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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF ESTATE OF ROBYN R. LEWIS,
DECEASED,

JAMES ROBERT SIMMONS,
Respondent,

-against-

No. 64

MEREDITH M. STEWART, et al.,
Appellants.

Syracuse University College of Law
950 Irving Avenue
Syracuse, New York 13244
March 25, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to number
2 64, Matter of Estate of Robyn Lewis.

3 Counsel would you like any rebuttal time?

4 MR. CIRANDO: Yes, Your Honor. Two
5 minutes, if necessary. Thank you.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go
7 ahead.

8 MR. CIRANDO: Two minutes.

9 CHIEF JUDGE LIPPMAN: You're on.

10 MR. CIRANDO: Thank you. My name is John
11 Cirando. I'm the attorney representing the family of
12 the deceased, the objectants to the probate of the
13 Texas will. This is an appeal from an order of the
14 Appellate Division Fourth Department affirming with
15 one justice dissenting the probate of the Texas will.

16 CHIEF JUDGE LIPPMAN: Counsel, you know, I
17 think in this case, on its surface certainly, there
18 appears to be an inequity, an injustice. It seems -
19 - - it seems very harsh in terms of, you know, what
20 transpired here and who gets - - - would get this
21 property or would get to succeed under the will.

22 How do we - - - how do we get to the point
23 where - - - where we have - - - you know, the only
24 will that we have has certain provisions. How do we
25 get beyond that? Is it - - - is it that your

1 argument is that - - - that the will that had the
2 four copies or whatever, we have to assume that it
3 was destroyed? Is that - - - is that the - - -

4 MR. CIRANDO: Well - - -

5 CHIEF JUDGE LIPPMAN: - - - heart of your
6 argument?

7 MR. CIRANDO: No, Your Honor.

8 CHIEF JUDGE LIPPMAN: Go ahead. What's the
9 heart of your argument?

10 MR. CIRANDO: Well, when my client first
11 came to see me and explained what happened, I thought
12 for a moment and I looked at him and I said that this
13 is a classic case of Texas hold'em, that we've got
14 this will and we're going to hold onto it, because it
15 might be worth something someday.

16 Now, let's go back - - -

17 CHIEF JUDGE LIPPMAN: But why isn't it
18 worth something today?

19 MR. CIRANDO: It shouldn't be. Let's go
20 back to the execution of the - - - the Texas will,
21 the lost will. Let's go back to the execution of the
22 Texas will. The way it was explained in court, the
23 surrogate says I'm unclear whether there was one
24 original and three copies - - -

25 CHIEF JUDGE LIPPMAN: Yes.

1 MR. CIRANDO: - - - or four originals.

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. CIRANDO: Okay? The Appellate
4 Division, when we raised that, mistakenly confused
5 their burden of proof with what the surrogate said.
6 So it was up to them to show that the - - - all of
7 the wills were accounted for. But - - - but let's go
8 - - - let's - - - and the - - -

9 JUDGE ABDUS-SALAAM: Even if they were
10 copies or - - -

11 MR. CIRANDO: Well - - -

12 JUDGE ABDUS-SALAAM: - - - or is it - - -
13 or did they have to all be originals, Mr. Cirando?

14 MR. CIRANDO: They should be originals.
15 But let's go back and - - - and look at what they
16 did.

17 CHIEF JUDGE LIPPMAN: You could have,
18 though, that all of them were meant to be as if they
19 were originals, couldn't you?

20 MR. CIRANDO: I - - -

21 CHIEF JUDGE LIPPMAN: You could?

22 MR. CIRANDO: Yes, yes.

23 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

24 MR. CIRANDO: Let's go back to what - - -
25 why they had four. They had four to put one in the

1 Texas house, one in the New York property, one in the
2 safe deposit box, and one with the in-laws, the
3 petitioner, who - - -

4 CHIEF JUDGE LIPPMAN: Yeah.

5 MR. MODESTI: - - - here, was along for the
6 ride. So where did they put the original? They put
7 the original in with the socks in the dresser drawer.
8 Now, that just doesn't make any sense at all, because
9 the purpose of having four was to protect against a
10 destruction by a fire, I think that they used.

11 CHIEF JUDGE LIPPMAN: What - - - what do we
12 presume about the one that was in Clayton? What - -
13 - what happened to that?

14 MR. CIRANDO: Now, we characterized - - -
15 that was called the lost will.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. CIRANDO: Okay.

18 CHIEF JUDGE LIPPMAN: What do - - - what do
19 we presume about it?

20 MR. CIRANDO: The only witness that I think
21 that was disinterested, as the dissent indicated, was
22 the highly credible neighbor, Mrs. Barnes.

23 CHIEF JUDGE LIPPMAN: Who talked about the
24 new will that she had seen?

25 MR. CIRANDO: The will came from the

1 attorney - - - from an attorney's office with a
2 covering letter. They went through the will. They
3 read the will together. Most importantly, it revoked
4 all prior wills.

5 CHIEF JUDGE LIPPMAN: Right. But - - - but
6 we can't probate that will, right?

7 MR. CIRANDO: We - - - we never asked that
8 that will be probated.

9 JUDGE PIGOTT: But you know, what you're
10 going, though, is this - - - this will that - - -

11 MR. CIRANDO: The lost will.

12 JUDGE PIGOTT: Is being raised to a level
13 higher than at least one original will, because we're
14 saying well, we don't know if the other three were
15 copies or original, so let's throw that one out and
16 be equitable, because we don't like the fact that the
17 father-in-law is getting this house instead of the -
18 - - instead of the descendants. It looks to me like
19 this is a heavy, heavy, heavy equity case. And I'm
20 sure you can think of as many as I can, where if
21 something happens, gee, can I get my neighbor to come
22 in and say she saw an envelope and there was
23 witnesses in there, and there's all this stuff, so
24 that will that Pigott wrote that's in the safety
25 deposit box was clearly revoked.

1 MR. CIRANDO: It was with the underwear.

2 JUDGE PIGOTT: And we - - - pardon me?

3 MR. CIRANDO: It was with the underwear or
4 socks. And it - - -

5 JUDGE PIGOTT: All right, I - - - all
6 right. So can - - - you know, can it be - - - can it
7 be set aside? I mean, aren't we opening an
8 inequitable door that no will, no will is safe
9 anymore?

10 MR. CIRANDO: Not on this record. Okay?
11 Because we have a situation where the judge
12 specifically indicated that Mrs. Barnes was highly
13 credible witness. And she testified - - - what she saw,
14 she testified to, or she testified to what she saw.
15 So it was very clear to him - - -

16 CHIEF JUDGE LIPPMAN: But what's the
17 implication of that?

18 MR. CIRANDO: The implication is - - -

19 CHIEF JUDGE LIPPMAN: What if she says that
20 - - - again, I come back to my first question. What
21 do we presume and why about the will that was in
22 Clayton? What - - - do we presume it's destroyed?

23 MR. CIRANDO: It - - - it reflects her
24 testamentary intent, not to let the property pass the
25 way she had wanted it to pass when she was - - -

1 CHIEF JUDGE LIPPMAN: Because we can't - -
2 -

3 MR. CIRANDO: - - - happily married.

4 CHIEF JUDGE LIPPMAN: - - - because we
5 can't find it?

6 MR. CIRANDO: We - - - it doesn't - - - I
7 don't think it - - - the fact that we can't find it
8 is not the important thing. The fact that it exe - -
9 - it expressed her testimonial or testamentary - - -

10 JUDGE STEIN: What if we found it?

11 MR. CIRANDO: - - - intent?

12 JUDGE STEIN: What if we found it and we -
13 - - and it was established that it was not duly
14 executed?

15 MR. CIRANDO: Then - - -

16 JUDGE STEIN: Then what?

17 MR. CIRANDO: - - - then I think - - -
18 well, that's interesting, because I think there was
19 one case that you had in the Third Department, wasn't
20 it, the Shinn case, where you said a later will can
21 be sufficient to revoke a prior - - - a later
22 instrument can be sufficient to revoke a prior
23 instrument, but it may not be effective in and of
24 itself.

25 JUDGE STEIN: But I think we were - - -

1 what we were saying is that it might not be able to
2 be probated - - -

3 MR. CIRANDO: That's right.

4 JUDGE STEIN: - - - because maybe it was
5 missing - - -

6 MR. CIRANDO: Right.

7 JUDGE STEIN: - - - or maybe it was
8 revoked. But it - - - but it still was duly executed
9 in the first place.

10 MR. CIRANDO: Well, I think when you looked
11 at the - - - when you look at the Gold - - -
12 Goldsticker case, it says, an - - - an instrument may
13 be effective to be a revocation, but it may not be
14 effective to pass - - - to be - - -

15 CHIEF JUDGE LIPPMAN: But is that the key,
16 her testimony about this - - -

17 MR. CIRANDO: Yes.

18 CHIEF JUDGE LIPPMAN: - - - this other
19 will?

20 MR. CIRANDO: Yes.

21 CHIEF JUDGE LIPPMAN: Or is it just that we
22 can't find the first will - - -

23 MR. CIRANDO: Well, it's - - -

24 CHIEF JUDGE LIPPMAN: - - - that was in
25 that loc- - - that - - - one of the four that was in

1 that location?

2 MR. CIRANDO: That - - - that we can't - -
3 - I misunderstood. I thought you were talking about
4 - - - that we can't find the first will, it would
5 seem to me, that - - - that she destroyed the first
6 will.

7 CHIEF JUDGE LIPPMAN: That's what I'm
8 saying. That's what I was asking originally. Is - -
9 - is that the key that we presume based on what we
10 have, that that will was destroyed, and that - - -
11 again, I understand the corroborating effect of - - -

12 MR. CIRANDO: If you can't - - -

13 CHIEF JUDGE LIPPMAN: - - - the testimony
14 about the other will. But what about that first will
15 - - -

16 MR. CIRANDO: If you can't - - - if you
17 can't find the will, then you have to presume that
18 it's destroyed. And that goes back to their burden.

19 JUDGE PIGOTT: That's - - -

20 MR. CIRANDO: And I think what the - - -

21 CHIEF JUDGE LIPPMAN: And that's my
22 question. Whose burden is it - - - once - - - once
23 we know that. Let's assume we can't find it.
24 Presume it's destroyed. Where does the - - - where
25 is the burden, then?

1 MR. CIRANDO: The burden is on them.

2 CHIEF JUDGE LIPPMAN: To do what?

3 MR. CIRANDO: To account for all of those
4 four copies.

5 CHIEF JUDGE LIPPMAN: And what's the - - -
6 and what's the responsibility of the surrogate?

7 MR. CIRANDO: The responsibility of the
8 surrogate is to determine that before he admits the -
9 - - the - - - a will to probate, and - - -

10 CHIEF JUDGE LIPPMAN: Determine what?
11 Where the others are? Where the other - - -

12 MR. CIRANDO: Yes.

13 CHIEF JUDGE LIPPMAN: - - - three, or
14 whatever it is?

15 MR. CIRANDO: Yes, especially - - - he
16 raised the question himself. You know, is it a
17 matter that should go back to the surrogate so that
18 that question is answered. But there's - - -

19 CHIEF JUDGE LIPPMAN: So that they can
20 rebut? If you - - -

21 MR. CIRANDO: They could show - - - it's a
22 matter - - - it's a failure of their proof.

23 JUDGE PIGOTT: You're saying that they
24 raised it themselves, because if they - - - if they'd
25 walked in with the first will and just filed it and

1 didn't say anything more and there were no
2 objections, nothing would have happened?

3 You objected, then they bring out the fact
4 that there may be three more originals and in have -
5 - - and in bringing it up, they then had to prove
6 that - - - where all four were.

7 MR. CIRANDO: But - - - right. But there's
8 - - - oh, I'm sorry.

9 JUDGE PIGOTT: No, no, I'm - - -

10 MR. CIRANDO: But there's three - - -
11 there's three aspects to our argument. The first one
12 was that. The second one is that her testamentary
13 intent was reflected by the lost will. And the third
14 thing is the - - - is the equity considerations,
15 which I think you - - - you know, you touched on a
16 little bit, Judge, but - - - but that is something -
17 - -

18 JUDGE PIGOTT: See it worries me that, you
19 know, you got - - - you've got somebody that nobody
20 likes but he's entitled to the - - - to the money.
21 Some - - - some surrogate says, well, you know,
22 there's equities here and I don't like you either, so
23 we're not going to do your will. And I hear that out
24 here somewhere we haven't seen it, we don't know who
25 signed it, but there was a will. And so we're going

1 to give all the money to Mr. Cirando.

2 CHIEF JUDGE LIPPMAN: Counsel - - -

3 JUDGE PIGOTT: What's the - - -

4 CHIEF JUDGE LIPPMAN: - - - but do we have
5 to go to equity for you to prevail here?

6 MR. CIRANDO: No. All you - - - all you
7 have to do is reverse it based on the dissent at the
8 Appellate Division, really.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. CIRANDO: I think - - - which was very
11 - - - very thorough. But - - - and I'll talk about
12 the rest of that later.

13 CHIEF JUDGE LIPPMAN: Yeah, well, you'll
14 have your rebuttal, counsel.

15 MR. CIRANDO: Thank you.

16 CHIEF JUDGE LIPPMAN: Let's hear from your
17 adversary.

18 MR. MODESTI: May it please the court,
19 Julian Modesti on behalf of the petitioner, James - -
20 -

21 CHIEF JUDGE LIPPMAN: Counselor, why
22 shouldn't we presume, based on the evidence and
23 really what - - - you know, they brought in the first
24 place - - - why shouldn't we presume that that first
25 will was destroyed?

1 MR. MODESTI: Your Honor, there - - - there
2 was - - -

3 CHIEF JUDGE LIPPMAN: And why doesn't that
4 present the burden to your side?

5 MR. MODESTI: Certainly. Your Honor, the
6 facts show there was only one original will. And - -
7 -

8 CHIEF JUDGE LIPPMAN: You don't think it's
9 open to question what the weight of all four of these
10 things are?

11 MR. MODESTI: On page - - - I don't, Your
12 Honor. On page 386 of the record, the appellants, on
13 direct examination of the ex-husband, went through
14 the will execution procedure with regard to the 1996
15 will.

16 CHIEF JUDGE LIPPMAN: Yeah, which is the
17 original.

18 MR. MODESTI: Right. And he says, but
19 there was - - - counsel, the question, "But there was
20 only one original. Answer: Yes, of each of the six
21 documents."

22 Now, the six documents - - -

23 JUDGE PIGOTT: Now, that was - - - I'm
24 sorry, you were going to explain that.

25 MR. MODESTI: No, I was just going to - - -

1 yeah. So the six documents: we've got two parties,
2 we've got the decedent and the ex-husband - - -
3 husband at the time. And we have a will from each, a
4 healthcare proxy for each, and a power of attorney
5 for each. So they signed one original and then they
6 made copies of that one original for - - -

7 JUDGE PIGOTT: They said mirror wills. Is
8 that the same as what we refer to as reciprocal
9 wills?

10 MR. MODESTI: Right. All to one - - - I
11 give it all to you and you give it all to me, or - -
12 -

13 JUDGE PIGOTT: So that second original is
14 signed by her, giving everything to her husband; the
15 first will is him giving everything to her. And then
16 in the event, you know, that we pre-decease, then the
17 other two - - -

18 MR. MODESTI: Then there's - - -

19 JUDGE PIGOTT: - - - the other two are POAs
20 and then healthcare proxies?

21 MR. MODESTI: Correct, Your Honor. Now - -
22 -

23 JUDGE ABDUS-SALAAM: Well, counsel, you
24 mentioned that on rec - - - record page 386, that
25 they were all originals. But that's not what I read.

1 I see something that says, "and on that day, and they
2 were all done at Don Driver's office, both the
3 originals, of course, and the copies."

4 MR. MODESTI: Yes, but --

5 JUDGE ABDUS-SALAAM: And then we have the
6 surrogate saying, I'm not clear whether these are
7 copies or originals, but he goes ahead and probates
8 this 1996 will.

9 MR. MODESTI: Your Honor, there were copies
10 made that day. That's acknowledged. But when the
11 question is: "Okay, and but there was only one
12 original?" Yes, sir, of each of the six documents."

13 That's the direct testimony.

14 And here's the other thing about this whole
15 issue. It's unpreserved, first of all. This was
16 never an issue - - -

17 CHIEF JUDGE LIPPMAN: Well, if it's your
18 burden, maybe they don't have to preserve it.

19 MR. MODESTI: It is our burden. Except
20 they stipulated that we met our burden before we got
21 into this hearing.

22 JUDGE PIGOTT: Is that in the record?

23 MR. MODESTI: That is in the record, Your
24 Honor. There's a letter to counsel. It is on page
25 165. And he says, this hearing is my burden - - -

1 this is opposing counsel saying this is - - - this is
2 his burden. Okay? And then when they got to the
3 hearing, there's a little colloquy between the court
4 and the party - - - and the counsel as to who's going
5 first. And he says: Your Honor, objectant's counsel,
6 this is mine, I'm going first.

7 CHIEF JUDGE LIPPMAN: Let me ask you
8 another question.

9 MR. MODESTI: Yes.

10 CHIEF JUDGE LIPPMAN: Why isn't - - - if we
11 find for you and uphold this will, why isn't it
12 directly contrary to the whole framework of our
13 statutory scheme in regard to who should be able to
14 collect in a situation like this? Why isn't it just
15 wrong pursuant to the letter and the spirit of New
16 York law in this area?

17 MR. MODESTI: Your Honor, it - - - it's
18 actually - - -

19 CHIEF JUDGE LIPPMAN: Why should the - - -
20 why should the ex-husband collect in this situation?
21 He - - - he's not eligible, right?

22 MR. MODESTI: Correct.

23 CHIEF JUDGE LIPPMAN: So why is it a good
24 thing to find for you? And I understand equity not
25 equity. From a - - - how is it effective? Isn't

1 this totally, completely contrary to what New York
2 law is all about here?

3 MR. MODESTI: Not at all, Your Honor.
4 We're actually enforcing New York law. And there's
5 been no mention to date of either - - -

6 CHIEF JUDGE LIPPMAN: We're - - - we're
7 enforcing New York law?

8 MR. MODESTI: We're going to - - -

9 CHIEF JUDGE LIPPMAN: In what way?

10 MR. MODESTI: - - - we're going to enforce
11 New York law, because we're going to uphold the
12 validity of this 1996 will. This - - - this will is
13 - - -

14 CHIEF JUDGE LIPPMAN: For a husband that
15 had had no contact with the wife for all that period
16 of time, that reads about it on the internet that she
17 died, who's ineligible, and through a freak of Texas
18 law, a father is eligible. That enforces New York
19 law on this issue on what the law not only says but
20 what it means?

21 MR. MODESTI: Your Honor, the husband's not
22 getting anything. And that's by virtue of - - -

23 CHIEF JUDGE LIPPMAN: Who's getting?

24 MR. MODESTI: The - - - the husband's - - -
25 the ex-husband's father.

1 CHIEF JUDGE LIPPMAN: And doesn't the
2 father acknowledge he's just there for the ride and
3 the husband is the real property in int - - - the
4 real person in interest?

5 MR. MODESTI: He - - - he did unfortunately
6 use the phrase "I'm here for the ride", Your Honor -
7 - -

8 CHIEF JUDGE LIPPMAN: Unfortunately,
9 doesn't it reflect the reality of what's going on
10 here?

11 MR. MODESTI: Your Honor, the - - - the - -
12 -

13 CHIEF JUDGE LIPPMAN: If that's not the
14 reality, what is?

15 MR. MODESTI: Your Honor, the reality is -
16 - -

17 CHIEF JUDGE LIPPMAN: And - - - yes?

18 MR. MODESTI: - - - that New York law is
19 being properly applied.

20 CHIEF JUDGE LIPPMAN: Nuh-huh. That's what
21 I asked. I - - -

22 MR. MODESTI: Essentially - - -

23 CHIEF JUDGE LIPPMAN: - - - said is,
24 doesn't this go against every principle of New York
25 law in this area that it's directly the opposite of

1 what one would think. And you'll make your argument
2 for the law, and we'll see how we determine - - - but
3 it's directly the opposite of what one would think
4 should happen under the precepts of New York law and
5 what it means, in the end in reality.

6 MR. MODESTI: So - - -

7 CHIEF JUDGE LIPPMAN: Isn't the husband
8 collecting here? And isn't that contrary to
9 everything about New York law in this area?

10 MR. MODESTI: So if we looked at intestacy,
11 it would be contrary, because by virtue of intestacy,
12 it would go to her parents, okay? Agreed. But
13 there's still a valid will.

14 CHIEF JUDGE LIPPMAN: Nuh-huh. But you're
15 - - - you're giving me your - - -

16 MR. MODESTI: No, I - - -

17 CHIEF JUDGE LIPPMAN: - - - your arguments.
18 I understand your legal argument - - -

19 MR. MODESTI: Right.

20 CHIEF JUDGE LIPPMAN: - - - how you get to
21 that point. I'm asking you, not just is it fair, but
22 does it go against what New York law is all about in
23 this area, that in reality, the husband is going to
24 collect in this situation seems so contrary to - - -
25 to what our statutory framework is all about.

1 MR. MODESTI: Your Honor, I have to
2 respectfully degree (sic), because you're making a -
3 - -

4 CHIEF JUDGE LIPPMAN: Tell me why you
5 disagree?

6 MR. MODESTI: Well, because you're - - -
7 you're accepting the principle of law of implied
8 revocation, and that this thing is going to go,
9 ultimately - - - ultimately has to go to the ex-
10 husband. And the ex-husband is not the father. Are
11 they related? Yes. Am I going to project what's
12 going to happen to this property in the future? I
13 will not do that, Your Honor.

14 But you can't make them the same person.
15 What we're doing is - - - and I understand the
16 visceral resistance to this. We all do. It's
17 obvious. I hear it on the street, Your Honor. So we
18 understand what's going on here.

19 But what are we doing to the law of wills
20 in New York State if just a verbal allegation of
21 seeing a will is enough to overturn a will?

22 CHIEF JUDGE LIPPMAN: What are we doing to
23 the laws - - - the law of wills in New York State by
24 allowing the ex-husband's father to - - - to be a
25 recipient here? What are we doing?

1 MR. MODESTI: Your Honor, this court has -
2 - -

3 CHIEF JUDGE LIPPMAN: What is this all
4 about? Is this not about justice? And is the law of
5 wills in New York about doing justice to the
6 intentions of the person who's unfortunately not with
7 us anymore?

8 MR. MODESTI: Your Honor, this court has
9 said many times in the past that it is not the intent
10 of the testator in and of itself that we're trying to
11 achieve, it's the intent in the light and context of
12 the statute. This court - - -

13 CHIEF JUDGE LIPPMAN: I - - - I get that.

14 MR. MODESTI: - - - this court has - - -

15 CHIEF JUDGE LIPPMAN: But you get the drift
16 of what I'm asking you?

17 MR. MODESTI: Oh, I get - - - I certainly
18 got the drift.

19 JUDGE ABDUS-SALAAM: Counsel - - -

20 MR. MODESTI: I got the drift from the - -
21 - the day I got this case.

22 JUDGE ABDUS-SALAAM: - - - okay, counsel -
23 - - counsel, if we - - -

24 MR. MODESTI: So but, Your Honor, what
25 happens is, this court has said on many times, on

1 many occasions, we know that we - - - everybody
2 agrees, all parties agree, counsel agrees, the judge
3 agrees, that we are not going to, by virtue of what
4 we're going to do and follow the law, effectuate the
5 testator's intent. And why do we not do that,
6 because we're protecting the statute and we're
7 protecting everyone else's will out there who has
8 one. Okay?

9 JUDGE ABDUS-SALAAM: Counsel, if we
10 disagree with you that it's clear - - - that the
11 testimony is so clear that these are - - - there's
12 only one original and that the surrogate said that he
13 was unclear about whether there were - - - whether
14 there was more than one original or they were copies,
15 did you - - - do you agree that this should go back
16 to the surrogate or go back down for a clarification
17 of that?

18 MR. MODESTI: Your Honor, I have a - - - I
19 disagree, respectfully, because I don't think the
20 issue was preserved. This court has interest of just
21 - - - does not have interest of justice jurisdiction
22 over unpreserved issues. I really think this is a
23 traded issue, which using this court's language from
24 the Misicki and Caradonna case, was winkled out of
25 the record.

1 CHIEF JUDGE LIPPMAN: What's wrong with the
2 reasoning of the dissent, that they don't have to
3 preserve in this case, that it's your burden?

4 MR. MODESTI: And we satisfied our burden.
5 We had testimony up there, and it was that there was
6 one original and that they - - - there was one
7 original, the six documents. And they stipulated
8 that we satisfied our burden, because they started
9 the case as an objectant.

10 JUDGE PIGOTT: And frankly, I don't know of
11 anybody that makes four original wills.

12 MR. MODESTI: Not to - - - not today, Your
13 Honor. It just doesn't make any sense, because I
14 agree, Your Honor, if you revoke one of the ori - - -
15 originals, you revoke all of them, by operational
16 law. That's true. That wasn't this case.

17 There was only one original and that was -
18 - - it's a stipulation before trial. If you
19 stipulate that there's a contract and your issue at
20 trial is only what are the - - - what are the issues
21 on damages, you can't then, on appeal, for the first
22 time, not the - - - not the litigants, a dissenting
23 justice, say you know what, I don't think there was a
24 contract. We got to send it all back.

25 This - - - this matter was addressed and

1 resolved, and then only after the dissenting decision
2 came out was this an issue for the first time. It's
3 unreserved. It - - - it shouldn't be countenanced
4 by this court, at this point, Your Honor.

5 CHIEF JUDGE LIPPMAN: Thank you, counsel.

6 MR. MODESTI: Thank you, Your Honor.

7 CHIEF JUDGE LIPPMAN: Rebuttal? Counsel.

8 MR. CIRANDO: With all - - - may it please
9 the court, with all due respect to Mr. Modesti, I
10 believe the issue was created - - - as to the number
11 of wills, was created by the surrogate himself, and
12 he - - - he's the one that raised that question.

13 Insofar as the family structure of the - -
14 - of the - - - the ex-husband, I think the record is
15 clear, he's the only child of - - - of the
16 petitioner.

17 And when it comes to upholding the policy
18 behind New York law, I think that dovetails into our
19 claim that both the surrogate and the Appellate
20 Division improperly failed to exercise their equity
21 power in this case.

22 JUDGE PIGOTT: Do you - - - do you see any
23 danger in this?

24 MR. CIRANDO: Not on this record, Judge.

25 JUDGE PIGOTT: If - - -

1 MR. CIRANDO: No.

2 CHIEF JUDGE LIPPMAN: - - - if you're - - -
3 if the - - - if the lady who died up here had died in
4 Texas, and if the husband was up here making these
5 claims, would - - - would your feelings be the same,
6 or would we be saying, oh, well, you know, the will's
7 clear, you know, it goes to their family down there?

8 MR. CIRANDO: I think you have to take - -
9 - when you're applying equity, it's - - - it's like
10 making chocolate chip cookies, okay? You've got all
11 of these ingredients. You've got the flour, the eggs
12 - - -

13 JUDGE PIGOTT: Do you see - - - do you see
14 more than this will in danger if we're going to say
15 that - - -

16 MR. CIRANDO: No.

17 JUDGE PIGOTT: - - - the surrogate can - -
18 - can say, well, you know - - -

19 MR. CIRANDO: Well, the surrogate - - -

20 JUDGE PIGOTT: - - - equity - - - equity
21 tells me I don't like this - - - this father-in-law.
22 He's going to give it away and that's not right. And
23 I think the next case you can say, you know, I don't
24 like Judge Pigott, what he's going to do with his
25 property, and so I'm not going to abide by his will.

1 Equity tells me it ought to go to Mr. Cirando.

2 MR. CIRANDO: I would appeal that if they
3 said that, Your Honor.

4 JUDGE PIGOTT: Oh, you would?

5 MR. CIRANDO: But let's - - -

6 JUDGE PIGOTT: But you see my point about
7 that?

8 MR. CIRANDO: Yeah, I see your point. But
9 - - - but Judge Stein, Judge Lippman, Judge Pigott,
10 okay, Judge Salaam, were all in the Appellate
11 Division before they came to the Court of Appeals.
12 They all - - - you all had equity jurisdiction. You
13 all could exercise equity.

14 JUDGE PIGOTT: Not - - - we - - - not as a
15 matter of law.

16 MR. CIRANDO: No.

17 JUDGE PIGOTT: I mean, we - - - we can't
18 say, all right, you convicted - - - you convicted
19 this man of larceny; we like him. So in the interest
20 of equity, we're going to - - - we're going to acquit
21 him.

22 MR. CIRANDO: No. No, no, no, no, no.

23 JUDGE PIGOTT: Well, if the EPTL says what
24 it says, I mean, it's - - - it's sad if people don't
25 get what they want, but do we say - - -

1 MR. CIRANDO: No.

2 JUDGE PIGOTT: - - - because of this case
3 and for every case now on - - -

4 MR. CIRANDO: No.

5 JUDGE PIGOTT: - - - equity prevails?

6 MR. CIRANDO: No, no. Because look at the
7 Snide case, that this court had, okay, where the
8 lawyer's worst nightmare, the husband signed the
9 wife's will and the wife signed the husband's will,
10 okay. And it came to the Court of Appeals. The
11 Third Department said it was - - - it reversed the
12 surrogate and said you can't admit the will to
13 probate, and the Court of Appeals saying it's in a
14 very unusual case, like we have here. There's no dan
15 - - - there's no danger of fraud. We don't have a
16 danger of fraud here either. And the ref - - -

17 JUDGE PIGOTT: You saying it doesn't mean
18 it's true. I mean - - -

19 MR. CIRANDO: Well.

20 JUDGE PIGOTT: - - - I'm - - - I'm amazed
21 at a neighbor who could testify, now - - - and the
22 judge - - - or the surrogate found her credible. But
23 what about tomorrow's witness, the neighbor tomorrow
24 that says - - -

25 MR. CIRANDO: That's why equity is - is- -

1 is applied to the total facts of the case. When I
2 was talking about baking something, you have to
3 consider each and every ingredient. Just because
4 somebody comes in - - - but this lady came in and did
5 testify. But then you look at what was this lady's
6 testimonial intent? She said she wanted to make a
7 new will. Was that in accordance with - - - after
8 she got divorced, did she need - - - need to make a
9 new will?

10 JUDGE PIGOTT: But if you don't - - -

11 MR. CIRANDO: So that's - - - that's what
12 she wanted. She never got - - - the other thing is,
13 she never got her will back. The son said he got his
14 will back from his mother after the divorce. He
15 didn't say, oh, by the way, there's another will
16 here, should we send it to her in New York? No,
17 that's where Texas hold'em comes in.

18 CHIEF JUDGE LIPPMAN: Counsel, but again I
19 ask, you - - - you can win without relying on equity,
20 right?

21 MR. CIRANDO: Yes.

22 CHIEF JUDGE LIPPMAN: That's your argument?

23 JUDGE PIGOTT: And that being the burden of
24 proof in surrogate's court on the answer?

25 MR. CIRANDO: As raised by the surrogate.

1 The surrogate said I've got - - -

2 CHIEF JUDGE LIPPMAN: And that's the heart
3 of - - -

4 MR. CIRANDO: - - - a question.

5 CHIEF JUDGE LIPPMAN: - - - that's the
6 heart of the dissenting opinion, really - - -

7 MR. CIRANDO: Yes.

8 CHIEF JUDGE LIPPMAN: - - - in this case.

9 MR. CIRANDO: The surrogate said I've got a
10 question from this proof.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. CIRANDO: Thank you.

13 CHIEF JUDGE LIPPMAN: Thank you both.

14 Appreciate it.

15 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Estate of Robyn R. Lewis, Deceased, No. 64 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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