

APPENDIX A
OPINIONS, ORDERS, COURT HEARINGS AND OBJECTIONS

**ORDER OF THE COURT OF APPEALS
FOR THE STATE OF NEW YORK
(APRIL 2, 2019)**

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of
Will of SYDNEY H. FIELDS,

Deceased,

RICHARD FIELDS,

Appellant,

v.

DIANA PALMERI,

Respondent.

Mo. No. 2019-125

Before: Hon. Janet DIFIORE, Chief Judge, presiding.

Appellant having appealed and moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal, insofar as taken from the September 2018

Appellate Division order, is dismissed, without costs, as untimely (*see* CPLR 5513[a]); and it is further

ORDERED, that the appeal, insofar as taken from the December 2018 Appellate Division order, is dismissed, without costs, upon the ground that such order does not finally determine the proceeding within the meaning of the Constitution; and it is further

ORDERED, that the motion, insofar as it seeks leave to appeal from the September 2018 Appellate Division order, is dismissed as untimely (*see* CPLR 5513 [b]); and it is further

ORDERED, that the motion, insofar as it seeks leave to appeal from the December 2018 Appellate Division order, is dismissed upon the ground that such order does not finally determine the proceeding within the meaning of the Constitution.

/s/ John P. Asiello
Clerk of the Court

**ORDER OF THE SUPREME COURT FOR THE
COUNTY OF NEW YORK GRANTING
MOTION TO DISMISS COMPLAINT
(JANUARY 31, 2019)**

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

FIELDS, RICHARD,

vs

PALMERI, DIANA,

**Index Number: 101305/2018
Sequence Number: 002**

Before: Barbara JAFFE, J.S.C.

Upon the foregoing papers, it is ordered

Defendants' motion to dismiss the complaint is granted, as this court has no appellate authority over surrogate's court. Plaintiff's remedy is an appeal to the Appellate Division.

**/s/ Barbara Jaffe
J.S.C.**

Dated: 1/30/19

- 1. Check One: Case Disposed**
- 2. Check as Appropriate: Motion is Granted**

ORDER OF THE APPELLATE DIVISION OF THE
SUPREME COURT DISMISSING THE MOTION
TO RESTORE THE APPEAL
(DECEMBER 27, 2018)

SUPREME COURT OF THE STATE OF NEW YORK
FIRST JUDICIAL DEPARTMENT,
COUNTY OF NEW YORK

Probate Proceeding,
Will of SYDNEY H. FIELDS,

Deceased.

RICHARD FIELDS,

Objectant-Appellant,
-against-

DIANA PALMERI,

Respondent-Respondent.

Surrogate's Court M-5489
File No. 2016-111

Before: Hon. David FRIEDMAN, Justice Presiding,
Barbara R. KAPNICK, Marcy L. KAHN,
Ellen GESMER, Cynthia S. KERN, Justices.

An appeal having been taken by objectant-appellant Richard J. Fields from an order of the Surrogates

Court, New York County, entered on or about March 26, 2018,

And an order of this Court having been entered on September 25, 2018 (M-3860/M-4076), granting petitioner's cross motion to dismiss the appeal (M-3860) and denying objectant-appellant's motion to reverse the decree and to stay the petitioner from liquidating the estate assets (M-4076),

And objectant-appellant having moved to restore the appeal,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

/s/ {Illegible}

Clerk

**ORDER OF THE APPELLATE DIVISION OF THE
SUPREME COURT DISMISSING THE APPEAL
(SEPTEMBER 25, 2018)**

**SUPREME COURT OF THE STATE OF NEW YORK
FIRST JUDICIAL DEPARTMENT,
COUNTY OF NEW YORK**

Probate Proceeding,
Will of SYDNEY H. FIELDS,

Deceased.

Surrogate's Court M-3860, M-4076
File No. 2016-111

Before: Hon. David FRIEDMAN, Justice Presiding,
Barbara R. KAPNICK, Marcy L. KAHN,
Ellen GESMER, Cynthia S. KERN, Justices.

An appeal having been taken by objectant-appellant Richard J. Fields from an order of the Surrogates Court, New York County, entered on or about March 26, 2018, and said appeal having been perfected,

And appellant Richard J. Fields having moved to reverse the probate decree, and to stay petitioner from liquidating the estate assets (M-4076),

And petitioner-respondent having cross-moved to dismiss the aforesaid appeal or, in the alternative, to strike certain portions of the appellants appendix and brief, to adjourn the appeal to the November 2018 Term, and for other relief (M-3860),

Now, upon reading and filing the papers with respect to the motion and cross motion, and due deliberation having been had thereon,

It is ordered that the cross motion by petitioner is granted and the appeal is dismissed (M-3860). The motion by appellant to reverse the probate decree and stay petitioner from liquidating the estate assets is denied (M-4076).

ENTERED: September 25, 2018

/s/ {Illegible}

Clerk

**DECREE OF PROBATE
(JULY 20, 2018)**

NEW YORK COUNTY SURROGATE'S COURT

Probate Proceeding,
Will of SYDNEY H. FIELDS,

Deceased.

File No.: 2016-111

Before: Rita MELLA, Judge of the Surrogate's Court

A Petition for Probate having been filed by Diana Palmeri ("Petitioner") dated December 17, 2015 seeking a Decree admitting the Last Will and Testament of Sydney H. Fields dated October 6, 2014 to probate and the issuance of letters testamentary to Petitioner; and

a Citation having been issued in connection with such Petition, and jurisdiction having been obtained over the necessary parties to said proceeding; and

an application having been filed by Diana Palmeri dated June 6, 2016 seeking the issuance of preliminary letters testamentary to Petitioner; and

Preliminary letters testamentary having been issued to Diana Palmeri on July 19, 2016; and

Petitioner having appeared by her attorneys, Edward R. Curtin, Esq., co-counsel Jules Martin Haas,

Esq., and trial counsel Albert V. Messina Jr. Esq., of Novick & Associates, P.C., and

Richard Fields, having initially appeared by his counsel Dehai Zhang, Esq., and later by Richard Alan Chen, Esq., and

Objections to Probate with Jury Demand dated February 24, 2016 having been filed by Richard Fields, alleging that the October 6, 2014 Will was not duly executed, that Sydney H. Fields did not possess the requisite testamentary capacity to execute the Will, that Sydney H. Fields did not know or understand the contents of the Will and that the Will was the product of fraud, duress and undue influence, and

the parties by their respective counsel having engaged in SCPA § 1404 examinations and CPLR Article 31 discovery; and

Petitioner having filed a motion for summary judgment pursuant to CPLR § 3212 dated November 28, 2017 seeking dismissal of the Objections to Probate filed by Richard Fields; and

Petitioner having filed an affirmation in support of motion for summary judgment of Jules Martin Haas, Esq. dated November 28, 2017, including deposition transcripts and other documents annexed thereto as exhibits, the affirmation of Edward R. Curtin, Esq., dated November 27, 2017, the affidavit of Diana Palmeri, sworn to on November 28, 2017, the affidavit of Adrienne Lawler sworn to on September 14, 2016, that affidavit of Arthur Fishelman sworn to on June 12, 2017, the affidavit of Stuart Michael sworn to on September 14, 2016, the affidavit of Irving Rothbart sworn to on September 14, 2016, the affidavit of William McAllister sworn to on September 30, 2016,

the affidavit of Gloria Madero sworn to on July 12, 2017 and a memorandum of law in support of motion of Albert V. Messina Jr. dated November 28, 2017; and

Objectant Richard Fields having submitted an affirmation with legal citations in opposition to motion for summary judgment of Richard Alan Chen, Esq., dated January 22, 2018, with exhibits annexed thereto, and an affidavit from Richard Fields sworn to on January 22, 2018; and

Petitioner having submitted a reply affirmation of Jules Martin Haas, Esq., dated February 23, 2018, with exhibits annexed thereto; and

the allegations of the parties having been heard, and oral argument of the motion for summary judgment having been heard before the Court on March 20, 2018, and upon all the pleadings and proceedings heretofore filed and had herein, and after due deliberation the Court having granted granting Petitioner's motion for summary judgment and dismissing the objections to probate on March 20, 2018, and the Court having rendered its written decision dated March 26, 2018;

NOW, upon motion of Novick & Associates, P.C., as attorneys for Petitioner, it is hereby

ORDERED, ADJUDGED and DECREED, that the written instrument dated October 6, 2014 offered for probate as the Last Will and Testament of Sydney H. Fields herein be and the same is hereby admitted to probate; and it is further

ORDERED, ADJUDGED and DECREED that letters testamentary shall issue to Diana Palmeri

upon qualification and without the posting of a bond;
and it is further

ORDERED, ADJUDGED and DECREED that preliminary letters testamentary dated July 19, 2016 are hereby revoked, and it is further

ORDERED, ADJUDGED and DECREED that a judgment in favor of Petitioner for costs and disbursements has been DENIED in the Courts exercise of discretion.

Jury
Surrogate Court

**DECISION AND ORDER OF THE
SURROGATE'S COURT OF NEW YORK
(MARCH 26, 2018)**

**SURROGATE'S COURT OF THE STATE OF
NEW YORK, COUNTY OF NEW YORK**

In the Matter of the Probate Proceeding,
Will of SYDNEY H. FIELDS,

Deceased.

File No.: 2016-111

Before: Rita MELLA, Judge of the Surrogate's Court

MELLA, S.:

At the call of the calendar on March 20, 2018, the court granted proponent's motion for summary determination, dismissed the objections, and directed probate of the October 6, 2014 instrument offered as the will of decedent Sydney Fields. Objectant is the child of decedent, and he admits that he did not have a relationship with decedent and that he never saw his father for the last 19 years of his life. Moreover, objectant admits that, over the years, he sent his father correspondence and photographs that were harassing or threatening.¹

¹ Objectant stated in opposition to this motion: "I wrote and sent harassing letters and photos to my father, and also to my half-brother . . . [who did not appear in this proceeding], and Orders of Protection were issued against me and criminal

Decedent explicitly disinherited objectant in the instrument offered for probate,² which, instead, benefits members of the family of decedent's spouse, who was not objectant's mother. Decedent's spouse died before him in September of 2014, which lead decedent to seek to revise his penultimate will—from 2006—that had benefited her, but which also had disinherited objectant in terms identical to those used in the 2014 instrument. The attorney-drafter of decedent's two prior wills was also the drafter of the 2014 instrument here offered for probate, and he confirms that, despite decedent having been in his 90s, his mental faculties were intact and that it was decedent alone in a meeting who informed the attorney-drafter of who he wanted to benefit with his estate and in what percentages.

On the merits, the attestation clause in the instrument, the contemporaneous affidavit of the attesting witnesses, as well as the sworn testimony of these witnesses and the attorney-drafter, established a *prima facie* case for probate (*Matter of Schlaeger*, 74 AD3d. 405 [1st Dept. 2010]). In response, objectant failed to demonstrate, through admissible evidence, the existence of a material question of fact requiring a trial on any of the objections on which he claims

charges were filed against me. I am not proud I did that" (Objectant's Affidavit in Opposition, dated January 22, 2018, ¶ 11).

² Article FIFTH(b) of the instrument states: "Because my son [objectant] hired a lawyer to sue me for money and because I had to have him arrested and brought to court for harassment of me and my wife, Teresa[,] I deliberately make no provision for him in this Will and it is my intention that he receive no part of my estate."

probate should be denied (*Zuckerman v. City of New York*, 49 NY2d. 557 [1980]). He objected that decedent lacked testamentary capacity, that the will was the product of undue influence, duress, mistake or fraud, and that it was not duly executed.

As to mental capacity, all the medical records, the affidavit of the attesting witnesses and their testimony from the SCPA 1404 examinations, as well as the affidavits of several neighbors and friends confirm the lucidity and mental acuity of decedent both before and after the will execution, despite his advanced age and his having some visual impairment. No evidence submitted by objectant raises a question of whether decedent could hold in his mind the nature and extent of his assets, the identity of the natural objects of his bounty, and the consequences of executing the will, which is the traditional test for determining testamentary capacity (*Matter of Kumstar*, 66 NY2d. 691 [1985]; *Matter of Khazaneh*, 15 Misc 3d. 515 [Sur Ct, NY County 2006]).

Regarding undue influence, proponent's proof established that this was a natural will, benefiting members of the family of decedent's spouse, with whom decedent was close and whom he considered his family. In opposition, objectant had to show, through evidence in admissible form, that the persons alleged to have unduly influenced decedent to make this will had the motive and opportunity to do so, together with some evidence, circumstantial or otherwise, indicating that undue influence was actually exercised on decedent (*Matter of Greenwald*, 47 AD3d 1036 [3d Dept 2008]). Objectant, however, provided no evidence that the will's beneficiaries had the opportunity to exercise undue influence or that they

did so in light of the testimony of the attorney-drafter, which established that the beneficiaries had no direct involvement in the preparation or execution of the will (*see Matter of Camac*, 300 AD2d 11 [1st Dept 2002]).

Objectant offered no evidence of duress—a wrongful threat precluding the exercise of free will—allegedly inflicted on decedent (*Matter of Guttenplan*, 222 AD2d 255 [1st Dept 1995]), nor any evidence of mistake (*Matter of Seelig*, 302 AD2d 721 [3d Dept 2003]). Objectant also failed to provide evidence of a misrepresentation made to decedent for the purposes of inducing him to make a will that he would not otherwise have made, as would be necessary to create a question of fact as to a fraud claim (*Matter of Schwartz*, 154 AD3d 540 [1st Dept 2017]; *Matter of Capuano*, 93 AD3d 666 [2d Dept 2012]).³ These objections were thus dismissed.

Finally, as to the will's execution, the claimed failure of the attesting witnesses to remember all its details are insufficient to rebut the presumption of regularity in the execution of a will (*Matter of Collins*, 60 NY2d 466 [1983]). When read in its entirety, the deposition testimony of the two attesting witnesses supports the conclusion that the signature on the instrument is decedent's and that decedent executed the instrument with full awareness of what he was doing and in compliance with all statutory require-

³ Objectant's opposition papers state that he has not had an opportunity to depose the concierge at decedent's building, who provided an affidavit in support of the motion. However, after submitting his opposition to the motion, objectant filed a note of issue and certificate of readiness with the court stating that all discovery has concluded.

ments (EPTL 3-2.1). Additionally, when the execution was supervised by an attorney and when there is a contemporaneous affidavit of the attesting witnesses reciting the facts of due execution, as is the case here, a presumption of proper execution arises (*Matter of Natale*, 158 AD3d. 579 [1st Dept 2018]).⁴ Here, the facts that the attesting witnesses could not confirm whether decedent had his magnifying glass that day (the attorney-drafter and one of the witnesses testified that he did) and could not provide a description of the aide who accompanied decedent to the will execution, but who appears to have stayed in a separate waiting area, were insufficient to rebut the presumption under the circumstances presented (*see id.*).

The fact that decedent had some visual impairment, even to the point of “legal” blindness as objectant argues, does not change this conclusion because blind persons may make wills (*Matter of McCabe*, 75 Misc 35, 36 [Sur Ct, NY County 1911]). Here, the attorney-drafter testified that the dispositive terms of the proposed instrument were provided to him by decedent himself and that he confirmed those dispositive provisions of the will orally to decedent shortly before execution. Moreover, the fact that the attorney-drafter had to mark the signature line at the end of the instrument with “X’s,” as requested by decedent, but the attorney-drafter did not mark “X’s” where decedent’s

⁴ The fact that the attorney supervising the will execution corrected the date by hand in the text of this affidavit does not alter this analysis. Even if, for the sake of argument, it did, due execution of the will was confirmed by the testimony of the attesting witnesses and the attorney-drafter at their SCP A 1404 examinations, transcripts of which were provided in support of the motion.

initials on the preceding pages of the will should be, is not suspicious (*see id.*). The last page of the will has both the signature line for the testator and signature lines for the attesting witnesses. Accordingly, the only inference that can reasonably be drawn from the fact that the attorney-drafter marked the testator's signature line with "X's" is that the testator wanted to be sure to execute the document correctly in spite of his visual impairment.

The remaining evidence on which objectant relies to support his claim that the will was not duly executed is the sworn-to "Letter of Opinion" of a claimed handwriting expert,⁵ which merely concludes that "a different person authored the initials of SHF" on the first page of the will⁶ offered for probate from the person who signed the will. **This letter does not conclude that decedent's signature at the end of the will is a forgery, or even that it might be (*see Matter of Dane*, 32 AD3d 1233 [4th Dept 2006]).**

⁵ Movant contests the expertise of the person making the report, pointing to the fact that Federal courts have rejected him as an expert in handwriting. Movant cites the following cases in this regard: *Balimunkwe v. Bank of Am., NA*, 2017 US App. Lexis 19875 (6th Cir., Jan. 17, 2017); *U.S. v. Revels*, 2012 US Dist. Lexis 65069, at *22 (ED Tenn., May 9, 2012); and *Dracz v. Am. Gen. Life Ins. Co.*, 426 F.Supp.2d 1373, 1378-379 (MD Ga 2006).

⁶ The will is three pages long, and only a copy of the first page of the proffered will is attached to the opinion letter reporting that the initials on it are not from the person who signed the instrument at the end. No opinion is offered as to initials on its second page, and the court considers this opinion letter as addressing only the initials on the first page of the proffered will.

Even if the court were to consider this letter an affidavit of an expert, there is no requirement that a testator initial the pages of a will for it to be valid (*see EPTL 3-2.1[a][1]*). Instead, all that is required in this regard is that it have been signed “at the end thereof” (*id.*). The opinion letter is not addressed to the real issue—whether it is decedent’s signature at the end of the will—a fact that objectant does not contest with competent evidence (*Matter of Herman*, 289 AD2d 239, 239-240 [2d Dept 2001] [objectant’s burden is to provide particulars in order to create issue of fact on a claim of forgery]; *Matter of Taylor*, 32 Misc 3d 1277(A), 2011 NY Slip Op 51440(U), at *4 [Sur Ct, Bronx County 2011], *citing Matter of Di Scala*, 131 Misc 2d 532, 534 [Sur Ct, Westchester County 1986]; *see also Celaj v. Cornell*, 144 AD3d 590 [1st Dept 2016] [expert report on collateral issue does not require denial of summary judgment]). Thus, this letter is insufficient in this instance to resist summary dismissal of the objection that the will was not duly executed (*see Matter of James*, 17 AD3d 366 [2d Dept 2005]; *see also Kopeloff v. Arctic Cat. Inc.*, 84 AD3d 890, 891 [2d Dept 2011]; *Murphy v. Conner*, 84 NY2d 969, 972 [1994]). Finally, objectant’s surmise that, “it is possible the first two pages of the Will were exchanged for other unknown pages” after the will was executed is mere speculation, insufficient to create an issue of fact requiring a trial (*see Matter of Weltz*, 16 AD3d 428 [2d Dept 2005]).

In examining all the evidence, the court determined that the October 6, 2014 instrument is valid and genuine and should be admitted to probate (*Collins*, 60 NY2d at 473; *see SCPA 1408*).

Accordingly, the court granted proponent's motion for summary judgment, and the objections to probate were dismissed.

This decision, together with the transcript of the March 20, 2018 proceedings, constitutes the order of the court.

Settle probate decree.

/s/ Rita Mella
Judge of the Surrogate's Court

Dated: March 26, 2018

ORDER OF COURT OF APPEALS
FOR THE STATE OF NEW YORK DENYING
MOTION FOR REARGUMENT
(JUNE 27, 2019)

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of
Will of SYDNEY H. FIELDS,

Deceased,

RICHARD FIELDS,

Appellant,

v.

DIANA PALMERI,

Respondent.

Mo. No. 2019-435

Before: Hon. Janet DiFIORE, Chief Judge, presiding.

Appellant having moved for reargument in the
above cause;

Upon the papers filed and due deliberation, it is
ORDERED, that the motion is denied.

/s/ John P. Asiello
Clerk of the Court

**Additional material
from this filing is
available in the
Clerk's Office.**