

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

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CA 09-01787

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

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IN THE MATTER OF THE JUDICIAL SETTLEMENT OF  
FINAL ACCOUNT OF MANUFACTURERS AND TRADERS  
TRUST COMPANY, PETITIONER-RESPONDENT-APPELLANT,  
AS EXECUTOR UNDER LAST WILL AND TESTAMENT OF  
JOHN CLARKE ADAMS.

MEMORANDUM AND ORDER

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PETER ADAMS AND CYNTHIA ADAMS, INDIVIDUALLY AND  
AS TESTAMENTARY TRUSTEES OF THEIR CHILDREN  
ARMAND ADAMS AND MAXINE ADAMS, AND MARC ADAMS,  
RESPONDENTS-APPELLANTS-RESPONDENTS.

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WILLIAMS & WILLIAMS, ROCHESTER (MITCHELL T. WILLIAMS OF COUNSEL), FOR  
RESPONDENTS-APPELLANTS-RESPONDENTS PETER ADAMS AND CYNTHIA ADAMS,  
INDIVIDUALLY AND AS TESTAMENTARY TRUSTEES OF THEIR CHILDREN ARMAND  
ADAMS AND MAXINE ADAMS.

HARRIS BEACH PLLC, PITTSFORD (ANDREW Q. CONROY OF COUNSEL), FOR  
RESPONDENT-APPELLANT-RESPONDENT MARC ADAMS.

HISCOCK & BARCLAY, LLP, SYRACUSE (JOHN D. COOK OF COUNSEL), FOR  
PETITIONER-RESPONDENT-APPELLANT.

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Appeals and cross appeal from an order of the Surrogate's Court,  
Onondaga County (Peter N. Wells, S.), entered December 17, 2008. The  
order, among other things, denied that part of respondents' motion for  
an award of counsel fees.

It is hereby ORDERED that said cross appeal is unanimously  
dismissed and the order is otherwise affirmed without costs.

Memorandum: Petitioner commenced this proceeding as the executor  
of decedent's estate seeking approval of its account. Respondents,  
the beneficiaries of the estate, filed various objections. Following  
a trial, Surrogate's Court concluded, inter alia, that petitioner was  
negligent in its fiduciary duty by failing to discover certain assets  
of the estate consisting of a block of IBM stock, and the Surrogate  
imposed a surcharge for petitioner's failure to marshal the estate  
assets and sell that stock. Respondents thereafter moved for, inter  
alia, an award of counsel fees, and the Surrogate refused to award  
such fees. Although it is well settled that a Surrogate has the  
discretion to order a fiduciary to pay counsel fees (*see generally*  
*Matter of Garvin*, 256 NY 518, 521; *Matter of Manufacturers & Traders*  
*Trust Co.*, 66 AD3d 1377, 1380-1381; *Matter of Birnbaum v Birnbaum*, 157  
AD2d 177, 191), here, the Surrogate did not abuse his discretion in

refusing to award counsel fees based on his conclusion that there was no evidence of bad faith, fraud, self-dealing or theft (*see Matter of Saxton*, 274 AD2d 110, 121). We further conclude, based on the colloquy during oral arguments before the Surrogate, that he was aware that he had the discretion to order petitioner to pay counsel fees. In light of our determination, we dismiss petitioner's cross appeal as moot.

Entered: April 30, 2010

Patricia L. Morgan  
Clerk of the Court