

**Matter of Schiff**

2010 NY Slip Op 30713(U)

February 5, 2010

Surrogate's Court, Nassau County

Docket Number: 020087

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK  
 COUNTY OF NASSAU

-----X  
 In the Matter of the Judicial Settlement of an Account of the  
 Proceedings of JP MORGAN CHASE BANK, N.A.  
 (successor by merger to Chase Manhattan Bank) and  
 MORTIMER W. HALL, as Trustees of the Trust under  
 Article ELEVENTH of the Will of

File No. 020087

Dec. No. 894

MORTIMER L. SCHIFF,

Deceased,

f/b/o Mortimer W. Hall.  
 -----X

In this accounting proceeding, the only issue before the court is approval of attorneys' fees.

The decedent Mortimer L. Schiff died on June 4, 1931, a resident of Nassau County. His will dated November 26, 1930 was admitted to probate by decree dated June 15, 1931. The will created a trust for the benefit of Dorothy Schiff Hall (sometimes hereinafter referred to as "Dorothy Schiff") under Article ELEVENTH. Letters of trusteeship originally issued to John M. Schiff, Felix M. Warburg and Casimir I. Stralem. Dorothy Schiff died on August 30, 1989, a resident of New York County, leaving a will and codicil which were admitted to probate by the Surrogate's Court of New York County by decree dated October 6, 1989. At the time of her death, the trustees of the Dorothy Schiff trust were Dorothy Schiff and Chemical Bank.

Pursuant to Subdivision A of Article ELEVENTH of the decedent's will, the Dorothy Schiff trust is to be administered and disposed of as follows:

"A. If my said daughter, DOROTHY SCHIFF HALL, shall survive me, to invest and from time to time reinvest said share and to collect the income thereof, and during the life of my said daughter, DOROTHY SCHIFF HALL, to apply the net income thereof to the use of my said daughter by payment thereof to her, and IN FURTHER TRUST upon the death of my said daughter to pay and distribute the principal of the trust estate so held to and among the lawful issue of my said daughter who shall survive my said daughter and the lawful issue of my said son,

JOHN MORTIMER SCHIFF, who shall survive my said daughter, in such amounts, equal or unequal, as my said daughter in her uncontrolled discretion may, by last will and testament duly admitted to probate and not otherwise, appoint, expressly granting to my said daughter the right in the exercise of such power of appointment to exclude wholly from participation therein any one or more of her issue and/or any one or more of the issue of my said son; provided, however, that my said daughter, by last will and testament duly admitted to probate and not otherwise, may on such terms and conditions as she may think fit appoint any part or parts of the principal of said trust estate to a trustee or trustees in trust for the use of any of the lawful issue of my said daughter born before my death and her surviving, or of any of the lawful issue of my said son born before my death and her surviving, during the life of the *cestui que trust* of each trust so created, or for such lesser period as she may think fit ...”

Pursuant to Article EIGHTH of her will, Dorothy Schiff exercised her power of appointment as follows:

“A. I have a testamentary power of appointment over the principal of the trust created under Article ELEVENTH of the Will of my father, MORTIMER L. SCHIFF, dated November 26, 1930. I am the income beneficiary of the trust during my life and also one of the Trustees. I HEREBY EXERCISE said power as follows:

“1. I DIRECT the surviving Trustees of the trust to pay and distribute the principal of the trust, per stirpes, to such of my lawful issue as shall survive me; provided, however, that if any of my children, MORTIMER W. HALL, ADELE HALL SWEET, or SARAH ANN KRAMARSKY, shall survive me, the share of the trust to which such surviving child of mine would be entitled shall not be paid and distributed to such surviving child, but, instead, the surviving Trustees of the trust, together with such surviving child as a successor Trustee in my place of the share for such child’s benefit, shall continue to hold such share in a separate trust (hereinafter referred to as “such child’s trust”) as a trust under my father’s Will ... and

(a) So long as such child shall live, the Trustees of such child’s trust shall pay to such child the net income thereof in regular installments;

(b) I AUTHORIZE AND EMPOWER the Trustees of such child’s trust, at any time or times, to pay and distribute to such child such part, parts of [sic] all of the principal of such child’s trust as the Trustees (other than such child), in their sole and absolute discretion, shall determine, without regard to the other resources of such child and without regard to the interests in such child’s trust of any other person;

(c) On the death of such child, the Trustees of such child's trust shall pay and distribute the principal thereof then remaining in their hands, per stirpes, to such of such child's lawful issue as shall survive such child, or, if no such issue shall survive such child, per stirpes, to such of my lawful issue as shall survive such child."

Dorothy Schiff was survived by her three children, Mortimer W. Hall, Adele Hall Sweet and Sarah Ann Kramarsky. In accordance with Dorothy Schiff's exercise of her power of appointment, Chemical Bank divided the principal of the Dorothy Schiff trust into three equal shares and held one such share in separate further trust for each of Mortimer W. Hall, Sarah Ann Kramarsky and Adele Hall Sweet. This is an accounting with respect to the sub-trust for the benefit of Mortimer W. Hall.

By decree dated April 6, 1992, Mortimer W. Hall was appointed to serve as co-trustee of the Mortimer W. Hall sub-trust with Chase Manhattan Bank (successor by merger to Chemical Bank). By order dated February 27, 2008, this court approved the resignation of JP Morgan Chase Bank, N.A. (successor to Chase Manhattan Bank) as co-trustee of the sub-trust for Mortimer W. Hall and the appointment of Dorothy T. Hall and Frederick Leopold as successor co-trustees to act in conjunction with Mortimer W. Hall. This accounting is an accounting by JP Morgan Chase Bank, N.A. (the resigned trustee) and Mortimer W. Hall. The accounting covers the period from December 26, 1989 through March 31, 2009. The accounting shows charges to the accounting parties of \$13,915,120.15.

The presumptive remaindermen of the sub-trust for the benefit of Mortimer W. Hall are the decedent's great-grandchildren, Richard R. Hall, Matthew W. Hall, Margaret A. Hall, Mary Howland and Dorothy T. Hall, all of whom are adults. Citation issued to all of the presumptive remaindermen as well as to Frederic W. Leopold, as a successor trustee of the sub-trust. None of

them have appeared in this proceeding.

With respect to the issue of attorneys' fees, the court bears the ultimate responsibility for approving legal fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of an estate (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Vitole*, 215 AD2d 765 [2d Dept 1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). While there is no hard and fast rule to calculate reasonable compensation to an attorney in every case, the Surrogate is required to exercise his or her authority "with reason, proper discretion and not arbitrarily" (*Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; see *Matter of Wilhelm*, 88 AD2d 6, 11-12 [4th Dept 1982]).

In evaluating the cost of legal services, the court may consider a number of factors. These include: the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY2d 1 [1974]). In discharging this duty to review fees, the court cannot apply a selected few factors which might be more favorable to one position or another but must strike a balance by considering all of the elements set forth in *Matter of Potts*

(123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Also, the legal fee must bear a reasonable relationship to the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided.

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter

(*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2] [a] [7th ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

The attorney has submitted an affidavit which shows that as of October 8, 2009, attorneys at his firm rendered a total of approximately 84 hours on this matter and a paralegal at the firm rendered 5.2 hours. Although contemporaneous time records have not been submitted to support the fee, counsel's affidavit recites that the firm performed the following services:

(i) the examination of the provisions of the decedent's will and correspondence and telephone conversations with the corporate trustee concerning its proposed resignation and the appointment of successor trustees;

(ii) the preparation and filing of an instrument by which JPMorgan Chase Bank, N.A. resigned as a trustee of the trust;

(iii) the examination of the instruments prepared by counsel for Dorothy T. Hall and Frederic W. Leopold, appointing such persons as successor trustees of the trust;

(iv) the examination of the instruments prepared by counsel for the nominated successor trustees by which the presumptive remaindermen of the trust consented to the appointment of the successor trustees;

(v) correspondence and telephone conversations with counsel for the successor trustees concerning these instruments, the judicial proceedings and the

transfer of assets from the corporate trustee to the successor trustees;

(vi) the preparation of the trustees' petition and other papers necessary to institute and prosecute the proceeding on behalf of the trustees;

(vii) the preparation of the account, covering the period from December 26, 1989, the date of the initial funding of the trust, through March 31, 2009, and the preparation of the trustees' petition, the citation and other papers necessary to institute this accounting proceeding on behalf of the trustees;

(viii) correspondence and telephone conversations with the corporate trustee and counsel for the successor trustees regarding the account and the accounting proceeding;

(ix) effecting service of the citation on the interested parties and preparing and filing herein the proofs of such service;

(x) appearing on October 7, 2009, the return date of the citation;

(xi) the examination of the provisions of the will and correspondence and telephone conversations with the trustees concerning the proposed reformation of the will to allow nominee registration of the securities held in the trust;

(xii) the preparation of the trustees' petition, the citation and other papers necessary to commence the reformation proceeding on behalf of the trustees;

(xiii) research and preparation of a memorandum of law in support of the trustees' petition; and

(xiv) the preparation of an order of reformation, which order was signed by the court on August 10, 1999.

Considering all of the factors used to determine the reasonableness of fees, the court fixes the attorney's fee in the requested amount of \$35,313.99, of which \$10,313.99 has been paid.

Submit decree.

Dated: February 5, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court