SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN THE MATTER OF THE ESTATE OF SAMUEL P. HEKEMIAN, deceased.	DOCKET NO.: A-003001-24-T4 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY: CHANCERY DIVISION, PROBATE PART Docket No. P-008-24 SAT BELOW: Hon. Darren T. DiBiasi, P.J.Ch. Civil Action

BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS PETER S. HEKEMIAN AND EDWARD G. IMPERATORE, ESQ. AS CO-EXECUTORS OF THE ESTATE OF SAMUEL P. HEKEMIAN

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PRELIMINARY STATEMENT

Samuel P. Hekemian ("Decedent"), in his August 27, 2002 Last Will and Testament ("LWT"), unequivocally directed that disputes regarding his Estate and Trusts are to be handled privately and efficiently through arbitration. Peter Hekemian ("Peter") (one of Decedent's sons) and Edward G. Imperatore, Esq. (a confidante and former attorney for Decedent) ("Mr. Imperatore"), the co-executors ("Co-Executors") of Decedent's Estate ("Estate"), seek to honor Decedent's wishes by compelling arbitration of a dispute commenced by Decedent's surviving spouse, Sandra Hekemian ("Sandra"), and one of his four sons, Richard Hekemian ("Richard"). The Appellate Division's prior decision regarding arbitration contemplated that if certain circumstances arose, the arbitration clause in the LWT would be triggered – that is precisely what has now happened.

Under materially different facts, the Co-Executors previously appealed the Trial Court's denial of their motion to compel arbitration in an action brought solely by Richard seeking to compel a formal accounting. This Court affirmed the decision below relying on the absence of a critical fact -- namely a "dispute." In the Matter of the Estate of Samuel P. Hekemian, deceased, Docket No. A-1774-21 (N.J. Super. App. Div. Jan. 13, 2023) ("Prior AD Op."). After remand, the facts dramatically changed when a "dispute" emerged because Sandra and Richard, through formal exceptions, contested the Co-Executors' formal accounting and asserted claims.

This Court's prior decision presciently anticipated that this day may come, noting its decision was "precisely tailored … to the enforceability of the arbitration provision against Richard Hekemian in the present circumstances" (emphasis added) and stressing that Richard (as the sole Plaintiff at that time) "has not created a dispute requiring arbitration under the terms of the LWT." (Id., slip op. at 18). However, the Prior AD Op. continued that: "If an accounting later leads to claims that the Co-Executors have been derelict in their duties as fiduciaries, then a dispute may arise, triggering the Article Seventeenth provision." Id., slip op. at 18-19 (emphasis added). The exceptions filed in the current contested accounting action by Sandra, and joined in by Richard (the "Exceptions"), alleging, *inter alia*, that the Co-Executors have committed waste and breached their fiduciary duties, constitute a "dispute."

The Prior AD Op. also reasoned that because the LWT is a "unilateral disposition of property" it does not reflect the "mutual assent" necessary to support the finding of an "agreement" to arbitrate under the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 et seq. ("NJAA"). Prior AD Op, slip op. at 17. Because Richard was the sole plaintiff in the prior action to compel an accounting, the Prior AD Op. did not review or consider Sandra's March 16, 2001 Last Will and Testament ("Sandra's 2001 Will"). Sandra's 2001 Will, prepared by the same draftsperson as the LWT, contains an identical arbitration provision to Article Seventeenth of the

LWT. New Jersey caselaw holds that reciprocal or mirror image wills entered into by spouses constitute evidence of an "agreement" regarding their assets and estates. The LWT and Sandra's 2001 Will clearly manifest mutual assent between and among Decedent and Sandra that they and any interested parties under their respective wills must resolve disputes regarding their estate planning by way of binding arbitration. Any other outcome would allow Richard to subvert the clear joint agreement of his parents to arbitrate, not litigate, disputes relating to their testamentary dispositions.

The Prior AD Op. did not find Richard to be equitably estopped from opposing arbitration because he had not received distributions. However, Sandra -- now a litigant -- received substantial distributions from the Estate and is equitably estopped from contesting the arbitration provision as is Richard, who joined in her Exceptions.

In denying the motion to compel arbitration, the Trial Court stated that it was "assuming without deciding that Sandra's claims are subject to arbitration," finding it was not necessary to adjudicate that issue because Richard had not received distributions and thus, the Trial Court reasoned, no basis existed to compel him to arbitrate. The Trial Court's error in failing to decide the pivotal issue of the existence of an agreement between Decedent and Sandra was compounded by its incomplete analysis of the bases on which Richard's claims (which are identical to Sandra's) must be subject to arbitration as well. This appeal seeks to correct those errors, and have this Court direct the matter to arbitration where it rightfully belongs.

PROCEDURAL HISTORY

The Decedent's LWT was probated, and his designated Co-Executors and Co-Trustees, Peter and Mr. Imperatore, qualified to serve on September 13, 2018. (Pa79). The Co-Executors promptly began administering the complex Estate and 15 months later, on November 14, 2019, timely filed a comprehensive Form 706 Federal Estate tax return ("706") with volumes of supporting schedules and materials, including valuations of numerous fractional and/or minority interests in various family real estate entities held by the Estate.

The Co-Executors, consistent with standard practice employed by fiduciaries, waited for IRS approval of the 706 or, in the alternative, expiration of the IRS statute of limitations, prior to closing the Estate and funding the testamentary trusts created by the LWT. However, on September 21, 2021, before either event occurred, Richard instituted litigation against the Co-Executors in the Superior Court, Chancery Division, Probate Part, captioned "In the Matter of the Estate Samuel Hekemian," Docket No. P-479-21, seeking to compel a "full accounting of the Estate and Trusts established pursuant to the Decedent's Will" (the "Predecessor Action"). (Pa6-54). Sandra, the Decedent's surviving spouse, did not take any affirmative position in that action. At that time, she was represented by attorney Grace Bertone,

Esq.[1], of the firm Bertone Picini, with whom the Co-Executors through counsel regularly communicated with respect to Sandra's income distributions and needs.

On November 1, 2021, the Co-Executors moved to compel arbitration of Richard's application seeking an accounting by invoking the mandatory arbitration clause set forth at Article Seventeenth of the LWT. (Pa55-Pa57). By order and written opinion dated February 7, 2022, the Trial Court denied the motion and subsequently stayed the matter pending appeal. (Pa58-Pa74).

On January 13, 2023, the Appellate Division issued the Prior AD Op. an unpublished decision upholding the Trial Court's denial of the motion. (Pa75-107). The essential holdings of that Prior AD Opinion were (as referenced in the Preliminary Statement) supra, that:

- Richard's request for an accounting, based on his statutory right to receive one, did not constitute a "dispute" and therefore the arbitration provision contained in the LWT had not been triggered under the facts and circumstances then presented; Id., slip op. at 18-19.

[1] On February 1, 2024, Peter along with his brother Jeffery and Mark, filed an action in the Superior Court of New Jersey, Chancery Division, General Equity Part, captioned Hekemian et als. v. Hekemian, BER-C-0019-24 (the "Visitation Action"), seeking to enjoin Richard, who held a power of attorney over Sandra and controlled her medical care and affairs, from interfering with their relationship with their mother, Sandra. Sandra abruptly terminated Ms. Bertone, who then asked the Trial Court in the Visitation Action to appoint a Guardian *Ad Litem* for Sandra out of concern for her own client. The Trial Court did so, which lead to the presently pending guardianship action filed by that Court appointee captioned "In the Matter of Sandra Hekemian, an alleged incapacitated person," Docket No. P-702-24.

- If a contested accounting alleging affirmative claims against the Co-Executors ultimately developed, the application of the arbitration clause would need to be revisited; Ibid.

- The LWT, standing alone and without consideration of Sandra's reciprocal Will constituted a unilateral disposition of property that did not constitute an "agreement" to arbitrate as defined by the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1, et seq. Id. at 17; and

- New Jersey's doctrine of applying equitable estoppel to compel arbitration did not apply to the facts presented because Richard sought an accounting only and had not received any distributions from the Trusts created by the LWT. Id., slip op. at 25-26.

After the Appellate Division's decision, Sandra, through her then attorney, Ms. Bertone, filed a notice of appearance on January 26, 2023. (Pa108). On remand, the Co-Executors engaged in informal discovery and exchanged information with then counsel for Richard and Sandra (Pa112). When Sandra and Richard refused to consent to a non-judicial settlement of the Estate administration, the Co-Executors, at the direction of the Court, filed a formal First Interim Accounting of the Estate's administration on January 9, 2024 (the "Accounting" and "Accounting Action") (Pa112). As a result, the Trial Court dismissed Richard's Predecessor Action to compel an Accounting and assigned the Accounting Action docket number P-008-24. Consistent with the Appellate Division's ruling and the Trial Court's understanding that if a contested accounting developed the motion to compel arbitration would be renewed, Paragraph 11 of the Verified Complaint in the Accounting Action expressly provided that the Co-Executors:

> expressly reserve their right to file a motion to compel arbitration consistent with the Decedent's intent as expressed in Article Seventeenth of their Last Will and Testament and the opinion of the Appellate Court. The filing of this action is intended to comply with the Court's order that the Co-Executors file their accounting with the Court and is not a waiver of their right to seek to compel arbitration based upon further facts and circumstances. (Pa112).

As the Trial Court observed at that time, if the accounting proceeding became "a contested matter," the parties and the Court would need to "take another crack at whether you can have an arbitration clause" because the Appellate Division had "left the door open." (Transcript of Case Management Conference 9/28/23; T. 5:17-25).

On March 22, 2024, Richard Mazawey, Esq., filed a notice of appearance on behalf of Richard and Thomas J. Gaynor, Esq., filed a notice of appearance on behalf of Sandra in connection with the Accounting Action. (Pa145-Pa146). On December 11, 2024, Sandra filed Exceptions challenging the Co-Executors' Accounting, which Richard joined in, alleging various breaches of fiduciary duty, and establishing the matter as a contested accounting proceeding. (Pa147-164). On February 4, 2025, as directed by the Decedent in his LWT and consistent with the prior rulings of this Court, the Co-Executors filed a motion to compel arbitration under the new factual circumstances presented. (Pa165-177). The Trial Court ultimately denied the Co-Executors' motion in an oral decision and Order on May 14, 2025. (Pa178). However, in colloquy preceding that opinion, the Trial Court observed the following regarding the benefits of sending the matter to arbitration and the unreasonableness

of Sandra and Richard's opposition to the Co-Executors' motion to compel arbitration:

> THE COURT: Le -- wait. Let me ask you a question here. Then why doesn't everyone just agree to go to arbitration, arbitrate the issue quickly, there's no appeals, it's done? This is what I don't understand. Everyone's concerned about the delays, et cetera, et cetera, et cetera. If everyone had just gone to arbitration five years ago -- six years ago, this all would've been done. It all would've been over with. Instead, we're going to continue to extend this litigation out. I don't understand, from Mrs. Hekemian's perspective or from Richard's perspective, if the concern is the delay, get to arbitration, obtain finality immediately. Why not?
> [T. 17:19 to 18:7 (emphasis added).]
>
> ***
>
> And at one point in time, she believed that arbitration was in her best interest. And now here she is, she's advanced in age, this estate's been lingering, and I'm puzzled by the opposition. I would think she would want finality, want a determination that can't be appealed so that she can move on with her life. And yet, she's opposing –
> [T. 23:8-14 (emphasis added).]
>
> ***
>
> And I don't see why she's opposing this, when in 2001, she realized it was a good idea to attend arbitration. And now, you would think this would be proof of concept. This is exactly why you have arbitration -- so that this event doesn't happen. And she is never going to obtain finality, I'm afraid.
> [T. 25:1-6 (emphasis added).]

When counsel for Sandra and Richard bemoaned the purported delay associated with the litigation process, the Trial Court sharply observed that their claims to prioritize "finality" and "efficiency" were a "farce." (T. 19:23-25; 20:1-9).

While the Trial Court initially appeared to indicate that it agreed with the Co-Executors' position, it ultimately denied the motion. (Pa178) In doing so, the Trial Court expressly declined to adjudicate the issue of whether a binding agreement to arbitrate exists between Decedent and Sandra, reasoning that it did not need to reach the issue because Richard was not a party to the agreement to arbitrate and had not yet received any distributions from the Estate or the resulting trusts and that it did not want to bifurcate the claims. The Court ruled that:

> Although the change in circumstances may impact the Court's decision as to compelling Sandra's claims to arbitration, the Court finds that it does not need to decide this issue because these changes do not affect the Court's decision with respect to Richard, and the Court does not want bifurcated proceedings.
> [T. 51:1-7 (emphasis added).]
>
> ***
>
> Assuming without deciding that Sandra's claims are subject to arbitration, there is no basis to compel Richard to arbitration or to bifurcate Sandra and Richard's claims.
> [T. 51:19 to 22 (emphasis added).]
>
> ***
>
> Although it is true that Sandra has received substantial distributions, potentially invoking the doctrine of equitable estoppel, Richard has not. As the Trial Court and the Appellate Division held previously, equitable estoppel cannot compel Richard to attend arbitration when Richard did not receive any benefits under the li -- will or trust.
> [T. 50:17 to 23 (emphasis added).]
>
> ***
>
> A bifurcation of the disputes here is not in the interest of judicial economy, as it would lead to wasted resources, duplicative efforts, and possibly unequal treatment and inconsistent results, as Sandra and Richard's claims are exactly the same.

[T. 51:23 to 52:2 (emphasis added).]

On May 27, 2025, the Co-Executors filed a notice of appeal seeking review of the Trial Court's decision. (Pa1-Pa5). While the above motion to compel arbitration and related proceedings were transpiring, Sandra filed motions, joined in by Richard, to remove the Co-Executors (April 15, 2025)[2] and to compel distribution of accumulated income (June 10, 2025)[3]. Those motions raise claims of alleged breach of fiduciary duties that are largely duplicative of the Exceptions filed by Sandra and are therefore part of the claims the Co-Executors assert must be subject to mandatory arbitration. On July 11, 2025, the Trial Court granted the Co-Executors' motion to stay further proceedings pending resolution of this appeal and observed that the pending motions would be subject to arbitration if the Co-Executors are successful on appeal. (Pa179).

STATEMENT OF FACTS

Overview of Decedent's Estate Plan

Decedent, who built a successful real estate business during his lifetime, died

[2] The motion was initially filed earlier as a cross-motion to Plaintiffs' motion to compel arbitration, but per the Court's directive, was re-submitted as a standard motion.

[3] The motion was initially filed as a separate order to show cause, but per the Court's directive, was re-submitted as a motion.

testate on August 21, 2018, as a resident of Bergen County, New Jersey. (Pa109). Prior to his death, he engaged the law firm of Clifford, Chance, Rogers & Wells, LLP to develop and implement a comprehensive estate plan. (Pa16-Pa48). Decedent's Last Will and Testament, executed on August 27, 2002, embodied that plan. Id. As noted below, Sandra executed a will prepared by the same law firm containing an identical arbitration provision reflecting a coordinated and congruent estate plan with the Decedent. (Pa212-Pa276).

Pursuant to the LWT, Decedent appointed two Co-Executors of his Estate and Co-Trustees of three testamentary trusts: (1) Peter – the oldest of his four sons and a successful real estate professional who had worked closely with Decedent in the family business, and (2) Mr. Imperatore – Decedent's long-time friend and one time attorney. (Pa16-48). Those trusts include: (i) a Credit Shelter Trust under Article Third (the "Credit Shelter Trust"), (ii) a Generation-Skipping Marital Trust under Article Fourth (the "Generation Skipping Trust"), and (iii) a Residuary Marital Trust under Article Sixth (the "Marital Trust") (collectively, the "Trusts" and individually, a "Trust"). Id.

Pursuant to the LWT, Decedent's surviving spouse, Sandra, is a lifetime beneficiary of each of the Trusts and is entitled to receive the income from the Generation Skipping Trust and Marital Trust. Id. Decedent's issue, including his four adult children, Peter, Mark Hekemian ("Mark"), Jeffrey Hekemian ("Jeffrey"),

and Richard, are lifetime discretionary beneficiaries of the Credit Shelter Trust and contingent remainder beneficiaries of the three Trusts. Id.

The Estate consists in large part of some 51 minority or fractional interests in real estate holding companies. Decedent clearly understood and intended that the interests he owned in various real estate projects would continue after his death and during administration of the Estate. Because at the time of Decedent's death, Peter was integrally involved with Decedent in managing the family real estate holdings, Decedent provided in his LWT that Peter would have "sole discretionary power" over all real estate entities in which Decedent held any interest. (Pa36-Pa37). Decedent also expressly authorized Peter to engage in a full range of real estate related activities, including the power to "mortgage" and "refinance" properties and to execute and deliver mortgages in connection therewith. Id. Specifically, the LWT provides that:

> TENTH: (A) PETER HEKEMIAN, acting in his capacity as co--executor or as trustee of any trust hereunder, shall have the sole discretionary power (notwithstanding that there are any other co-fiduciaries acting with him) over all the real estate enterprises, including general partnerships, limited partnerships, limited liability companies, corporations, and other entities, which form a part of my estate or any trust hereunder, including the powers to manage, retain, purchase, sell, exchange, lease, mortgage, refinance, grant options, build, repair, alter or dispose of all such real property or the improvements thereon or the entities holding such real property, upon such terms as he may determine, and to execute and deliver deeds, leases, mortgages, partnership agreements, operating agreements, and other related instruments. (emphasis added). Id.

Decedent's clear intent and expectation that the family real estate business he had built would continue after his death was evidently a key factor in his decision to include a mandatory arbitration provision in the LWT. He did not want the details of the family's closely held business to be exposed to competitors in a public record and did not want the successes he achieved to be diminished or tarnished by protracted public litigation.

Decedent Unambiguously Mandated Arbitration of All Disputes Concerning Administration of his Estate and Trusts.

At Article Seventeenth, the LWT contains a clause directing that any disputes regarding the "interpretation" or "administration" of the LWT or Trusts created thereunder "shall" be resolved through arbitration. (Pa43-Pa44). Article Seventeenth of the LWT makes clear that arbitration, and not a court action, is the exclusive forum and remedy for resolution of any such disputes. Id. It further directs that the decision of the arbitrator shall be "final and binding upon all interested parties" and "not appealable to any court of law," but does direct that New Jersey "substantive law" shall be applied by the arbitrator to resolve any dispute. Id. Moreover, in Article Seventeenth, Decedent authorized and directed the interested parties to the LWT to have input into the specifics of the mediation process by engaging in a process for selecting arbitrators (Article Seventeenth(A)) and establishing the procedures for arbitration by "agreement of the interested parties" (Article Seventeenth(B)). Id. Specifically, Article Seventeenth states:

SEVENTEENTH: Any dispute regarding the interpretation [sic] this will and the trusts created hereunder, or arising out of administration by the executors and/or others acting hereunder in a fiduciary or other capacity, shall be submitted for settlement by arbitration**,** in the following manner:

(A) Any interested party may initiate arbitration by giving written notice by certified mail to the executors and/or trustees of the intention to arbitrate the dispute. Such notice shall explain the nature of the dispute and any remedy or remedies sought. If the party initiating such arbitration and the executors and/or trustees shall be unable to agree upon a single arbitrator within sixty (60) days of the mailing of the notice to arbitrate, each of them may designate his or her own arbitrator (with the executors and/or trustees to designate one and only one arbitrator for the executors and/or trustees, collectively), none of whom shall be an interested party hereunder. All such designated arbitrators shall then meet and decide upon a single, mutually acceptable arbitrator to resolve the dispute serving as sole arbitrator thereof.

(B) The arbitrator shall decide the dispute by applying the substantive law of the State of New Jersey. Procedures for the arbitration shall be established by agreement of the interested parties, or in absence of such an agreement by the arbitrator. The decision of the arbitrator shall be final and binding upon all interested parties and shall not be appealable to any court of law. Costs of the arbitration shall be paid from such trust or assessed against the parties as may be determined by the arbitrator, as part of the decision.

(C) Arbitration shall be the exclusive remedy for resolving disputes concerning this will and the trusts created hereunder, including but not limited to the administration of the will and such trusts**;** provided, however, that an interested party may bring an action at law or equity to enforce any decision and/or award of an

arbitrator hereunder. [Emphasis added.]

The specific and detailed provisions for initiating and engaging in arbitration set forth in Article Seventeenth demonstrate Decedent's clearly articulated plan that his heirs, beneficiaries, and fiduciaries resolve any disputes regarding his assets in a private and efficient manner through a non-judicial forum. Id. The level of detail contained within the Article Seventeenth provisions reflect that Decedent deliberately and carefully considered and developed a mechanism for dispute resolution as an integral part of his estate planning, and the language of Article Seventeenth makes plain that it prohibits such disputes from being brought in a judicial forum. Id.

Sandra, Through Her Joint Estate Planning, Confirmed Her Agreement That She and All Interested Parties Must Address Disputes Concerning Administration of Decedent's Estate and Trusts Via Binding Arbitration.

Sandra executed a reciprocal will with Decedent, specifically, a Last Will and Testament on March 16, 2001, simultaneously and in coordination with the execution by Decedent of his Last Will and Testament on that same date ("Decedent's 2001 LWT"). (Pa212-Pa276). The reciprocal wills executed by Sandra and Decedent on March 16, 2001, each contain an identical arbitration provision to the one set forth at Article Seventeenth of the Decedent's subsequent

2002 LWT[4]. (Pa212-Pa276; Pa16-Pa48). Specifically, Article Sixteenth of Sandra's 2001 LWT provides as follows:

> SIXTEENTH: Any dispute regarding the interpretation [sic] this Will and the trusts created hereunder, or arising out of administration by the executors and/or others acting hereunder in a fiduciary or other capacity, shall be submitted for settlement by arbitration, in the following manner:
>
> (A) Any interested party may initiate arbitration by giving written notice by certified mail to the executors and/or trustees of the intention to arbitrate the dispute. Such notice shall explain the nature of the dispute and any remedy or remedies sought. If the party initiating such arbitration and the executors and/or trustees shall be unable to agree upon a single arbitrator within sixty (60) days of the mailing of the notice to arbitrate, each of them may designate his or her own arbitrator (with the executors and/or trustees to designate one and only one arbitrator for the executors and/or trustees, collectively), none of whom shall be an interested party hereunder. All such designated arbitrators shall then meet and decide upon a single, mutually acceptable arbitrator to resolve the dispute serving as sole arbitrator thereof.
>
> (B) The arbitrator shall decide the dispute by applying the substantive law of the State of New Jersey. Procedures for the arbitration shall be established by agreement of the interested parties, or in absence of such an agreement by the arbitrator. The decision of the arbitrator shall be final and binding upon all interested parties and shall not be appealable to any court of law. Costs of the arbitration shall

[4] Decedent updated his March 16, 2001 Will on August 27, 2002 to the present form. It is substantially similar to his March 16, 2001 Will, with only two changes: (i) Decedent removed Jeffrey as a trustee under Article Ninth; and (ii) inserted one extra Article (revised Article TENTH quoted *supra*), which vests Peter with decision-making authority over Decedent's real estate holdings. The arbitration provision remains and contains identical terms to that of his March 16, 2001 Will.

> be paid from such trust, or assessed against the parties as may be determined by the arbitrator, as part of the decision.
>
> Arbitration shall be the exclusive remedy for resolving disputes concerning this Will and the trusts created hereunder, including but not limited to the administration of the Will and such trusts; provided, however, that an interested party may bring an action at law or equity to enforce any decision and/or award of an arbitrator hereunder. (Pa246-Pa276).

The identical arbitration provisions in the Decedent's and Sandra's wills not only demonstrate their agreement to submit disputes concerning administration of their respective estates and trusts to binding arbitration but also to dispose of their assets in an identical testamentary manner. Id. Despite slight differences in executor and trustee designations in Article Ninth of their wills, all material terms pertaining to how the assets were to be distributed are the same, providing for the establishment of three identical Trusts to receive the assets of Sandra's and Decedent's estates. Id. Both Sandra and Decedent were lifetime beneficiaries of the Trusts created under the other's will. Id. Accordingly, the two documents reflect the "agreement" between Decedent and Sandra as to how their estates were to be administered, how their assets were to be distributed, and how any "disputes" regarding the administration of their estates and trusts were to be resolved.

All Parties Have Relied on the LWT and are Estopped from Disavowing Its Terms

After the probate of the LWT, no party in interest challenged the probate and/or the terms of the LWT. (Pa79). The Co-Executors qualified to serve, have

administered the Estate for a period of time exceeding 6 years and distributed millions of dollars of estate and trust assets pursuant to and in reliance on the provisions of the LWT, including the arbitration provision of Article Seventeenth. Co-Executor Peter Hekemian pledged a substantial sum from his personal assets as additional collateral to avoid Decedent's death causing a default on the line of credit for which Decedent and Peter were jointly and severally liable. (Pa279-Pa280). Such a default would have created a liquidity crisis in the early phase of the administration of the Estate, thereby jeopardizing the Estate's ability to retain assets and generate income to support Sandra. Peter and Mr. Imperatore agreed to serve and have undertaken the actions they have as Co-Executors (retaining professionals; filing tax returns; distributing income; and overseeing the real estate business owned in part by Decedent) cognizant of and in reliance on, the terms of the LWT, including the mandatory arbitration provision. (Pa209-Pa210; Pa279-Pa280).

Sandra, who has filed Exceptions, has received a substantial benefit from the Estate pursuant to the LWT. (Pa147-Pa164). Sandra received in excess of $1.7 million in distributions during the accounting period and has continued to receive additional distributions to support her care and living expenses since the end date of the Accounting.

Richard likewise has sought to enforce his beneficial interest under the LWT. He sought benefits from the Estate and Trusts when in 2021, he requested a loan or

distribution from the Estate in the amount of $1.2 million to the exclusion of the other beneficiaries and like Sandra, whose Exceptions he has joined in, he seeks damages as result of purported harm to his beneficial interests under the LWT. (Pa50-Pa52; Pa147-Pa164).

As set forth infra, despite the fact that all parties have relied on, and sought to enforce their rights under the LWT, Sandra and Richard have improperly refused to abide by the Article Seventeenth arbitration provision, which is an integral part of the governing instrument vesting them with the very beneficial rights they seek to enforce by and through their Exceptions and motions.

STANDARD OF REVIEW

The standard of appellate review regarding a Trial Court's order compelling or denying arbitration is de novo. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020); Goffle v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019).

LEGAL ARGUMENT

I. A "Dispute" Exists Triggering Application of the Article Seventeenth Arbitration Provision. (T. 45:8-21).

The Prior AD Op. made clear that its holding was narrowly confined to whether the arbitration clause could be enforced against Richard under the specific facts then before the Court. In denying the Co-Executors' motion to compel arbitration, the Court emphasized that the arbitration clause in Article Seventeenth of the LWT is only triggered by actual "disputes." The Court found that Richard's

request for an accounting simply invoked his statutory rights and did not amount to a dispute requiring arbitration. However, the Court expressly stated that if, following delivery of the accounting by the Co-Executors, allegations were made that the fiduciaries had breached their duties, such claims could constitute a dispute triggering application of the arbitration provision.

On December 11, 2024, Sandra filed Exceptions to the Co-Executors' Accounting. In filing the Exceptions, Sandra represented that Richard "joins in, and supports" the Exceptions. (Pa147). By and through the Exceptions, Richard and Sandra object to the Co-Executors' Accounting, expressly seek to surcharge the fiduciaries, repeatedly claim "the Co-Executors have committed waste" and engaged in a "pattern of gross and negligent fiduciary conduct," and allege that the Co-Executors breached their "fiduciar[y] obligations owed to the beneficiaries under common law as well as New Jersey statutes." (Pa147-Pa164).

While the Co-Executors reject and strenuously oppose those claims and allegations, the Exceptions and allegations and claims set forth therein have created a "dispute" regarding administration of Decedent's Estate as envisioned by the Appellate Division. That "dispute" triggers application of the mandatory arbitration provision contained at Article Seventeenth. The Trial Court, in addressing the Co-Executors' renewed motion, agreed.

> As an initial matter, the Court agrees with the co-executors that the filed exceptions now create a dispute, triggering the arbitration provision under Article Seventeenth.
> [T. 45:8-11.]

II. The Exceptions Must Be Dismissed and Submitted to Arbitration In Accordance With Decedent's and Sandra's Agreement to Arbitrate Disputes Involving Their Estates. (T. 45:1-47:15; 51:1-52:11).

Sandra and Decedent agreed to arbitrate all disputes related to the "interpretation" of their wills and the "administration" of their estates and trusts, as memorialized by the identical clear, unequivocal, and detailed arbitration provision contained in each of their reciprocal wills. By its terms, the arbitration clause set forth at Article Seventeenth of the LWT (which is mirrored in Sandra's 2001 Will at Article Sixteenth) provides that it applies to and is binding on "all interested parties" to the Estate. The Co-Executors, who are clearly "interested part[ies]" with respect to Decedent's Estate, now rightfully seek to enforce the arbitration clause with respect to disputes created by the Exceptions and related motion practice filed by Sandra and Richard, who are interested parties as well.

a. Sandra and Decedent's Agreement to Arbitrate is Valid, Enforceable, and Irrevocable under the NJAA. (T. 45:1-47:15; 51:1-52:11).

The NJAA provides, in relevant part, that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."

N.J.S.A. 2A:23B-6(a) (emphasis added). N.J.S.A. 2A:23B-1 broadly defines "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Under the NJAA's expansive definition, the arbitration provision in Sandra's 2001 Will and the LWT clearly satisfies the "record" requirement of the NJAA. The Prior AD Op. expressly held that the "record" requirement of the NJAA is satisfied in this case. See Prior AD Op., slip op. at 12. (holding that "[u]nder the NJAA's expansive definition, the arbitration provision in Article Seventeenth satisfies the "record" requirement.)

Unlike the term "record," the NJAA does not define "agreement." See N.J.S.A. 2A:23B-1. Nonetheless, Black's Law Dictionary states that an "'[a]greement is in some respects a broader term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property.'" Black's Law Dictionary 84 (11th ed. 2019) (quoting 1 Samuel Williston, A Treatise on the Law of Contracts § 2, at 6 (Walter H.E. Jaeger ed., 3d ed. 1957)) (emphasis added). "'An agreement, as the courts have said, is nothing more than a manifestation of mutual assent by two or more . . . legally competent persons to one another.'" Ibid. (quoting Williston, § 2 at 6); Hekemian, A-1774-21, slip op. at 13-14. Because both "contract" and "agreement" are used as discrete terms in the NJAA, the Prior AD Op. held that (1) "it is clear that the Legislature did not intend to impose the technical

requirements of contract formation upon the creation of 'valid, enforceable' arbitration provisions as defined by N.J.S.A. 2A:23B-6(a)." Prior AD Op., slip op. at 14-15 (emphasis added), and (2) the Black's Law Dictionary's definition of "agreement" as a manifestation of mutual assent by two or more persons is the appropriate standard to be applied here. Id., slip op. at 14.

This standard is consistent with our State's contract law jurisprudence, which indicates that an agreement to arbitrate "'must be the product of mutual assent, as determined under customary principles of contract law.'" Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605-06 (App. Div. 2015) (quoting Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014)). The expanded flexibility and requirement that only an "agreement" exists, as guided by contract law principles, is also aligned with the NJAA's notion that agreements to arbitrate are valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract. See N.J.S.A. 2A:23B-6(a).

b. Sandra and Decedent Manifested the Requisite Mutual Assent to Create an Agreement to Arbitrate. (T. 45:1-47:15; 51:1-52:11).

New Jersey courts use an objective standard to evaluate evidence of the manifestation of assent. Pagnani-Braga-Kimmel Urologic Assoc., P.A. v. Chappell, 407 N.J. Super. 21, 28 (Law Div. 2008) ("The obligations of each party depend not on the subjective intent of the parties, but rather the expressed intent of the parties") (citing Leitner v. Braen, 51 N.J. Super. 31, 38 (App. Div. 1958)) (internal citations

omitted). It is also clearly established that express or implied conduct of the parties has been found to evidence mutual assent. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 436 (1992) ("An offeree may manifest assent to the terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact"); see also Restatement (Second) of Contracts § 19(1) (1981) ("The manifestation of assent may be made wholly or partly by … other acts or by failure to act."); see also Rogalski v. Laureate Education, Inc., No. 20-11747, 2022 WL 19410319 (D.N.J. September 30, 2022) (holding that because student's "actions in pursuing the degree and relationship … evince assent," plaintiff was bound by forum selection clause in unsigned student agreement). New Jersey caselaw has long expressed and described what it means to form an agreement based on words or conduct in the estate planning context.[5] In Minogue v. Lipman, 28 N.J. Super. 330, 332 (App. Div. 1953), the decedent and his surviving spouse made an appointment

[5] In 1978, the Legislature enacted N.J.S.A. 3B:1-4, governing situations where parties are attempting to enter into a contract regarding the dispositive provisions of an irrevocable will. Specifically, the statute describes certain technical criteria and imposes a statute of frauds requirement for contracts to make a will. However, N.J.S.A. 3B:1-4 is not applicable here because all that is required under the NJAA is that the parties formed an agreement (not a contract) to arbitrate. The issue here is whether Sandra and Decedent agreed to arbitrate certain disputes concerning their common estate plan, which is valid, enforceable, and mandatory under the NJAA. Therefore, the case law prior to enactment of N.J.S.A. 3B:1-4 remains binding and instructive because agreements are guided by principles of contract law, and the holdings of those cases remain vital and directly relevant to the analysis before this Court.

with a lawyer for purposes of preparing and executing their respective wills. The decedent provided the attorney with instructions to prepare both wills in which each testator was to devise specified ownership interests in certain real estate to their respective children and to the children of the other (both testators had children only from prior relationships and did not share any biological children). Ibid. The remainder of each testator's estate was to pass to the surviving spouse for life or until remarriage, and then to the children of each respective testator. Ibid. Following the passing of the decedent, the surviving spouse prepared a new will revoking the prior reciprocal will and left her entire estate to her children to the exclusion of her late spouse's issue. Id. at 333. The decedent's children later brought suit to establish that the agreement between their parent and the surviving spouse was irrevocable and enforceable. Id. at 331.

The Appellate Division affirmed that the surviving spouse breached her agreement with the decedent by executing a new will disinheriting the decedent's children. In reaching its decision, the Appellate Division stated that "the testamentary instruments themselves imply a mutual and reciprocal testamentary regard. The instruments were prepared by the same scrivener, executed at the same time in the presence of each other, and it is conceded that there is no claim of lack of free exercise of the will by either testator or testatrix." 28 N.J. Super. at 336 (emphasis added). Furthermore, the Appellate Division found that "[b]oth

instruments contain unique mutual and reciprocal provisions … and each instrument gives the other a life estate in the residue of the estate which, upon the death of the surviving spouse, or remarriage, is devised to the children of each testator in shares." Ibid. (emphasis added). The Court also noted that the surviving spouse had accepted the benefits of her life estate from her late husband. Id. at 335; see also Tooker v. Vreeland, 92 N.J. Eq. 340, 346 (Ch. 1929) (holding that after surviving spouse changed certain pecuniary bequests through revised will, court recognized irrevocable compact between her and her late husband, and enforced bequests in earlier mutual wills, in part, because surviving spouse had "accepted the benefit of her husband's gift," and thereby became legally "bound to carry out the obligation she undertook") (emphasis added); see also Gromek v. Gidzela, 36 N.J. Super. 212, 217 (App Div. 1955) ("The law is well-settled that where a husband and wife make an irrevocable compact to dispose of their combined estates, the terms of which find expression in mutual wills, equity will enforce their contract according to its established practice.").

Here, Sandra's and Decedent's testamentary instruments and their coordinated execution of same are more than sufficient to prove that they formed an "agreement," as required by the NJAA, to arbitrate "disputes" regarding "administration" of their estates. Sandra and Decedent manifested their mutual assent to arbitrate by their actions of including unique and identical arbitration provisions in their respective

wills to govern their common estate plan, and by Sandra's conduct of accepting benefits under the LWT. The execution of their respective wills is a clear, outward expression of Sandra's and Decedent's mutual assent to require arbitration of disputes concerning their estates.

Moreover, no ambiguity exists concerning the arbitration procedure Sandra and Decedent agreed to because the express terms of the procedure are clearly memorialized in the "record" of their testamentary documents. Such a unique provision was undeniably considered and mutually agreed on by both Sandra and Decedent, and demonstrates their clear and objective joint manifestation of assent. This is not a situation of "cookie cutter" wills with standard or boilerplate provisions. The arbitration provision contained in each is deliberate and purposeful. Through their intentional conduct, a meeting of the minds occurred between Sandra and Decedent, resulting in their "agreement" to arbitrate any "dispute" concerning their wills, estates and trusts.

c. The Trial Court Failed to Decide Whether Decedent and Sandra Entered Into an Agreement to Arbitrate Disputes Concerning Their Estates. (T. 51:1-52:11).

During much of the colloquy at the motion hearing, the Trial Court appeared to indicate that it agreed with the Co-Executors' position:

> And at one point in time, she believed that arbitration was in her best interest.
> [T. 23:8-9 (emphasis added).]

***

> And I don't see why she's opposing this, when in 2001, she realized it was a good idea to attend arbitration.
> [T. 25:1-3 (emphasis added).]

However, in ultimately denying the Co-Executors' motion to compel arbitration, the Trial Court expressly declined to adjudicate the issue of whether a binding agreement to arbitrate exists between Decedent and Sandra. The Trial Court reasoned that it did not need to reach the issue because Richard was not a party to the agreement between Decedent and Sandra and had not yet received any distributions[6] from the Estate or the resulting Trusts:

> Although the change in circumstances may impact the Court's decision as to compelling Sandra's claims to arbitration, the Court finds that it does not need to decide this issue because these changes do not affect the Court's decision with respect to Richard, and the Court does not want bifurcated proceedings.
> [T. 51:1-7]
>
> ***
>
> Assuming without deciding that Sandra's claims are subject to arbitration, there is no basis to compel Richard to arbitration or to bifurcate Sandra and Richard's claims.
> [T. 51:19 to 22 (emphasis added).]

The only "support" for the Trial Court's abstention from determining whether Sandra's claims are required to be arbitrated is its (unexplained) reluctance to bifurcate the proceedings. In other words, the Trial Court incorrectly presumed that

[6] It is beyond dispute that Richard will obtain distributions from the Estate. In addition, Richard has made requests for distributions from the Estate, including a request for a $1.2 million distribution, to the exclusion of other beneficiaries, and has sought damages by and through the Exceptions.

bifurcation would not be appropriate if Sandra's but not Richard's claims were determined to be arbitrable. But even assuming arguendo that Richard is not subject to Article Seventeenth, it has long been the case that under the NJAA, a court should stay an arbitrable action pending the arbitration, pursuant to N.J.S.A. 2A:23B-7(g). The Appellate Division held:

> Although not mandatory, when significant overlap exists between parties and issues, claims against parties who have not agreed to arbitrate should be stayed pending the arbitration. In other words, the arbitration agreement must be enforced notwithstanding the presence of other persons who are not parties to the Agreement. [Perez v. Sky Zone LLC, 472 N.J. Super. 240, 251 (App. Div. 2022) (emphasis added).]

See also Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 196 n.7 (2013) (ordering arbitration as to some parties, but staying the litigation as to others, noting the "Law Division has a number of procedural tools at its disposal to manage the proceedings, including staying the litigation during the pendency of the …arbitration.") The Trial Court's purported concern with bifurcating Richard and Sandra's claims is not a valid reason to refrain from requiring arbitration.[7]

[7] While unpublished, the Appellate Division reinforced this in Valley Nat'l Bank v. Encore LED Lighting, LLC, et al, Docket No. A-391-23, 2024 N.J. Super. Unpub. 2024 WL 3548452 (N.J. Super. App. Div. Jul. 26, 2024), which, citing Perez, held that because some parties were bound to arbitrate, that agreement "must be enforced notwithstanding the presence of other entities who are not parties to the arbitration agreement."

The Trial Court's failure to address the pivotal issue of the existence of an agreement to arbitrate between Decedent and Sandra constituted clear error. By "[a]ssuming without deciding that Sandra's claims are subject to arbitration," the Trial Court failed to adjudicate the primary issues presented by the Co-Executors' motion or consider and apply to the facts of this case a broad body of caselaw reflected in decisions of this Court regarding how and when a non-signatory to an arbitration agreement may be compelled to bring his claims in arbitration where (i) there is a sufficient nexus between his claims and the subject matter of the arbitration clause, (ii) the non-signatory is a third party beneficiary of the agreement in which the arbitration clause is contained, or (iii) there are grounds to compel arbitration via the doctrine of equitable estoppel. All of those factors, which are present here, were overlooked by the Trial Court as a result of its failure to directly address and decide the issue of the existence of an arbitration agreement between Decedent and Sandra. The impact of that failure is to undermine and disregard the clear testamentary intention of Decedent and Sandra that disputes regarding their estates are to be handled in the privacy of an arbitration setting and with related efficiency and economy. Left unchanged, the Trial Court's decision will permit a beneficiary under a testamentary instrument to have outsized and unintended control over the Decedent's testamentary directions and privacy concerns.

III. The Trial Court Failed to Properly Consider and Find That Richard Claims are Subject to Arbitration. (T. 45:22-52:11).

Had the Trial Court completed its analysis of the impact of identical arbitration provisions contained in the LWT and Sandra's 2001 Will, and found, as it appeared poised to do, that the reciprocal wills constituted an agreement to arbitrate within the meaning and intendment of the NJAA, it then would have been properly positioned to analyze whether Richard, who is an interested party to the Estate and Trusts but not a signatory to the LWT, was nonetheless bound by it, and required to submit his claims (which are identical to Sandra's) to arbitration. The Supreme Court in Hirsch, supra, set forth the starting point for that analysis:

> The United States Supreme Court has recognized that, in the context of arbitration, traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel.
> [Id. at 179 (emphasis added).]

The contract law bases for applying arbitration that were identified by the United States Supreme Court and echoed and endorsed by our Supreme Court in Hirsch, must be considered separately, each on its own merits. Here, the Trial Court failed to do so. Instead, it grounded its holding that Richard's claims were not subject to arbitration on the sole fact that Richard "still has not received benefits under the last will and testament." (T. 47:14-15). The Trial Court's limited analysis ignored entirely the fact that Richard is undeniably a beneficiary under the Trusts

created by the LWT and Sandra's 2001 Will. The only "rights" Richard possesses and seeks to enforce here derive from his status as a beneficiary and are derivative of the LWT by which Decedent was free to dispose of his property as he deemed fit and to attach whatever terms and conditions to his gift as he deemed appropriate. Richard is therefore bound by the agreement contained in his parents' Wills, designed to preserve their assets from the expense of costly and protracted litigation and ensure that disputes (involving their family members who are "interested parties") are resolved privately, promptly, and efficiently by requiring binding arbitration as the sole means of resolution.

In Hirsch, the Supreme Court also outlined the relevant factors and criteria to be applied in determining whether the "intertwinement" of claims asserted by or against the parties and non-parties to the arbitration agreement can serve as a basis for "an extension of equitable estoppel." Id. at 192. As to this issue, Justice LaVecchia's opinion for the Court summarized its holding that while "intertwinement" alone is insufficient, it does serve as a basis to compel arbitration when joined with other factors:

> Stated simply, we reject intertwinement as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration. Id. at 192-193 (emphasis added).

Here, Richard's claims are not merely "intertwined" with Sandra's, as the Trial Court observed, they are identical to them. (See T. 51:23-52:2: "Sandra and Richard's Claims are exactly the same.") Richard has not filed any separate or independent Exceptions to the Co-Executors' Accounting, but only joined in those asserted by Sandra. (Pa147). The joint Exceptions are, in the wording of Hirsch, "tethered" directly to the LWT and the arbitration clause contained therein because they relate to "the administration by the executors" of the LWT and the Trusts created thereunder. The Trial Court failed to analyze or acknowledge this indisputable "nexus" between Richard's claims and the arbitration agreement. See Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254 (App. Div. 2001). As set forth *infra,* the Trial Court also improperly disregarded the Co-Executors' detrimental reliance in expecting that the arbitration provision would be honored and enforced if a dispute arose in their administration of the Estate. The Trial Court erroneously relied solely on the finding that:

> Although it is true that Sandra has received substantial distributions, potentially invoking the doctrine of equitable estoppel, Richard has not. [T. 50:17-19.]

a. The Trial Court Failed to Consider Richard's Status as a Third-Party Beneficiary and Interested Party in Determining Whether His Claims are Subject to Arbitration. (T. 45:22-52:11).

As noted above, the New Jersey Supreme Court's opinion in Hirsch recognized that an arbitration provision may be enforced against a third-party

beneficiary to the contract in which the arbitration provision is contained. Here, the arbitration provision is contained within the reciprocal wills executed by Decedent and Sandra. The only rights that Richard seeks to assert arise from those documents. It would be patently illogical, and defy New Jersey caselaw and common sense, if the inheritance rights vested in Decedent and Sandra's sons were not guided by the terms and conditions set forth in the LWT and Sandra's 2001 Will, which created those rights. The express language of the arbitration provision states that it is binding on Richard as an interested party to the Estate. Article Seventeenth of the LWT provides that "Any interested party may initiate arbitration by giving written notice" (Article Seventeenth, Sec. A) and definitively provides that, "The decision of the arbitrator shall be final and binding upon all interested parties" (Article Seventeenth, Sec. B) (emphasis added). The express language binding interested parties stands in contrast to the arbitration clause at issue in Hirsch, which the Court found inadequate to bind a non-party noting: "Importantly, this arbitration clause makes no mention of parties aside from Scudillo … it does not embrace any express inclusion of claims involving other parties." Hirsch, supra 215 N..J. at 194. The opposite is true here, and by the standard articulated in Hirsch, the arbitration clause should be enforced as to all disputes raised by interested parties who seek to assert rights and claims as beneficiaries under the LWT and derive their rights and claims directly from that governing instrument.

The ability of a parent to commit a child to binding arbitration, as a third party beneficiary of an agreement containing an arbitration clause, was affirmed in Hojnowski ex rel. Vans Skate Park, 375 N.J. Super. 568, (App. Div. 2005) reasoning:

> "[N]on signatories of a contract … may … be subject to arbitration if the nonparty is an agent of a party or third party beneficiary to the contract." Garfinkel v. Morristown Obstetrics & Gynecology Assoc., 333 N.J. Super. 291, 308, 755 A.2d 626, 636 (App. Div. 2000) (quoting Mutual Benefit Life Ins. Co. v. Zimmerman, 783 F. Supp. 853,865 (D.N.J.), aff'd, 970 F. 2d 899 (3d Cir. 1992))
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> ****
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> "The principle that determines the existence of a third party beneficiary status focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement." Broadway Maintenance Corp. v. Rutgers, The State Univ., 90 N.J. 253, 259, 447 A.2d 906, 909 (1982).
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> ****
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> "In this case, it is clear that Andrew's mother intended that Andrew benefit from the contract that she signed on his behalf. Indeed, her execution of the agreement had no purpose other than to gain for her son the benefit of entry into the skatepark. That the entry was conditioned upon a relinquishment of the right to trial and its replacement with the right to mandatory arbitration does not render the contract against public policy or otherwise avoidable.
> [Id. at 576.]

While the factual context of Hojnowski (admission of a minor to a skatepark and submission of personal injury claims to arbitration) is different from the matter sub judice, the underlying principles regarding arbitration and third-party beneficiary status are the same. A parent may enter into a contract containing an

arbitration clause for the benefit of a child, and the child is bound by the arbitration provision. Here, Decedent and Sandra executed reciprocal wills to benefit their four sons, and provided that all parties with an interest in their estates would be required to resolve any dispute regarding the administration of their estates through binding arbitration.

Indeed, on March 16, 2001, when Decedent and Sandra engaged in coordinated estate planning to benefit their children and executed the reciprocal wills containing their agreement to arbitrate, two of their sons (Richard and Mark) were minors. It is plain from their wills that Sandra and Decedent were engaged in an effort to ensure the future financial security of their children and that they required, as an integral part of that plan, mandatory arbitration of all disputes regarding their estates and trusts. As beneficiaries under the LWT created by Decedent, Richard (and his brothers) are in a position directly akin to third-party beneficiaries under a traditional contract, who, like in Hojnowski, are ultimately the intended beneficiaries of the agreement.

Enforcing the arbitration provision in the LWT as to the claims of Sandra and Richard is entirely logical and appropriate, where, as here, their rights as beneficiaries and interested parties are wholly derivative of and flow from the LWT, and any effort to enforce rights thereunder are bound by the terms thereof.

b. The Trial Court Failed to Analyze the Nexus Between Richard's Claims and the Arbitration Provision of Article Seventeenth of the LWT. (T. 48:20-52:11).

Central to the Trial Court's denial of the Co-Executors' motion to compel arbitration was its analysis and discussion of the application of the Appellate Division's reasoning in Jansen, supra, to the matter sub judice. Jansen was cited with approval in the Prior AD Op. and relied on by the Co-Executors. The Co-Executors agree that Jansen, along with subsequent cases which have cited and applied its holding, is highly relevant to the disposition of the matter. However, for the reasons which follow, the Trial Court's analysis of Jansen's application was incomplete and led it to incorrectly decide the Co-Executors' motion.

In Jansen, the plaintiffs, decedent's children, asserted that they were the intended beneficiaries of decedent's retirement account and filed an action against the brokerage house managing the account. 342 N.J. Super. at 255. They claimed that the brokerage house had provided negligent financial advice to the decedent, thereby depriving them of their portion of his retirement account. Id. at 256.

This Court held that the plaintiffs were required to arbitrate their claims in accordance with the client agreement governing the account. Id. at 260. Even though the beneficiaries were not parties or signatories to the client agreement, the Court observed that courts across the jurisdictions had held that "heirs" to financial accounts could be compelled to arbitrate their claims relating to negligent

management of the funds. Id. at 259. Noting New Jersey's "well settled public policy favoring arbitration," the Court reiterated prior case law, which holds that "non-signatories … may … be subject to arbitration if the nonparty is an agent of a party or a third party beneficiary … ." Id. at 261 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assoc., 333 N.J. Super. 291, 308 (App. Div. 2000)).

The Court in Jansen held that, as third-party beneficiaries of the retirement account at issue, the beneficiaries were bound by the arbitration clause even though they had not signed the agreement containing the arbitration provision. The Court held so because "they were the intended successors to [decedent's] interest in the accounts." Id. at 261. In reaching its decision, the Court found that because the beneficiary's claims arose out of the brokerage house's alleged failure to abide by the terms of the agreement, a "substantial nexus exist[ed] between the subject matter of the arbitration agreement and the claim" sufficient to compel arbitration by the non-signatory beneficiaries. Ibid. (emphasis added).

The Prior AD Op. in this matter recognized and reaffirmed the reasoning and holding of Jansen, but concluded that it did not apply to Richard's limited action to compel an accounting on the facts which then existed, because:

> In contrast, here, there is no "substantial nexus" between Article Seventeenth's arbitration provision and Plaintiff's statutory right to receive an accounting under N.J.S.A. 3B:17-2.
> [Prior AD Op., slip op. at 27-28.]

Applying the above reasoning to the current facts of this contested accounting proceeding, there can be no doubt that a "substantial nexus" now exists between the Exceptions filed by Sandra and Richard and the arbitration clause contained in Article Seventeenth of the LWT. The contested Accounting and accompanying motions filed by Richard and Sandra, which as set forth above allege multiple breaches of fiduciary duty in the administration of the Estate and Trusts, clearly constitute a "dispute" regarding the "administration" of the Estate and thus fall squarely within the arbitration clause contained in Article Seventeenth the LWT. The Trial Court's opinion referenced Jansen's "substantial nexus" reasoning, but failed to acknowledge or consider that, based on the joint filing of Exceptions by Sandra and Richard, the "substantial nexus" criterion is clearly satisfied by the facts and circumstances now presented.

c. The Trial Court's Exclusive Focus on Whether Richard Received Distributions from the Estate or Trusts Ignored the Co-Executors' Detrimental Reliance on the LWT's Arbitration Provision and the Compelling Circumstances Favoring Arbitration of All Disputes Relating to the Estate and Trusts. (T. 45:22-52:11).

In distinguishing the facts and holding of Jansen from the matter sub judice, the Prior AD Op. also found it significant that Richard, who was then the sole litigant adverse to the Co-Executors, had not received "any distribution or loan from the estate or the trusts" and that there was "no evidence of detrimental reliance" on the part of the Co-Executors. Id., slip op. at 25-26. The Prior AD Op. reasoned that the

absence of those factors indicated there were "no 'compelling circumstances' warranting the application of equitable estoppel principals as a basis to compel arbitration" (id. at 28) in that action to compel an accounting. In making the above observation, the Prior AD Op. cited Hoelz v. Bowers, 473 N.J. Super. 42, 53 (App. Div. 2022) for the proposition that: "Equitable estoppel is applied only in very compelling circumstances … where the interests of justice, morality and common fairness clearly dictate that course." (Citations omitted) (Id. at 25). In the now contested Accounting Action, the Trial Court, by limiting its analysis of whether compelling circumstances were present based on consideration of "justice, morality and common fairness" to the single question of whether Richard had received a distribution, erred in failing to consider the full set of facts and circumstances present here, which other judicial opinions have found significant in analyzing the "compelling circumstances" issue.

Equitable estoppel has been applied and detrimental reliance has been found where a non-signatory to an agreement requiring arbitration has embraced the agreement or has obtained, or sought to obtain, benefits flowing from it. See E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F. 3d 187, 200 (3d Cir. 2001) ("In the arbitration context, the doctrine [of equitable estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's

arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.") (quoting International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000)). (emphasis added).

In Facta Health, Inc. v. Pharmadent, LLC, No. 20-09631, 2020 WL 5957619, at *3 (D.N.J. Oct. 8, 2020), the New Jersey District Court noted that equitable estoppel should be used to compel a non-signatory to arbitrate, explaining:

> where a non-signatory directly benefits from an agreement that includes an arbitration provision, by asserting claims that rely on said agreement as a basis for those claims, the non-signatory is then equitably estopped from claiming that he is not bound by the arbitration clause … . (emphasis added).

The District Court noted that the doctrine "prevents a non-signatory from 'cherry picking' the provisions of a contract that it will benefit from and ignoring other provisions that don't benefit it or that [they] would prefer not to be governed by (such as an arbitration clause)." Id. (citing Invista S.A.R.L. v. Rhodia, S.A., 625 F.3d 75, 85 (3d Cir. 2010)) (emphasis added). In Facta, the Court found that the relief sought by non-signatory plaintiffs arose out of the agreement in question, and that absent the application of equitable estoppel:

> the Defendants would be required to take action based on the Plaintiffs' allegations that directly relate to and arise under the Agreement … yet, to their detriment, the Defendants would then be asked to proceed in a manner which would allow the non-signatory Plaintiffs to avoid the Agreement's express alternative dispute resolution procedure. To allow the non-signatory Plaintiffs to assert claims which embrace certain

> provisions of the Agreement but repudiate others would create the type of unfairness and injustice that the doctrine of equitable estoppel was precisely designed to prevent**.** [Id. at *4 (emphasis added).]

The Court in Facta thus enforced the agreement's alternative dispute resolution provision against the non-signatory plaintiffs "as a matter of equitable estoppel." Id.

Moreover, in KRHP, LLC, et al. v. Best Care Laboratory, LLC, et al., A-1031-20, 2021 WL 4998015, at *3 (N.J. Super. Ct. App. Div. Oct. 28, 2021), the Appellate Division rejected an assertion by plaintiffs as ousted members of an LLC that they were no longer bound to the dispute resolution provision in the operating agreement at bar. The Court, applying reasoning consistent with equitable estoppel, held that "plaintiffs cannot claim as ousted members of the corporation they are not bound by the Operating Agreement's arbitration provision, when their complaint asserts defendants violated other provisions of the same agreement, thereby divesting plaintiffs of their interest in the company." The Appellate Division grounded its ruling on the fundamental concept that plaintiffs "cannot have it both ways".

The Prior AD Op. did not address whether Richard was "cherry picking" the provisions of the LWT or seeking to "have it both ways" because his only claim at that time was to exercise his statutory right to receive an Accounting. Now that Richard has filed Exceptions (by echoing those asserted by Sandra) seeking affirmative relief as a beneficiary of the Estate and Trusts, a different analysis and result are required, consistent with the analysis and holdings of DuPont; Facta;

Invista; and KRHP," supra. Richard is clearly attempting to obtain benefits from the Estate and Trusts by asserting rights as a beneficiary, while attempting to ignore and disregard the LWT's mandatory arbitration provision.

The above cases recognize, as the Trial Court below failed to do, that there is no meaningful difference between seeking benefits under an agreement and actually receiving them, when analyzing the application of equitable estoppel. The Trial Court's reasoning that equitable estoppel could not be applied **until** Richard had received benefits would lead to an absurd, circular, and erroneous result. For example, if Richard were permitted to pursue his Exceptions outside of arbitration and the court awarded him a monetary judgment, the result of those actions and events would be to establish that his claims were subject to arbitration all along. The Trial Court's analysis ignored the reasoning and holdings of the cases cited above.

The Trial Court also failed to fully analyze or consider the Co-Executors' detrimental reliance on the arbitration provision of Article Seventeenth of the LWT, and their expectation that it would be enforced if any dispute arose concerning administration of the Estate and Trusts. In Hirsch, the Supreme Court emphasized the importance of detrimental reliance in analyzing whether equitable estoppel applied, and observed, in denying the application to compel arbitration, that there was no evidence in the record that the parties seeking to enforce the arbitration "knew about the arbitration clause" or "expected to arbitrate their disputes in

detrimental reliance." 215 N.J. at 195. Precisely the opposite facts are true here. At the time Richard and Sandra filed their Exceptions, they had each been represented by multiple sets of counsel, with whom they had consulted regarding their respective rights under the Trusts established by the LWT. When Richard, Sandra and their counsel read and reviewed the LWT, they were fully informed of its arbitration provision. There can be no credible claim of ignorance or surprise as to the arbitration requirement contained in the LWT.

Conversely, the Co-Executors, who were also fully aware of the arbitration provision of Article Seventeenth, had every reason to expect and rely on it being enforced if any "dispute" arose. The Trial Court acknowledged the Co-Executors' detrimental reliance argument but did not analyze it, noting that Sandra and Richard had disputed the Co-Executors' position and emphasizing that equitable estoppel is, in its view, only applicable when a third party is "receiving benefits under such agreement." (5/14/25 T. 48:20-24). By its exclusive focus on the receipt of "benefits" by Richard, the Trial Court ignored the undisputed factual record that (1) each of the Co-Executors read the LWT before qualifying to serve, (2) Peter had pledged substantial personal assets to prevent the Estate from defaulting on a loan, which would have resulted in needing to liquidate significant real estate assets during the early phase of administration (to the detriment of Sandra and Richard), and (3) the Co-Executors clearly expected that final, binding and non-appealable arbitration

would resolve any dispute—not six years of open ended litigation. (Pa165-Pa166; Pa209-Pa210; Pa279-Pa280).

The Trial Court also failed to consider the "common fairness" basis for finding that "compelling circumstances" mandate arbitration, as articulated by this Court in Hoelz, 472 N.J. Super. at 53, and relied on in the Prior AD Op. It violates all notions of common fairness that Richard, who has caused years of wasteful litigation surrounding Decedent's Estate can now file a summary "me too" to the Exceptions filed by Sandra (despite lacking standing as to any Exception(s) relating to interests that only Sandra possesses), and thereby disrupt the carefully developed mechanism for dispute resolution that his parents had jointly designed and implemented. The Trial Court's incomplete analysis of the totality of the circumstances led to its erroneous conclusion that purely because Richard had not received a distribution, he could block and disrupt the mutual agreement to arbitrate made by Decedent and Sandra.

d. The Trial Court Failed to Consider the Intertwinement of Richard and Sandra's Claims and Their Relationship to the Written Arbitration Agreement Contained in the LWT. (T. 45:22-52:11).

As noted (supra at 33), in Hirsch, the Supreme Court recognized that the "intertwinement" of the claim of parties and non-parties to the arbitration agreement may serve as a basis to invoke the doctrine of equitable estoppel provided the claims are related to a "written arbitration clause between the parties" or there is "evidence

of detrimental reliance." While both of those factors are present here, the Trial Court failed to analyze or consider either of them.

Further, as discussed supra, in qualifying to serve and administer the Estate and prepare to fund the Trusts, the Co-Executors detrimentally relied on their reasonable expectation that the arbitration clause contained in Article Seventeenth would be enforced if disputes arose. The Trial Court failed to take account of this aspect of the Hirsch holding, which clearly provides a basis for granting the relief the Co-Executors sought.

The "intertwinement" rationale for compelling arbitration recognized in Hirsch is grounded in the same substantive principles as the "substantial nexus" analysis that this Court articulated in Jansen and subsequently affirmed in Drosos v. GMM Global Money Managers, Ltd. 2023 WL 7545067 (App. Div. 2023). In Drosos, the Appellate Division considered whether the individual claims of one of the principals of a business entity embroiled in complex litigation should be referred to arbitration, based on an arbitration clause contained in the entity's operating agreement which he had signed on its behalf. After citing Hirsch and Jansen, the Appellate Division made the following observations and holding:

> Drosos has not separated his claims for misappropriation, conversion and conspiracy from those of GGLM, and a review of the complaint strongly suggests they cannot be untangled from one another.

****

> We've long recognized that "[a]rbitrability of a particular claim 'depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause.'" Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 258 (App. Div. 2001) (quoting Wasserstein, 261 NJ at 286). Here, we're satisfied Drosos's claims are so clearly intertwined with those of his company, GGLM, all of which arise out of and relate to the Dreamfood operating agreement and its alleged breach, as to make Drosos's claims arbitrable along with those of DGLLM, of which Drosos is the sole member. See Jansen, 342 N.J. Super. at 258. (emphasis added). Drosos supra, 2023 WL 7545067 at *9.

In analyzing how to apply the "intertwinement" and "substantial nexus" principles of Hirch and Jansen to the instant case, this Court should also be guided by the reasoning of the Third Circuit in Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923, 938 (1985), overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993), which was cited with approval in Jansen. In concluding that non-signatory future beneficiaries of a deferred compensation plan were properly subject to arbitration because they had joined in the claims asserted by a signatory party with whom they had related and congruent interests, the Third Circuit held:

> Since the non-parties to this arbitration agreement have related and congruent interests with the principals to the litigation, the district court did not abuse its discretion in refusing to stay the arbitration.
>
> ****
>
> The plaintiffs who join with Barrowclough claim no present entitlement to the deferred compensation and press no claims separate from his. Their inchoate and derivative claims should not entitle them to maintain separate litigation in a forum that has been waived by the principal

> beneficiary. [Barrowclough supra 752 F.2d at 938-39 (emphasis added).]

Similarly, here, this Court should not permit Richard's joinder in claims to Sandra's Exceptions to empower him to disrupt the arbitration mechanism that Decedent, Sandra, and their fiduciaries agreed to follow.

IV. The Trial Court Erred by Failing to Implement the Testator's and his Spouse's Intent to Submit Any Disputes Concerning the Administration of his Estate or the Trusts to Arbitration. (T. 45:22-52:11).

It is a bedrock principal of New Jersey jurisprudence that a testator is entitled to dispose of his property as the testator sees fit, and that the courts are duty bound to implement a testator's intent and wishes as expressed in testamentary documents. As codified by our legislature at N.J.S.A. 3B:3-33.1, "the intention of a testator as expressed in his will controls the legal effect of his dispositions . . .;" See also Matter of Will of Maliniak, 199 N.J. Super. 490, 493 (App. Div. 1985) ("[t]he duty of the court is to construe a will so as to carry out the expressed intent of the [Decedent]"). (emphasis added).

It is equally clear that the power to direct the disposition of property by will includes the right to attach to testamentary gifts such terms, conditions, limitations or restrictions as the testator pleases, provided they are not contrary to public policy or affirmative law. See Matter of Will of Liebl, 260 N.J. Super. 519, 525 (App. Div. 1992) citing Alper v. Alper, 2 N.J. 105, 114-15 (1949) ("Testamentary dispositions are required to be enforced unless contrary to public policy or a rule of positive

law"). Courts give deference to a testator's decisions and will not interfere with a condition attached to a gift if there is a rational and reasonable basis for it. See Howard Sav. Institution of Newark v. Trustees of Amherst College, 61 N.J. Super. 119, 129 (Ch. Div. 1960), aff'd, 34 N.J. 494, (1961)(A testator has the right to dispose of his private estate in whatever manner and according to such terms and conditions as meet his wishes and desires, in absence of any prescribed law to the contrary); Matter of Estate of Donner, 263 N.J. Super. 539 (App. Div. 1993) (upholding provision that denied trust income or principal to daughter until she reached age 65, her husband died or they were divorced because there was a "reasonable economic basis" for the restriction given husband's reckless financial practices).

The Decedent could have disposed of assets however he deemed fit, including by omitting the named beneficiaries. The Decedent (and Sandra) clearly sought to benefit their four children, but they also agreed, and Decedent in his will required, that as part of that gift, any intra-family disputes regarding Decedent's Estate and Trusts would be handled in a private and efficient manner through binding arbitration. None of the beneficiaries, including Richard and Sandra, challenged the LWT when it was probated. Moreover, the beneficiaries of the LWT have no obligation to accept the benefits the Decedent left to them in the LWT if they did not wish to accept the terms thereof. However, as set forth supra, they cannot select

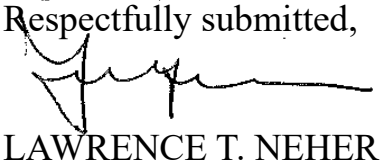
which provisions to abide by and which provisions to disregard as Richard and Sandra have done here by seeking to enforce their beneficial interests and rights under the LWT while simultaneously disregarding the critical arbitration provision of the same document.

The Trial Court erred when, in contrast to established judicial policy, it declined to honor the Decedent's intent as clearly expressed in his LWT that all interested parties who accept his testamentary gift are required likewise to honor and abide by the carefully crafted arbitration provision.

CONCLUSION

For the foregoing reasons, the Co-Executors respectfully request that this Court reverse the Trial Court's order denying the Co-Executors' motion to compel arbitration of the disputes in this contested Accounting Action and direct the parties to arbitrate their disputes in accordance with Article Seventeenth of Decedent's LWT.

Respectfully submitted,



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FILE NO.:

JULY 23, 2025

VIA ECOURTS
Ms. Patricia A. Shaw, Case Manager
Superior Court of New Jersey
Appellate Division, Team 4
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08611

Re: In the Matter of the Estate of Samuel Hekemian
Docket No.: A-003001-24

Dear Ms. Shaw:

This office represents Appellant, Edward G. Imperatore in his individual capacity ("Imperatore"). We write to advise the court that Imperatore joins in and adopts by reference the Brief and Appendix filed by Lawrence T. Neher, Esq., of Berkowitz, Lichtstein, Kuritsky, Giasullo & Gross, LLC, on behalf of Appellants.

Thank you for your courtesy and consideration.

Respectfully submitted,

/s/ Geoffrey D. Mueller
GEOFFREY D. MUELLER

GDM/km
cc: All Counsel of Record
(via e-courts)

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September 18, 2025

Filed via eCourts.
Ms. Patrica Shaw, Case Manager
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08611

RE: In the Matter of the Estate of Samuel P. Hekemian, Deceased
Docket No.: A-003001-24

Dear Ms. Shaw:

Our firm represents interested Respondent/beneficiary, Richard E. Hekemian ("Richard"), in the above matter.

Richard adopts and joins in full the arguments advanced in the Opposition Brief and Appendix filed by Respondent Sandra Hekemian filed by Thomas J. Gaynor, Esq., of Smith & Gaynor, LLC.

Respectfully submitted,

RICHARD S. MAZAWEY, ESQ.

cc: All Counsel of Record (Sent via eCourts).

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-003001-24-T4

IN THE MATTER OF THE ESTATE OF SAMUEL P. HEKEMIAN, DECEASED	CIVIL ACTION On Appeal from the Superior Court of New Jersey - Bergen County Chancery Division, Probate Part Sat Below: The Honorable Darren T. DiBiasi, P.J. Ch. Docket No.: P-008-24

BRIEF FILED ON BEHALF OF DEFENDANT/RESPONDENT SANDRA HEKEMIAN

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PRELIMINARY STATEMENT

This appeal brought by the Plaintiffs Peter Hekemian and Edward G. Imperatore, Esquire, as co-Executors of the Estate of Samuel P. Hekemian, deceased (the "Estate") arises from the Trial Court's denial of their Motion to Compel Arbitration pursuant to Article SEVENTEENTH of the Last Will and Testament of Samuel P. Hekemian (the "Decedent") dated August 27, 2002 (the "LWT").

This issue was previously decided by Honorable Edward A. Jerejian, P.J.Ch. by way of Order dated February 7, 2022 (Docket Number P-479-21) denying Plaintiffs' Motion to Compel Arbitration. Honorable Jerejian's opinion concluded that an arbitration agreement did not exist between Richard E. Hekemian ("Richard") and the co-Executors of the Estate and that Richard may not be compelled to arbitration. The decision of Honorable Jerejian was affirmed by this Court in In the Matter of the Estate of Samuel P. Hekemian, deceased, Docket No. A-1774-21 (N.J. Super. App. Div. January 13, 2023) ("Prior AD Op.").

Plaintiffs, again, come before this Court seeking to enforce the same arbitration provision based on two red herrings. First, the Plaintiffs argued, unsuccessfully, that Respondent Sandra Hekemian ("Sandra") and her husband, the Decedent, each executed (non-reciprocal) wills on October 16, 2001 - both having an arbitration clause - created an enforceable arbitration agreement. This proposition is meritless.

Second, Plaintiffs allege that income distributions were made to Sandra triggered the application of the Doctrine of Equitable Estoppel. The mandatory distribution of income from the marital trusts does not cause the application of that doctrine. No agreement to arbitrate claims exists, and the co-Executors have not, in making mandatory income distributions, acted in a manner that would trigger the application of that doctrine.

The arbitration provision must be deemed to be unenforceable without any need for determining whether the requisite agreement to arbitrate exists or whether the Equitable Estoppel Doctrine may be applied. This Court clearly stated that "we note that arbitration clauses that eliminate the courts' expected role in resolving will disputes are inconsistent with the detailed statutory scheme vesting the superior courts with the authority to adjudicate such issues." Prior AD Op., slip op. at 32. In the preceding paragraph of the Prior AD Op., this Court went to great lengths to specify that the New Jersey Legislature has "expressly allocated probate powers to the courts under N.J.S.A. 3B:2-2, which grants the Superior Courts "full authority to hear and determine all controversies respecting wills, trusts, and estates." Prior AD Op., slip op. at 31. As a result, the arbitration clause is unenforceable.

This Court previously determined that the arbitration clause is unenforceable as it "does not 'accomplish a clear and unambiguous waiver of rights' because it fails to explain that plaintiff is relinquishing his right to bring a claim in court." Prior

AD Op., slip op. at 18 (citing Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 444 (2014)).

Nevertheless, the non-reciprocal wills dated March 16, 2001 did not create an enforceable arbitration agreement. Sandra and Decedent subsequently executed new wills demonstrating the lack of any agreement or contract. Since such wills were subsequently revoked and replaced by new wills, no mutual assent to any agreement to arbitrate existed.

A will is not a contract, nor is it an agreement. No court in New Jersey has ruled that a will is an agreement between the testator and their beneficiaries for the purposes of arbitration provisions because there lacks a consensual understanding between parties in the will context where only one party has expressed an intent to arbitrate.

Plaintiffs' assertion that mandatory income distributions made to Sandra triggered the application of the Doctrine of Equitable Estoppel fails. Plaintiffs' claim that detrimental reliance existed as a result of mandatory (non-discretionary) income distributions to a trust beneficiary is absurd. Peter Hekemian did not rely to his detriment upon the arbitration clause by extending the term of the Valley National Bank line of credit. Peter Hekemian was jointly and severally liable on that loan with his father. He increased the use of the line of credit following the death of his father and benefitted personally therefrom.

PROCEDURAL HISTORY

Respondent accepts Appellant's Procedural History except for the following:

The essential holdings of the Prior AD Opinion were (as referenced in the Preliminary Statement) supra. that:

> - arbitration clauses that eliminate the courts' expected role in resolving will disputes are inconsistent with the detailed statutory scheme vesting the superior courts with the authority to adjudicate such issues. Id.; slip op. at 32; (Pa 106).
>
> - the subject arbitration clause set forth in Article SEVENTEENTH of the LWT does not "accomplish a clear and unambiguous waiver of rights" because it fails to explain that defendants are relinquishing their right to bring a claim in court. Id. at 18; (Pa 92).

STATEMENT OF FACTS

Decedent died testate on August 21, 2018, as a resident of Bergen County, New Jersey. (Pa 109). Decedent executed a Last Will and Testament on August 27, 2002. (Pa 16 - Pa 48).

Pursuant to the LWT, Decedent appointed his son Peter Hekemian and Edward G. Imperatore, Esquire as co-Executors of his estate and co-Trustees of three (3) testamentary trusts established therein. (Pa 32- Pa 34). The three (3) testamentary trusts created under the LWT include: (i) the Credit Shelter Trust under Article THIRD (the "Credit Shelter Trust"), (ii) the Generation-Skipping Marital Trust under Article FOURTH (the "GST Marital Trust"), and (iii) the Residuary Marital Trust under Article SIXTH (the "Residuary Marital Trust") (Pa 16 - Pa 48).

Pursuant to the provisions of the LWT, Sandra is a lifetime beneficiary of each of the aforementioned trusts and is entitled to the mandatory distribution of all the net income from the GST Marital Trust and the Residuary Marital Trust. Id. The Decedent's issue, including his four (4) adult children, Peter Hekemian, Mark Hekemian, Jeffrey Hekemian, and Richard Hekemian, are lifetime discretionary beneficiaries of the Credit Shelter Trust and contingent remainder beneficiaries of each of the three (3) trusts. Article SEVENTEENTH of the LWT contains the following arbitration provision:

SEVENTEENTH: Any dispute regarding the interpretation [sic] this will and the trusts created hereunder, or arising out of administration by the executors and/or others acting hereunder in a fiduciary or other capacity, shall be submitted for settlement by arbitration, in the following manner:

(A) Any interested party may initiate arbitration by giving written notice by certified mail to the executors and/or trustees of the intention to arbitrate the dispute. Such notice shall explain the nature of the dispute and any remedy or remedies sought. If the party initiating such arbitration and the executors and/or trustees shall be unable to agree upon a single arbitrator within sixty (60) days of the mailing of the notice to arbitrate, each of them may designate his or her own arbitrator (with the executors and/or trustees to designate one and only one arbitrator for the executors and/or trustees, collectively), none of whom shall be an interested party hereunder. All such designated arbitrators shall then meet and decide upon a single, mutually acceptable arbitrator to resolve the dispute serving as sole arbitrator thereof.

(B) The arbitrator shall decide the dispute by applying the substantive law of the State of New Jersey. Procedures for the arbitration shall be established by agreement of the interested parties, or in absence of such an agreement by the arbitrator. The decision of the arbitrator shall be final and binding upon all interested parties and shall not be appealable to any court of law. Costs of the arbitration shall be paid from such trust or assessed against the parties as may be determined by the arbitrator, as part of the decision.

(C) Arbitration shall be the exclusive remedy for resolving disputes concerning this will and the trusts created hereunder, including but not limited to the administration of the will and such trusts; provided, however, that an interested party may bring an action at

> law or equity to enforce any decision and/or award of an arbitrator hereunder. (Pa 28 - 29).

Sandra executed a non-reciprocal will with Decedent on the same date that the Decedent executed his Last Will and Testament, namely, March 16, 2001. (Pa 212 - Pa 276). The non-reciprocal wills executed by them on March 16, 2001 contain an arbitration provision similar to the subject arbitration provision contained in Article SEVENTEENTH of the LWT. Id.

The wills executed by Sandra and Decedent on March 16, 2001 are not reciprocal as alleged by the Plaintiffs. Significantly, in Article NINTH of the Last Will and Testament of Samuel P. Hekemian dated March 16, 2001, he appoints his son Peter, his son Jeffrey, and his friend Edward G. Imperatore as executors under the Will. Conversely, in Article NINTH of the Last Will and Testament of Sandra Hekemian of the same date, she appoints her husband, Samuel, as the executor of her will. Similarly, under the terms of Samuel P. Hekemian's Last Will and Testament dated March 16, 2001, Sandra is not appointed as a trustee of any trusts created under that Will. Sandra's Will, on the other hand, appoints her husband, Samuel, together with her sons Peter and Jeffrey, as trustees of the Credit Shelter Trust, GST Marital Trust, and Residuary Marital Trust created under her Will. Id.

At no time did the Decedent enter into any contractual arrangement relating to death in accordance with N.J.S.A. 3B:1-4, which statute was in effect on March

16, 2001. In fact, both Sandra and Decedent thereafter executed new wills. Despite the fact that over seven (7) years had passed since the death of the Decedent, the Credit Shelter Trust, GST Marital Trust, and Residuary Marital Trust remain unfunded. (Pa 160). Despite the fact that the GST Marital Trust and the Residuary Marital Trust both mandate that the trustees pay to or apply the net income to or for the benefit of Sandra at least quarter-annually, the Plaintiffs have failed to do so. As a result of such failure to distribute all of the net income to Sandra from the two (2) marital trusts, she deemed it necessary to file a motion to compel distribution of accumulated income.

LEGAL ARGUMENT

POINT I

THE ARBITRATION CLAUSE IS UNENFORCEABLE AS IT ELIMINATES THE SUPERIOR COURT'S ROLE IN RESOLVING WILL DISPUTES

The Prior AD Op. clearly recognized the expansive statutory scheme enacted by the New Jersey Legislature which expressly "allotted probate powers to the courts under N.J.S.A. 3B:2-2, which grants the Superior Courts 'full authority to hear and determine all controversies respecting wills, trusts and estates.'" Prior AD Op., slip op. at 31. This Court went on to list numerous examples of New Jersey's statutory scheme which provides courts with the means of protecting the interests of beneficiaries and providing trustees and executors with "guideposts for acting in their fiduciary capacities." Id. The New Jersey statutes cited included N.J.S.A. 3B:3-17, N.J.S.A. 3B:10-23, N.J.S.A. 3B:10-26, N.J.S.A. 3B:31-57, N.J.S.A. 3B:31-64, and N.J.S.A. 3B:31-71. Id., slip op. at 31 - 32. This Court concluded its opinion by finding as follows:

> "While we need not decide whether a will may include a valid and enforceable arbitration provision under New Jersey law to resolve the issue presented in this case, we note that arbitration clauses that eliminate the courts' expected role in resolving will disputes are inconsistent with the detailed statutory scheme vesting the superior courts with the authority to adjudicate such issues."

Id.; slip op. at 32.

Unquestionably, it is not the intent of the New Jersey Legislature to prevent beneficiaries under wills the right to adjudicate any controversies or disputes by the New Jersey courts. As a result, the arbitration clause set forth in Article SEVENTEENTH of the LWT must be found to be unenforceable.

POINT II

THE ARBITRATION CLAUSE IS UNENFORCEABLE FOR IT DOES NOT ACCOMPLISH A CLEAR AND UNAMBIGUOUS WAIVER OF RIGHTS

The Prior AD Op. also found that the arbitration provision set forth in Article SEVENTEENTH of the LWT "does not 'accomplish a clear and unambiguous waiver of rights' because it fails to explain that plaintiff is relinquishing his right to bring a claim in court." Prior AD Op, slip op. at 18 (citing Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 444 (2014). Moreover, an arbitration clause "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court." Atalese, 219 N.J. at 447; see also Kleine v. Emeritus of Emerson, 445 N.J. Super. 545, 550 (App. Div. 2016) (emphasizing the language from Atalese that "it is well established that the party from whom an arbitration clause has been extracted must 'clearly and unambiguously' agree to a waiver of the right to sue.").

Additionally, the New Jersey Supreme Court recently affirmed the Atalese interpretation of enforceability when it held that an enforceable arbitration agreement "clearly and unmistakably informs the parties that ... final and binding arbitration will take the place of a jury or other civil trial." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137 - 38 (2020). A litigant's right to avail themselves to the court process is so important that any court scrutinizing an arbitration clause in an

agreement must determine that any party subject to the arbitration clause is apprised of their rights. This is particularly true in the context of disputes involving wills. As set forth above in Point I, this Court, in the Prior Ad. Op., stated that "... we note that arbitration clauses that eliminate the courts' expectant rule in resolving will disputes are inconsistent with the detailed statutory scheme vesting the superior courts with the authority to adjudicate such issues." Prior Ad. Op., slip op. at 32.

For the reasons set forth above, the arbitration provision set forth in Article SEVENTEENTH of the LWT must be found to be unenforceable.

POINT III

THE EXISTENCE OF A "DISPUTE" DOES NOT TRIGGER THE APPLICATION OF THE ARTICLE SEVENTEENTH ARBITRATION PROVISION

As articulated in the Prior Ad Op. this Court simply based its decision on the fact that the arbitration provision was not triggered for an actual "dispute" did not exist. It is undisputable, however, that this Court did not opine that if a "dispute" existed that the subject arbitration clause would be enforceable. This Court, on the other hand, did find that "[c]ritically, Article Seventeenth does not 'accomplish a clear and unambiguous waiver of rights' because it fails to explain that plaintiff is relinquishing his right to bring a claim in court." Prior Ad Op., slip op. at 18. As a result, regardless of whether an actual "dispute" exists, the arbitration provision is unenforceable.

Moreover, as set forth in Point I above, the subject arbitration provision is unenforceable as this court noted "that arbitration clauses that eliminate the courts' expected role in resolving will disputes are inconsistent with the detailed statutory scheme vesting the superior courts with the authority to adjudicate such issues." Prior Ad Op., slip op. at 32.

Although Respondent maintains that the arbitration provision must be found to be unenforceable for the reasons set forth above, no "agreement" to arbitrate under

the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 et seq. ("NJAA") exists in this matter.

The arbitration provision set forth in Article SEVENTEENTH of the Will is unenforceable. The New Jersey Arbitration Act ("Arbitration Act"), N.J.S.A. 2A:23B-1 to 32, provides "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a). However, the favored status of arbitration "is not without limits." See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). Importantly, a court in New Jersey must first apply "state contract-law principles ... [to determine] whether a valid agreement to arbitrate exists." See Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006).

In determining whether an arbitration agreement is enforceable, a New Jersey Court's initial inquiry must be "whether the agreement to arbitrate all, or any portion of a dispute is the product of mutual assent, as determined under customary principles of contract law." Kernahan v. Home Warranty Adm'r of Fla. Inc., 236 N.J. 301, 319 (2019) (internal quotations omitted). Here, there is a lack of mutual assent regarding the arbitration clause. A will is not a contract, nor is it an agreement. No court in New Jersey has ruled that a will is an agreement between the testator and

their beneficiaries for the purposes of arbitration provisions because there lacks a consensual understanding between parties in the will context where only one party has expressed an intent to arbitrate. See In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979) ("[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute."). Therefore, on basic contract principles, the lack of mutual assent to the provision renders the provision unenforceable and the beneficiaries should not be compelled to arbitrate.

Lastly, underlying arbitrability is the fundamental principle that a party must agree to submit to arbitration. See Garfinkel, 168 N.J. at 132 ("The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." New Jersey case law is clear that for an arbitration clause to be valid, there must be a clear waiver of the right to sue.

In Atalese, the New Jersey Supreme Court stated that "[a]n arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430 (2014) at 430. As set forth in Point II above, the Court previously found that the arbitration clause in question failed to accomplish a clear and unambiguous waiver of rights.

Plaintiffs' argument that both Sandra and Decedent executed wills on March 16, 2001 constituted an "agreement" also fails. Although those wills were executed on the same date there certainly did not exist any form of agreement or contract between them as a result of executing the wills. First, it should be pointed out that these wills are not reciprocal. Significantly, in Article NINTH of the Last Will and Testament of Samuel P. Hekemian dated March 16, 2001, he appoints his son Peter, his son Jeffrey, and his friend Edward G. Imperatore as Executors under the will. Conversely, in Article NINTH of the Last Will and Testament of Sandra of the same date, she appoints her husband as the Executor of her will. Similarly, under the terms of Samuel P. Hekemian's Last Will and Testament, his wife, Sandra, is not appointed as a Trustee of any trusts created under that will. Sandra's will, on the other hand, appoints her husband, Samuel P. Hekemian, together with her sons Peter and Jeffrey, as Trustees of the Credit Shelter Trust, GST Marital Trust, and Residuary Marital Trust created under her will. Significantly, on the date that Decedent and Sandra executed those wills, dated March 16, 2001, N.J.S.A. 3B:1-4 was in effect relating to contractual arrangements relating to death and provided as follows:

> "A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after September 1, 1978, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of

> a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills."

Undeniably, on March 16, 2001 Samuel and Sandra Hekemian did not enter into any form of contractual arrangement described in N.J.S.A. 3B:1-4. In fact, both Decedent and Sandra possessed the right after signing those wills to revoke that will and execute a new will containing any provisions which Decedent or Sandra desired. Samuel Hekemian just over a year later, did just that executing a new Last Will and Testament on August 27, 2002. Sandra, as well, subsequently executed a new will.

Despite Plaintiffs' assertion to the contrary, their reliance on Minogue v. Lipman, 28 N.J. Super. 330, 332 (App. Div. 1953) is not relevant to this matter. The decision in that case predated the effective date of N.J.S.A. 3B:1-4. If the spouses in Minogue had executed their respective wills on March 16, 2001 they would have been required to establish a contract by one of the three methods set forth in N.J.S.A. 3B:1-4 in order to prevent the wife in that case from altering her will's provisions.

In the instant matter, the execution by Decedent and Sandra of non-reciprocal wills on the same date did not create any form of agreement to arbitrate disputes relative to their estates. The fact that both Sandra and Decedent subsequently executed new wills demonstrates the lack of any agreement or contract.

Since the wills executed on March 16, 2001, were subsequently revoked and replaced by new wills, there can be no mutual assent to any agreement requiring arbitration of disputes concerning the estates of Samuel and Sandra Hekemian. The fact that both individuals retained the unilateral right to revoke and replace their wills - and in fact exercised that right - demonstrates that no binding contractual obligation existed between them regarding arbitration or any other estate related matter.

As established under N.J.S.A. 3B:1-4 and Kernahan, the mere execution of separate wills on the same date does not create a mutual assent or binding contractual arrangement unless specific conditions are met, which are absent in this case. Therefore, any argument that the arbitration provision contained in the revoked March 16, 2001 Wills remains enforceable is untenable.

POINT IV

THE ARBITRATION CLAUSE IS NOT ENFORCEABLE UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL

In this matter, the co-Executors certainly may not invoke the Doctrine of Equitable Estoppel as a means of enforcing the arbitration in the LWT. The New Jersey Supreme Court has held that to "establish equitable estoppel, parties must prove that an opposing party 'engaged in conduct, either intentionally or under circumstances that induced reliance, and that [they] acted or changed their position to their detriment.'" Hirsch v. Amper Fin. Servs., LLC., 215 N.J. 174, 189 (2013). The Court in Hirsch, further stated that "equitable estoppel, unlike waiver, requires detrimental reliance." Ibid. Moreover, the Prior AD Op. acknowledged that equitable estoppel "is applied only in very compelling circumstances ... 'where the interests of justice, morality and common fairness clearly dictate that course.'" Hoelz v. Bowers, 473 N.J. Super. 42, 53 (App. Div. 2022) (quoting Davin, LLC v. Daham, 329 N.J. Super. 54, 67 (App. Div. 2000)), Prior AD Op., slip op. at 25. The co-Executors' attempted to demonstrate detrimental reliance upon the arbitration clause in the LWT when Peter Hekemian extended the term of the Valley National Bank line of credit which was not only maintained by Decedent at the time of his death, but Peter Hekemian, individually, was jointly and severally liable on that loan. It is proffered that Peter Hekemian, individually, benefitted from those actions and

any such actions should not serve as a justification or cause for enforcing the arbitration provision. The receipt by Sandra of net income from the GST Marital Trust and the Residuary Marital Trust certainly does not constitute the receipt of a benefit that would warrant the application of the Equitable Estoppel principles to this case. In fact, the receipt by Sandra of the net income from the marital trusts serves to effectuate the Estate tax planning of the Decedent. The marital trusts were undoubtedly drafted so that each of those trusts would qualify for the Federal Estate Tax Marital deduction. Each of the marital trusts qualified under 26 U.S.C. §2056(b)(7)(a) as a Qualified Terminable Interest Property trust and, therefore, qualified for a deduction from the gross estate for purposes of 26 U.S.C. §2056(a).

So what are the co-Executors suggesting that Sandra should have done in order to avoid the application of the arbitration clause - file a qualified disclaimer of the property passing to her under the terms of the LWT? If Sandra filed a qualified disclaimer of her interest in the Estate, the result of the disclaimer may certainly have resulted in the imposition of a Federal estate tax liability upon the Decedent's death. Certainly, Decedent never intended Sandra to take such action in order to avoid the imposition of the arbitration provision.

As to respondent Richard Hekemian, no distributions have been made to him from the Credit Shelter Trust. The factual circumstances relating to him are the same as on the date that the Prior AD Op. was rendered.

For the reasons set forth above, the Doctrine of Equitable Estoppel does not apply in this matter and therefore the arbitration clause must be found to be unenforceable.

POINT V

TRIAL COURT DECISION NOT TO BIFURCATE THE CLAIMS OF SANDRA HEKEMIAN AND RICHARD HEKEMIAN MUST BE UPHELD

Plaintiffs have failed to submit to this court any legitimate legal or factual basis that would allow this Court to reverse the trial court's decision not to bifurcate any disputes or claims of either Sandra or Richard between judicial resolution and arbitration. The trial court's reliance on Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124 (2001) was appropriate. In doing so, the trial court did not find that Sandra's claims are subject to arbitration, however, it did hold that there was no basis to compel Richard to arbitration or to bifurcate Sandra and Richard's claims. (T. 51:1). Therefore, this Court must affirm the decision of the trial court and find that the arbitration provision is not enforceable.

POINT VI

TESTATOR'S INTENT THAT THE INTERESTED PARTIES ABIDE BY THE ARBITRATION PROVISION HAS NO BEARING ON THE ENFORCEABILITY OF THAT ARBITRATION PROVISION

Any desire of the testator, in this case the Decedent Samuel P. Hekemian, that interested parties under the LWT abide by the terms of the arbitration provision has no bearing whatsoever on the enforceability of any such provision. The enforceability of the subject arbitration provision is not governed by the testator's intent but rather by the law. As set forth in the preceding points in this brief (i) arbitration clauses may not eliminate the courts' expected role in resolving will disputes as they are inconsistent with the detailed statutory scheme vesting the Superior Courts with the authority to adjudicate such issues; (ii) the arbitration clause fails to accomplish a clear and unambiguous waiver of rights because it fails to explain that the Respondents are relinquishing their right to bring a claim in court, (iii) an "agreement" to arbitrate does not exist, and (iv) the Doctrine of Equitable Estoppel does not apply.

Once again, for these reasons, this Court must find that the arbitration provision is unenforceable.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the subject decision of the Trial Court was well-reasoned and well-supported by the facts before the Court and by law. It is therefore requested that this Court enter an order affirming the decision of the Trial Court denying the co-Executors' motion to compel arbitration of the Accounting Action.

Respectfully submitted,

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Attorneys for Defendant/Respondent
Sandra Hekemian

THOMAS J. GAYNOR, ESQUIRE

Dated: September 24, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN THE MATTER OF THE ESTATE OF SAMUEL P. HEKEMIAN, deceased.	DOCKET NO.: A-003001-24-T4 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY: CHANCERY DIVISION, PROBATE PART Docket No. P-008-24 SAT BELOW: Hon. Darren T. DiBiasi, P.J.Ch. Civil Action

REPLY BRIEF ON BEHALF OF APPELLANTS PETER HEKEMIAN AND EDWARD G. IMPERATORE, ESQ., AS CO-EXECUTORS OF THE ESTATE OF SAMUEL P. HEKEMIAN

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PRELIMINARY STATEMENT

Respondents Sandra Hekemian ("Sandra") and Richard Hekemian ("Richard"), (collectively "Respondents") by and through their joint opposition, repeat the Trial Court's fundamental error by ignoring Plaintiffs' core argument—supported by precedent, policy, and equity—that non-signatories to an arbitration agreement may be compelled to arbitrate where their claims are inseparably intertwined with, and derivative of, the agreement to arbitrate. Richard's claims are not merely related to Sandra's; they are identical. Richard has filed no independent claims in this litigation, instead fully aligning himself with, and often leading, Sandra's challenges. Moreover, Richard's claims, asserted through Sandra, derive entirely from Decedent's LWT. That Will contains the same arbitration provision Sandra expressly accepted in her joint estate planning with Decedent, included in her own 2001 Will, and has never disavowed.

Unlike the prior appeal, which concerned Richard's narrow demand for an accounting, Sandra is now the principal litigant. She has filed exceptions (joined in by Richard) challenging the Estate's administration and opposed the application of the arbitration clause, an identical version of which she included in her own 2001 Will. Respondents now ask this Court to adopt a sweeping rule outlawing all arbitration provisions in testamentary instruments. Any such pronouncement would directly contravene New Jersey's established public policy favoring arbitration, as

well as the longstanding principle of honoring testamentary intent. This Court, in the Prior AD Op., expressly declined to find such clauses to be *per se* unenforceable. The arbitration provision Decedent requested and included in his LWT was carefully crafted to streamline the resolution of anticipated family disputes by applying substantive New Jersey law in an efficient private and final forum. The wisdom of that provision is borne out by the record: four years of coordinated litigation tactics by Respondents that have delayed the Estate's settlement and resulted in protracted litigation which may only be curbed by enforcement of the arbitration clause.

LEGAL ARGUMENT

I. NEW JERSEY COURTS FAVOR ALTERNATIVE DISPUTE RESOLUTION TO PROMOTE EFFICIENCY AND FINALITY WHILE ALLOWING FOR APPROPRIATE JUDICIAL OVERSIGHT.

Respondents' contention that enforcing the arbitration provision here would undermine the primacy of the Courts ignores the established judicial policy favoring alternative dispute resolution ("ADR") and the judicial safeguards in place to ensure the efficacy of the ADR process. New Jersey has a "strong public policy. . . favoring arbitration." Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997); Marchak v. Claridge Commons, Inc., 134 N.J. 275, 281 (1993) ("arbitration is a favored form of relief"); Billing v. Buckingham Towers Condo. Ass'n, 287 N.J. Super. 551, 564 (App. Div. 1996) ("litigation ought to be a last resort, not a first one"). The Legislature codified this public policy when it enacted the New Jersey

Arbitration Act, N.J.S.A. 2A:23B-1, et seq. ("NJAA"). Indeed, New Jersey "courts operate under a presumption of arbitrability." Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 14 (App. Div. 2011) (internal citations omitted).

While the Superior Court is vested with authority to hear probate disputes, the legislature has not stipulated that the court has "exclusive jurisdiction." Our Courts routinely delegate authority and refer matters outside the courtroom to promote efficiency and reduce judicial burden—including by: compelling mediation or arbitration, appointing special adjudicators to serve judicial functions, and appointing special agents. Moreover, the NJAA provides for judicial recourse and oversight of the arbitration process. Courts may correct evident mistakes or misdescriptions and can vacate or modify an arbitration award in numerous circumstances, including fraud, corruption, partiality, misconduct, exceeding power, or fundamental procedural unfairness. See N.J.S.A. 2A:23B-23 and -24.

Critically, the arbitration provision at issue here mandates that "[t]he arbitrator shall decide the dispute by applying the substantive law of the State of New Jersey" (emphasis added) thereby ensuring that the interested parties retain the full range of protections available through New Jersey statutory and case law. (Pa43-44). The only difference is that the parties will, as Decedent intended, be permitted to air and resolve their disputes more expeditiously and within a private forum.

The policy favoring arbitrability is rooted in the notion that the arbitration is an efficient means of dispute resolution. See Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 (2006) (noting "object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties."). Courts have recognized the benefits of arbitration in the particular context of family disputes, similar to this case, noting that the "opportunity for resolution of sensitive matters in a private and informal forum rather than presentation of the matter in the public arena of an open courtroom" is beneficial. See Minkowitz v. Israeli, 433 N.J. Super. 111, 132 (App. Div. 2013). In that case, the Appellate Division observed that:

> arbitration conducted in a less formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties' own choosing, is often far less antagonistic and nasty than typical courthouse litigation. In sum, the benefits of arbitration in the family law setting appear to be well established. [Id. (citation omitted).]

This is precisely the situation Decedent contemplated and provided for in his LWT, requiring his family members and fiduciaries to resolve disputes in connection with his Estate and Trusts in a private and efficient manner through a binding arbitration process. Respondents have proven Decedent prescient in mandating arbitration, where they have repeatedly employed vexatious litigation tactics that result in delays, inefficiencies, waste, and conflict. By way of example:

- Respondents have each changed counsel four times for a collective turnover of eight attorneys with respect to the Estate. In order, Richard has employed:

Coughlin Midlige & Garland; O'Toole Scrivo; Williams, Graffeo & Stern; and Mazawey Law Firm. Sandra has been represented by Norris McLaughlin; Coughlin Midlige & Garland; Borteck & Czapek; Bertone Piccini; and Gaynor & Smith. These constant changes in counsel repeatedly stalled progress, requiring the Co-Executors' counsel to re-brief new attorneys and renegotiate previously resolved substantive and procedural issues. This pattern rendered timely and efficient proceedings impossible and repeatedly reversed substantive and procedural progress, resulting in increased costs and unreasonable delays. In fact, Respondents' current counsel delayed filing the exceptions for nine months.

- In a recent decision dismissing a corporate action Richard filed against Co-Executor Peter Hekemian[1] and numerous family entities alleging member oppression and other relief, the same Court that presided over this Estate case analyzed in detail Richard's abuse of the judicial process, awarded fees against Richard for his vexatious litigation, and appointed a Special Review Agent, who "in the interest of judicial economy and efficiency" is required to review certain disputes before Richard may commence additional litigation.[2] [Pra311-347].

- Sandra has refused to submit to Court ordered evaluations in a pending guardianship action brought by an independent Court-appointed guardian *ad litem* after her own former counsel raised concerns about her wellbeing. This has delayed the distribution of accumulated income to her in this Estate matter, which the Trial Court presiding over both matters attributed entirely to Sandra: "[h]er capacity, though, is in doubt. And I understand the reluctance on behalf of the co-executors. There is a guardian ad litem who has filed a guardianship action or at least an action to compel evaluations. Your client has decided not to cooperate with those evaluations. It has, in my opinion, unnecessarily extended that litigation. So there are ways in which she can prevent additional litigation and receive the funds sooner rather than later. But she is taking different positions in this litigation and in the guardianship which simply make that challenging. So she's going to have to wait until there's a final adjudication in the guardianship action." [Pra281 9:7-20]

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[1] As noted by the Hon. John Keefe, Sr., P.J.A.D. (Ret.), appointed as a Special Discovery Adjudicator in a pending business litigation, Richard repeatedly delayed resolution of that action by his litigation tactics and serial hiring and firing of counsel (Richard had 9 different law firms as counsel of record) (Pra311-346, 34:4-17).

[2] In that case, the Court also made several rulings that undermine and nullify Respondents' exceptions. The impact of those rulings will be addressed after the proper forum is determined.

Accordingly, enforcement of Article Seventeenth—entirely consistent with New Jersey's longstanding practices and established policy favoring arbitration, Decedent's intent, and the interests of efficiency and finality—is essential to prevent further abuse of the judicial process and ensure the Estate's timely resolution. The Trial Court all but acknowledged this principle when it remarked:

> "And I don't see why [Sandra's] opposing this, when in 2001, she realized it was a good idea to attend arbitration. And now, you would think this would be proof of concept. This is exactly why you have arbitration — so that this event doesn't happen. And she is never going to obtain finality, I'm afraid." (T.25:1-6) (emphasis added).

II. THE ARBITRATION PROVISION IN THE LWT IS VALID, BINDING AND ENFORCEABLE.

Contrary to Respondents' assertions, this Court did not rule that the LWT's arbitration provision is invalid. Rather, it expressly held that "[i]f an accounting later leads to claims that the Co-Executors have been derelict in their duties as fiduciaries, then a dispute may arise, triggering the Article Seventeenth provision" and noted that its decision was "precisely tailored … to the enforceability of the arbitration provision against Richard Hekemian in the present circumstances." In the Matter of the Estate of Samuel P. Hekemian, Deceased, Docket No. A-1774-21 slip op. 18-19 (N.J. Super. App. Div. Jan. 13, 2023) ("Prior AD Op.").

Respondents' reliance on Atalese v. U.S. Legal Servs. Grp. LP, 219 N.J. 430 (2014) in an attempt to invalidate the arbitration clause (an identical version of which

was included in Sandra's own 2001 Will) is misplaced. Atalese did not prescribe any "magic words" that are required for an arbitration provision to be valid. Rather, it found that "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights" noting that the clause "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." 219 N.J. at 444-447. Here, the language of Article Seventeenth clearly and unambiguously meets that broad standard where it plainly states that

> [a]ny dispute regarding the interpretation [of] this Will and the Trusts created hereunder, or arising out of administration by the executors and/or others acting hereunder in a fiduciary or other capacity, shall be submitted for settlement by arbitration. . . [Pa43-44.]

The LWT further specifies that:

> Arbitration shall be the exclusive remedy for resolving disputes concerning this Will and the trusts created hereunder, including but not limited to the administration of the Will and such trusts; provided, however, that an interested party may bring an action at law or equity to enforce any decision and/or award of an arbitrator hereunder…" [Id. (emphasis added).]

Finally, the LWT provides that the arbitrator's decision is "final and binding upon all interested parties" and "not appealable to any court of law". Id. (emphasis added).

Thus, the arbitration provision broadly and plainly states: (i) arbitration is the "exclusive remedy" for resolving disputes; (ii) the decision of the arbitrator is final

and binding on all interested parties and not appealable; and (iii) the only resort to the courts is to enforce any decision and/or award of the arbitration. Id.

The facts of Atalese are markedly distinguishable. Atalese involved a dispute regarding a consumer service agreement. Id. at 435. The Court in Atalese expressed that "an average member of the public may not know - without some explanatory comment - that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Id. at 442. It is clear that the "plain language" waiver has only been applied to consumer and employment contracts which are the result of unequal bargaining power. See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124 (2001) (employment); Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301 (2019) (consumer); Martindale v. Sandvik, Inc., 173 N.J. 76 (2002) (employment). Accordingly, County of Passaic v. Horizon Health Care Services, 474 N.J. Super. 498, 502 (App. Div. 2023), enforced an agreement to arbitrate that lacked the express waiver purportedly required by Atalese, "because the parties are sophisticated and possess relatively equal bargaining power," the requirement of an express waiver of the parties' right to seek relief in a court of law is inapplicable.

Here, Decedent and Sandra, both represented by the same skilled, competent, and qualified counsel, executed reciprocal Wills containing identical arbitration provisions in 2001. Indeed, it is telling that there is no record evidence that Sandra

actually (1) disavowed the arbitration provision in the Will she executed in 2001, or (2) did not understand it (or the identical provision in Decedent's LWT).

Richard likewise is a sophisticated litigant who has been represented by numerous counsel throughout the Estate administration process and has been personally involved and engaged in multiple litigations. Despite having received a notice of probate and copy of the LWT shortly after it was probated, Richard never contested the terms of the LWT or otherwise challenged its validity. The statute of limitations pursuant to Rule 4:85 has long lapsed. (Prior AD Op., slip op. at 5). Instead, Richard reviewed the LWT, understood he derived beneficial interests therefrom, and actively sought to obtain benefits from the LWT by requesting a distribution and/or loan from the Trusts for a home purchase. Id. When that request was denied, Richard sued the Co-Executors seeking to compel them to provide him with a judicial accounting. Id. After the accounting was filed, he worked with Sandra to prosecute exceptions that she filed and he fully joined in. (Pa147-164). Richard, on his own, and especially with the assistance of counsel, understood the dispute resolution language of the LWT when he sought to receive benefits from the Trusts. There can be no doubt he was aware of it after the Prior AD Op. when he joined in Sandra's exceptions creating a dispute regarding the administration of the Estate and Trusts. (Pa147). In resisting arbitration while seeking to enforce rights and prosecute exceptions, Richard is impermissibly seeking to cherry pick portions of the LWT to

honor while disregarding other material provisions. See Facta Health, Inc. v. Pharmadent, LLC, No. 20-09631, 2020 WC 5957619 at 13 (D.N.J. Oct. 8, 2020).

III. RESPONDENTS HAVE ASSERTED IDENTICAL CLAIMS, DERIVE THEIR RIGHTS FROM THE LWT, AND ARE BOUND BY THE LWT'S ARBITRATION CLAUSE

A. Decedent and Sandra Agreed to Arbitrate Disputes Concerning Decedent's Will, Trusts, and Estate.

Respondents' arguments overlook the fact that this Court has held that NJAA requires only an "agreement" to arbitrate, not a formal contract:

> [A]n agreement is in some respects a broader term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property. …. An agreement, as the courts have said, is nothing more than a manifestation of mutual assent by two or more . . . legally competent persons to one another. [Prior AD Op. slip op. at 13-14 (citations and internal quotations omitted; emphasis added.)]

Respondents mischaracterize Co-Executor's position and conflate the law. Plaintiffs do not assert that Decedent and Sandra had a "contract to make a will" as contemplated by N.J.S.A. 3B:1-4. Nor are they seeking to enforce a contract to make a dispositive bequest or prohibit a party from changing their will. Rather the reciprocal Wills – prepared by shared counsel as a coordinated estate plan – contain identical arbitration provisions reflecting the spouses' agreement to arbitrate disputes concerning their Estates and Trusts. Accordingly, the statute of frauds

applicable to contracts to make a will is not relevant[3]. Moreover, its enactment did not displace established precedent recognizing that mutual or reciprocal wills may evidence spouses' mutual assent to common estate planning objectives as set forth in Co-Executor's Initial Appeal Brief.

Respondents' contention that the 2001 Wills are not purely reciprocal and that both Sandra and Decedent subsequently changed their Wills, does not undermine the parties' original agreement to arbitrate as reflected and recorded in their 2001 Wills. The minimal differences between Decedent's 2001 Will and Sandra's 2001 Will, relating primarily to fiduciary appointments, do not impact the issues on appeal. The 2001 Wills, prepared by the same attorney, have identical dispositive schemes and arbitration provisions – which are reaffirmed in the 2002 LWT before the Court.

Moreover, the record contains no evidence that Sandra affirmatively stated or otherwise demonstrated as a matter of fact that she actually changed her will, when she purportedly changed it (i.e., after Decedent's death), or what the terms of the purported new will are (including whether there is an arbitration provision). These assertions are without citation to the record, contrary to Rules 2:6-2(a)(5) and 2:6-4.

The possibility that Sandra may have subsequently changed her will does not serve to negate or "undo" the agreement she reached with Decedent in 2001 to

[3] Nevertheless, the writing or "record" element of the statute and of the NJAA is satisfied where both wills contain the relevant arbitration provision in writing at issue here, and Decedent and Sandra signed their respective wills.

arbitrate disputes regarding his Estate and Trusts. The key fact is that each of their coordinated Wills included identical mandatory arbitration provisions. As a matter of logic and common sense, and consistent with the caselaw cited in Co-Executor's Initial Appeal Brief, the inclusion of arbitration provisions by both spouses reflects their "mutual assent" and "agreement" to have any dispute concerning Decedent's Will, Estate, and Trusts settled through arbitration. It is undisputed (and supported in the factual record) that Decedent did not change his LWT in the intervening years between 2001/2002 and his death in 2018, and therefore continued to rely upon the prospective enforcement of the arbitration provision in Article Seventeenth of the LWT if any "dispute" arose. (Pa15-49). Sandra has offered no evidence that she renounced her 2001 agreement with Decedent, despite clearly being in a position to do so. The only conclusions that can be drawn are that the "agreement" remained intact at Decedent's death, was relied on by Decedent, understood by Sandra and his fiduciaries, and should now be enforced.

B. All Parties Have Assented to and Relied on the LWT and are Bound by the Arbitration Provision.

As set forth in Co-Executor's Initial Appeal Brief, a party can manifest assent in myriad ways, including expressly, through conduct, agency, equitable estoppel, and by third-party beneficiary principles. The Trial Court fundamentally erred by analyzing the matter in reverse order, beginning with Richard, a contingent

remainder beneficiary who has joined in Sandra's filings and claims, rather than Sandra (the primary beneficiary and exceptant), and finding that neither Richard's nor Sandra's claims were subject to arbitration based on the singular fact that Richard had not yet received a distribution from the Estate. (T. 50:7-11; 51:19-22). In doing so, it neglected to (1) analyze and decide the issue of Decedent's and Sandra's 2001 agreement to arbitrate as set forth in their Wills, and (2) analyze and apply the substantial body of law binding third parties to arbitration agreements as set forth in Plaintiffs' Initial Appeal Brief. Respondents have similarly failed to analyze or offer any rebuttal arguments on these critical points.

Plaintiffs rely primarily on their unrebutted arguments with respect to these key points but note that, with respect to this accounting action, Richard has joined fully in Sandra's exceptions to Plaintiffs' first interim accounting of the Estate (although he has no standing with respect to the claims pertaining to the disbursement of income which are exclusive to Sandra) and has not filed any independent claims or legal arguments of his own. As such, Richard's claims are identical to, entirely intertwined with and derivative of Sandra's claims. Accordingly, if the Court would have completed its analysis of the impact of the identical arbitration provisions contained in 2001 Wills, and found, as it appeared

poised to do[4], that the reciprocal Wills constituted an agreement to arbitrate within the meaning and intendment of the NJAA, it would follow that Richard, as a beneficiary of that agreement who sought to enforce the terms of the LWT and his beneficial interests thereunder, is likewise bound by the arbitration provision.[5]

The record belies Respondents' arguments that there was no detrimental reliance. Edward Imperatore, Esq. certified that, even prior to Decedent's death, Decedent's and Sandra's Wills were delivered to his office and before qualifying as Co-Executor, he read Decedent's LWT and was aware of the mandatory arbitration provision. (Pa209-210). Similarly, Peter Hekemian reviewed the LWT prior to qualifying as a Co-Executor and was aware of the mandatory arbitration provision. (Pa279-280). It is fundamental that as fiduciaries who qualified to serve and uphold the terms of the LWT, the Co-Executors are entitled to rely on and be guided by its provisions, protections, and procedures. See Barner v. Sheldon, 292 N.J. Super. 258, 265 (Law Div. 1995), aff'd, 292 N.J. Super. 157 (App. Div. 1996) ("[a]n executor is bound to observe the directions of the testator's will"); Dickerson v. Camden Trust

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[4] The Court noted that it was "assuming without deciding that Sandra's claims are subject to arbitration." (T. 51:19-22).

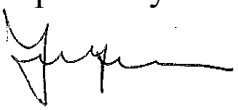
[5] Respondents cite Garfinkel as support for the Trial Court's refusal to bifurcate the proceedings. But Garfinkel involved a single litigant having some arbitrable and some non-arbitrable claims. Respondents do not address the fact that the "arbitration agreement must be enforced notwithstanding the presence of other persons who are not parties to the Agreement." Perez v. Sky Zone LLC, 472 N.J. Super. 240, 251 (App. Div. 2022); see also Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 196 n. 7 (2013) (bifurcating proceedings).

Co. 140 N.J. Eq. 34, 44 (Ch. 1947) ("the will of the testator… is a law to the executors… any deviation from such authority is illegal, and at their own risk. The executors are bound to observe this direction of the will.") The Co-Executors have undertaken substantial efforts in connection with the Estate's administration, including valuing assets, making tax filings, managing assets, distributing millions of dollars, and preparing and filing an accounting, all in reliance on the terms of the LWT, including the arbitration provision. From the instant litigation was instituted, the Co-Executors invoked the arbitration provision in an effort to implement the procedure mandated by Decedent for a final and binding resolution of the inter-family dispute in a private and efficient forum, while applying the substantive law of New Jersey, as Decedent and Sandra agreed in 2001 when creating their Wills. The failure of Respondents to abide by that provision is the sole reason for the ongoing delay. The failure to enforce the plain and unambiguous provision undermines the LWT and creates uncertainty for all interested parties who derive their rights and responsibilities therefrom.

CONCLUSION

For the foregoing reasons, the arbitration provision at Article Seventeenth of the LWT should be enforced and the order of the trial court reversed.

Respectfully submitted,



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