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COURT OF APPEALS
STATE OF NEW YORK

IRENE LAWRENCE KOEGEL,

Appellant,

-against-

NO. 79

JOHN B. KOEGEL,

Respondent.

20 Eagle Street
Albany, New York
November 18, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Amanda M. Oliver
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 79, Matter of
2 Koegel. Let's just wait one moment, Counsel, for your
3 colleagues to clear out.

4 Counsel, good afternoon.

5 MR. HIMMEL: Good afternoon, Your Honor. May it
6 please the court, my name is Andrew Himmel from Himmel &
7 Bernstein, and I represent the appellant. And I would like
8 to reserve three minutes of rebuttal time.

9 CHIEF JUDGE DIFIORE: You may have three minutes,
10 sir.

11 MR. HIMMEL: Thank you, Your Honor.

12 The key question, the core question, before this
13 court is whether this court should allow for judicial cures
14 of materially defective acknowledgements, or whether this
15 consideration is best left for the legislature.

16 The court, in Galetta, held that the defect in
17 this case was substantial and material because the
18 certificate failed to include all necessary statutory
19 language in the - - - in the certificate. And the RPL, the
20 Real Property Law 306, states that a certificate must
21 include this language. It uses the word must, and as this
22 court has held, when a stat - - - statute uses such
23 mandatory terms, such as must or shall, the - - - the
24 effect is preemptory, I mean, unless there is a - - -

25 JUDGE RIVERA: Counsel, if I can interrupt you.



1 I'm on the screen.

2 MR. HIMMEL: Yes.

3 JUDGE RIVERA: Thank you.

4 MR. HIMMEL: Yes.

5 JUDGE RIVERA: Well, this case is very close to
6 the hypothetical scenario presented in Galetta, which given
7 the way that hypothetical is presented, does suggest that
8 the court - - - well, at least at that time, that perhaps
9 it made sense when actually everything that is statutorily
10 required is done in fact but is not properly articulated in
11 the document - - -

12 MR. HIMMEL: Okay, Your - - - Your Honor?

13 JUDGE RIVERA: - - - but the underlying facts
14 cannot change, right? That - - - that is what happened
15 here, everyone agrees that the one thing that's missing is
16 that proper acknowledgement; not that there wasn't an
17 acknowledgment, but rather, the documentation that there
18 was a proper acknowledgment.

19 MR. HIMMEL: Your Honor, you're - - - you're
20 referring to the Galetta dicta, and what I would say to
21 that is there's no hierarchy of the importance of the
22 requirements for a valid acknowledgement. Part of the
23 problem of the Galetta dicta was that it assumed that the
24 first two requirements, the oral acknowledgement and the
25 prohibition about a notary taking acknowledgment unless he



1 - - - he knows the - - - the signer or has evidence as such
2 - - - it's not as if those two requirements are the
3 important ones and the third one is not important. So
4 there are three requirements and Galetta - - -

5 JUDGE RIVERA: Well, no, I'm not suggesting
6 they're not important. I - - - I want to clarify sort of
7 the context of my question.

8 MR. HIMMEL: Sure.

9 JUDGE RIVERA: Because that would mean that we
10 would jettison the requirement and I think it's very clear
11 that that's not what we're talking about here.

12 The question is whether or not one could provide
13 that requirement subsequently if - - - if the rest had been
14 done in fact, right. That - - - that's really the
15 question.

16 MR. HIMMEL: Your Honor, I think that what
17 happened - - -

18 JUDGE RIVERA: I mean, the acknowledgment
19 occurred, correct?

20 MR. HIMMEL: It did not. Well, it depends what
21 you mean. The - - - the oral acknowledgement occurred - -
22 -

23 JUDGE RIVERA: Correct.

24 MR. HIMMEL: - - - step one. The - - -

25 JUDGE RIVERA: Yes.



1 MR. HIMMEL: - - - notary knowing the signer,
2 step two, that did take place. But the fact that the third
3 requirement did not take place renders this defective.
4 Which is - - -

5 JUDGE RIVERA: Yes. But - - - although there's
6 no hierarchy, all three are requisites, I'm not disagreeing
7 with you about that. But the first two go to the heart of
8 the party, right, the signer or the signers knowing that
9 they've made this choice, that they are foregoing perhaps
10 some great benefits, or at least they - - - they understand
11 the consequences of signing the antenuptial agreement.

12 The - - - the last part, they might not even know
13 that there's a problem, right? I mean, that's what
14 Galetta says, look, through no fault of their own, the
15 parties are trying mightily to comply. They're doing what
16 they need to do. Through no fault of their own now the
17 ante - - - the nuptial agreement would be held
18 unenforceable when this is something that can easily be
19 cured because it's not about going back in time to do
20 something that wasn't done. It's merely to properly
21 document that it was done.

22 MR. HIMMEL: Well, Your Honor - - -

23 JUDGE RIVERA: And that's the difference - - -
24 isn't that the difference, that you actually did do these
25 things? It's about con - - - as - - - as Galetta says,



1 conforming - - - conforming the actual events with the
2 documentation.

3 MR. HIMMEL: Well, the conforming of the actual
4 events was the language that Galetta used in Galetta dicta.
5 But what happened here was because the language was not
6 placed into the certificate - - -

7 JUDGE RIVERA: Um-hum.

8 MR. HIMMEL: - - - I think the presumption in
9 your question, Your Honor, is - - - is - - - it really goes
10 to the heart of this - - - is, should cures be available in
11 the first place.

12 JUDGE RIVERA: Um-hum.

13 MR. HIMMEL: And it - - - and it is appellant's
14 position that there's no source of stat - - - of any
15 authority for the judiciary to so act. There's no
16 statutory - - -

17 JUDGE RIVERA: Well, I - - - I think - - - if I
18 can just - - - I'm not going to disagree with that latter
19 point. That's your argumentation of - - - certainly, you
20 may proceed with it. But I - - - I think really the - - -
21 the question before us in this case is whether or not the
22 evidence presented to address the gap was acceptable given
23 the statutory mandates. It's not whether or not sort of
24 writ large, you know, the judiciary can go about the
25 business of saying anything you want to do to cure your

1 errors or mistakes or - - - or the deficiencies is okay.
2 We're only talking about this one, which is everything
3 happened as it should, as a matter of fact, but you don't
4 have the proper documentation of one aspect of this that is
5 outside the control of the signatories.

6 MR. HIMMEL: I - - - I don't believe that
7 everything took place that - - - that - - -

8 JUDGE RIVERA: Okay.

9 MR. HIMMEL: - - - was supposed to take place,
10 Your Honor. That - - - that is our position.

11 JUDGE RIVERA: Okay.

12 MR. HIMMEL: Even though it was out of their
13 control, there's no statutory provision that says so long
14 as it's out of their control, that can dilute the
15 application of the third requirement. The third
16 requirement is a material defect which is exactly what
17 Galetta held in any event. So the Galetta dicta, with
18 respect to the Galetta panel, is at - - - is in conflict
19 with the holding of Galetta. This is a material defect.
20 And - - - and in terms of whether there can be evidence to
21 bridge the gap, that, I think, is just another way of
22 saying should cures be available in the first place.

23 And it's appellant's position that there is no
24 source of judicial authority to provide that cure. There's
25 no statutory grant, there's no constitutional grant. And



1 this does not fall into the doctrine of inherent judicial
2 power because that relates to a - - - a judge - - - a
3 court's ability to exert power, because it's a court, to
4 control its own business. That doesn't apply here where
5 the legislature has so heavily occupied this area.

6 CHIEF JUDGE DIFIORE: Counsel, let's assume for a
7 moment that a cure is permissible. Are the affidavits that
8 were submitted by the notaries here sufficient?

9 MR. HIMMEL: Yes. If a cure - - - if - - - if
10 this court does what it has never done before, which is to
11 allow for a cure under the acknowledgment method, then the
12 Jacobsen (ph.) affidavit would be a cure. But I have to
13 hasten to add that it would not function as a subscribing
14 witness statement. It is completely defective as a
15 subscribing witness statement. It only gains vitality if
16 this court, as I said, creates a new path of - - - of
17 validation, which currently simply does not exist.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.
19 Counsel?

20 MS. READ: Good afternoon, Your Honors. Can you
21 hear me?

22 CHIEF JUDGE DIFIORE: We can hear you, yes.

23 MS. READ: Good. There - - - I'm Susan Read. I
24 represent the executor of the estate, John Koegel.

25 There are three areas that I would like to



1 address. One is why the 1947 amendments, among other
2 things, completely undermines Ms. Koegel's statutory
3 interpretation argument that you just heard, that a waiver
4 with a cert - - - deficient certificate may never be
5 validated or cured because the legislature did not use the
6 word cure. The second area I would like to cover is why
7 the rule, the bright-line rule, that she proposes is
8 uniquely terrible and unfair. And lastly, what the rule
9 would be going forward.

10 In referring to the 1947 amendments, you have to
11 remember that the text of the law originally said that
12 during the lifetime of the other that the waiver had to be
13 subscribed and duly acknowledged. Then the court - - - the
14 surrogate in Erie County decided Matter of Maul, which
15 eventually made its way up here. It was affirmed without
16 opinion. That was a case where there was absolutely no
17 certificate. But he found that he - - - relating to the
18 real property law, the surrogate subpoenaed a subscribing
19 witness - - - there was a subscribing witness - - - and
20 took the testimony from the subscribing witness that he'd
21 been present, that he knew that the - - - Linda Maul, who
22 executed the waiver. And then the judge issued the
23 certificate.

24 The law revision commission thought that that
25 law, that rule, should be codified in order to liberalize



1 the acknowledgement requirement. And they did that by
2 setting up two co-equal - - - and that's co-equal, not
3 mutually exclusive - - - ways to - - - to validate a
4 waiver. And that was the acknowledgement method and the
5 subscribing witness method.

6 It seems to me impossible to conceive that the
7 legislature amended the law specifically to allow evidence
8 from a subscribing witness to validate a waiver where there
9 was no certificate of acknowledgment but would not - - -
10 but not validate a waiver where there was a certificate - -
11 - an acknowledgment and a certificate, and the notary did
12 everything he or she was supposed to do other than include
13 all the proper language in the certificate.

14 The surrogate below made a specific finding that
15 the affidavits were sufficient because they were based on
16 the notary's personal knowledge of the signers and their
17 actual observation of the signing. Now, the certificate -
18 - - the surrogate below, and I - - - I - - - I understand
19 from what my adversary just said that he thinks this should
20 have happened. But the certificate - - - the surrogate
21 below did not consider it necessary to call the two
22 subscribing witnesses for any kind of live testimony to
23 this effect, to have them give their addresses, and then
24 for him, the surrogate, to issue a certificate of
25 acknowledgement.



1 I - - - I - - - I didn't say that - - - he didn't
2 say - - - my adversary didn't say at the time that that
3 would be necessary. And there is certainly no doubt the
4 surrogate would have done this if asked.

5 Why is this bright-line rule that's being
6 proposed uniquely terrible? Well, I would say it's always
7 unfair because what we're talking about here is a paperwork
8 error. There's no fraud. There was no over-weaning of
9 somebody's will. It would reward someone that got exactly
10 what she freely bargained for, agreed to, at the expense of
11 the beneficiaries, which is often, as it is in this case,
12 the children of the testator's first family.

13 And it's particularly unfair here where it was
14 mutual. It doesn't have to be; waivers can be unilateral.
15 But in this case, it was mutual, which means that Ms.
16 Koegel has gotten the full benefit of her bargain. When
17 these two individuals married in 1984, she was 54; he was
18 60. There was no way of telling which one would outlive
19 the other. She has basically received the full benefit of
20 that bargain. It would be like somebody who tries to
21 rescind a contract when you can't be - - - you can't - - -
22 you can't restore what the situation was because, of
23 course, Mr. Koegel has died.

24 I think, too, that it is - - - there's no
25 offsetting benefit which you can find to this - - - to this



1 rule that they propose because it - - - today, there is a
2 form. In 1984, there was not. So it's not as though the
3 court's going to make anything clearer by saying that there
4 is a - - - by - - - by adopting the bright-line rule that
5 my adversary suggests. There still will probably be
6 typographical errors. There will still be law office
7 failure, which is likely what - - - well, which is what
8 happened here. But for the most part, the bench and the
9 bar absolutely understand what's required. As I said,
10 there's a form. You can just get the form and fill in the
11 form.

12 I also would point out in terms of the unfairness
13 that this is not an equitable distribution case. The
14 surrogate cannot account or compensate in the award for the
15 separate property that Ms. Koegel brought to the marriage.
16 It can't account for her assets at the time of the death.
17 All he would have here is the one-third of the net minus
18 statutory deductions. At least in equitable distribution,
19 if the - - - if the - - - if the prenup is thrown out - - -
20 if it's not effective in the matrimonial action, and that's
21 what 236(B) (3) says, that you can't use it in a matrimonial
22 action if it's not properly acknowledged or approved - - -

23 JUDGE FAHEY: Counselor?

24 MS. READ: Yes?

25 JUDGE FAHEY: One of the things that strikes me



1 is - - - is that in both the cases today, there's an
2 argument that any change in the strictly proscribed
3 procedure would create too much flexibility and essentially
4 reduce it to a jury question and a question of fact that
5 has to be submitted to a - - - a trier, and that would make
6 it difficult for the practitioner to know how to operate.
7 How do you respond to that?

8 MS. READ: Well, I think in this case, as - - -
9 as I said in my brief, there are very few things that can
10 go wrong. They're very few factual issues that can be
11 presented. You know, you either - - -

12 JUDGE FAHEY: But as you know, inevitably,
13 something will.

14 MS. READ: Well, sure. Inevitably, there'll be a
15 - - - a problem. Inevitably, somebody will leave something
16 out.

17 JUDGE FAHEY: Um-hum.

18 MS. READ: But you have to do two things. You
19 have to say, I - - - I either knew the person or took
20 actions to make sure that the person who signed it was the
21 person described. You have to take the acknowledgment,
22 have the - - - the declarant has to acknowledge - - -

23 JUDGE FAHEY: So - - - so do you think it's - - -
24 do you think it's the nature of what needs to be cured that
25 distinguishes this case and doesn't make it totally



1 arbitrary?

2 MS. READ: I'm sorry, I - - -

3 JUDGE FAHEY: Do you think it is the nature of
4 what needs to be cured and - - - and removes this case from
5 something that would be a totally arbitrary cure?

6 MS. READ: I think it's the nature of what needs
7 to be cured that makes what has to be done pretty obvious
8 and doesn't really create any messy issues of fact - - -

9 JUDGE FAHEY: Um-hum.

10 MS. READ: - - - that have to be either
11 considered by the trial court or get into a - - - or given
12 to a jury.

13 JUDGE FAHEY: Because - - - because that's the
14 danger, I think, is those - - - those - - - as you put it,
15 those messy issues of fact.

16 MS. READ: Yes. There no - - - that was what
17 Judge Kaye said in Matisoff, was one of - - -

18 JUDGE FAHEY: Um-hum.

19 MS. READ: - - - the problems she had in the
20 Matisoff case because you would get into an argument there
21 about whether the people during - - - whether the two
22 individuals, during the course of the marriage, had carried
23 out their original intent. That - - - that's not the
24 situation - - - that's not the situation here.

25 JUDGE FAHEY: Thank you.



1 MS. READ: I think the rule here should be, at a
2 minimum, in it - - - and the rule in the - - - in EPTL area
3 actually, as it's been understood by surrogates through the
4 years, is actually narrower than the Galetta rule, although
5 I think the Galetta rule is a - - - is a - - - is a fine
6 rule. But the rule, it seems to me, that in the EPTL area
7 should be, at a minimum, that a spousal waiver with a
8 defective certificate of acknowledgement is nonetheless
9 valid and enforceable where the surrogate finds that the
10 notary or other official who signed the certificate knew
11 the signer and observed the signer execute the waiver.
12 That's a very simple rule, and it's a very narrow rule.

13 JUDGE FAHEY: Thank you.

14 MS. READ: If there are no more questions?

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MS. READ: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel, you have your
18 rebuttal time.

19 MR. HIMMEL: Thank you, Your Honor.

20 A few points. These are co-equal and distinct
21 statute - - - statutory provisions, the subscribing witness
22 method and the acknowledgment method. We know this from
23 Galetta because the husband in Galetta tried to cite Maul -
24 - - that's the 1941 case that led to the 1947 codification.
25 The husband tried to cite Maul as support. And this court



1 - - - I believe it was in footnote 4 of Galetta - - - said
2 no. Why? Because Maul is a subscribing witness case. It
3 is not an acknowledgment case. So Galetta fully understood
4 that these are separate and distinct approaches.

5 The second point I want to raise is that my
6 adversary has referred to this as a paperwork error, a law
7 office failure. This is another way of saying this third
8 requirement's really not all that important. The first two
9 ones, that's what's really important. But the third one
10 setting forth the language, that's not so important. And
11 if you blow it there, it's just a paperwork error. Not
12 true. And we know that that's not true because Galetta
13 said, this is, in fact, a substantial error.

14 The third point I want to make is that there was
15 some discussion here about the benefit of the bargain.
16 Now, you can line up the equities, yes, the - - - there's
17 an argument from respondent that she benefited, my client,
18 from the - - - the bargain. The bargain is that William
19 Koegel would take care of all her expenses. My client can
20 argue she was rushed into signing a prenuptial agreement
21 one week before the marriage.

22 This - - - this parade of - - - of - - - of
23 equities can go on and on. But to link the question of
24 whether a cure should be available to a weighing of the
25 equities, that's a terrible idea because it makes this a



1 hopelessly fact-oriented inquiry, which provides absolutely
2 no consistency - - -

3 JUDGE RIVERA: But Counsel, I - - - I thought
4 that - - - you correct me if I've misunderstood the record.
5 I thought that she did admit that when she signed this, she
6 thought it meant what's hers is hers, and what's his is
7 his.

8 MR. HIMMEL: The very next sentence - - - because
9 she said that in her deposition. The very next sentence in
10 her deposition, which is page 200 of the record, is she
11 said, but I had no idea that after twenty-nine years of
12 marriage, after Bill died, I would have no standing. So
13 that's in the record.

14 But I have to emphasize that her understanding,
15 this - - - this - - - this equitable weighing of factors,
16 it applied to the second affirmative defense of unfairness.
17 We lost that argument. That argument was struck. But all
18 of those equitable factors that were so relevant to the
19 first affirmative defense in this case are completely
20 irrelevant to - - - to the - - - sorry. It's - - - they're
21 irrelevant to the first affirmative defense which relates
22 to the defect of the acknowledgment.

23 And finally, the rule that Counsel is proposing,
24 it's very interesting. Where does the court derive its
25 authority to fashion such a rule? It could be a good idea.



1 But the issue here isn't whether it's a good idea to - - -
2 to craft a rule. The issue is where does this court get
3 its authority to craft such a rule. It's interesting if
4 there's - - - as long as there's a witness. So in other
5 words, we're conflating subscribing witness method with the
6 acknowledgment method. Maybe that's a great idea. It's
7 never been done before. Galetta recognized that these are
8 two separate and distinct approaches. Even if it is a good
9 idea, that's not enough for this court to act.

10 JUDGE RIVERA: But let me - - - let me ask you
11 this. Isn't - - - isn't all the statute requiring that
12 there be a - - - an acknowledgment so if - - - if indeed
13 that is documented, that that actually occurs, but it's
14 documented later, why - - - why wouldn't that be within the
15 statutory amendments? Why is that so far afield from what
16 the statute requires; aren't you staying with the core
17 requirement?

18 MR. HIMMEL: I can - - - I can only answer the
19 way Galetta answered. The - - -

20 JUDGE RIVERA: Um-hum.

21 MR. HIMMEL: - - - defect is that there was no -
22 - - in - - - in the certificate, it didn't contain the
23 appropriate language. That's not only a defect; that's a
24 material defect. I - - - it's hard to - - -

25 JUDGE RIVERA: Yeah, but if - - - but if - - -



1 the - - - it - - - it fails to articulate what actually
2 occurred. It failed to properly articulate what actually
3 occurred, right? That she acknowledges it before a person
4 who indeed knows her and whom she knows.

5 MR. HIMMEL: That - - - that's correct. But that
6 requirement - - -

7 JUDGE RIVERA: It's not like later on, someone is
8 trying to acknowledge it? It's not like the prior case,
9 right?

10 MR. HIMMEL: No - - -

11 JUDGE RIVERA: You agree that it's not like the
12 prior case, that seven years have elapsed, and there was
13 never an acknowledgment?

14 MR. HIMMEL: That's correct. This was relatively
15 contemporaneous as far as the - - -

16 JUDGE RIVERA: Um-hum.

17 MR. HIMMEL: - - - acknowledge - - - the
18 certificate is concerned. That certificate - - - and that
19 certificate has to be attached to be - - - they're not
20 really separate documents. It either has to be endorsed or
21 attached. This - - - and - - - and rendered it defective
22 because it didn't comply with that third requirement - - -

23 JUDGE RIVERA: Um-hum.

24 MR. HIMMEL: - - - and - - - and I - - - I just -
25 - - appellant's position is that you can't get around the



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importance of that third requirement. You can't say, well, that's so much easily more curable. Why not - - - why don't we just allow for a cure. There has to be, first, an answer to the threshold question: should cures be allowed in the first place? And appellant thinks not.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. HIMMEL: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Koegel v. Koegel, No. 79 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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