

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 20-00537

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE ESTATE OF KYMBER ANN
VOELKER, DECEASED.

MEMORANDUM AND ORDER

ANTHONY S. PECORARO, PETITIONER-RESPONDENT;

SANDRA KENYON, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

COLE SORRENTINO HURLEY HEWNER GAMBINO P.C., BUFFALO, MAGAVERN MAGAVERN
GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Niagara County
(Matthew J. Murphy, III, S.), dated March 7, 2019. The decree, inter
alia, ordered that a lost will may be offered for probate.

It is hereby ORDERED that the decree is unanimously affirmed
without costs.

Memorandum: In appeal No. 1, respondent appeals from a decree
that, following a hearing, ordered, inter alia, that decedent's lost
will may be offered for probate. In appeal No. 2, respondent appeals
from an order that denied her motion pursuant to CPLR 5015 for
"reconsideration" of the decree. Although Surrogate's Court
considered the motion to be one pursuant to CPLR 2221, a motion
pursuant to CPLR 2221 is not the proper procedural vehicle in which to
address a final judgment (*see e.g. Matter of Synergy, LLC v Kibler*,
124 AD3d 1261, 1262 [4th Dept 2015], *lv denied* 25 NY3d 967 [2015];
Gorman v Hess, 301 AD2d 683, 686 [3d Dept 2003]), and the decree is a
final judgment inasmuch as it determined the rights of the parties in
this special proceeding pursuant to SCPA 1407 (*see SCPA 601; Matter of*
Carroll, 100 AD2d 337, 337 n 1 [2d Dept 1984]). Nevertheless,
inasmuch as respondent has not raised on appeal any issues with
respect to the denial of her motion pursuant to CPLR 5015, she has
abandoned any contentions with respect thereto, and we therefore
dismiss the appeal from the order in appeal No. 2 (*see Matter of State*
of New York v Daniel J., 180 AD3d 1347, 1348 [4th Dept 2020], *lv*
denied 35 NY3d 908 [2020]).

Based on our review of the record in appeal No. 1, we see no
reason to disturb the findings of the Surrogate, " 'which are entitled
to great weight inasmuch as they hinged on the credibility of the

witnesses' " (*Matter of Lee*, 107 AD3d 1382, 1384 [4th Dept 2013]; see *Matter of Winters*, 84 AD3d 1388, 1389 [2d Dept 2011]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court