

Ilene contends that the factual differences between this proceeding and those presented in *Matzoff* and *Galetta* do not matter, since the issue in all three cases is whether there is a bright-line test versus a flexible rule in construing the requirements of Domestic Relations Law § 236(B)(3). She maintains that these cases demonstrate that there is a bright-line rule.

B. Analysis

1. CPLR 3211(a)

"On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996; *see Leon v Martinez*, 84 NY2d 83, 87).

"A motion to dismiss a complaint based on documentary evidence 'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Stein v Garfield Regency Condominium*, 65 AD3d 1126, 1128, quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see* CPLR 3211[a][1]; *Held v Kaufman*, 91 NY2d 425, 430-431; *Parekh v Cain*, 96 AD3d 812, 815; *Sato Constr. Co., Inc. v 17 & 24 Corp.*, 92 AD3d 934, 935-936). To qualify as documentary evidence, the evidence "must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86; *see Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 808; *Granada Condominium III Assn. v Palomino*, 78 AD3d at 997).

"[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case" (*Fontanetta v John Doe 1*, 73 AD3d at 84-85, quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 21-22 [2005]; *see Datena v JP Morgan Chase Bank*, 73 AD3d 683, 685 [deed]; *Pronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [mortgage and note]).

"In opposition to a motion pursuant to CPLR 3211(a), a plaintiff may submit affidavits 'to preserve inartfully pleaded, but potentially meritorious claims'" (*Raach v SLSJET Mgt. Corp.*, 134 AD3d 792, 794, quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635; *see* CPLR 3211[a][7]; *Town of Huntington v Long Is. Power Auth.*, 130 AD3d 1013, 1015).

2. Acknowledgments

Domestic Relations Law § 236(B)(3) provides, in part, that "[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action

if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (*Matisoff*, 90 NY2d at 130-131; *see* EPTL 5-1.1-A[e][2][4]). Such agreement may include "a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will" (Domestic Relations Law § 236[B][3]).

A proper acknowledgment requires both an oral declaration by the signer of the document made before an authorized officer and a written certificate of acknowledgment, attached to the agreement, endorsed by an authorized public officer attesting to the oral declaration (*see* Real Property Law § 306; *Matisoff*, 90 NY2d at 137-138; *Matter of Henken*, 150 AD2d 447, 447; *see also* General Construction Law § 11). Thus, an instrument is not duly acknowledged unless there is a written certificate as well as an oral acknowledgment (*see Rogers v Pell*, 154 NY 518; *Matter of Abady*, 76 AD3d 525, 526-527). However, "there is no requirement that a certificate of acknowledgment contain the precise language set forth in the Real Property Law. Rather, an acknowledgment is sufficient if it is in substantial compliance with the statute" (*Weinstein v Weinstein*, 36 AD3d 797, 798; *see Matter of Abady*, 76 AD3d at 526).

Pursuant to Real Property Law § 309-a(1), "[t]he certificate of an acknowledgment, within this state of a conveyance or other instrument in respect to real property situate in this state, by a person, must conform substantially with the following form, the blanks being properly filled." The certificate of an acknowledgment form appears in the statute as follows:

> "State of New York)
>) ss.:
> County of . . .)
>
> On the . . . day of . . . in the year . . . before me, the undersigned, personally appeared . . . , *personally known to me* or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument. (Signature and office of individual taking acknowledgment.)" (Real Property Law § 309 a[1] [emphasis added]).

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[4] Subsection two of EPTL 5-1.1-A(e), which pertains to "Waiver or release of right of election," provides that "[t]o be effective under this section, a waiver or release 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."

The acknowledgment requirement fulfills two goals. First, it "serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person" (*Matisoff*, 90 NY2d at 133; *see Galetta*, 21 NY3d at 191-192). Second, it imposes on the person signing a "measure of deliberation in the act of executing the document" (*Galetta*, 21 NY3d at 192). When there is no acknowledgment at all, this second requirement has not been fulfilled (*see id.* at 196).

3. Curability of Acknowledgment Defect

At the outset, John is correct that *Matisoff* is not controlling here. *Matisoff* does not provide support for Irene's position that the defective certificates of acknowledgment utterly refute the allegations in the petition that she is not entitled to an elective share of the decedent's estate due to the waiver set forth in the prenuptial agreement.

In *Matisoff*, a case involving a postnuptial agreement in which the parties waived any rights of election provided by the EPTL, "it [wa]s undisputed . . . that the document was not acknowledged by the parties or anyone else" (90 NY2d at 130).

The case at bar differs from *Matisoff* since here, there were certificates of acknowledgment of the signatures of Irene and the decedent, albeit the certificates did not contain the required language for acknowledgment as currently required by the Real Property Law. Similarly, Irene's reliance on *D'Elia* is misplaced since the agreement in that case was not at all acknowledged at the time of execution. Thus, this Court's statement in *D'Elia* that "[i]t is uncontroverted that the parties' postnuptial agreement was not properly acknowledged at the time that it was executed" (14 AD3d at 478) was not referring to a defective acknowledgment, as occurred here, but instead, to the absence of any acknowledgment, presenting this Court with the same situation which arose in *Matisoff* (*see e.g. Ballesteros v Ballesteros*, 137 AD3d 722, 723 [the "Promissory Note," drafted by the wife in 2009, after the parties were married, pursuant to which the husband agreed to purchase a condominium for the wife in the event that they divorced, was unenforceable since the "Promissory Note" was an agreement between spouses, which did not have a certificate of acknowledgment attached to it although the husband had the document signed by a notary]). In that vein, Irene's reliance on First and Fourth Department cases is also unavailing, as those cases are distinguishable for the same reason (*see Filkins v Filkins*, 303 AD2d 934, 934 ["It is undisputed that no written certificate of acknowledgment was attached when the parties entered into the agreement in 1995"]; *Schoeman, Marsh & Updike v Dobi*, 264 AD2d 572, 573 [legal malpractice counterclaim related to the *Matisoff* matrimonial action]; *cf. Anonymous v Anonymous*,

253 AD2d 696, 697 [the First Department found that the Supreme Court erred in granting renewal to the husband with respect to the wife's prior motion to declare a prenuptial agreement to be unenforceable, due to the husband's failure to submit an acknowledgment with the agreement, where the husband could have submitted the certificate of acknowledgment on the prior motion. Moreover, the First Department questioned the appearance of the "alleged acknowledgment in affidavit form which was executed and which surfaced some 12 years after the fact in the midst of a contested matrimonial action in light of the required formalities of Domestic Relations Law § 236(B)(3)"]).

Here, given the presence of executed acknowledgments, admittedly without certain language required by the Real Property Law, rather than an absence of any acknowledgment at all, the decision in *Galetta* is more on point and instructive than *Matisoff* and *D'Elia* with respect to the issue at bar. Further, the Surrogate's Court correctly found that the Court of Appeals, in *Galetta*, left open the issue of whether a defective acknowledgment can be cured.

In *Galetta*, the parties executed a prenuptial agreement before different notaries at different times one week before their wedding took place in July 1997 (21 NY3d at 189). As here, it was undisputed that the signatures on the document were authentic and there was no claim that the agreement was procured through fraud or duress (*see id.* at 189-190).

The certificate of acknowledgment relating to the wife's signature contained the proper language (*see id.* at 190). However, in the acknowledgment relating to the husband's signature, the certificate failed to indicate that the notary "confirmed the identity of the person executing the document or that the person was the individual described in the document" (*id.*). The husband filed for divorce and the wife separately filed for divorce and for a declaration that the prenuptial agreement was unenforceable (*see id.*).

The wife moved for summary judgment on her cause of action seeking declaratory relief, contending that the agreement was invalid because the certificate of acknowledgment relating to the husband's signature did not comport with the Real Property Law requirements. The husband opposed the motion on the basis that the language of the acknowledgment substantially complied with the Real Property Law. He also submitted an affidavit from the notary who had witnessed his signature in 1997 and executed the certificate of acknowledgment (*see id.*). "The notary, an employee of a local bank where the husband then did business, averred that it was his custom and practice, prior to acknowledging a signature, to confirm the identity of the signer and assure that the signer was the person named in the document. He stated in the affidavit that he *presumed* he had followed that practice before acknowledging the husband's signature" (*id.* [emphasis added]).

The Supreme Court denied the wife's motion, finding that the acknowledgment substantially complied with the requirements of the Real Property Law. A divided Fourth Department affirmed the order albeit on the different ground that, although the acknowledgment was defective, the deficiency could be cured after the fact and that the notary's affidavit raised a triable issue of fact as to whether the agreement had been properly acknowledged when executed (*see* 96 AD3d 1565, *revd* 21 NY3d 186).[5]

With respect to the issue of whether the certificate of acknowledgment accompanying the husband's signature was defective, the Court of Appeals determined that without stating "'to me known and known to me,'" the certificate failed to indicate either that the notary knew the husband or had ascertained through some form of proof that the husband was the person described in the prenuptial agreement (21 NY3d at 193). The Court noted that:

> "At the time the parties here signed the prenuptial agreement in 1997, proper certificates of acknowledgment typically contained boilerplate language substantially the same as that included in the certificate accompanying the wife's signature: 'before me came (name of signer) to me known and known to me to be the person described in and who executed the foregoing instrument and duly acknowledged to me that s/he executed the same'" (*id.* [footnote omitted]).

The Court pointed out that the "'to me known and known to me to be the person described in the document'" language "satisfied the requirement that the official indicate that he or she knew or had ascertained that the signer was the person described in the document" (*id.*). It also observed that "[t]he clause beginning with the words 'and duly acknowledged' established that the signer had made the requisite oral declaration" (*id.*). Given the failure to include this language in the acknowledgment of the husband's signature, the Court of Appeals agreed with the Fourth Department that the acknowledgment did not conform with statutory requirements (*see id.* at 194).

Since the Court of Appeals determined that the certificate was defective, it then turned to address the question of "whether such a deficiency can be cured and, if so, whether the affidavit of the notary public prepared in the course of litigation was sufficient to raise a question

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[5] The dissent reasoned that summary judgment should have been awarded to the wife declaring the prenuptial agreement to be invalid since the acknowledgment was fatally defective (*see* 96 AD3d at 1569). It noted that the issue of whether the defect could be cured had not been raised in the Supreme Court and was, therefore, not properly before the Fourth Department. On the merits, it concluded that such a deficiency could not be cured, nor was the notary public's affidavit sufficient to raise a question of fact if a cure had been possible (*see id.*).

of fact precluding summary judgment in the wife's favor" (*id.*). However, in looking at the proof submitted by the husband, the Court of Appeals stated that it "need not definitively resolve the question of whether a cure is possible because, similar to what occurred in *Matisoff*, the proof submitted here was insufficient" (*id.* at 197).

The Court of Appeals analyzed in detail the affidavit of the notary submitted by the husband in opposing the wife's summary judgment motion. The Court pointed out that the notary only recognized his own signature and had no independent recollection of notarizing the subject document (*see id.*). Given these statements, the Court found that the husband could not rely on the notary's custom and practice to fill in the evidentiary gaps because "the averments presented by the notary public in this case [we]re too conclusory to fall into this category" (*id.*).[6]

Further, the Court stated that if the notary had recalled acknowledging the husband's signature, "he might have been able to fill in the gap in the certificate by averring that he recalled having confirmed [the husband's] identity, without specifying how" (*id.* at 198). However, since the notary did not recall acknowledging the husband's signature and was attempting to rely on custom and practice evidence, the Court stated that "it was crucial that the affidavit describe a specific protocol that the notary repeatedly and invariably used—and proof of that type is absent here" (*id.*).

The situation at bar is akin to the hypothetical described by the Court of Appeals in *Galetta*, where the notaries here, the decedent's law partner and Irene's attorney, actually recalled acknowledging the signatures at issue. In such a situation, the Court of Appeals explained that the confirmation of the identity of the signer, through an affidavit, is sufficient without having to explain how the identity was confirmed (*see id.*).

Although, in support of her motion, Irene submitted the prenuptial agreement with the defective acknowledgments to demonstrate that the agreement was invalid, the Surrogate's Court properly declined to dismiss the petition on the basis of documentary evidence in light of John's submission in opposition to her motion. To supplement the allegations of the petition, in opposition, John submitted affidavits which showed that the petition may be meritorious in spite of the documentary evidence. In response to the assertion that the prenuptial agreement was invalid as

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[6] The Court pointed out that the notary did not detail the specific procedure he routinely followed to "'ask and confirm'" the identity of the signer (21 NY3d at 198). The Court reasoned that "[t]here are any number of methods a notary might use to confirm the identity of a signer he or she did not already know," such as asking the signer to produce valid photographic identification or asking another person to vouch for the signer's identity where, for example, the signer might have been a regular customer of the bank (*id.*).

improperly acknowledged, the affidavits of Donovan and Jacobsen specifically stated that each observed the document being signed, took the acknowledgment in question, and personally knew the individual signer signing before him. In so doing, the defect in the acknowledgment was cured in order to give vitality to the expressed intent of the parties set forth in the prenuptial agreement.

Accordingly, the Surrogate's Court properly denied Irene's motion pursuant to CPLR 3211(a)(1) and Domestic Relations Law § 236(B)(3) to dismiss the petition. Therefore, the order is affirmed.

LEVENTHAL, J.P., CHAMBERS and LASALLE, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

Exhibit B

STATE OF NEW YORK APPELLATE DIVISION
SECOND DEPARTMENT

In the Matter of William F. Koegel, etc., deceased. John B. Koegel, etc., petitioner-respondent; Irene Lawrence Koegel, respondent-appellant.

Appellate Division Docket No.: 2019-03605
Westchester County File No.: 452/14

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached hereto is a true copy of a Decision and Order dated June 17, 2020, and entered in the Office of the Clerk of the Appellate Division, Second Department on June 17, 2020.

Dated: Albany, New York
June 22, 2020

GREENBERG TRAURIG, LLP

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ACTIVE 51059249v1

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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G/afa

_____AD3d_____ Submitted - January 28, 2020

LEONARD B. AUSTIN, J.P.
ROBERT J. MILLER
FRANCESCA E. CONNOLLY
VALERIE BRATHWAITE NELSON, JJ.

2019-03605 DECISION & ORDER

In the Matter of John Koegel, etc., deceased.
John B. Koegel, etc., respondent; Irene Lawrence Koegel, appellant.

(File No. 452/14)

Himmel & Bernstein, LLP, New York, NY (Andrew D. Himmel of counsel), for appellant.

Greenberg Traurig, LLP, Albany, NY (Susan Phillips Read of counsel), for respondent.

In a probate proceeding in which John B. Koegel, as executor of the estate of William F. Koegel, petitioned pursuant to SCPA 1421 to invalidate a notice of election made pursuant to Estates, Powers and Trusts Law § 5-1.1-A and for a declaration that Irene Lawrence Koegel was not entitled to an elective share of the estate of William F. Koegel, Irene Lawrence Koegel appeals from an order of the Surrogate's Court, Westchester County (Brandon R. Sall, S.), dated February 5, 2019. The order granted the petitioner's motion for summary judgment on the petition.

ORDERED that the order is affirmed, with costs.

Prior to their marriage in 1984, William F. Koegel (hereinafter the decedent) and Irene Lawrence Koegel (hereinafter the appellant) executed a prenuptial agreement whereby they each waived and relinquished "any elective or statutory share granted under the laws of any jurisdiction." Following the decedent's death in 2014, his will was admitted to probate, and letters testamentary were issued to the petitioner. The appellant thereafter served a notice of election of the spousal elective share pursuant to Estates, Powers and Trusts Law § 5-1.1-A. The petitioner then

commenced this proceeding pursuant to SCPA 1421 against the appellant in December 2014, seeking to invalidate the notice of election based upon the prenuptial agreement. After interposing an answer and objections, the appellant moved pursuant to CPLR 3211(a)(1) and Domestic Relations Law § 236(B)(3) to dismiss the petition on the basis that the acknowledgment of the prenuptial agreement was defective and unenforceable. The petitioner opposed the motion and submitted affidavits of the two notaries who took the acknowledgments and who each knew the individual signer signing before him. By order dated June 23, 2015, the Surrogate's Court (Thomas E. Walsh II, A.S.) denied the motion. On February 7, 2017, this Court affirmed the Surrogate's Court's order on the basis that extrinsic proof provided by the notary who took a party's signature could remedy a defective acknowledgment of a prenuptial agreement and that the affidavits of the notaries who took the acknowledgments in this case cured the defect in the acknowledgment (*Matter of Koegel*, 160 AD3d 11, 27).

Subsequently, the petitioner, relying, inter alia, on the affidavits, moved for summary judgment on the petition. In an order dated February 5, 2019, the Surrogate's Court (Brandon R. Sall, S.) granted the motion, concluding that the issue of the sufficiency of the affidavits was not properly before the court due to the determination on the prior appeal that those affidavits cured the defect in the acknowledgment of the prenuptial agreement. The court determined that, in any event, the affidavits were sufficient to cure the defect, since they were based on the notaries' personal knowledge of the signers and the notaries' actual observation of the signing. This appeal is from the order dated February 5, 2019.

"The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165 [internal quotation marks omitted]; *see Matter of Chung Li*, 165 AD3d 1105, 1106; *Ramanathan v Aharon*, 109 AD3d 529, 530). Law of the case "applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision, and to the same questions presented in the same case" (*Ramanathan v Aharon*, 109 AD3d at 530 [citations and internal quotation marks omitted]; *see Matter of Chung Li*, 165 AD3d at 1106). "'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the [Surrogate's] Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law'" (*Matter of Norton v Town of Islip*, 167 AD3d 624, 626, quoting *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809, 809; *see Matter of Chung Li*, 165 AD3d at 1106; *Voss v Netherlands Ins. Co.*, 136 AD3d 1288, 1289).

Here, the issue of whether extrinsic evidence could cure a defect in the acknowledgment of a prenuptial agreement was previously raised and decided against the appellant on the prior appeal in this matter (*see Matter of Koegel*, 160 AD3d at 23-27). Accordingly, reconsideration of that issue is barred by the law of the case doctrine (*see Matter of Norton v Town of Islip*, 167 AD3d at 626; *Matter of Chung Li*, 165 AD3d at 1106; *Voss v Netherlands Ins. Co.*, 136 AD3d at 1289; *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d at 809).

Accordingly, we agree with the Surrogate's Court's determination to grant the petitioner's motion for summary judgment on the petition.

In light of the foregoing, the parties' remaining contentions need not be reached.

AUSTIN, J.P., MILLER, CONNOLLY and BRATHWAITE NELSON, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

Exhibit C

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M273350
MB/

LEONARD B. AUSTIN, J.P.
ROBERT J. MILLER
FRANCESCA E. CONNOLLY
VALERIE BRATHWAITE NELSON, JJ.

2019-03605 DECISION & ORDER ON MOTION

In the Matter of John Koegel, etc., deceased.
John B. Koegel, etc., respondent; Irene Lawrence Koegel, appellant.

(File No. 452/2014)

Appeal from an order of the Surrogate's Court, Westchester County, dated February 5, 2019, which was determined by decision and order of this Court dated June 17, 2020. Motion by the appellant for leave to appeal to the Court of Appeals from the decision and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

AUSTIN, J.P., MILLER, CONNOLLY and BRATHWAITE NELSON, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

October 5, 2020

MATTER OF KOEGEL, DECEASED

Exhibit D

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

John B. Koegel as Executor
of the Estate of WILLIAM F. KOEGEL
a/k/a William Fisher Koegel, Deceased,

Pursuant to SCPA §1421

----------x

File No. 2014-452/A

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Respondent Irene Lawrence Koegel ("Respondent") hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a decision and order of the Surrogate's Court of the State of New York, County of Westchester, dated and entered with the clerk of this Court on February 5, 2019 (hereinafter the "Order"), notice of entry of which was served on the Respondent by Petitioner John B. Koegel ("Petitioner") on February 14, 2019, granting summary judgment in favor of Petitioner, and from each and every part of the Order, as well as the whole therefore.

Dated: New York, New York
March 14, 2019

HIMMEL & BERNSTEIN, LLP
Attorneys for Respondent
Irene Lawrence Koegel
928 Broadway, Suite 1000
New York, NY 10010
(917) 331-4221

By: _____
Andrew D. Himmel

To: GREENBERG TRAURIG LLP
Attorneys for Petitioner John B. Koegel
54 State Street, 6th Floor
Albany, NY 12207
(518) 689-1400

Clerk of the Court
Surrogate's Court: State of New York
County of Westchester
111 Dr. Martin Luther King Jr. Blvd.
19th Floor
White Plains, NY 10601

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

John B. Koegel as Executor
of the Estate of WILLIAM F. KOEGEL
a/k/a William Fisher Koegel, Deceased,

Pursuant to SCPA §1421

File No. 2014-452/A

AFFIRMATION
OF SERVICE

----------x

ANDREW D. HIMMEL, an attorney duly licensed to practice law in the courts of the state of New York, hereby affirms the following pursuant to the penalties of perjury:

I am over the age of 18 and am not a party to this lawsuit. On March 14, 2019, I served the within Notice of Appeal and accompanying papers of Respondent Irene Lawrence Koegel regarding the decision and order of the Westchester County Surrogate's Court dated February 5, 2019 by depositing a true copy thereof enclosed in a properly addressed wrapper into the custody of an overnight delivery service, Federal Express, for overnight delivery, prior to the latest time designated by Federal Express for overnight delivery, addressed to counsel for Petitioner, Greenberg Traurig, LLP, 54 State Street, 6th Floor, Albany, NY 12207.

Dated: New York, NY
March 14, 2019

Andrew D. Himmel

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

John B. Koegel as Executor of the
Estate of William F. Koegel
a/k/a William Fisher Koegel, Deceased

File No. 2014-452/A

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☐ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ■ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ■ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	■ Domestic Relations	☐ Election Law	■ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☐ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Surrogate's Court	County: Westchester
Dated: Feb. 5, 2019	Entered: Feb. 5, 2019
Judge (name in full): Brandon R. Sall	Index No.: 2014-452/A
Stage: ☐ Interlocutory ■ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ■ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Respondent Irene Lawrence Koegel appeals from the February 5, 2019 decision and order of the Surrogate's Court, Westchester County, granting Petitioner John Koegel's motion for summary judgment dismissing the petition.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether a certificate of acknowledgment accompanying a nuptial agreement which is defective due to noncompliance with New York Domestic Relations Law §236(B)(3) can be cured, an issue previously answered by the Second Department in a prior appeal in this matter in the negative, the motion to appeal of which to the Court of Appeals was dismissed upon the ground that the order sought to be appealed from did not finally determine the proceeding within the meaning of the Constitution. The February 5, 2019 Order does finally determine the proceeding and Respondent therefore appeals this final order both as a good faith application for the modification of existing law and as a necessary step to ultimately appeal to the Court of Appeals.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Irene Lawrence Koegel	Respondent	Appellant
2	John R. Koegel	Petitioner	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Andrew D. Himmel, Himmel & Bernstein, LLP			
Address: 928 Broadway, Suite 1000			
City: NYC	State: NY	Zip: 10010	Telephone No: 917-331-4221
E-mail Address: ahimmel@hbesq.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: Greenberg Traurig LLP			
Address: 54 State Street, 6th Floor			
City: Albany	State: NY	Zip: 12207	Telephone No: 518-689-1400
E-mail Address: reads@gtlaw.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

SURROGATE'S COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER
* *

John Koegel as Executor of the Estate of

DECISION and ORDER

WILLIAM F. KOEGEL, a/k/a,
WILLIAM FISHER KOEGEL,

File No: 2014-452/A

Deceased,

Pursuant to SCPA 1421.
* *

SALL -S.

In this contested proceeding pursuant to SCPA 1421, the petitioner, John Koegel (John), as executor of the estate of William F. Koegel, a/k/a William Fisher Koegel (the decedent), moves for an order pursuant to CPLR 3212 granting him summary judgment and invalidating the respondent's notice to elect her statutory spousal share. The respondent, Irene Koegel (Irene), opposes the motion. For the reasons set forth before, the motion is granted.

The decedent died testate on February 3, 2014 survived by Irene, who was his wife of more than 29 years, and two children from a prior marriage: John and Robert Koegel. The court admitted his will to probate and issued letters testamentary to John on March 21, 2014. On July 29, 2014, Irene served a notice of election pursuant to EPTL 5-1.1-A.

The decedent and Irene married on August 4, 1984 and remained married until his death. They had both been widowed at the time of the marriage. This was the decedent's

third marriage and Irene's second marriage.

Shortly before their marriage, the parties executed a prenuptial agreement, which provided, inter alia, that

> In consideration of said marriage and of the mutual covenants set out herein, each of the parties hereto agrees to make no claim as surviving spouse to any part of the estate of the other and irrevocably waives and relinquishes (a) all right to homestead property, to any family allowance or exempt property and to any elective or statutory share granted under the laws of any jurisdiction, (b) any right to serve as personal representative of the estate of the other, and (c) all other rights in and to the property, real or personal, wherever situated, which the other party now owns or may hereafter acquire; provided, however, that nothing herein contained shall be deemed to constitute a waiver of any bequest or other disposition which either party may voluntarily make for the benefit of the other.

Each party was represented by separate counsel. William Donovan (Donovan), represented the decedent, his law partner, and acknowledged the document as follows:

> On this 26 date of July, 1984, before me personally appeared WILLIAM F. KOEGEL, one of the signers and sealers of the foregoing instrument, and acknowledge the same to be his free act and deed.

Curtis Jacobsen, the attorney who represented Irene as executor of the estate of her late first husband, represented her and signed an acknowledgment in substantially the same form, except the date that was filled in by hand was July 30th.

In his petition, John asserts that the decedent relied on the mutual covenants contained in the prenuptial agreement and bestowed many and substantial financial benefits on Irene throughout their marriage; that he relied on the prenuptial agreement in setting forth his testamentary intentions in his will; that Irene accepted the benefits of the prenuptial agreement without ever raising any question about its validity or fairness, that she is barred by the doctrine of laches from contesting the fairness or validity of the

prenuptial agreement; and that, having accepted the benefits of the marriage premised on the prenuptial agreement, she is estopped from electing her statutory spousal share.[1]

In her answer, Irene admitted that she signed the prenuptial agreement but denied that her signature or that of the decedent were properly acknowledged. For her first affirmative defense, she asserted that the prenuptial agreement was invalid and unenforceable pursuant to the Court of Appeals decision in *Galetta v Galetta*, 21 NY3d 186 (2013), because the acknowledgments are defective in that they omit the language reciting that the notaries knew the signatories or ascertained through some other form of proof that the signors were the persons described, as required by Domestic Relations Law §236 (B) (3). In her second affirmative defense, she alleged that the agreement was invalid and unenforceable because it was unfair in various respects.

Initially, Irene moved to dismiss the petition upon documentary evidence–the written prenuptial agreement–because the acknowledgments did not contain the language stating that the notaries knew the signors or had ascertained them to be the persons described and therefore the agreement was invalid for failing to comply with Domestic Relations Law §236 (B) (3). In response to that motion, the petitioner submitted affidavits from Donovan

---

[1]Paragraph 2 of the decedent's will refers to the prenuptial agreement that he and Irene entered into upon their marriage and provides "[t]he bequests to and other dispositions for the benefit of my wife contained in this Will are made by me in recognition of and notwithstanding the antenuptial agreement. . .however . . .in all other respects said antenuptial agreement shall be unaffected by the Will. In addition, I have heretofore made other dispositions in favor of my wife, including but not limited to having designated her as the beneficiary of certain retirement benefits payable at my death" (Last Will and Testament of William F. Koegel, Exhibit 1 to Exhibit A to the affirmation in support of petitioner's motion).

and Jacobsen in which each attested to the fact that they knew the signatory whose signature each notarized, and they recalled each one signing the prenuptial agreement.

In light of these affidavits, and the fact that the court in *Galetta* expressly left open the question as to whether a defective acknowledgment could be cured, this court denied Irene's motion to dismiss the petition, and Irene filed an appeal with the Appellate Division, Second Department.

During the pendency of the appeal, John moved for partial summary judgment to dismiss the second affirmative defense, which the court granted in a decision dated September 27, 2016.

On February 7, 2018, the Appellate Division affirmed this court's denial of the motion to dismiss. It distinguished the *Galetta* case and held that the affidavits of Donovan and Jacobsen sufficiently supplemented the petition to overcome Irene's motion to dismiss on the basis of documentary evidence.

John now moves for summary judgment in his favor and for a declaration that Irene is not entitled to take any elective share of the decedent's estate and that her notice of election is invalid. He asserts that the Donovan and Jacobsen affidavits cured any defect in the acknowledgments that may otherwise have rendered the prenuptial agreement invalid and unenforceable. In addition, he asserts that the decedent and Irene entered into the agreement with the express and mutual intention that the marriage would not change their respective rights (or the rights of their respective children) to the property they owned at the time of their marriage, that she accepted the benefits of the prenuptial agreement during the more than 29 years of her marriage to the decedent; and that accordingly, she

ratified the prenuptial agreement and is estopped from challenging its validity.

John also alleges that Irene entered the marriage possessed of significant property which she had recently inherited from her deceased first husband and that she understood, as she testified in her deposition, that "What was mine was mine and what was his was his" (Deposition transcript of Irene Koegel, attached as Exhibit 3 to the affirmation in support of petitioner's motion, at 75-76). John also points out that at the time the parties entered the prenuptial agreement, neither Irene nor the decedent could have known who would die first, that the prenuptial agreement was a fair way to protect her financial interests as well as his, and that they both enjoyed the benefit of having their estates free from the claims of a surviving spouse. Thus, having accepted such benefits conferred by the agreement, Irene ratified the agreement and is estopped from setting it aside or challenging its validity.

John also contends that the doctrine of laches bars Irene from electing her statutory spousal share.

Irene does not raise any factual issues in opposition to John's motion, but rather, citing *Matisoff v. Dobi*, 90 NY2d 127, argues that the Court of Appeals does not recognize any exception to the requirement of a formal acknowledgment on a nuptial agreement, and accordingly, that the prenuptial agreement, containing a defective acknowledgment, cannot be saved by principles of estoppel, ratification or laches. Rejecting the decision of the Appellate Division, Irene contends that a certificate of acknowledgment which accompanies a nuptial agreement and which is materially defective due to noncompliance with Domestic

Relations Law §236 (B) (3) cannot be cured by extrinsic evidence. She argues for the application of a bright line test as set forth in the Court of Appeals' decision in *Matisoff v. Dobi*, 90 NY2d 127 (1997).

In reply, John contends that Irene's reliance on the *Matisoff* case is misplaced and that the Appellate Division has rejected her argument. He also notes that she has not challenged the sufficiency of the affidavits of Donovan and Jacobsen or addressed his arguments based on estoppel, ratification and laches.

Summary judgment is a drastic remedy, properly invoked when it is clear that no genuine factual issues exist (*see Andre v Pomeroy*, 35 NY2d 361 [1974]). Issue finding, rather than issue determination, is the focus of the court's inquiry (*Anyanwu v Johnson*, 276 AD2d 572, 573 [2d Dept 2000]), and the motion will be granted only where, upon admissible papers and proof submitted, the movant's case is sufficiently established to warrant the court, as a matter of law, to direct judgment in favor of the movant (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any genuine material issues of fact *(see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to lay bare his/her proof, producing admissible evidence sufficient to establish the existence of genuine material issues of fact which require a trial *(see Alvarez v Prospect Hosp.*, 68

NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557). While a court must construe the facts in the light most favorable to the non-moving party *(see Martin v Briggs*, 235 AD2d 192, 196 [1997]; *McArdle v M&M Farms*, 90 AD2d 538 [1982]), mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion (*see Zuckerman v City of New York*, 49 NY2d 557*)*.

The court need not address Irene's argument that the Court of Appeals' bright line test set forth in *Matisoff v Dobi*, 90 NY 2d 127 (1997), should apply here. The Appellate Division rejected Irene's reliance on *Matisoff*. The appellate court held that the affidavits of Donovan and Jacobsen showed that the petition may be meritorious in spite of the documentary evidence (the prenuptial agreement). In its decision affirming this court's denial of Irene's motion to dismiss on the basis of the prenuptial agreement, the Appellate Division stated:

> In response to the assertion that the prenuptial agreement was invalid as improperly acknowledged, the affidavits of Donovan and Jacobsen specifically stated that each observed the document being signed, took the acknowledgment in question, and personally knew the individual signer signing before him. *In so doing, the defect in the acknowledgment was cured in order to give vitality to the expressed intent of the parties set forth in the prenuptial agreement.*

(*Matter of Koegel*, 160 AD3d 11, 27 [2d Dept 2018] [emphasis added]). Accordingly, the issue of the sufficiency of the affidavits is not before this court. Nonetheless, in case there is any question on this point, this court finds that the affidavits of Donovan and Jacobsen were sufficient to cure the defect in the acknowledgments, because they were based on the notaries' personal knowledge of the signors and their actual observation of the signing (*cf. Galetta v Galetta*,21 NY3d 186 [2013] [notary's affidavit was insufficient to cure the

defect in the acknowledgment because he did not personally know the signor, could not recall his signing the separation agreement, and did not detail his usual custom and practice to enable the court to determine whether the requirements for an acknowledgment were met]).

Having found that the Donovan and Jacobsen affidavits cured the missing language in the acknowledgments in the prenuptial agreement, and having previously dismissed the second affirmative defense, the court finds that the prenuptial agreement is valid and enforceable, and therefore Irene's notice of election to take her statutory spousal share is invalid. Therefore, the petitioner's motion for summary judgment is granted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

The following papers were considered:

1. Notice of motion, dated October 2, 2018, affirmation dated October 1, 2018, exhibits and memorandum of law in support, dated October 1, 2018;

2. Memorandum of law in opposition, dated October 31, 2018; and

3. Memorandum in reply, dated November 12, 2018.

Dated: White Plains, NY
February 5, 2019

HON. BRANDON R. SALL
Westchester County Surrogate

To: Susan Phillips Read, Esq.
Greenberg Traurig LLP
54 State St., 6th Floor
Albany, NY 12207
(Attorneys for petitioner)

Andrew D. Himmel
Himmel & Bernstein LLP
928 Broadway, Ste 1000
New York, NY 10010
(Attorneys for respondent)

SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

JOHN B. KOEGEL as Executor of the Estate of WILLIAM F. KOEGEL, a/k/a WILLIAM FISHER KOEGEL *Deceased,* Pursuant to SCPA §1421	**NOTICE OF ENTRY** File No. 2014-452/A

PLEASE TAKE NOTICE that the within is a true and correct copy of the Decision and Order of the Decision and Order of the Surrogate's Court of the State of New York, Westchester County (Hon. Brandon R. Sall), issued in the above-captioned proceeding on February 5, 2019.

Dated: February 14, 2019
Albany, New York

GREENBERG TRAURIG, LLP

By: _____

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