Susan Phillips Read, an attorney admitted to practice law in the courts of the State of New York, hereby affirms the following under the penalties of perjury:

1. I am Of Counsel in the firm of Greenberg Traurig, LLP, attorneys for Respondent John B. Koegel, executor of decedent William F. Koegel's estate (hereafter "the Executor"). I am fully familiar with the facts recited and circumstances recounted in this Affirmation.

2. I submit this Affirmation in opposition to the motion by Appellant Irene Lawrence Koegel (hereafter "Ms. Koegel") for leave to appeal to this Court from the Decision and Order of the Appellate Division, Second Department, dated June 17, 2020 (hereafter "June 2020 Order") (*Matter of Koegel*, 184 AD3d 764 [2d Dept 2020]) (*see* Exhibit B annexed to Ms. Koegel's Memorandum of Law, dated November 3, 2020 [hereafter "Ms. Koegel's MOL"]). The June 2020 Order affirmed the Decision and Order of Surrogate's Court, Westchester County, dated February 5, 2019 (hereafter "February 2019 Order" or "final determination") (*see* Exhibit D annexed to Ms. Koegel's MOL).

3. The Court should deny Ms. Koegel's motion. Here, Ms. Koegel asks the Court to grant leave to decide "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" (Ms. Koegel's

MOL at 1). But this question of law is not reviewable on an appeal from the Appellate Division's June 2020 Order. And even if it were otherwise, the proffered question is not leaveworthy under any of the traditional certiorari factors; Ms. Koegel does not advance a meritorious legal argument; and negative certiorari factors exist.

Summary of Factual and Procedural Background

4. Decedent William F. Koegel (hereafter "Decedent") and Ms. Koegel married in August 1984. Decedent was 60 years old at the time and Ms. Koegel was 54; both were widowed (Decedent for the second time). Decedent was the father of two adult sons from his first marriage, and Ms. Koegel was the mother of three children from her previous marriage, one apparently still living at home.

5. Both Decedent and Ms. Koegel possessed substantial material assets in 1984. In the week prior to their marriage, they separately signed a prenuptial agreement (hereafter "the 1984 agreement" or "the agreement") consisting solely of mutual waivers of the right of spousal election, as then allowed by Estates, Powers and Trusts Law §5-1.1 (f) (1) (superseded by Estates, Powers and Trusts Law §5-1.1-A [e] [1]). To comply with Estates, Powers and Trusts Law §5-1.1 (f) (2) (superseded by Estates, Powers and Trusts Law §5-1.1-A [e] [2]), their signatures were acknowledged.

6. Ms. Koegel later testified in her deposition in this proceeding that she understood when she signed the 1984 agreement that it meant that she and Decedent would be maintaining separate funds and assets, and "what was mine was mine and what was his was his."

7. The notary who acknowledged Decedent's signature was his longtime law partner. The notary who acknowledged Ms. Koegel's signature was her personal attorney. This attorney had worked on the estate of Ms. Koegel's late husband, of which she was co-executor, and she had retained him as independent counsel to represent her in connection with the 1984 agreement.

8. Decedent died on February 3, 2014 at the age of 90. His last will and testament had been signed, published and declared on December 18, 2008. Decedent made testamentary dispositions in his will in stated reliance on the validity of the 1984 agreement in which he and Ms. Koegel had both waived their spousal elective rights, thus protecting their individual estates and families from claims of the surviving spouse.

9. Decedent's estate was admitted to probate in March 2014, and letters testamentary were issued to the Executor, Decedent's elder son. In July 2014, Ms. Koegel served a notice of election pursuant to Estates, Powers and Trusts Law §5-1.1-A.

10. In December 2014, the Executor filed a petition pursuant to Surrogate's Court Procedure Act §1421 and Estates, Powers and Trusts Law §5-1.1-A, requesting the court to declare Ms. Koegel's spousal election to be invalid and to dismiss the notice of election in light of her waiver in the 1984 agreement or, alternatively, on the grounds of laches and equitable estoppel and ratification.

11. In February 2015, Ms. Koegel answered the Executor's petition. She objected and asserted as an affirmative defense that the 1984 agreement was defective, invalid and unenforceable pursuant to *Galetta v Galetta* (21 NY3d 186 [2013]) because the certificates of acknowledgment omitted language reciting that the notaries knew the signers, or had ascertained through some sort of proof that the signers were the persons described in the 1984 agreement, as required by Domestic Relations Law §236 (B) (3). She alleged as an additional affirmative defense that the 1984 agreement was invalid and unenforceable on account of unfairness. Ms. Koegel moved to dismiss the petition on the basis of her affirmative defense that cited *Galetta* and Domestic Relations Law §236 (B) (3).

12. In opposition to Ms. Koegel's motion to dismiss, the Executor submitted affidavits from the two notaries. The notary who acknowledged Decedent's signature explained that (and how) he already knew Decedent, his former law partner; and the notary who acknowledged Ms. Koegel's signature

explained that (and how) he already knew Ms. Koegel, his client. The Executor took the position that even if the certificates of acknowledgment were facially defective, the deficiencies alleged were curable and had been cured by the two affidavits.

13. By Decision and Order dated June 23, 2015, Surrogate's Court denied Ms. Koegel's motion to dismiss the Executor's petition. Ms. Koegel appealed.

14. By Decision and Order dated February 7, 2018, the Appellate Division affirmed the Surrogate's denial of Ms. Koegel motion to dismiss in an exhaustive, 15-page writing (*see* Exhibit A annexed to Ms. Koegel's MOL). The Appellate Division concluded that, contrary to Ms. Koegel's contention, "extrinsic proof provided by the notary public who took a party's signature . . . can remedy a defective acknowledgment" of a prenuptial agreement (*Matter of Koegel*, 160 AD3d 11, 12 [2d Dept 2018] [hereafter "February 2018 Order" or "prior nonfinal order"]). The Court further observed that, by virtue of the two affidavits, "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" (*id.* at 27). Accordingly, the Appellate Division affirmed the Surrogate's denial of Ms. Koegel's motion to dismiss the Executor's petition.

15. On February 12, 2018, Ms. Koegel asked the Appellate Division for permission to appeal its February 2018 Order to this Court. The Appellate Division denied the motion by Order dated April 26, 2018.

16. On June 4, 2018, Ms. Koegel asked this Court to grant her leave to appeal the Appellate Division's February 2018 Order. By Order decided and entered on September 13, 2018, this Court dismissed Ms. Koegel's motion on the basis of nonfinality.

17. The Executor then promptly moved in Surrogate's Court on October 1, 2018 for summary judgment on the petition in its entirety, asking the Surrogate to dismiss Ms. Koegel's remaining[1] affirmative defense; i.e., the allegation that her waiver was invalid on account of non-curable defective certificates of acknowledgment per *Galetta* and Domestic Relations Law §236 (B) (3). He asked the Surrogate to declare that Ms. Koegel's notice of election was invalid and she was not entitled to take any elective share of Decedent's estate. The Executor advanced both the February 2018 Order and his other defenses to support the motion.

[1] During the more than two years that Ms. Koegel's appeal was pending in the Appellate Division after papers were served and filed, the parties completed discovery and Surrogate's Court granted the Executor summary judgment on his petition to the extent of dismissing Ms. Koegel's affirmative defense of unfairness. Ms. Koegel did not appeal.

18. In the February 2019 Order, the Surrogate granted the Executor summary judgment, determining that the 1984 agreement was valid and enforceable and therefore that Ms. Koegel's notice of election to take her statutory share was invalid. The Surrogate based his decision exclusively on the Appellate Division's prior nonfinal order. Ms. Koegel appealed again to the Appellate Division.

19. In its June 2020 Order, the Appellate Division affirmed the Surrogate's February 2019 Order solely on the basis of the doctrine of law of the case.

20. On July 21, 2020, Ms. Koegel asked the Appellate Division for leave to appeal its June 2020 Order to this Court. The Appellate Division denied her motion on October 5, 2020 (*see* Exhibit C annexed to Ms. Koegel's MOL). Now she is asking this Court for leave to appeal the Appellate Division's June 2020 Order.

Non-Reviewability

21. As already noted, the Surrogate's February 2019 Order granted the Executor summary judgment on his petition to invalidate Ms. Koegel's notice of spousal election. The Surrogate's February 2019 Order constituted a final

determination within the meaning of the New York Constitution (*see* NY Const art VI, §3 [b]).

22. At that point, CPLR 5602 (a) (1) (ii) authorized Ms. Koegel to ask the Court of Appeals for leave to appeal, which, if granted, would have brought the Appellate Division's February 2018 Order up for review (*see generally* Arthur Karger, The Powers of the New York Court of Appeals, §6.7 at 209-210; §9.1 at 287-288 [West rev 3d ed 2005]; Siegel, NY Prac §527 at 1010-1011; §529 at 1018 [6th ed 2018]). The two prerequisites for Court of Appeals jurisdiction had then been met: (1) the Surrogate's February 2019 Order finally determined the proceeding in which the Appellate Division issued the prior nonfinal order in February 2018; and (2) the Appellate Division's prior nonfinal order "necessarily affect[ed]" the Surrogate's final determination; specifically, reversing the former would necessarily require reversal of the latter.

23. Granted, there are situations where the Court's finality and "necessarily affects" principles are difficult to apply with certainty. But that was not the case in February 2019. Rather, the way was indisputably clear for Ms. Koegel to ask this Court to review the question of law decided against her by the Appellate Division in its February 2018 Order. There were no jurisdictional

barriers of appealability (as had been the case when she asked the Court for leave to appeal in 2018, before the Surrogate's final determination) or reviewability.

24. Much to the Executor's surprise and dismay, Ms. Koegel did not take a direct appeal of the Surrogate's final determination to the Court of Appeals. At the tail end of the 30-day period to move in the Court of Appeals for leave to appeal, she instead appealed again to the Appellate Division. It appeared likely to the Executor from the content of Ms. Koegel's initial informational statement that she intended merely to repeat and reargue on her second appeal the very same contentions that the Appellate Division had already considered and rejected in its lengthy writing of February 2018 (*see* Exhibit D annexed to Ms. Koegel's MOL). This proved to be the case.[2]

25. In the June 2020 Order, which Ms. Koegel now seeks permission to appeal, the Appellate Division affirmed the Surrogate's February 2019 Order

[2] In an attempt to speed Ms. Koegel's second appeal along, on April 8, 2019 the Executor moved in the Appellate Division for a summary disposition (i.e., an order affirming the Surrogate's February 2019 Order for the reasons stated by the Appellate Division in its prior nonfinal order), or, alternatively, for expedited briefing and determination without oral argument. On April 18, 2019, Ms. Koegel consented to the relief sought by the Executor. On June 17, 2019, however, the Appellate Division denied the Executor's motion. In the event, the Appellate Division promptly scheduled oral argument for a date approximately three months after the appeal was perfected (both parties submitted), and issued its decision and order (the June 2020 Order) about five months later notwithstanding the onset of the pandemic in the interim. Still, Ms. Koegel's "idle" second trip to the Appellate Division (*see* Siegel, *supra*, §529 at 1011), including its coda (her unsuccessful motion asking the Appellate Division for its permission to appeal the June 2020 Order to this Court), consumed almost 19 months.

solely on the basis of the doctrine of law of the case. The Court observed that "the issue of whether extrinsic evidence could cure a defect in the acknowledgment of a prenuptial agreement was previously raised and decided against [Ms. Koegel] on the prior appeal in this matter," and cited various Second Department cases to support its unwillingness to reconsider a previously raised and decided legal issue absent a showing of subsequent evidence or change of law (*Matter of Koegel*, 184 AD3d at 766).

26. *People v Evans* (94 NY2d 499 [2000]) is the controlling precedent in this Court on the doctrine of law of the case. There, Judge Rosenblatt explained that "[l]aw of the case is a *judicially crafted policy* that expresses *the practices of courts generally to refuse to reopen what has been decided*, [and is] not a limit to their power. As such, *law of the case is necessarily amorphous in that it directs a court's discretion, but does not restrict its authority*" (*id.* at 503 [internal citation and quotation marks omitted]) (emphases added).

27. Thus, *Evans* establishes that the doctrine of law of the case does not compel a court to refuse to reopen a previous ruling in the same case. Indeed, in *Evans* itself a new trial judge reopened and changed his predecessor's *Sandoval* ruling, and the Court of Appeals rejected the defendant's objection that the doctrine of law of the case prohibited the change. Rather, the decision whether or

not to reconsider lies within a court's discretion. In this instance, the Appellate Division, in an exercise of its discretion, declined to reopen and reexamine the merits of its prior nonfinal order because Ms. Koegel had made no showing of subsequent evidence or change of law in support of a different result. It is "well established that an exercise by the courts below of discretion vested in them, with respect to a matter not controlled by some binding principle or rule of law, is generally *not reviewable* in the Court of Appeals" (Karger, *supra*, §16.1 at 569) (emphasis added). Indeed, the unreviewability of a discretionary determination follows inexorably from the constitutional restriction of the Court's jurisdiction to the review of questions of law, with a few exceptions not relevant here (*see* NY Const, art VI, § 3 [a]).

28. Despite Ms. Koegel's conviction to the contrary (Ms. Koegel's MOL at 16-17), the merits of the Appellate Division's February 2018 Order are not reviewable on an appeal from its June 2020 Order. The only question of law even arguably theoretically reviewable on appeal from the June 2020 Order would be whether the Appellate Division abused its discretion as a matter of law when it declined to reconsider the February 2018 Order on the ground of law of the case. Ms. Koegel does not make this argument and, in fact, there exists no support for it.

29. To recapitulate, the June 2020 Order constitutes an unreviewable exercise of the Appellate Division's discretion. The question of law that Ms. Koegel raises on this motion was decided against her by the Appellate Division in its February 2018 Order, and she did not ask this Court for permission to appeal from the Surrogate's final determination of February 2019 to review the Appellate Division's prior nonfinal order, as she might have done. Whatever Ms. Koegel's reason for taking a second appeal to the Appellate Division instead, by doing so she inevitably ran the risk that the Appellate Division might legitimately do exactly what it did and thereby effectively preclude review of the merits of the February 2018 Order in the Court of Appeals. It would be pointless for the Court to grant Ms. Koegel leave to appeal the June 2020 Order under these circumstances, where the Court lacks jurisdiction to review the question of law that she seeks to present and would have no choice other than to affirm the Appellate Division (*cf. Hecker v State*, 20 NY3d 1087 [2013] [in an appeal as of right, Court of Appeals affirms because Appellate Division's determination on the basis of an unpreserved question of law constituted an exercise of discretion and therefore was unreviewable in Court of Appeals]).

Ms. Koegel's Motion Does Not Present a Leaveworthy Question or Advance a Meritorious Legal Argument

30. In any event, Ms. Koegel does not present a leaveworthy issue or advance a meritorious legal argument. To be leaveworthy, a "[q]uestion of law should be novel or of public importance, present a conflict with prior decisions of the Court of Appeals or involve a conflict among the departments of the Appellate Division" (22 NYCRR 500.22 [4]). Here, Ms. Koegel argues that whether a defective certificate of acknowledgment in a nuptial agreement is curable constitutes a matter of public and statewide importance for two principal reasons: (1) "[f]irst and foremost" the Court in *Galetta* left the issue open; and (2) the Court in *Matisoff v Dobi* (90 NY2d 127 [1997]) "recognized that questions concerning prenuptial agreements are of public importance" (Ms. Koegel's MOL at 11). She acknowledges, however, that a question of law is "not necessarily leaveworthy, or of public importance, solely because it may involve a question of law left open by the Court of Appeals" (*id.*). What makes the difference here, in her view, is that the open question is "not some stray principle of law," but rather involves "the enforceability of nuptial agreements and the application of [Domestic Relations Law §236 (B) (3)]," within a "comprehensive statutory scheme that overhauled the law governing the validity and enforceability of nuptial agreements, further underscoring the public importance of this area" (*id.* at 11-12). The

"comprehensive statutory scheme" in question is the Equitable Distribution Law, enacted as part of the Domestic Relations Law in 1980, "which significantly reformed the New York statutory scheme governing division of property, economic life and familial rights and obligations *upon the dissolution of a marriage*" (*Matisoff*, 90 NY2d at 132) (emphasis added).

31. A question of law is not leaveworthy merely because it is open, as Ms. Koegel acknowledges. Otherwise, the docket of the Court of Appeals would overflow. Further, an issue is not of public importance just because it supposedly arises under the Domestic Relations Law (*see* paragraph 38, *infra*). There is not a hierarchy of New York statutes on the basis of relative public importance, with the Domestic Relations Law at or near the pinnacle.

32. The Court of Appeals necessarily relies on the lower courts to resolve most open questions of law by consensus over time and pursuant to its guidance to the bench, bar and public. For example, in *Galetta* the Court of Appeals described in some detail those circumstances that would "make[] a strong case for a rule permitting evidence to be submitted after the fact to cure a defect in a certificate of acknowledgement" (*Galetta*, 21 NY3d at 197). The facts of this case fit the hypothetical "strong case" to a T; i.e., the evidence demonstrates "that at the time the document was signed the notary or other official did everything he or she was

supposed to do, other than include the proper language in the certificate" (*id.*). Ms. Koegel offers no good reason to disregard the cure where the evidence satisfies this fact pattern. A notary's paperwork error in no way undermines the acknowledgment's purpose "to impose a measure of deliberation and impress upon the signer the significance of the document" (*id.* at 196).

33. The Court of Appeals in *Galetta* also pointed out that the Legislature had amended the Real Property Law in 1997 to enact a new section 309-a to create a uniform acknowledgment form for all notarial acts performed in the State (*id.* at 193, n 1). A stated purpose of section 309-a was to make it easier for notaries to know how to prepare a proper certificate of acknowledgment by supplanting the bewildering diversity of variable and confusing notarial certificates then existing with a simple form that clearly states the basic facts of the notarial act (*see* Memorandum in Support of Legislation at 000007, and letter from the National Notary Association, dated June 24, 1997, at 000015, Bill Jacket, L 1997, ch 179). Notably, the uniform acknowledgment form was not available to the notaries in this case because the 1984 agreement predates the statute by 13 years. It was likely also unavailable to the Galettas, at least as a practical matter, since they executed their prenuptial agreement sometime in July 1997 (*Galetta*, 21 NY3d at

189) and section 309-a took effect with the Governor's signature on July 8, 1997 (Bill Jacket, *supra* at 000001).

34. The Court of Appeals decided *Galetta* more than seven years ago. Ms. Koegel has not identified any case since *Galetta* other than her own where resolution of a dispute over a nuptial agreement's validity has turned on the question of whether a defect in a certificate of acknowledgment may be cured with extrinsic evidence. And there is no reason to suppose that cases presenting this issue are currently in the pipeline or in prospect. These happy circumstances likely result from *Galetta*'s clear explanation of what a proper certificate of acknowledgment must encompass, and enactment of the model acknowledgment form, which has now been widely available for 23 years. Simply put, the question of cure does not arise if a certificate is proper in the first place, and the Court's guidance in *Galetta* and the Legislature's enactment of section 309-a have, respectively, explained what a proper certificate requires and supplied the bench, bar and public with a handy form that satisfies those requirements. Whatever the cause, the dearth of cases belies the notion that Ms. Koegel presents a question of law that is "ripe for resolution" by the Court of Appeals (Ms. Koegel's MOL at 12).

35. Ms. Koegel cites *Matter of Seawright v Board of Elections in the City of New York* (35 NY3d 227 [2020]) as having dispensed with a "similar contention" of unleaveworthiness based on "the unlikelihood of recurrence" (Ms. Koegel's MOL at 12-13). In *Seawright*, however, the Court was asked to resolve a split between the First and Third Departments over a question of law. By contrast, there is no conflict among the departments of the Appellate Division on the question of law that Ms. Koegel requests the Court to address.

36. Nor have "some courts outside the Second Department . . . cast doubt on the availability of cures concerning defective acknowledgments in regard to the conveyance of real property," thereby signifying "considerable uncertainty" in the lower courts post-*Galetta (id.* at 14). The only post-*Galetta* case that Ms. Koegel cites for this proposition is *80P2L LLC v U.S. Bank Trust, N.A.* (2019 NY Slip Op 32604 [U] [Sup Ct, NY County]), a dispute under the Real Property Law over priority in the chain of title of a condominium unit in Manhattan (Ms. Koegel's MOL at 15). The particular question at issue in *80P2L LLC* was whether defendant was permitted to adduce extrinsic evidence to show that a mortgage in its favor had, in fact, been properly acknowledged when recorded in the Office of the Register of the City of New York. The question arose because the mortgage actually appearing in the Register's scanned digital records did not display a notary

stamp; in short, the acknowledgment was absent, not allegedly defective. Supreme Court ruled in favor of plaintiff and disallowed extrinsic evidence on the theory that the burden fell on defendant to insure that full recordation had properly taken place since, as between two innocent persons (plaintiff and defendant), defendant (actually, defendant's predecessor in interest, who filed the mortgage originally) had been the one in position to check for and correct any error in the mortgage's recordation. Thus, *80P2L LLC* is in no way relevant to the question of cure that Ms. Koegel argues is leaveworthy.

Negative Certiorari Factors

37. Even assuming that the question of law raised by Ms. Koegel is reviewable and leaveworthy and that her legal argument is meritorious, this case is an unattractive candidate for resolving any doubt possibly left over from *Galetta* about the potential and showing required to remedy a defect in a certificate of acknowledgment required by Domestic Relations Law §236 (B) (3). There are three negative certiorari factors.

38. First, the Court may prefer to examine an issue of matrimonial law in an appeal in a matrimonial action. Ms. Koegel takes the position that the legal question that she asks this Court to review is of public importance and therefore leaveworthy in significant part because it arises under the Domestic Relations Law

(Ms. Koegel's MOL at 11-12). But section 236 (B) (3) is part of the Equitable Distribution Law, as noted earlier, and is applicable only to matrimonial actions as defined in Domestic Relations Law §236 (B) (2), which this is not. Rather, this is an estate proceeding pursuant to Surrogate's Court Procedure Act § 1421.

39. Domestic Relations Law §236 (B) (3) and Estates, Powers and Trusts Law §5-1.1-A (e) (2) are substantively identical. And the general principles enunciated in *Galetta* logically apply universally to certificates of acknowledgment. Nonetheless, in *Galetta* this Court was unwilling to treat as analogous cases that addressed the cure of purported defects in a surviving spouse's waiver of the right of spousal election, in part, because these estate proceedings did not "involve" Domestic Relations Law §236 (B) (3) (*Galetta*, 21 NY3d at 196, n 3). And presumably, only the validity of the certificate of acknowledgment of the surviving spouse's signature is germane where a nuptial agreement consists solely of mutual waivers of the right of spousal election, as is the case here.

40. Second, Ms. Koegel waited for almost 30 years and until after decedent's death before she objected to the validity and fairness of her waiver of the right of spousal election. For nearly three decades, then, her estate and beneficiaries enjoyed the advantage of Decedent's waiver of his right of spousal

election in the event Ms. Koegel predeceased him (*see Matter of Davis*, 20 NY2d 70 [1967]). Importantly, Decedent relied on the validity and enforceability of the 1984 agreement to order his financial affairs during his lifetime and to make the provisions and arrangements embodied in his will.

41. Consequently, throughout this litigation the Executor has carefully preserved alternative defenses to Ms. Koegel's notice of spousal election; namely, laches and equitable estoppel and ratification. As a result, in the unlikely event the Court of Appeals ever decided that Ms. Koegel's waiver of the right of spousal election was invalid because of non-curable defective certificates of acknowledgment, as she requests, this estate proceeding would not be over. And this is not "speculation," as Ms. Koegel claims (Ms. Koegel's MOL at 16). The Court would have to remit to Surrogate's Court for further proceedings; specifically, for the Surrogate to decide whether to invalidate Ms. Koegel's notice of election on the basis of any of the Executor's preserved alternative defenses.[3] In short, the reversal sought by Ms. Koegel would not certainly determine the

[3] The Surrogate and the Appellate Division did not need to reach and did not consider or decide the Executor's alternative defenses in light of the existence of the prior nonfinal order, as was to be expected. The Executor nonetheless fully briefed the alternative defenses in the lower courts for two principal reasons: (1) to insure preservation; and (2) to facilitate a more comprehensive decision, if desired by either court below, and thereby potentially hasten the end of this litigation. Ms. Koegel has never advanced or briefed any arguments in opposition to the alternative defenses raised by the Executor.

ultimate outcome of this proceeding because of the Executor's undecided and persuasive alternative defenses (*cf. Yesil v Reno*, 92 NY2d 455, 457 [1998] [Court of Appeals exercises its discretion to decline certified questions from the United States Court of Appeals for the Second Circuit because of "uncertainty (about) whether (the questions) can be determinative of the underlying matters"]).

42. Finally, the Court must always be mindful of the cost of an appeal to the parties in time and money, and the additional cost to the estate should weigh especially heavily against a leave grant here. Through no fault of the Executor, this litigation to resolve a single, straightforward disputed issue is fast approaching its sixth anniversary in the courts. The most recent statistics from the Court (which reflect a time period before the impact of COVID-19 was felt) suggest that an appeal in the normal course in this matter would not be resolved any earlier than the spring of 2022 (*see* 2019 Court of Appeals Annual Report at 4-5, available at https://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2019.pdf [last accessed Oct. 15, 2020]). Under these circumstances, the burden on the estate of an appeal would be a negative certiorari factor even if Ms. Koegel presented a leaveworthy issue or advanced a meritorious legal argument, which she does not. If the question raised by Ms. Koegel is truly salient despite all present indications to the contrary (*see* paragraph 34 above), it will come up soon enough in an actual

matrimonial action, which would afford the Court a much better opportunity and more leeway to explore *Galetta* and Domestic Relations Law § 236 (B) (3) than does this long-running estate proceeding.

Conclusion

43. With her notice of spousal election in July 2014, Ms. Koegel sought to overturn the then nearly 30-year-old 1984 agreement. She concededly willingly entered into the agreement and fully understood its terms. Ms. Koegel's personal attorney did everything right at the time he notarized her signature to the 1984 agreement except to recite the obvious in the certificate of acknowledgment; namely, that he knew that the signer was the person described in the agreement -- Ms. Koegel, his client. Ms. Koegel offers no reason other than this subsequently-cured omission (and the parallel subsequently-cured omission in the certificate executed by Decedent's notary, his longtime law partner) to justify a ruling that she possessed "the option to abide the event of which (party to the agreement) died before the other, being sure that if she predeceased [Decedent] he could not take any of her estate against her children, but leaving it open for her, if old mortality turned the other way, to take against his will . . . as though no agreement had been made" (*Davis*, 20 NY2d at 75).

44. Ms. Koegel's notice of spousal election prompted the Executor to commence this estate proceeding to enforce the waiver or, alternatively, to vacate the notice on other grounds. As this Affirmation demonstrates, ample cause exists for the Court to deny Ms. Koegel's motion for leave to appeal the Appellate Division's June 2020 Order and to allow the Executor -- at long last -- to settle the estate and carry out Decedent's estate plan, which was explicitly predicated on the existence and validity of Ms. Koegel's waiver.

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Dated: November 9, 2020
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