Bonnie Allen v. Mararete Dalk

MR. CHIEF JUSTICE: THE NEXT CASE BEFORE THIS COURT IS THE CASE OF ALLEN VERSUS DALK. MR. FALLEN. -- MR. PHALEN.

MAY IT PLEASE THE COURT. MY NAME IS WILLIAM FEEL AND. I PRACTICE WITH BONNER -- WITH BOND, ARNETT AND FEEL AND IN OCALA. THE PURPOSE OF THIS TODAY IS A WILL CONFERENCE, AFTER WHICH THE DECEDENT MADE A CONFERENCE WITH THE LAWYER, FOR THE PURPOSE OF EXECUTING HER WILL. AT THAT TIME THERE WERE EIGHT SEPARATE ORIGINAL DOCUMENTS BEING CIRCULATED FOR EXECUTION. THERE WERE FOUR DUPLICATE ORIGINAL LIVING ALSO, THREE DUPLICATE ORIGINAL POWERS OF ATTORNEY, AND ONE DOCUMENT ENTITLED "LAST WILL AND TESTAMENT" OF CRYSTAL McVEE, WHICH ESSENTIALLY EMPLOYEDED A TESTAMENTARY SCHEME WHEREBY BONNIE ALLEN WAS TO RECEIVE JEWELRY, PERSONAL EFFECTS AND AN AUTOMOBILE, WITH THE BALANCE OF THE ESTATE TO BE SHARED EQUALLY BETWEEN BONNIE ALLEN'S TWO DAUGHTERS.

EXPLAIN TO US EXACTLY WHAT HAPPENED, UNDER YOUR THEORY, AS TO THE REASON THAT SHE DIDN'T SIGN THIS WILL.

THE TRIAL COURT FOUND SPECIFICALLY, IN VERY DETAILED FINDINGS OF FACT, THAT IT A SIMPLE RESULT OF CONFUSION AND MISTAKE.

I MEAN, BECAUSE ARE TELLING US IS SHE CAME DOWN TO THE LAWYER'S OFFICE TO SIGN THE WILL WILL.

ACTUALLY, YOUR HONOR, I AM SORRY.

WERE THE WITNESSES THERE?

YES, YOUR HONOR. ACTUALLY IT WAS NOT THE --

DID THEY SIGN IT?

I AM SORRY.

DID THEY SIGN IT?

YES, SIR.

THEY SIGNED WITHOUT HER SIGNING.

BUT THE TRIAL COURT -- YES, YOUR HONOR. THE SIMPLE ANSWER IS YES. WHAT THE TRIAL COURT FOUND HAPPENED --

ISN'T THAT A DIRECT VIOLATION WITNESSES WITNESSING SOMETHING THAT HASN'T HAPPENED?

YES, YOUR HONOR, AND LET ME HASTEN TO ADD WE ARE NOT HERE, TODAY, ADVOCATING THAT THAT DOCUMENT CONSTITUTES A VALID WILL. THAT IS NOT BEFORE THE COURT. WE ARE NOT SUGGESTING TO THE COURT THAT IT D WHAT WE ARE SUGGESTING TO THE COURT IS THAT, UNDER THE HOLDING UNDER THE ESTATE OF TOLBIN CASE, THAT THE IMPLEMENTATION OF

EXECUTIVE TRUST, AND I AM GOING TO ARGUE THAT, BUT RETURNING TO THE CHIEF JUSTICE'S QUESTION IN THIS CASE, I THINK IT IS IMPORTANT FOR THIS COURT TO UNDERSTAND THE FACTS AS FOUND BY THE TRIAL COURT. FIRST OF ALL, THE LAWYER IN QUESTION DESCRIBES HIMSELF AS SEMIRETIRED. THIS WAS NOT ACTUALLY AT HIS OFFICE. THIS WAS AT HIS MOBILE HOME, IN A RETIREMENT COMMUNITY, JUST OUTSIDE OF OCALA A ALL OF THE PEOPLE INVOLVED WERE RATHER ELDERLY PEOPLE. THEY WERE IN A RELATIVELY CROWDED SURROUNDINGS. WHY IT WAS NECESSARY TO HAVE FOUR DUPLICATE ORIGINAL LIVING ALSO AND THREE DUPLICATE ORIGINAL POWERS OF ATTORNEY, I CERTAINLY CAN'T SAY.

WITHOUT THE BENEFIT OF TOLIN. WOULD YOU STILL BE ARGUING WHAT YOU ARE ARGUING NOW?

I WOULD LIKE TO THINK I WOULD HAVE BEEN PERCEPTIVE ENOUGH TO, FIRST, ADVOCATE THE POSITION ADOPTED BY TOLIN, I DON'T KNOW. TOLIN CLEARLY BROKE NEW GROUND.

IT IS UNLIKELY TO HAPPEN AGAIN, AND IT IS CLEAR WHAT THE INTENT WAS, SO IT IS DISTINGUISHABLE FROM YOUR CASE, WHERE YOU ARE HARD-PRESSED TO ANSWER WHY SHE DIDN'T SIGN IT, IN ORDER TO LAY THE PREDICATE FOR THE CONSTRUCTIVE.

WITH RESPECT, YOUR HONOR, I DON'T THINK I AM HARD-PRESSED TO ANSWER THAT QUESTION, SIMPLY BECAUSE THE TRIAL COURT HAS ALREADY ANSWERED FOR US. THE TRIAL COURT, HAVING HEARD THE EVIDENCE AND OBSERVED THE WITNESSES, FOUND NOT ONLY THAT IT WAS HER INTENT BUT FOUND, SPECIFICALLY, THAT IT WAS HER CLEAR INTENT TO DISPOSE OF HER PROPERTY IN ACCORDANCE WITH THE TERMS OF THE DOCUMENT ENTITLED "LAST WILL AND TESTAMENT". WHAT THE TRIAL COURT FOUND SPECIFICALLY IS THAT, AS A RESULT OF CONFUSION AND MISTAKE AND RELATIVELY-CROWDED CIRCUMSTANCES, CIRCULATING EIGHT ORIGINAL DOCUMENTS FOR SIGNATURE DIFFERENT PEOPLE SIGNING DIFFERENT THINGS AT DIFFERENT TIMES, AND JUSTICE LEWIS, LET ME HASTEN TO ADD AGAIN, I WASN'T INVOLVED IN THAT NOR AM I SUGGESTING THAT WAS A GOOD WAY FOR IT TO HAVE BEEN DONE. WE PLAY THE CARDS WE GET DEALT. I AM SUREc THAT IS THE WAY IT HAPPENED. I AM SURE ATTORNEY BAKER --

HELP ME, AS WE GO FROM THE VARIATION ON LEGAL DOULTS, FROM EXECUTE AGO WILL TO -- LEGAL DOCUMENTS, FROM EXECUTING A WILL TO THE TRUST SITUATION, TO GETTING AWAY FROM POLICY DECISIONS THAT WERE MADE, IN GETTING FAR AWAY FROM THE WAY PROPERTY CAN BE CONVEYED, BY THE USEFUL AN INSTRUMENT LIKE THIS, HOW CAN WE RECOGNIZE YOUR SITUATION, NOW, AS SORT OF A FURTHER EXCEPTION OR CREATION OF A TRUST, HOW WOULD WE POSSIBLY PUT ANY BOUNDS OR LIMITS ON THIS NOW, BECAUSE WE ALL RECOGNIZE THAT THERE ARE SIMPLY A MYRIAD OF HUMAN SITUATIONS THAT OCCUR OUT THERE THAT COULD BE ANALOGIZEED TO WHAT OCCURRED HERE. AND SO THIS IS THE -- WHAT WE DO HERE, OF COURSE, JUST AS YOU ARE BUILDING ON A PRIOR DECISION THAT SAID, NOW, THIS IS JUST A NARROW, LIMITED CIRCUMSTANCE, BUT NOW WE ARE BUILDING ON THAT, THERE WILL BE BUILDING ON ANY DECISION THAT WE MAKE HERE, SO HELP US WITH THE PROPOSITION THAT THERE CAN BE A RATIONAL LIMITATION ON A RULE THAT WE WOULD DEVELOP HERE. COULD YOU HELP US WITH THAT?

I THINK THAT I CAN, YOUR HONOR, AND I WOULD LIKE TO TRY. FIRST OF ALL, LET THERE BE NO MISTAKE, THE PETITIONER RECOGNIZES THE PUBLIC POLICY SIGNIFICANCE OF THIS CASE, AND IT REALLY TRIED TO ADDRESS THAT IN OUR BRIEF. I AM NOT SUGGESTING, FOR ONE MOMENT THAT, THIS IS SOMETHING THE COURT SHOULD CONSIDER LIGHTLY OR SHOULD JUST FRIVOLOUSLY SAY, WELL, WE WANT TO DO SOME EQUITY HERE. I THINK IT IS LEGITIMATE FOR THE COURT TO BE CONCERNED WITH HOW THIS OPINION WILL BE LIMITED, AND IN POINT OF FACT, THAT IS ONE OF THE ISSUES THAT I TRIED TO ADDRESS, SOMEWHAT, IN MY BRIEF. FORTUNATELY, THIS COURT HAS ALREADY GIVEN ME A VERY EFFECTIVE TOOL WITH WHICH TO WORK, AND THAT IS THE TOLIN CASE ITSELF, WHICH IT IS CLEAR IN A READING FROM FROM THE TOLIN CASE AND I AM

CONFIDENT CONTINUES TO INTEND THAT THAT BE A NARROW DECISION. THE TOLIN CASE CONTAINS, I WOULD RESPECTFULLY SUBMIT, THE TOOLS THAT THIS COURT NEEDS TO LIMIT THIS OPINION, AND IF THE COURT WERE TO FIND IN FAVOR OF MY CLIENT IN THIS CASE, I CERTAINLY WOULD ANTICIPATE THAT ANY OPINION WRITTEN WOULD EMPHASIZE, PERHAPS MORE STRONGLY, THOSE POINTS RAISED IN TOLIN, AND THEY ARE, FIRST, THE INTENT OF THE DECEDENT MUST BE CLEAR. IN THE TOLIN CASE IT WAS CLEAR FROM FACTUAL STIPULATIONS. IN THIS CASE IT IS CLEAR FROM WHAT WAS ESSENTIALLY UNCONTRADICTED EVIDENCE BEFORE THE TRIAL COURT. THE TRIAL COURT FOUND SPECIFICALLY, IN ITS RATHER DETAILED OPINION THAT, THE CLEAR INTENT OF THE TESTATOR OR THE DECEDENT WAS THAT HER PROPERTY PASS IN ACCORDANCE WITH THE TERMS OF THAT WILL.

HAVEN'T WE ALREADY CROSSED THE BRIDGE THAT THE POLICY CONSIDERATIONS ARE THAT, TO REFLECT THAT INTENT FOR STABILITY PURPOSES, WE WANTED IN WRITING SOME CERTAIN FORMALITIES FORMALITIES? ISN'T THAT DIFFERENT THAN JUST REVOKING THE CODD I SILL?

IF I MAY, YOUR HONOR, I THINK YOU HAVE ASKED TWO QUESTIONS. I WOULD LIKE TO ANSWER THEM BOTH. FIRST OF ALL, I BELIEVE THE ANSWER TO YOUR FIRST QUESTION WOULD BE, CERTAINLY, YES, AND ONLY IF WE ARE ADVOCATING THIS DOCUMENT AS A WILL ENTITLED TO PROBATE. WE ARE NOT. WE CONCEDE THAT THIS DOCUMENT IS NOT A WILL, FOR THE PURPOSES OF THE PROBATE. WITH REGARD TO THE COURT'S SECOND QUESTION, I THINK WITH RESPECT, THAT IS REALLY THE KEERTION AND I SUSPECT MR. KLEIN WILL PROBABLY AGREE WITH ME ON THIS. THE REAL KEY THE COURT HAS DECIDED.

ON THE FIRST ISSUE, YOU SAY IT IS NOT A WILL ADMITTED TO PROBATE, BUT THE EFFECT BE THE SAME. YOU WANT INTENT AND PROVISIONS OF THIS WILL TO BE WHAT THE COURT EFFECTUATES, SO HOW DOES THAT THROW OUT THE ENTIRE REQUIREMENT THAT THERE BE STRICT COMPLIANCE WITH THE STATUTE? I MEAN, WHETHER IT WAS WITNESSES NOT SIGNING. BUT BY SAYING YOU ARE NOT ASKING FOR IT TO BE ADMITTED TO PROBATE YOU ARE ASKING FOR THE SAME EXACT REMEDY, WHICH IS THAT THE PROVISIONS OF THE WILL BE GIVEN EFFECT.

IN EFFECT DISTINCTION WITHOUT A DIFFERENCE. SUPERFICIALLY, JUSTICE PARIENTE, I UNDERSTAND HOW THAT WOULD APPEAR TO BE THE CASE, WHICH THE SEGUE TAKES ME RIGHT BACK TO WHAT JUSTICE LEWIS WAS ASKING. IS THERE AN EFFECTIVE DIFFERENCE BETWEEN ATTEMPTING TO REVOKE A CAD SYLLABI ACT IN FAILING AND ATTEMPT TO EXECUTE A WILL IN FAILING? I SUBMIT THAT THERE IS NO FUNCTIONAL DIFFERENCE. BOTH THE EXECUTION OF PROBATE DOCUMENTSANT REVOCATION OF PROBATE DOCUMENTS ARE CONTROLLED BY EXACTLY THE SAME PART V OF EXACT SAME PART OF CHAPTER 732, BOTH ARE ENCOMPASSED WITH WHAT WE MIGHT COMMONLY CALL THE WILLS STATUTES, AND IN THE TOLIN CASE, JUSTICE PARIENTE, THIS COURT DID PRECISELY WHAT YOU ARE SUGGESTING MAY BE OF CONCERN NOW. THE TOLIN COURT LOOKED AT THE ACTS WHERE THE TESTATOR ATTEMPTED TO DESTROY A CODICIL BY ACT, TEARING IT UP, AND THE COURT RULED, PROPERLY SO, THAT UNDER EFFECT, THAT WAS NOT EFFECTIVE REVOCATION. HAD THAT STOPPED THERE, I PROBABLY WOULDN'T BE HERE TODAY, BUT THE COURT WENT ONE STEP FURTHER AND SAID, EVEN THOUGH YOU TRIED TO REVOKE THE CODICIL, AND EVEN THOUGH THAT ATTEMPT WAS DEFECTIVE, INSTEAD OF FORCING DISTRIBUTION OF ASSETS IN ACCORDANCE WITH THE CODICIL, IN WHICH CASE THE BROWARD ART GUILD WOULD HAVE TAKEN IT, WE ARE GOING TO IMPRESS A CONSTRUCTIVE TRUST, SO THAT THE PROPERTY OF THE DECEDENT WILL BE DISPOSED OF IN ACCORDANCE WITH THE CLEAR INTENT.

MAYBE THIS IS A DISTINCTION WITHOUT A DIFFERENCE, BUT AS I UNDERSTAND TOLBIN, THE FACTS WERE THAT THE TESTATOR ACTUALLY TORE UP A DOCUMENT. IT JUST HAPPENED TO BE THE DUPLICATE RATHER THAN THE ORIGINAL. IS THAT WRAPPED WHAT HAPPENED?

THAT IS EXACTLY CORRECT. -- IS THAT WHAT HAPPENED?

THAT IS EXACTLY CORRECT.

IN THIS CASE THE TESTATOR SIGNED OTHER DOCUMENTS INTESTATE BUT NEVER SIGNED A WILL, CORRECT?

ALSO CORRECT.

IF THIS IS WHAT YOU ARE SAYING SAYING, THIS WOULD HAVE BEEN ON THIS DAY THERE WAS A COPY OF THE WILL AND THAT WAS SIGNED, AND SOMEHOW THE SIGNATURES FOR THE WITNESSES WERE ON ANOTHER DOCUMENT, WOULDN'T THAT BE CLOSER, BUT HERE IT WAS NO SIGNATURE AT ALL? SO HOW IS THAT A MISTAKE?

WITH RESPECT, YOUR HONOR --

IN THE NARROW HOLDING OF TOLL BIN. 4.

ARE RESPECT, YOUR HONOR, THE DECEDENT NEVER SIGNED THE WILL, BUT MS. McPEEK DID SIGN SEVERAL SEPARATE DOULTS. THE TRIAL COURT FOUND THAT, WITH THAT WILL-SIGNING CEREMONY, SHE DECLARED TO HER FRIEND WHO HAD DRIVEN HER THERE, THAT SHE HAD JUST SIGNED THE WILL. MS. McPEAK SAT AT THE CARD TABLE ON THE BACK PORCH AND SIGNED SEVEN SEPARATE DOCUMENTS. JUST IN A HORRIBLE MISTAKE, SHE SIGNED HER HAND TO SEVEN OFFICIAL-LOOKING LEGAL DOCUMENTS THAT HER LAWYER TOLD HER INCLUDED HER WILL, AND THAT IS, AGAIN, INCLUDED IN THE RECORD. SHE LEFT THINKING SHE HAD SIGNED THE WILL, SO MR. TOLBIN REALLY, REALLY THOUGHT HE WAS TEARING UP HIS CODICIL, WHEN HE TORE UP THAT PAPER, MS. McPEAK REALLY, REALLY, REALLY THOUGHT SHE WAS SIGNING HER WILL, WHEN THOSE DOCUMENTS WERE SIGNED.

BUT YOU ARE TALKING ABOUT A LIVING WILL. YOU ARE TALKING ABOUT A WILL THAT TRANSFERS PROPERTY, CORRECT CORRECT? AND THE POWER OF ATTORNEY IS SOMETHING THAT WE THINK OF WHENc TRANSFERRING THE POWER. IN THE SEVEN DOCUMENTS, EVEN THOUGH WE HAD THESE FACTS, DID SHE CLEARLY NOT READ THE DOCUMENTS. SHE SAID I SIGNED A WILL. THAT IS NOT A WILL.

WHAT THE TESTIMONY BEFORE THE TRIAL COURT WAS IN THE RECORD AND FOUND BY THE TRIAL COURT, IS THAT THE DOCUMENTS WERE EXPLAINED TO HER BY LAYER, PRIOR TO EXECUTION, AND YOU ARE RIGHT. I MEAN YOU ARE SIMPLY RIGHT. SHE DIDN'T SIGN THE WILL. IF SHE HAD, I HOPE I DON'T SOUND FACETIOUS, WE WOULDN'T BE HERE. WHAT HAPPENED WHEN SHE THOUGHT SHE SIGNED THE WILL, BUT AS A RESULT OF A MISTAKE OF FACT, THE WILL DID NOT GET SIGNED. EVERYTHING YOUR HONOR SAYS IS CERTAINLY CORRECT. IT IS EQUALLY CORRECT TO NOTE THAT MR. TOLBIN THOUGHT HE WAS TEARING UP HIS ORIGINAL CODICIL BUT HE DIDN'T, BUT FOR THE CONSTRUCTIVE TRUST, MR. TOLBIN'S ESTATE WOULD HAVE PASSED IN ACCORDANCE WITH THE TERMS OF THE CODICIL, AND THE BROWARD ART KBILED WOULD HAVE RECEIVED HIS -- BROWARD ART GUILD WOULD HAVE RECEIVED HIS STATE, CONTRARY TO HIS INTENT. SIMILARLY IN THIS CASE, IF A CONSTRUCTIVE TRUST IS NOT IMPRESSED, MRS. McPEAK'S ESTATE IS GOING TO PASS, IN A TESTATE SITUATION, IN A MANNER CLEARLY FOUND NOT TO BE IN CONFORMANCE WITH HER INTENT.

WE HAVE ALL OF THESE DOCUMENTS FLOATING AROUND AND SHE THOUGHT SHE WAS SIGNING A WILL. SUPPOSE THE WILL WAS NOT AMONGST DOCUMENTS AT ALL, BUT THE ATTORNEY TOLD HER THAT THE WILL WAS INCLUDED AMONG THESE DOCUMENTS. DO WE STILL, AND SHE MADE THE SAME STATEMENTS TO THESE PEOPLE THAT "I JUST SIGNED MY WILL", DO WE THEN IMPOSE A CONSTRUCTIVE TRUST, UNDER YOUR THEORY?

NO, YOUR HONOR, YOU DO NOT, AND HERE IS THE REASON WHY. BECAUSE HER INTENT WOULD, THEN, NOT BE CLEAR, WITH REGARD TO HER TESTAMENTARY SCHEME.

BUT WE WOULD HAVE EVERYTHING EXCEPT THE ACTUAL PHYSICAL DOCUMENT THERE.

BUT THAT IS A VERY CRITICAL EXCEPT, BECAUSE IT ENABLED THE TRIAL COURT TO DETERMINE, IN THE TRIAL COURT FINDINGS OF FACT, PRECISELY WHAT THE INTENT OF MS. McPEAK WAS, AND I AM SUGGESTING TO THIS COURT, IN RESPONSE TO ONE OF THE EARLIER QUESTIONS, THAT THAT IS ONE OF THE CRITICAL SAFEGUARDS THAT WOULD HAVE TO BE IMPOSED. I SEE THAT MY TIME ON DIRECT HAS EXPIRED. I WOULD LIKE TO RESERVE THE REST FOR REBUTTAL. MR. CHIEF JUSTICE: THANK YOU, MR. FEEL EN-- THANK YOU, MR. PHALEN, MR. KLEIN.

MR. CHIEF JUSTICE AND MEMBERS OF THE COURT, CHRIS KLEIN WITH RESPECT TO MARC WREATH DALK. -- TO MARC WREATH DALK. OUR CASE -- TO MARC WREATH DALK. -- TO MARGARETE DALK. I BELIEVE THAT IS CRITICAL. I BELIEVE THIS COURT HAS HELD, IN AT LEAST SEVEN OPINIONS THAT I HAVE CITED IF IN OUR BRIEF, THAT YOU HAVE GOT TO HAVE A VALID WILL BEFORE THE COURT. OTHERWISE THERE IS NO TESTAMENTARY INTENT. SO IN TOLBIN, FIRST YOU HAD A TESTATOR, AND THE THRESHOLD WAS CROSSED, OPENING THE DOOR FOR THE COURT TO DETERMINE THE INTENT. I THINK THAT IS REALLY, REAL IMPORTANT. OBVIOUSLY THE FACTS ARE VERY DIFFERENT. IN TOLBIN, THERE WAS A HIGH-QUALITY PHOTOCOPY THAT THIS COURT HELD WAS IN DISTINGUISHABLE FROM THE ORIGINAL, AND THAT IS WHAT THE TESTATOR TORE UP.

SO IN THIS SITUATION, IF WE HAD HAD A DUPLICATE OF THE WILL, HIGH-QUALITY DUPLICATE OF THE WILL, THE TESTATOR DID, IN FACT, SIGN, OR THAT THE DECEDENT DID, IN FACT, SIGN, THEN WOULD YOU AGREE, THEN, UNDER THOSE CIRCUMSTANCES, THAT TOLBIN WOULD BE APPLICABLE?

ABSOLUTELY NOT. I THINK YOU ARE STILL OPENING THE FLOOD GATE GATE FURTHER. -- THE FLOOD GATE FURTHER. FIRST OF ALL, YOU WOULD STILL HAVE THE WITNESS PROBLEMS, AND I AM NOT SO SURE --

WAIT. WHAT WOULD BE THE WITNESS PROBLEMS? WE ARE ASSUMING THAT THE WITNESSES, ALSO SIGNED THIS HIGH-QUALITY DUPLICATE.

THEN YOU WOULD HAVE AN ORIGINAL, BECAUSE THEN YOU WOULD HAVE THE WITNESSES SIGNING WITH THE TESTATOR. I THINK YOU HAVE GOT SERIOUS WITNESS PROBLEMS HERE. OBVIOUSLY YOU HAVE GOT A STILL BLANK SIGNATURE LINE THAT WAS NOTARIZED, AND THERE IS WITNESSES THERE, SO THAT, YOU KNOW, THAT HAS ALREADY BEEN DECIDED, BUT THE YOU KNOW -- WAS THERE ANY TESTIMONY --

WAS THERE ANY TESTIMONY ABOUT THESE WITNESSES, WHAT THEY SIGNED, WHEN THE TESTATOR --

YEAH. I THINK THEY WERE SHOVELING PAPERS AROUND -- SHUFFLING PAPERS AROUND, YOUR HONOR, AND THAT WAS THE ONLY TESTIMONY THAT WAS THERE. I DIDN'T HAVE ACCESS. I DEPOSED THEM, AND BASICALLY THEY ALL SAID IT WAS A MISTAKE.

AND THEN THE ORIGINAL STAYED IN, WHAT, THE ATTORNEY'S OFFICE? AND NO ONE --

NO. IN OUR CASE, THE ORIGINAL -- IN TOLIN, THE ORIGINAL STAYED IN THE ATTORNEY'S OFFICE. IN THIS CASE, THE ORIGINAL WENT WITH THE DECEDENT, AGAIN, NOT THE TESTATOR. WENT WITH THE DECEDENT AND WAS DELIVERED --

SHE THOUGHT SHE HAD ASSIGNED TOP KOPP I, ASSIGNED WILL.

THAT WAS WHAT THE TESTIMONY WAS, YOUR HONOR, BUT I DON'T KNOW THAT WE CAN EVER DETERMINE THAT, BECAUSE YOU KNOW, THERE IS NO TESTAMENTARY INTENT FROM HER. SO SHE

MAY HAVE THOUGHT THAT, AND THAT IS WHAT THE TRIAL COURT FOUND THAT, SHE THOUGHT SHE SIGNED IT. I WOULD LIKE TO POINT OUT THAT THIS IS NOT THE FIRST TIME THAT THIS HAS HAPPENED. I MEAN, IN THE CASE DECIDED BY THIS COURT BACK IN 1949, NEALS CITED IN OUR BRIEF, THE COURT FOUND THAT AND SIGNED WILL IS VALID. AT THAT TIME, AND I KNOW THAT THIS IS NOT PRECEDENTIAL, BUT THE MIAMI COURT FOUND THAT A LAWYER FOUND THAT ONE OF HIS CLIENTS DID NOT ACTUALLY SIGN THE WILL, AND IT CAN'T BE PROBATED. TOLIN WAS AN UNIQUE SET OF FACTS ACCORDING TO THIS COURT. I DON'T THINK OUR CASE IS UNIQUE. THIS HAS HAPPENED BEFORE. IT WILL HAPPEN AGAIN.

WHAT ARE THE WITNESSES ATTESTING TO, WHEN THEY SIGN THE WILL?

THEY ARE ATTESTING TO THE FACT THAT THE TESTATOR SIGNED IN THEIR PRESENCE OR, ALTERNATIVELY ALTHOUGH IT IS NOT APPLICABLE HERE, THE TESTATOR COULD HAVE DIRECTED SOMEBODY TO SIGN, IF THE TESTATOR WERE HOSPITALIZED OR SOMETHING AND COULDN'T SIGN, THE TESTATOR, PURSUANT TO STATUTE, COULD SAY PLEASE SIGN FOR ME, AND THE WITNESSES, ALTERNATIVELY, COULD ATTEST THAT THAT PERSON SUBSCRIBED THE TESTATOR'S NAME IN THEIR PRESENCE, BUT THE --

WHAT WAS THE TIME LINE HERE, BY THE WAY, BETWEEN THE TIME OF THE EVENT OF SOME OF THESE DOCUMENTS BEING SIGNED, AND, THEN, THE DEATH OF THE --

WOW. I THINK IT WAS ABOUT A YEAR AFTER THE MEETING WITH THE ATTORNEY, WHEN THE POWER OF ATTORNEY AND THE LIVING WILL WERE SIGNED.

AND WHAT WAS THE EVIDENCE ABOUT THE DISTRIBUTION OF THE ORIGINAL AND ALL THE COPIES, AS FAR AS WHAT THEY WERE, WHO THEY WERE WITH?

THE EVIDENCE WAS SHE WALKED OUT OF THE LAWYER'S OFFICE. THE DECEDENT WALKED OUT OF THE LAWYER'S OFFICE AND HAD EVERYTHING BASICALLY IN AN ENVELOPE AND WENT BACK HOME AND WENT TO HER NEIGHBOR AND SAID HERE IS MY WILL AND OTHER STUFF, AND CALLED THIS -- AND CALL THIS PERSON, IF I SHOULD DIE.

AND THE LAWYER KEPT COPIES?

THE LAWYER KEPT COPIES, YES, BUT NOT EXECUTED. THE -- I BELIEVE THE LAWYER'S FILE HAS A COPY. THE TESTIMONY IS CLEAR THAT SHE NEVER SIGNED A PHOTOCOPY OR ANY OTHER XEROX OR FAX OR ANY OTHER VERSION OF THE WILL.

BUT THE DOCUMENTS WERE DIVIDED UP BETWEEN HER AND THE PERSON THAT ARRANGED -- AN ATTORNEY. IS THAT THE LICENSED ATTORNEY?

OH, YES. YES. HE MAINTAINED AN OFFICE OUT OF HIS HOUSE.

WHAT DO YOU READ TOLIN AS SAYING, EXACTLY? PARAPHRASE IT. THE LAW THAT COMES OUT OF TOLIN.

WELL, FIRST OF ALL, I THINK THIS COURT STRESSED THAT THIS WAS A VERY, VERY NARROW OPINION WITH AN UNIQUE SET OF FACTS, AND BASICALLY THIS COURT HELD THAT THE SKBENT OF THE -- THE INTENT OF THE TESTATOR IN THAT CASE WAS FRUSTRATED BY A MISTAKE OF FACT, AND THE COURT SAID, WELL, WE ARE GOING TO FIX THAT, AND WE ARE GOING TO TRY IT, BECAUSE THE GUIDING POLL STAR ISc THE INTENT OF THE TESTATOR. OF COURSE, IN HERE I DON'T THINK WE HAVE TESTAMENTARY INTENT. I THINK YOU HAVE GOT TO CROSS THE THRESHOLD. TOLIN HAD A PROBATED WILL BEFORE THE COURT, NECESSARILY BEFORE THE COURT, AND I THINK THAT IS THE THRESHOLD, AND IF YOU DON'T WALK THROUGH THAT DOOR, I DON'T THINK --

BUT HAD THE FINDER OF FACT WALKED THROUGH THAT DOOR AS HE SAID, HASN'T HE MADE THE PROPER FINDINGS THAT THIS WAS, THEN, INTENT, AND IT WAS FRUSTRATED, DUE TO NO FAULT, AND TESTATE WAS GOING TO PASS INTO THE WRONG HANDS, BECAUSE OF THIS MISTAKE? WHICH IS OBVIOUS TO THE FACT FINDER.

THE FACT FINDER CLEARLY FOUND THAT, BUT I DON'T THINK THAT THE INTENT IS LEGALLY SUFFICIENT. I MEAN THIS COURT HAS HELD THAT, IN ORDER TO GET TO THE INTENT OF THE TESTATOR, YOU HAVE GOT TO DO IT WITHIN THE FOUR CORNERS OF THE WILL THAT WAS SIGNED BY THE TESTATOR. SO HOW DO WE KNOW, HOW DO WE KNOW THAT THE ONLY PERSON THAT KNOWS, SHE DIDN'T REALLY SIGN HER WILL, IS NOW DEAD?

BUT WHAT ARE YOU ASKING US TO DO? TO DISAGREE WITH THE FACT FINDER OR EXACTLY WHAT ARE YOU ASKING US TO DO?

WELL, I THINK, AS A MATTER OF LAW, THE FACTS AND THE INTENT ARE IRRELEVANT. I THINK THAT THE MANY CASES THAT WE HAVE CITED DEEM THIS KIND OF INTENT, WHICH IS REALLY EXTRINSIC AND PAROL EVIDENCE OF INTENT, I THINK IT IS IRRELEVANT IRRELEVANT. IN FACT, THIS COURT HAS ALREADY RULED ON THAT, IN THE PRATT CASE IN 1956. IT SAID IN TRINS I CAN -- INTRINSIC EVIDENCE OF MISTAKE ISN'T EVEN ALLOWED, UNLESS THERE ARE CONFLICTING TESTAMENTARY PROVISIONS NECESSARILY BEFORE THE COURT. HERE, THERE IS NO TESTAMENTARY PROVISIONS, IN OUR OPINION, SO I THINK YOU HAVE GOT THAT WALL THERE AND I THINK IT IS A GOOD WALL. I THINK THE LEGISLATURE WANTED TO ENSURE AUTHENTIC ALSO.

WHAT IS THE ACTUAL -- AUTHENTIC WILLS.

WHAT IS THE ACTUAL DISPOSITION IN THE WILL, VERSUS THE INTESTATE DISPOSITION? HOW DIFFERENT IS IT?

OKAY.

BECAUSE PART OF THIS CONSTRUCTIVE TRUST IS THAT SOMEONE BENEFITS FROM THIS MISTAKE AND SOMEBODY IS UNJUSTLY ENRICHED.

ABSOLUTELY. MY CLIENT IS THE SOLE SURVIVING LEGAL HEIR, INTESTATE HEIR, UNDER THE INTESTATE STATUTE. SHE IS A HALF SISTER. THE BENEFICIARIES NAMED IN THE UNSIGNED WILL ARE THE SISTER-IN-LAW AND HER DAUGHTERS OF THE -- MY CLIENT LIVES IN GERMANY, AND THE OTHERS LIVE HERE LOCALLY.

YOUR CLIENT, UNDER THE, HER WILL THAT DIDN'T GET SIGNED, RECEIVED NOTHING.

THAT'S RIGHT. BUT INTERESTINGLY, AND ALTHOUGH I DID NOT TRY TO SUBMIT IT FOR PROBATE, BECAUSE I KNOW THAT IT IS NOT ALLOWED, MY CLIENT SIGNED A HOLE-GRAPHIC WILL IN GERMANY, AND THIS IS ALL IN RECORD. IN GERMANY, YOU CAN JUST SCRIBBLE OUT A WILL, WITHOUT WITNESSES OR NOTARY OR ANYTHING AND SAY THIS IS HOW I DISPOSE OF MY PROPERTY, AND WE HAVE GOT THE GERMAN STATUTE AND SO FORTH ALL IN THE RECORD, SO IRONICALLY, THE WILL THAT MY CLIENT DID SIGN WHICH IS CLEARLY NOT ENFORCEABLE TRANSFERRED HER PROPERTY TO HER GERMAN RELATIVES, WHO ARE MY CLIENT'S SON AND SON-IN-LAW AND DAUGHTER. SO THAT IS ANOTHER TWIST IN HERE AND THAT IS WHY I SAID THE INTENT, IN OUR BRIEF, AS I MENTIONED, I DON'T KNOW THAT THE INTENT IS CLEAR HERE, BECAUSE THE ONLY DOCUMENT THAT WAS SIGNED TRANSFERS THE PROPERTY TO THE GERMAN SIDE OF THE FAMILY, AND THE DOCUMENT THAT WASN'T SIGNED IS BEFORE THIS COURT ON THE CONSTRUCTIVE TRUST ARGUMENT.

IF A DECEDENT'S INTENT IS CLEAR, AND FRUSTRATED ONLY THROUGH THE MISTAKE OF THE LAWYER,, CAN A CONSTRUCTIVE TRUST BE ESTABLISHED?

I WOULD SAY NO, BECAUSE THE INTENT IS LEGALLY INSUFFICIENT. AGAIN, THE INTENT HAS GOT TO BE WITHIN THE FOUR CORNERS OF ASSIGNED TESTAMENTARY DOCUMENT, SO I WOULD SAY IT IS LEGALLY IRRELEVANT, AND THAT IS A THRESHOLD THAT THIS COURT HAS CONSISTENTLY PLACED ON THE -- IN THE LAW OF WILLS, SO I WOULD SAY NO.

WE DON'T HAVE A STATUTORY SCHEME WITH REGARD TO THE REVOCATION OF CODD SILLS, DO WE? AN EXACT.

YES. THE STATUTE ALLOWS FOR REVOCATION OF A CODICIL, BY TEARING UP THE ORIGINAL.

BUT DOES IT COVER ALL CIRCUMSTANCES? FOR EXAMPLE STRIKE AGO MATCH TO IT AND IT BURNS PARTIALLY.

I BELIEVE IT SAYS BURNING OR DESTROYING ORTARYING IT UP. YES, IT DOES. THAT IS THE ORIGINAL. IN TOLIN, OF COURSE, THE TESTATOR TORE UP WHAT THIS COURT SAID WAS A HIGH-QUALITY COPY, IN DISTINGUISHABLE FROM THE ORIGINAL. AGAIN, HERE, WHERE DOES IT END? I MEAN THERE, IS NOT EVEN A COPY OF A WILL SIGNED, SO IT IS CERTAINLY NOT THE REVERSE OF TOLIN HERE.

SO, THEN, TOLIN WAS WITHIN THE STATUTORY MECHANISM FOR REVOKING, ONCE THE CODICIL HAD COME IN?

NO. IN TOLIN, THIS COURT EXPRESSLY FOUND THAT THE CODICIL HAD NOT BEEN LEGALLY REVOKED, PURSUANT TO THE STATUTE, BUT THE COURT IMPOSED THE CONSTRUCTIVE TRUST, DUE TO THE UNIQUE, NARROW SET OF FACTS THERE, WHERE YOU HAD -- AND I THINK A KEERTION AT LEAST FROM THE MY PERSPECTIVE, IS THAT IN TOLIN, AGAIN, YOU HAD A PROBATED WILL BEFORE THE COURT, SO ONCE YOU GET THE WILL BEFORE THE COURT, IT KIND OF OPENS THE DOOR FOR THE INTENT THING. BUT TO AVOID THE FRUSTRATION OF THE TESTATOR'S INTENT IN TOLIN, THIS COURT SAID WE ARE GOING TO IMPOSE A CONSTRUCTIVE TRUST, BUT I THINK THAT THAT IS A NARROW DECISION THAT SHOULD REMAIN A NARROW DECISION. I THINK THAT, YOU KNOW, IF WE IMPOSE A CONSTRUCTIVE TRUST HERE WE WILL BE EFFECTIVELY VALUE DADEING AN IN -- VALIDATING AN INVALID WILL, AS THE FIFTH DCA SAID, AND THAT IS A VALID POINT, THAT THE ONLY WAY TO DISINHERIT A LAIR -- AN HEIR IS BY VALID WILL. WHETHER YOU CALL IT A CONSTRUCTIVE TRUST, EFFECTIVELY THAT IS WHAT YOU NEED IS A VALID WILL, BECAUSE THAT IS WHAT YOU NEED DISINHERIT MY CLIENT. AND THE CLIENT WRITES, IN STATUTE, DECIDED BY THE BRIEF, VESTS ON DEATH, AND THE CONSTRUCTIVE TRUST THES KICKS IN SO WE HAVE A VESTED CASE HERE.

WHAT ABOUT OUR SITUATIONS THAT HAVE OCCURRED, WHERE, PERHAPS THERE HAS BEEN A SIGNING BUT THERE HASN'T BEEN COMPLIANCE WITH THE WITNESS REQUIREMENT. ARE THERE CASES OUT THERE?

ABSOLUTELY. THE STATUTE IS VERY STRICTLY CONSTRUED. I MEAN, IF THERE IS A PROBLEM WITH THE WITNESS, THE WILL IS OUT, AND IF THERE IS EVEN A CASE WHERE ANOTHER MISTAKE OF FACT CASE, WHICH I HAVE CITED, THE FIRST DCA DECIDED THE BARKER THAT, THE ATTORNEY REDRAFTED A WILL, AND BY MISTAKE OF FACT, HE LEFT OUT A RESID WATER CLAUSE, AND IN THAT CASE, THE FIRST DISTRICT HELD THAT THAT RESID WATER CLAUSE, YOU KNOW, IT WAS A MISTAKE. PASSES BY INTESTATE. YOU HAVE GOT A STATUTORY SCHEME THAT IS VERY STRICTLY CONSTRUED, AND YOU HAVE A BUNCH OF CASES THAT VERY STRICTLY CONSTRUE IT. I THINK BARK CERRA KEY HERE. BASICALLY THE BARKER CASE SAID A LOT OF THINGS, BUT THE INQUIRY IS NOT WHAT THE PERSON MEANT TO SAY, WHICH IS WHAT WE HAVE GOT HERE. WHAT DID SHE MEAN TO SAY? SHE DIDN'T SAY ANYTHING HERE. THE INQUIRY HERE IS WHAT DID SHE MEAN TO SAY? IF SHE WOULD HAVE SIGNED IT, WHA DID SHE MEAN TO SAY? THE PROPER INQUIRY IS WHAT DID SHE MEAN BY WHAT SHE DID SAY IN A WILL. THAT IS WHERE THE COURTS ARE SUPPOSED TO

GET INTO INTENT, AND I JUST DON'T THINK THE INTENT IS HERE. THANK YOU. MR. CHIEF JUSTICE: THANK YOU, MR. KLEIN. REBUTTAL.

COUNSELOR, WOULDN'T YOU HAVE TO AGREE THAT TOLINc IS A SLIPPERY SLOPE THAT WE OUGHT TO LIMIT TO ITS PARTICULAR FACTS AND SHOULD NOT EMBELLISH? IT IS A DANGEROUS PRECEDENT. WOULDN'T YOU HAVE TO AGREE TO THAT?

NO, YOUR HONOR. I WOULD AGREE THAT TOLIN MUST BE CAREFULLY UTILIZED, AND UTILIZEED IN SMALL MEASURE, BUT I DO NOT BELIEVE TOLIN WAS AND RIGSAL, AND -- WAS ABORITIONAL, AND QUITE FRANKLY --

DO YOU HAVE OTHER CASES THAT SAY WHAT TOLIN SAY?

NEW YORK CITY YOUR HONOR, NOR ARE THERE ANY OTHER CASES EXCEPT THE FIFTH DISTRICT COURT OF APPEAL CASE, WHICH BRINGS US HERE TODAY, WHICH EXPRESSLY DECLINED TO FOLLOW TOLIN.

IS THAT REALLY CORRECT, AND LET ME TAKE, FOR INSTANCE, THE OTHER CASE LAW THAT HAS BEEN OUT THERE ALL THE TIME, WITH REFERENCE TO OTHER FAILURES, IN OTHER WORDS OTHER MISTAKES, YOU MIGHT CALL THEM, WHERE THE WITNESSING ASPECT AND ALL OF THOSE OTHER EX-GENT PARTS OF THE REQUIREMENTS, THE LEGAL REQUIREMENTS FOR A VALID WILL, EVEN THOUGH WE MIGHT HAVE A VALID SIGNATURE, THE DECEDENT, THAT IS THAT THIS IS PART OF MY CONCERN, MY INITIAL QUESTION TO YOU, IS THAT AREN'T WE GOING TO END UP OVERRULING ALL OF THOSE CASES, THEN, BECAUSE THERE ARE MANY INSTANCES, PERHAPS, WHEN THE PESON DOES EXECUTE THE WILL THERE FOR YOU HAVE OPENED IT UP TO KNOWING THAT PERSON -- YOU HAVE GOT EVERYBODY COMING IN AND SAYING, YES, THAT IS WHAT AUNT MARY INTENDED TO DO, EVEN THOUGH SHE DIDN'T GET IT IN PROPER FORM WITH WITNESSES AND ALL OF THAT. AREN'T WE GOING TO END UP IN THROWING THIS OPEN, AND IN DOING AWAY WITH ALL OF THOSE OTHER REQUIREMENTS, TOO, UNDER THE GUISE OF TRYING TO DO EQUITY AND THE TRUST?

NO MORE SO THAN WAS ALREADY DONE IN TOLIN. LET ME RESPOND SPECIFICALLY TO THESE EARLIER CASES, AND MR. KLEIN IS EXACTLY CORRECT, AS CERTAINLY I CONCEDE HIM TO BE. A NUMBER OF CASES HOLD YOU MUST COMPLY STRICTLY WITH THE WILL STATUTES. NO DOUBT. THOSE CASES, EACH AND EVERYONE CITED BY MY FRIEND AND OPPONENT, ARE PRETOLIN. TOLIN, ALSO, SAID YOU -- ARE PRE-TOLIN. TOLIN, ALSO, SAID YOU MUST COMPLY WITH THE WITNESS STATUTE. THAT IS HOW THIS CASE STARTS OFF. BUT THIS COURT SAYS BUT TO DO EQUITY, WE WILL IMPRESS A CONSTRUCTIVE TRUST, NOT THAT THIS COURT DETERMINED THAT THE ATTEMPTED REVOCATION OF THE CODICIL WAS VALID. CERTAINLY IT WAS NOT AND CERTAINLY THIS COURT RULED IT WAS NOT, BUT THIS COURT DID NOT STOP THERE. IT WENT FURTHER AND SAID, BUT UNDER THESE FACTS, IN ORDER TO DO EQUITY, WE WILL IMPRESS A CONSTRUCTIVE TRUST, AND WHAT I AM SUGGESTING TO THIS COURT IS THAT THE FACTS OF THIS CASE, AND LET'S REMEMBER TOLIN WAS DECIDED IN 1993. THIS IS '01, EIGHT YEARS. IT DOESN'T HAPPEN OFTEN. I DON'T THINK THIS IS A FLOOD GATE SITUATION. THIS, AS FAR AS I CAN TELL, THE SECOND CASE WHERE UNIQUE OR, PERHAPS BY DEFINITION, NEARLY UNIQUE FACTS COMPEL EQUITY AND IMPRESS A CONSTRUCTIVE TRUST. WHAT ARE THE TESTS? NUMBER ONE, THE INTENT OF THE DECEDENT MUST BE CLEAR. THE TRIAL JUDGE SAID AS-IS CLEAR FROM THE EVIDENCE PRESENTED AT FINAL HEARING, MRS. McPEAK EXPRESSED HER TRUE TESTAMENTARY INTENT IN THE PURPORTED WILL. NUMBER TWO, THERE MUST BE A MISTAKE OF FACT. THAT IS TRUE HERE. IN THE CONFUSED, WHAT THE TRIAL COURT TERMS "CONFUSION" OF CIRCULATING MULTIPLE DOCUMENTS FOR ORIGINAL SIGNATURE, THEY JUST MESSED UP. THEY JUST MADE A MISTAKE, AND THE WILL WAS THE ONE DOCUMENT THAT DID NOT GET SIGNED, UNDER THOSE CIRCUMSTANCES, I RESPECTFULLY SUBMIT THAT TOLIN STANDS FOR THE PROPOSITION THAT EQUITY WILL STEP IN TO RELIEF UNJUST ENRICHMENT, AND LET ME SAY VERY QUICKLY, NOBODY SUGGESTED THAT MS. DALK, WHO IS MR. KLEIN'S CLIENT, DID ANYTHING WRONG OR IS AT FAULT

OR ANYTHING LIKE. THAT IT IS NOT AN UNJUST ENRICHMENT IN THAT SENSE. IT IS AN UNJUST ENRICHMENT THAT, IN THE SENSE THAT SOMEONE IS RECEIVING THE ASSETS OF THE DECEDENT WHOM THE DECEDENT DID NOT INTEND. MR. CHIEF JUSTICE: THANK YOU, COUNSEL. WE APPRECIATE COUNSEL'S ASSISTANCE IN THIS CASE.