TO BE SUBMITTED BY:
SUSAN PHILLIPS READ

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

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

Deceased,

PURSUANT TO SCPA 1421.

Appellate Division Docket No. 2019-03605

BRIEF FOR PETITIONER-RESPONDENT JOHN B. KOEGEL

SUSAN PHILLIPS READ
GREENBERG TRAURIG, LLP
54 State Street, 6th Floor
Albany, New York 12207
(518) 689-1483
reads@gtlaw.com
Attorneys for Petitioner-Respondent
John B. Koegel

Surrogate's Court, Westchester County, Index No. 2014-452/A

TABLE OF CONTENTS

Page(s)

PRELIMINARY STATEMENT..1

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED....................3

COUNTERSTATEMENT OF THE NATURE AND FACTS OF THE CASE......4

1. The Agreement...4

2. The Parties' Financial Status Before and During Marriage.............7

3. Decedent's Last Will and Testament and Ms. Koegel's Attack on the Validity and Enforceability of Her Waiver.......................9

ARGUMENT..11

POINT ONE - MS. KOEGEL'S RELIANCE ON THE COURT OF APPEALS' DECISIONS IN *MATISOFF* AND *GALETTA* IS MISPLACED AND, IMPORTANTLY, HAS ALREADY BEEN REJECTED BY THIS COURT.......11

POINT TWO - PRINCIPLES OF ESTOPPEL AND RATIFICATION AND LACHES BAR MS. KOEGEL FROM AVOIDING THE EFFECT OF HER WAIVER OF THE RIGHT OF SPOUSAL ELECTION..............................16

1. Estoppel and Ratification..16

2. Laches..21

CONCLUSION...23

TABLE OF AUTHORITIES

Page(s)

Cases

Matter of Batlas,
144 AD3d 791 (2d Dept 2016) 6

Beutel v Beutel,
55 NY2d 957 (1982) 20

Cosh v Cosh,
45 AD3d 798 (2d Dept 2007) 20

Matter of Davis
20 NY2d 70 (1967) 18

Defilippi v Defilippi,
48 Misc 3d 937 (Sup Ct Westchester County 2015) 20

Galetta v Galetta
21 NY3d 186 (2013) 2, 4, 6, 11, 12

Gardella v Remizov,
144 AD3d 977 (2d Dept 2016) 20

Hoffer-Adou v Adou,
121 AD3d 618 (1st Dept 2014) 20

Matter of Koegel
160 AD3d 11 (2nd Dept 2018) 2

Mahon v Moorman,
234 AD2d 1 (1st Dept 1996) 20

Markovitz v Markovitz,
29 AD3d 460 (1st Dept 2006) 20

Matisoff v Dobi
90 NY2d 127 (1997) 2, 6, 11

Saratoga County Chamber of Commerce v Pataki,
100 NY2d 801 (2003) 21

Stacom v Wunsch,
162 AD2d 170 (1st Dept 1990), *lv denied* 77 NY2d 873 (1991) 20

Telaro v Telaro
25 NY2d 433 (1969) 14

Triple Cities Constr. Co. v Maryland Cas. Co.,
4 NY2d 443 (1958) 21

Werking v Amity Estates, Inc.,
2 NY2d 43 (1956) 21

Statutes

CPLR 5501 13

CPLR 5501 (a) (1) 2, 13

CPLR 5601 (d) 11

CPLR 5602 (a) (1) (ii) 11

Decedent Estate Law § 18 6

Domestic Relations Law § 236 (B) (3) 6

EPTL 5-1.1-A (e) (1) 5

EPTL 5-1.1-A (e) (2) 5

EPTL 5-1.1 (f) (1) 5

EPTL 5-1.1 (f) (2) 6

Real Property Law § 292 6

Real Property Law § 303 6

Real Property Law § 304 6

Real Property Law §306 6

Real Property Law § 309-a 6

Other Authorities

Court of Appeals, "Civil Jurisdiction and Practice Outline"
www.nycourts.gov/ctapp/Sforms/civiloutline.pdf 10, 14

Paul S. Forster, *Resuscitation of Defective Acknowledgments: The Second Department Comes to the Rescue and Permits the Use of Extrinsic Proof to Save a 30-Year-Old Pre-Nuptial Agreement Waiver of the Right of Election,* NYSBA Trusts & Estates Law Section Newsletter, Spring 2018 4

Arthur Karger, *The Powers of the New York Court of Appeals* West rev 3d ed (2005) 10, 11

Alan D. Scheinkman, *The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality*, 54 St John's L Rev 443, (1980) 10

PRELIMINARY STATEMENT

This appeal involves the validity and/or enforceability of Respondent-Appellant Irene Lawrence Koegel (Ms. Koegel)'s waiver of the right of spousal election. She alleges that her 1984 Prenuptial Agreement (the Agreement) with decedent William F. Koegel (Decedent), which consists solely of mutual waivers of the right of spousal election (R 195-196) [1], was defective, invalid and unenforceable because the accompanying certificates of acknowledgment did not recite that the individuals taking those acknowledgments knew the signatories or ascertained through some form of proof that the signatories were the persons described therein (R 61-62).

But Ms. Koegel's signature was acknowledged by her personal attorney, Curtis H. Jacobsen (Jacobsen). Decedent's signature was acknowledged by his longtime law partner, William E. Donovan (Donovan). Respondent-Petitioner John B. Koegel, the executor of Decedent's estate (the Executor), has submitted affidavits in this estate proceeding from Jacobsen and Donovan in which each explained that (and why) he already knew Ms. Koegel and Decedent, respectively, before executing the certificates of acknowledgment (R 194; R 192-193).

In the most recent proceedings below, Ms. Koegel did not dispute or raise any issue about the adequacy of these affidavits to effect a cure of the deficiency in the

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

acknowledgments;[2] instead, she again argued, as she does on this appeal, that the complained-of defects were simply not curable as a matter of law, based on the Court of Appeals' decisions in two matrimonial actions, *Matisoff v Dobi* (90 NY2d 127 [1997]) and *Galetta v Galetta* (21 NY3d 186 [2013]), and notwithstanding this Court's 2018 Decision and Order in *Matter of Koegel* (160 AD3d 11 [2nd Dept 2018]) (generally, the Court's prior nonfinal order) (R 358-372). The Court's prior nonfinal order affirmed Surrogate's Court's decision and order in 2015, which denied Ms. Koegel's motion to dismiss the Executor's petition to invalidate her notice of spousal election (R 197-202). Ms. Koegel's motion to dismiss was premised on her affirmative defense asserting the defect in the acknowledgments (R 181; R 188).

The Court's 2018 Decision was well-considered, exhaustive and correct. In any event, Ms. Koegel does not get a "do-over" in this Court on the merits of her motion to dismiss the Executor's petition (*see* CPLR 5501 [a] [1]). Surrogate's Court's final Decision and Order dated February 5, 2019 (Surrogate's Court's final order; R 7-15) simply and solely effectuated this Court's prior nonfinal order,

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[2] On this appeal, though, Ms. Koegel confusingly and contrarily states that "<u>For purposes of this appeal, [she] assumes</u> that the affidavits of the notaries . . . would otherwise constitute a cure of the defective acknowledgment[s], if the law allowed for the introduction of subsequent extrinsic evidence" (*see* Ms. Koegel's Opening Brief, dated September 10, 2019 [Ms. Koegel's Opening Brief] at p 15, n 2 [emphasis added]; *but see id.* at 8). There is no reason to "assume" anything; the Surrogate has clearly ruled that the Donovan and Jacobsen affidavits cured the defect in the acknowledgments (R 13-14; *see also* n 3, *infra*). And Ms. Koegel does not dispute that determination in her brief.

thereby creating a final determination. Consequently, there is nothing for the Court to review on this appeal, unless it chooses to reach the Executor's preserved, alternative grounds for summary judgment.

Specifically, the Executor argued alternatively and additionally in Surrogate's Court that principles of estoppel and ratification or laches called for summary judgment to invalidate Ms. Koegel's notice of election (R 399-404). Ms. Koegel chose not to brief the Executor's alternative grounds for summary judgment, which the Surrogate left undecided.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is a defective certificate of acknowledgment for a prenuptial agreement consisting of mutual waivers of the right of spousal election curable after the death of the first-deceased spouse by extrinsic evidence from the notary who executed the certificate?

Answer of Surrogate's Court: On the basis of the Court's prior nonfinal order, Surrogate's Court correctly answered "yes."

2. Did the Donovan and Jacobsen affidavits cure the defects in the acknowledgments at issue in this case?

Answer of Surrogate's Court: On the basis of the Court's prior nonfinal order and, independently, Surrogate's Court correctly answered "yes."[3]

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[3] Although the Court in its 2018 decision certainly indicated that the Donovan and Jacobsen

3. Even if the defective certificates of acknowledgment in this case were not curable or were not cured (neither of which is the case), do principles of estoppel and ratification or laches bar Ms. Koegel from challenging the Agreement's validity?

Answer of Surrogate's Court: Surrogate's Court did not answer this question.

COUNTERSTATEMENT OF THE NATURE AND FACTS OF THE CASE

1. The Agreement

Decedent and Ms. Koegel were mature adults (Decedent was 60 years old; Ms. Koegel was 54) when they married on August 4, 1984 (R 24, ¶¶ 8, 9; R 37 [Para. SECOND]). Both had been recently widowed, Decedent for the second time (R 182). 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, apparently all

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affidavits cured the complained-of defects in the certificates of acknowledgment (160 AD3d at 27), that issue had not been specifically briefed and the Executor was unsure whether the Court had meant to leave this question open for Surrogate's Court, especially in view of the nonfinal nature of the Court's order. The Executor was not alone in this uncertainty (*see* Paul S. Forster, *Resuscitation of Defective Acknowledgments: The Second Department Comes to the Rescue and Permits the Use of Extrinsic Proof to Save a 30-Year-Old Pre-Nuptial Agreement Waiver of the Right of Election*, NYSBA Trusts and Estates Law Section Newsletter, Spring 2018 at 13 ["(A)lthough not stated specifically, the language of (the Court's 2018 decision) would appear to have found that the executor had cured the defects in the acknowledgments and granted the executor summary judgment invalidating the exercise of the right of election. Hopefully, clarification on this point will come from the Surrogate's Court in due course"]). Ultimately, Surrogate's Court ruled that the issue of the sufficiency of the affidavits was not before him because it had already been decided by this Court. The Surrogate added that "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," which he contrasted with the fact pattern in *Galetta* (R 7-8).

but one of whom no longer lived at home (R 182-183). In the week before their wedding, they separately signed the Agreement (R 195-196; R 77).

The first paragraph of the two-page Agreement states that they both "desire that their said marriage shall not in any way change their pre-existing legal right, or that of their respective children and heirs, in the property belonging to each of them at the time of said marriage or thereafter acquired" (R 195). The second paragraph provides that in consideration of the mutual covenants set out in the Agreement, each of the parties agreed "to make no claim as surviving spouse to any part of the estate of the other" (*id.*). This provision waived the spousal right of election, as allowed at the time by EPTL 5-1.1 (f) (1) (now EPTL 5-1.1-A [e] [1]). These mutual waivers safeguarded both parties' estate property for their children and heirs, unfettered by claims of the surviving spouse. The third paragraph states that neither party was induced to enter into the Agreement by any promise of any property settlement, and that they entered into the Agreement "with knowledge on the part of each of them as to the approximate extent and probable value of the estate of the other" (R 195).

In compliance with EPTL 5-1.1 (f) (2) (now EPTL 5-1.1-A [e] [2]), Decedent's and Ms. Koegel's signatures on the Agreement were acknowledged (R 196). Under this provision, a spouse's waiver or release of the right of election, to be effective, must be made during the lifetime of the other and must be "in writing and

subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property." Domestic Relations Law § 236 (B) (3), part of New York's Equitable Distribution Statute, similarly provides that, to be valid and enforceable in a matrimonial action, an agreement made before or during a marriage 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."[4]

For a legally adequate acknowledgment, the signatory must orally acknowledge to the notary public or other officer that he or she in fact signed the document, and the notary public must know or have satisfactory evidence that the signatory is the person described in and who signed the document (*see* Real Property Law §§ 292, 303). Real Property Law §306 compels the notary public or other officer to execute a certificate of acknowledgment to memorialize that these requirements have been met, which is indorsed on or attached to the document itself (*see* Real Property Law § 309-a [model language for a certificate of

[4] The Court of Appeals in *Matisoff* noted that it had affirmed determinations allowing parties to provide the requisite acknowledgment at a later date under statutory requirements similar to Domestic Relations Law § 236 (B) (3), citing EPTL 5-1.1 (f) (2) as an example of a similar statutory provision (90 NY2d at 137, 137 n 2). The cases under the EPTL or its predecessor, section 18 of the Decedent Estate Law, involved the absence of an acknowledgment of the signature of a subscribing witness, not the decedent, in situations where the decedent's signature was proved, rather than acknowledged (*see Galetta*, 21 NY3d at 196, n 3; *see also* Real Property Law § 304 ["When the execution of a conveyance (of real property) is proved by a subscribing witness, such witness must state . . . that he knew the person described in and who executed the conveyance. The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance").

acknowledgment, codified by the Legislature in 1997 (L 1997, ch 179)]; *see also Matter of Batlas*, 144 AD3d 791 [2d Dept 2016]).

The notary who acknowledged Decedent's signature was Donovan, his longtime law partner at Rogers & Wells, a large New York City law firm at the time (R 192). The notary who acknowledged Ms. Koegel's signature was Jacobsen, an attorney who had worked on the estate of Ms. Koegel's late husband. Ms. Koegel was co-executor of the estate, and she subsequently retained Jacobsen as independent counsel to represent her in connection with the Agreement (R 194). Donovan's and Jacobsen's acknowledgments, however, neglected to recite that Donovan knew Decedent and that Jacobsen knew Ms. Koegel (R 196; R 80).

Ms. Koegel concedes that she read the Agreement before she signed it, and did not have any questions about or make any comments to anyone regarding the Agreement (R 77; R 92). She did not ask Decedent or anyone else for more time to consider the Agreement before signing it (R 90-92; R 141). And while Ms. Koegel has asserted that her chosen attorney did not fully advise her of her right of spousal election and that she had only five days before the wedding to sign the Agreement, she admits that she fully understood that by virtue of the Agreement, she and Decedent would be maintaining separate funds and assets, and that "what was mine was mine and what was his was his" (R 137-138; *see also* R 90).

2. <u>The Parties' Financial Status Before and During Marriage</u>

Before she married Decedent, Ms. Koegel knew that he was the head of litigation at a large New York City law firm, owned a house in Scarsdale, New York, was a member of a country club and owned an interest in a parcel of property in Somers, New York (R 101-103; R 105; R 182-183). For her part, in 1983 Ms. Koegel had inherited from her late husband the marital home in Chappaqua, New York, which sold a year later for $435,000; she inherited from him, outright or in trust, a total gross estate of $651,571.49 (R 110; R 155; R 159-160; R 183). In sum, Ms. Koegel entered the marriage with significant property of her own to protect for her children.

Consistent with the Agreement, throughout their marriage Decedent and Ms. Koegel maintained separate funds, although Decedent paid all the expenses on the Scarsdale house and a Somers condominium, where he and Ms. Koegel later resided (R 90; R 103; R 106-107). By keeping her funds separate from Decedent's and by not having to pay living expenses for 29 years, Ms. Koegel was freed up to grow the substantial resources that she possessed when she married Decedent. And she did, maintaining her own separate accounts that totaled approximately $885,000 at or around the time of Decedent's death (R 302-327). Moreover, Ms. Koegel was also able to use her separate funds during Decedent's lifetime in any manner she wanted, including to assist two of her grown children financially (R 109; R 114-118; R 121-125).

3. Decedent's Last Will and Testament and Ms. Koegel's Attack on the Validity and Enforceability of Her Waiver

Decedent executed his will in 2008 (R 36-46). Notwithstanding the Agreement and explicitly recognizing its existence as well as explicitly recognizing dispositions that he had made to Ms. Koegel during his lifetime (R 37-38), Decedent left her his 50% ownership of a condominium apartment in Florida of which she was co-tenant (R 38). This 50% interest was worth approximately $275,000 at the time of his death (R 63). Decedent also bequeathed Ms. Koegel an exclusive lifetime possessory interest in the Somers condominium (including almost all of Decedent's personal property located there); a used car worth approximately $10,000; and the benefits of an IRA, an annuity and a pooled income trust (R 38-39; R 63). Decedent's will recites that his testamentary dispositions in favor of Ms. Koegel were made in reliance on the continuing validity of the mutual provisions of the Agreement in which they each waived their spousal elective rights, keeping their properties separate from one another and the offspring of their previous marriages (R 37-38).

Decedent died on February 3, 2014 (R 23). On July 29, 2014, Ms. Koegel filed a notice of spousal election notwithstanding the waiver that she had signed almost 30 years earlier to the day (R 51-52); and on December 10, 2014, the Executor commenced this proceeding to set aside Ms. Koegel's notice (R 23-34). In February 2015, Ms. Koegel filed her answer and objections to the Executor's

petition (R 59-65), asserting as an affirmative defense that the Agreement was defective, invalid and unenforceable because the certificates of acknowledgment omitted language reciting that the notaries knew the signatories, or had ascertained though some sort of proof that the signatories were the persons described in the Agreement (R 61-62).

In 2015, Surrogate's Court denied Ms. Koegel's motion to dismiss the petition on the basis of this affirmative defense (R 348-357), and this Court affirmed the denial in its prior nonfinal order (R 358-372). Less than a month after the Court of Appeals dismissed Ms. Koegel's motion for permission to appeal this Court's prior nonfinal order (R 387),[5] the Executor moved in Surrogate's Court for summary judgment in order to obtain an order that finally determined this estate proceeding (R 17-22).

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[5] Ms. Koegel's unsuccessful foray to the Court of Appeals inevitably delayed the parties' return to Surrogate's Court to obtain a final determination. Ms. Koegel indicates that she "believed" that the Court's nonfinal order was, indeed, final, and that the Court of Appeals dismissed her motion for permission to appeal on the ground of non-finality "[d]espite" her argument to the contrary (*see* Ms. Koegel's Opening Brief at 8-9). The Executor does not question the sincerity of Ms. Koegel's mistaken belief, and the intricacies of the Court of Appeals' finality jurisprudence are often daunting; however, the question in this instance was not close. The Court of Appeals' "Civil Jurisdiction and Practice Outline" [Court of Appeals' Outline], available on its website, lists "Order Denying (in whole or in part) Motion to Dismiss" in the "Too Early" column on the "Finality Continuum" (*see* www.nycourts.gov/ctapp/Sforms/civiloutline.pdf at 41), and the leading treatise on the Court of Appeals' jurisdiction unequivocally states that "[A]n order which denies a motion to dismiss the complaint or petition is clearly nonfinal, since obviously such an order leaves the ultimate disposition of the action or proceeding to future judicial action therein" (Arthur Karger, *The Powers of the New York Court of Appeals,* §4.4 at 56 [West rev 3d ed 2005] [emphasis added]; *see also* Alan D. Scheinkman, *The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality*, 54 St John's L Rev 443, 461 [1980] ["(A)n order of the appellate division that either affirms the denial of a motion to dismiss a complaint or reverses the grant of such a motion is non-final"]).

ARGUMENT

POINT ONE

MS. KOEGEL'S RELIANCE ON THE COURT OF APPEALS' DECISIONS IN *MATISOFF* AND *GALETTA* IS MISPLACED AND, IMPORTANTLY, HAS ALREADY BEEN REJECTED BY THIS COURT

Ms. Koegel rehashes the arguments she made to this Court when she appealed Surrogate's Court's denial in 2015 of her motion to dismiss, seeking a different outcome (or at least in the belief that she was required to take this second appeal to the Appellate Division in order to fulfill the jurisdictional requirements for the Court of Appeals to review this Court's 2018 decision, if it so chooses) (*see* Ms. Koegel's Opening Brief at 11; *but see* CPLR 5601 [d], 5602 [a] [1] [ii]; Karger, *supra,* §9.1 at 288, § 6.7 at 209-210). She urges the Court (again) that the bright-line rule of *Matisoff*, a matrimonial action involving the complete absence of an acknowledgment in a postnuptial agreement, should control the outcome in this estate proceeding. And she contends that while *Galetta,* another matrimonial action, "involved a defective acknowledgment, as opposed to the absence of an acknowledgment altogether, the policy considerations [in *Matisoff*] supporting a bright-line rule test precluding the availability of post-execution cure are equally applicable" (*see* Ms. Koegel's Opening Brief at 16).

But in *Galetta*, the Court of Appeals distinguished cases involving the complete lack of an acknowledgement (such as *Matisoff*) from cases in which there

is only "an omission in the requisite language of the certificate of acknowledgement" (21 NY3d at 196 [emphasis added]), as is the situation here. The Court advised that

> [a] compelling argument can be made that the door should be left open to curing a deficiency . . . where the signatures on the prenuptial agreement are authentic, there are no claims of fraud or duress, and the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgement was defective or incomplete (*id.* [emphasis added]).

The Court of Appeals further observed in *Galetta* that

> the husband makes a strong case for a rule permitting evidence to be submitted after the fact to cure a defect in a certificate of acknowledgement when that evidence consists of proof that the acknowledgement was properly made in the first instance -- 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. By considering this type of evidence, courts would not be allowing a new acknowledgment to occur for a signature that was not properly acknowledged in the first instance; instead, parties who properly signed and acknowledged the document years before would merely be permitted to conform the certificate to reflect that fact (*id.* at 97 [emphases added]).

Relying on these statements in *Galetta,* this Court correctly determined that the defective certificates of acknowledgements in this case -- a real-life example of the "compelling argument" and "strong case" described by the Court of Appeals -- could be remedied by extrinsic proof.

Factually, this case is a far cry from *Galetta*, where the Court of Appeals held that the notary's curative affidavit was insufficient. There the notary was not the

signatory's personal attorney or longtime law partner. Rather, he was a bank employee who did not personally know the party whose signature he acknowledged; and did not recall having acknowledged the signature. Nor did he describe any specific protocol that he routinely and invariably followed to ascertain a signatory's identity. He could swear only that he recognized his own signature, was employed at the signatory's bank at the relevant time and was "confident" that he had followed the procedures (that he did not recall in the first place) to confirm that the signatory was the same person named in the document (21 NY3d at 197).

Importantly, to the extent Ms. Koegel goes beyond asking the Court merely to serve as a conduit for a subsequent appeal to the Court of Appeals,[6] she is effectively asking the Court to reconsider Surrogate's Court's denial in 2015 of her motion to dismiss. CPLR 5501 defines the scope of an appeal from a final judgment; that is, what an appellate court is empowered to review on such an appeal. And CPLR 5501 (a) (1) specifies that "[a]n appeal from a final judgment [here, Surrogate's Court's final order] brings up for review: 1. any non-final judgment or order which necessarily affects the final judgment [i.e., Surrogate's Court's denial in 2015 of Ms. Koegel's motion to dismiss], . . . <u>provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken</u>" (CPLR 5501 [a] [1] [emphasis added]).

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[6] *Compare* pp 1, 8, 10-11 of Ms. Koegel's Opening Brief *with* pp 12-20).

Here, Surrogate's Court's denial in 2015 of Ms. Koegel's motion to dismiss "necessarily" affect[ed]" Surrogate's Court's final order in 2019 (*see* Court of Appeals' Outline at p 39 [in general, "a nonfinal order necessarily affects a final determination if the result of reversing that order would necessarily be to require a reversal or modification of the final determination" [internal quotation marks omitted]). But there is nothing for the Court to review on this appeal because Surrogate's Court's denial in 2015 of Ms. Koegel's motion to dismiss was "previously . . . reviewed" in this Court's decision in 2018, which was the sole basis for Surrogate's Court's final order in 2019.

The Court of Appeals' decision in *Telaro v Telaro* (25 NY2d 433 [1969]) is also instructive. After trial in an action that the wife brought for separation from the husband, the trial court granted the separation and dismissed the husband's counterclaims. In so doing, the judge wrote a memorandum in which he unambiguously concluded that disputed assets, including a brokerage account, were owned by both spouses. The Appellate Division affirmed.

Telaro involved an action subsequently brought by the wife to recover one-half of a sum of money withdrawn by the husband from the joint brokerage account. The only issue in the action was the nature of the wife's ownership interest in the account, and so she moved for summary judgment upon the ground of res

judicata. The motion was denied by Supreme Court and the Appellate Division affirmed.

On the wife's subsequent appeal from an unfavorable trial judgment, the husband argued that by the wife's failure to raise res judicata in the Appellate Division for a second time, she had abandoned or waived her right to raise res judicata in the Court of Appeals. The Court rejected the husband's argument, stating as follows:

> [I]n the classic sense of law of the case, the issue [of res judicata] was not available to plaintiff wife either in the trial court or before the Appellate Division on the subsequent appeal from the trial judgment in this action. The affirmed prior denial of summary judgment on which this pure question of law was raised was determinative for all courts but this one. It would have been both bootless and inappropriate for the wife to reargue the point in the Appellate Division. If the strong doctrine of the law of the case was not to be violated, the Appellate Division could not properly pass upon the question anew" (*id.* at 437-438 [emphases added]).

By parity of reasoning, it is "bootless and inappropriate" for Ms. Koegel to reargue the merits of her motion to dismiss in this Court, which "could not properly pass upon the question anew." The "affirmed prior denial" of her dispositive motion was "determinative" for all courts but the Court of Appeals. At this juncture, only the Court of Appeals has jurisdiction to review the "pure question of law" that Ms. Koegel seeks to present in this appeal; i.e., whether a defective certificate of acknowledgment of a waiver of the right of spousal election may be cured after the

death of the first-deceased spouse by extrinsic evidence from the notary who executed the certificate.

POINT TWO

PRINCIPLES OF ESTOPPEL AND RATIFICATION AND LACHES BAR MS. KOEGEL FROM AVOIDING THE EFFECT OF HER WAIVER OF THE RIGHT OF SPOUSAL ELECTION

Ms. Koegel accepted the benefits of the Agreement for nearly three decades of marriage without ever once questioning its validity or fairness. It would be inequitable in the extreme for her to escape the consequence of her spousal waiver at this late date, after Decedent's death and contrary to his intent and reasonable expectations when he signed the Agreement and later planned his estate in reliance on its effectiveness. Fortunately, principles of ratification, estoppel and laches under New York law prevent Ms. Koegel from enjoying the advantages but shirking the trade-off inherent in the bargain she willingly made. And this would be the case even if the defects in the acknowledgments were not curable or had not been cured.

1. <u>Estoppel and Ratification</u>

Decedent and Ms. Koegel entered into the Agreement with the express, mutual intention that their marriage would not in any way change their pre-existing right, or the right of their own individual children or heirs, to the property belonging to each of them at the time of their marriage or thereafter. This meant that whatever property Decedent brought to the marriage or acquired thereafter was his, and

whatever property Ms. Koegel brought to the marriage or acquired thereafter was hers. Indeed, Ms. Koegel testified at her deposition that she understood the Agreement to mean "what was mine is mine and what was his is his" (R 137-138). To carry out this intention, Decedent and Ms. Koegel promised each other in the Agreement that neither would make a claim as a surviving spouse to any part of the estate of the other.

When Decedent and Ms. Koegel stated their shared intention and made their promise to each other in the Agreement, Ms. Koegel was neither naïve nor penniless: she was the co-executor of her late husband's estate, and he had left her a valuable house in Chappaqua, New York and other substantial assets (R 110; R 155; R 159-160; R 183). Coming into the marriage, Ms. Koegel thus had a sizable estate to protect for herself and her family, and she had a continuing interest in safeguarding these assets and those that she amassed during the marriage.

Ms. Koegel could not have known in 1984 whether she or Decedent, who was six years older, would die first. The straightforward terms of the Agreement created a reasonable and fair way to protect her financial interests as well as those of her children and heirs. If Decedent died first, Ms. Koegel would not be allowed to share in his estate, but she would, of course, retain all of the estate that she had maintained and accumulated during the marriage. And if Ms. Koegel died first, her children and

heirs would receive the entire estate that she possessed; Decedent would have no claim to any of it.

In accordance with the parties' understanding memorialized in the Agreement, Ms. Koegel in her will left nothing to Decedent. She merely gave him a six-month option to purchase all of her right and interest in the Florida condominium, which they jointly owned, and all its contents for $400,000, less an amount equal to one-half of any outstanding mortgage indebtedness (R 330).[7] Thus, the Agreement provided Ms. Koegel with a clearly understood, continuing benefit -- a protection she never questioned until after Decedent's death (R 96-97; R 130).

The fact pattern here is similar to *Matter of Davis* (20 NY2d 70 [1967]). There, the husband and wife, a 49-year-old widow, entered into a prenuptial agreement whereby they each waived any right in the estate of the other. At the time they were married, the wife had an estate valued between $300,000 and $400,000 and, as here, manifested a desire to keep her estate intact for the sake of her children by a previous marriage. After the husband died, his will revealed that he had made no provision whatsoever for his wife solely because they had mutually agreed in their prenuptial agreement that neither would have any claim in or to the estate of the other. Nevertheless, the widow sought to annul the prenuptial

[7] As noted earlier, Decedent was more generous: he bequeathed Ms. Koegel his 50% interest in the Florida condominium, valued at $275,000 (not $400,000) at the time of his death, and its contents outright, "in recognition of and notwithstanding the Prenuptial Agreement" (R 37). She complains that Decedent did not also provide her with funds to support carrying costs (*see* Ms. Koegel's Opening Brief at pp 4-5).

agreement, arguing in part that she had relinquished an expectancy of greater value than the expectancy relinquished by her late husband.

Disallowing this contention, the Court of Appeals observed that

> [r]ealizing the uncertainty, [the wife] was unwilling to gamble with money which she felt should go to her children. In seeking to protect her estate against any lawful claim by her husband, she was willing to give him like protection.
>
> If she had predeceased her husband he could have asserted no claim against her estate. It requires more than the circumstances here to rule that this agreement gave her the option to abide the event of which died before the other, being sure that if she predeceased him he could not take any of her estate against her children, but leaving it open to her, if old mortality turned the other way, to take against his will . . . as though no agreement had been made (20 NY2d at 74-75 [emphasis added] [internal quotation marks omitted]).

The Court of Appeals upheld the prenuptial agreement with the following emphatic statement: "Stress should also be laid upon the fact that the prospective husband in the same instrument waived any right to elect to take against the will of his prospective wife. Mutual rights were thus surrendered by both parties" (*id.* at 75-76 [internal quotation marks omitted]).

Likewise, Decedent and Ms. Koegel each surrendered the right to claim against the estate of the other, and thereby enjoyed the considerable benefit of having their estates free from claims of the surviving spouse. A party to an agreement who accepts an agreement's benefits is estopped from challenging the agreement's validity on the ground that it was not properly executed or was unfair

(*see Hoffer-Adou v Adou*, 121 AD3d 618 [1st Dept 2014] [defendant who had accepted benefits under a separation agreement for almost three years was estopped from challenging it as unconscionable]; *Markovitz v Markovitz,* 29 AD3d 460 [1st Dept 2006] [defendant was estopped from challenging settlement agreement as unfair by having accepted the benefits thereof]; *Mahon v Moorman,* 234 AD2d 1 [1st Dept 1996] [defendant who accepted the benefits due him under a separation agreement was estopped from challenging its validity on the ground it was not properly executed]).

Similarly, a party to an agreement who accepts its benefits ratifies the agreement and cannot set it aside for defective execution or coercion (*see Beutel v Beutel*, 55 NY2d 957 (1982) [wife ratified separation agreement by receiving its benefits for two years despite alleged incapacity to contract]; *Gardella v Remizov*, 144 AD3d 977 [2d Dept 2016] [defendant who accepted benefits under postnuptial agreement for eight years thereby ratified the agreement and could not annul it on account of a defective acknowledgment]; *Cosh v Cosh*, 45 AD3d 798 [2d Dept 2007] [wife ratified separation agreement by accepting its benefits for three years and could not attack it on grounds of unconscionability, fraud, duress, or overreaching]; *Stacom v Wunsch*, 162 AD2d 170 [1st Dept 1990], *lv denied* 77 NY2d 873 [1991] [wife who accepted benefits of separation agreement for five years ratified it and could not annul the agreement for duress and coercion]; *Defilippi v Defilippi*, 48

Misc 3d 937 [Sup Ct Westchester County 2015] [plaintiff who accepted benefits under divorce stipulation of settlement for nearly one and one-half years ratified it and could not claim it void for defective acknowledgment]).

In sum, Ms. Koegel is estopped from now challenging the Agreement or has otherwise ratified it. To allow Ms. Koegel to set aside the Agreement would be to enable her to reap an undeserved windfall. Further, Decedent relied on the existence and validity of the Agreement to make his estate plan, as his will plainly shows (*see, e.g.*, R 37-38). Under New York law, the doctrine of equitable estoppel generally forecloses the exercise of a party's rights -- here, the right of spousal election -- based upon that party's words or conduct upon which another party rightfully has relied, and so relying changes his position to his injury (*see Werking v Amity Estates, Inc.*, 2 NY2d 43, 53 [1956]; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]).

2. <u>Laches</u>

The Court of Appeals has "defined laches as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003]). To establish laches, a party must show

> (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or motive on the part of the offending party that the complainant would

> assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant. All four elements are necessary for the proper invocation of the doctrine (*Meding v Receptopharm, Inc.*, 84 AD3d 896, 897 [2d Dept 2011] [internal quotation marks and citations omitted]).

Here, Ms. Koegel's failure to challenge the Agreement until 30 years after she agreed to be bound by it meets each of these four elements. First, in her answer and objections to the petition, Ms. Koegel alleged that the Agreement was unfair for a number of reasons, including that Decedent did not provide "financial disclosure concerning Decedent's net worth to Respondent" and that "the circumstances surrounding the execution of the agreement . . . constitut[ed] duress, overreaching, and inequitable conduct" (R 62). Notably, however, Surrogate's Court has determined that Ms. Koegel could "prove no set of facts demonstrating a fact-based, particularized inequality with regard to the agreement" (R 356).

Second, Respondent waited for 30 years, until after Decedent's death, before she attacked the Agreement's validity. Third, during the 29-plus years between the execution of the Agreement and Decedent's death, Ms. Koegel never expressed any concern to Decedent (or anyone else) regarding the Agreement (R 96-97; R 130). Finally, Decedent's estate has already been prejudiced in that Ms. Koegel's notice of election has frustrated the Executor's ability to comply with Decedent's express wishes in the Agreement that his "marriage [to Ms. Koegel] shall not in any way change [his] pre-existing legal right, or that of [his] children and heirs, in the

property belonging to [him] at the time of [his marriage to Ms. Koegel] or thereafter acquired" (R 55). Ms. Koegel's notice of election has concomitantly thwarted the Executor's ability to execute Decedent's estate plan, which was explicitly based upon the Agreement's existence and validity (*see e.g.,* R 37-38). And, of course, if Ms. Koegel were ever afforded the relief that she seeks, Decedent's estate plan would be defeated. Since Ms. Koegel's conduct meets each of the four elements to establish laches, her spousal election is barred on that basis, too.

CONCLUSION

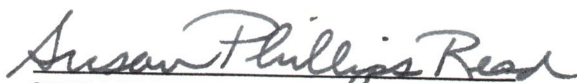
What has happened here is plain enough: Decedent's death prompted Ms. Koegel to renege on her 30-year old waiver of the right of spousal election in order to serve her own and her family's financial interests at the expense of Decedent's express wishes and his family's inheritance. Ms. Koegel's notice of election is contrary to her admitted understanding that the Agreement was meant to insure that "what was mine was mine and what was his was his" (R 137-138); it has stymied for going on six years the realization of the estate plan set out in Decedent's will, which was predicated on the existence and validity of the Agreement. The Court should affirm Surrogate's Court's final order for the reasons stated in this Court's prior nonfinal

order and/or on the basis of any or all of the Executor's preserved, alternative grounds for summary judgment.

Dated: Albany, New York
October 10, 2019

Respectfully submitted,

GREENBERG TRAURIG, LLP



SUSAN PHILLIPS READ
54 State Street, 6th Floor
Albany, New York 12207
Tel.: (518) 689-1483
reads@gtlaw.com
Attorneys for Petitioner-Respondent

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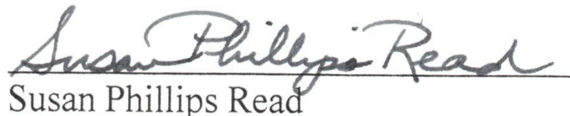

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