

Matter of Schroeder (Otto)
2022 NY Slip Op 33457(U)
September 29, 2022
Surrogate's Court, New York County
Docket Number: File No. 1999-3358/A
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Judicial Settlement
of the Account of the Proceedings of
Regan Otto Schroeder and Jed Isaacs as
the Executors of the Estate of

File No. 1999-3358/A

RICHARD A. OTTO,

Deceased.

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A N D E R S O N, S.

Two objections by decedent's wife, Maria Otto ("Maria"), require determination in this contested executors' accounting in the estate of Richard Otto. The first challenges the legal fees set forth on Schedules C and C-1. The second opposes the executors' request that Maria pay certain legal fees from her share of the residuary estate.

Background

Richard Otto died on August 18, 1999, at the age of 66, survived by Maria and six children from his prior marriages. He left an estate in excess of \$25 million, most of which came from two sources: 1) the sale of his majority ownership in Rock Bottom Stores, Inc., a chain of drug stores ("Rock Bottom"), and 2) his interest in multiple real estate partnerships and limited liability companies (the "Real Estate Entities").

Under his will, decedent bequeathed to Maria his tangible property and 50% of his residuary estate either outright (33 1/3%) or in trust (16 2/3%). The remaining 50% was to be held in trust or distributed outright to Maria's daughter and three of his six

children, depending on their ages. Letters testamentary issued to decedent's daughter, Regan Otto Patry ("Patry"), and his accountant, Jed Isaacs ("Isaacs").¹ Letters of trusteeship issued to Patry and decedent's lawyer, Richard Marlin ("Marlin").

From the outset, the administration of this large estate was complex and contentious (see e.g. *Matter of Otto*, 2018 NY Slip Op 32083[U] [Sur Ct, NY County 2018]; *Matter of Otto*, NYLJ, Mar. 25, 2015, at 22, col 4 [Sur Ct, NY County 2015]; *Matter of Otto*, 32 Misc 3d 1244[A], 2011 NY Slip Op 51696[U][Sur Ct, NY County 2011], *affd* 96 AD3d 433 [1st Dept 2012]). Litigation over the executors' interim account, which covered the period from August 18, 1999, to April 30, 2009 ("the Interim Account"), lasted more than ten years and was not concluded by decree until March 2019.

Shortly after the Interim Account was settled, the executors filed the instant final account for the period May 1, 2009, through December 31, 2018 (the "Final Account"). The executors asked the court to allocate to Maria's one-third share of the residuary estate "all attorney's fees incurred in the defense of the prior interim accounting ... in accordance with the Court of Appeals' decision in *Matter of Hyde* [15 NY3d 179 (2010)]." Maria objected to the proposed allocation and to the more than \$1.5 million in legal fees and disbursements in Schedules C and C-1 of

¹ Isaacs died in 2020. The fiduciary of his estate has been substituted as a party.

the Final Account (the "Objections"). None of the other respondents filed objections.

Thereafter, the parties stipulated that the court determine the objections on submission without a hearing.

Objections to Legal Fees

Maria challenges a total of \$1,541,382.62 in legal fees and disbursements. Of that amount, \$1,525,265.42 was paid to five law firms as shown on Schedule C of the Final Account. The remaining \$16,117.20 appears on Schedule C-1 as unpaid legal fees owing to two law firms. These fees are in addition to the almost \$1.8 million in legal fees approved by the court in the decree settling the Interim Account.

Two of the five law firms, Willkie Farr & Gallagher LLP ("Willkie Farr") and Trachtenberg Rodes & Friedberg LLP ("Trachtenberg"), represented Patry as co-executor. The remaining firms, Greenfield Stein & Senior LLP ("Greenfield"), Scarola Ellis LLP and its successor, Scarola Malone and Zubatov LLP (the Scarola Firms"), and Sonnenschein Nath & Rosenthal LLP ("Sonnenschein") represented co-executor Isaacs at various points.

In an accounting, the fiduciaries have the burden of establishing the reasonableness and the value of the services rendered (*see e.g. Matter of Wolf*, 67 AD2d 930 [2d Dept 1979]; *Matter of Jurgielewicz*, NYLJ, June 25, 1997, at 30, col 5 [Sur Ct,

Suffolk County 1997]; 5 Cox-Arenson-Medina, New York Civil Practice SCPA ¶ 2211.06[2][a] [Matthew Bender]). The Surrogate then has the ultimate responsibility to determine reasonable attorneys fees (see SCPA 2110; *Matter of Stortecky*, 85 NY2d 518 [1995]; *Matter of Marsh*, 265 AD2d 253 [1st Dept 1999]).

In determining the reasonableness of such fees, time expended has some relevance, but that factor is hardly conclusive (see *Matter of Potts*, 213 AD 59 [4th Dept 1925], *affd* 241 NY 593 [1925]). Indeed, hours spent may be less important than other relevant factors, including 1) the value of the assets involved, 2) the difficulty of the questions presented, 3) the skill required to handle the matter, 4) the attorney's experience, ability and reputation, 5) the benefit resulting to the estate from the services rendered, and 6) the certainty of compensation (see *Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 213 AD 59).

Within this framework, a more detailed discussion of the long history of this estate is necessary. By May 1, 2009, the starting point of the Final Account, the executors had amended the Interim Account to cover the period up to April 30, 2007, and Maria and Marlin had filed objections. The executors would later supplement the Interim Account to include transactions occurring from May 1, 2007, through April 30, 2009, but neither Maria nor Marlin

objected to any aspect of the Interim Account covering this later period.

Some of Maria and Marlin's objections challenged the executors' conduct with respect to RB Holdings Corp. ("RB Holdings"), decedent's wholly-owned corporation and the successor to Rock Bottom of which decedent, his son Jonathan, and his sister Linda, were shareholders. Decedent had become the sole owner of RB Holdings after Rock Bottom sold its assets to the pharmacy and convenience store chain, Duane Reade, Inc. ("Duane Reade").

The sale of Rock Bottom closed about a year before decedent's death, but Duane Reade challenged the transaction. In September 2001, RB Holdings, decedent's estate, and Duane Reade executed a settlement agreement, pursuant to which RB Holdings agreed to pay Duane Reade approximately \$7,000,000 (the "Duane Reade Settlement"). As a result of this substantial payment and other expenses, the liabilities of RB Holdings far exceeded the reserve the company held for the payment of such liabilities. A dispute then arose over the obligations of the former Rock Bottom shareholders to contribute to the shortfall in accordance with a prior agreement. That dispute eventually settled in December 2001 (the "2001 Settlement Agreement"), which enabled RB Holdings to satisfy its outstanding liabilities. All interested parties, including the executors and Maria, expressly consented to the

terms of the 2001 Settlement Agreement.

In the years that followed, the executors provided informal and formal discovery to Marlin and a succession of lawyers representing Maria in order to allay their concerns about the estate's administration. The discovery included information related to the operations of RB Holdings. In April 2009, more than two years after Maria and Marlin had filed objections, Maria retained a new attorney who sought additional discovery regarding RB Holdings, including access to the company's books and records and a "full accounting" of the funds used by RB Holdings to pay its obligations under the Duane Reade Settlement.

In response, the executors moved for a protective order and Maria cross-moved to compel the production of the requested documents. The court determined that Maria's objections relating to RB Holdings (and therefore the discovery to advance them) were either foreclosed by her consent to the 2001 Agreement or failed to state a ground for relief. Maria's cross-motion to compel discovery was therefore denied except to the extent that discovery was necessary to substantiate that RB Holdings had not paid any professional fees accounted for as an estate expense (*see Matter of Otto*, 2011 NY Slip Op 51696[U]). Maria appealed the court's decision, which was affirmed based on Maria's consent to the 2001 Agreement (*see Matter of Otto*, 96 AD 3d 433).

About the same time that the discovery motions were returnable, Marlin stipulated to the withdrawal of most of his objections, including those relating to RB Holdings. However, he continued to press his objections to 1) certain accounting fees the executors had paid as reflected on Schedule C, and 2) Isaacs' commissions. Patry's potential liability relating to the executors' payment of the accounting fees led to a dispute between the co-executors. Patry filed a cross-petition to implead RSM McGladry, Inc. ("RSM), the accounting firm with which Isaacs was affiliated. She also asserted a cross-claim against Isaacs.

Several months after the court decided the discovery motions, Isaacs filed a Note of Issue. Maria then moved to vacate it, claiming that discovery had not been concluded. The executors opposed the motion, which was eventually withdrawn by stipulation (see *Matter of Otto*, NYLJ, July 10, 2013, at 22, col 2 [Sur Ct, NY County 2013]). Thereafter, the executors filed their Statement of the Issues (Uniform Rules for Sur Ct [22 NYCRR] § 207.30), which reflected their contention that, as a result of the court's 2011 decision denying Maria discovery regarding RB Holdings, only six issues remained to be tried: 1) Maria's objections to legal fees (2 issues), 2) Maria and Marlin's objections to accounting fees (3 issues), and 3) Marlin's objection to Isaacs' commissions (one issue). In response, Maria filed a Counterstatement of Issues,

which included, albeit in slightly different terms, the five issues relating to professional fees that the executors had identified. In addition, Maria claimed that she, like Marlin, had objected to Isaacs' commissions and that six other issues that had not been included in the executors' Statement of the Issues required determination.

Given the parties' disagreement over the issues to be tried, Isaacs moved to strike Maria's Counterstatement of Issues, arguing that it was not based on "the issues framed in the pleadings." Maria opposed the motion, but also cross-moved to amend her objections. The court struck the five issues Maria identified relating to professional fees based on the executors' Statement of the Issues which, unlike Maria's, specifically identified the amount of professional fees at issue. The court also rejected Maria's effort to join Marlin's objection to Isaacs' commissions since her pleading was silent on that issue. As for the remaining six issues, the court struck five on the ground that Maria's pleading did not raise those issues. The court did, however, allow Maria to proceed on one claim, namely that the executors had failed to investigate properly the propriety of an agreement pursuant to which decedent transferred control of the Real Estate entities to Jonathan for \$10,000. As for Maria's cross-motion to amend her objections, the court found no basis for an amendment at

such a late stage of the litigation (see *Matter of Otto*, NYLJ, Mar. 25, 2015, at 22, col 4).

A week before the trial was scheduled to begin, Marlin withdrew his remaining objections. Thus, the only objections remaining to be tried were Maria's. Over two days, the court held a trial to determine whether the executors' conduct with regard to the agreement was proper. The parties waived their right to a hearing on Maria's objections to professional fees and relied on their post-trial submissions.

In a decision dated August 24, 2018, the court dismissed the objection relating to the agreement transferring control of the Real Estate entities to Jonathan. As for the objection to professional fees, the court fixed accounting fees in the amount of \$1,133,552.64, reducing them by \$42,881, and fixed legal fees and disbursement in the amount of \$588,999.66, reducing them by \$8,469.68 (see *Matter of Otto*, 2018 Slip Op 32083[U]).² Maria filed a Notice of Appeal but did not perfect it. As noted above, the decree settling the Interim Account in accordance with the trial decision was entered in March 2019 - after the end date of the Final Account (December 31, 2018).

² At issue was the reasonableness of the executors' legal fees for only a portion of the interim accounting period: August 18, 1999, to April 30, 2006. Maria did not challenge the \$1,188,258 in legal fees and \$432,636 in accounting fees the executors incurred between May 1, 2006, and April 30, 2009.

As the above illustrates, during the period of the Final Account, the executors required substantial legal services to defend against the objections to the Interim Account. In addition, the executors continued to administer a complex estate that presented numerous legal issues unrelated to the contested accounting. For example, issues regarding RB Holdings and the Real Estate Entities continued to require the attention of the executors and their legal counsel. The executors' counsel also assisted in the preparation of a significant supplement to the Interim Account, which covered the period from May 1, 2007, to April 30, 2009.

Willkie Farr

Schedules C and C-1 of the Final Account reflect that petitioners paid Willkie Farr \$825,899.36 for services rendered as Patry's counsel between May 1, 2009, and August 31, 2018, and that petitioners owe the firm an additional \$13,025.20. This is in addition to the more than \$500,000 in legal fees and disbursements the firm received during the period of the Interim Account.

As an initial matter, the executors' submissions are silent as to the \$13,025.20 in legal fees set forth on Schedule C-1, notwithstanding Maria's specific objections to these fees. Since the executors have not substantiated these fees in an affidavit of services or with contemporaneous time records, the court has no

basis to evaluate them. Accordingly, the objection as to these fees is sustained.

As to the remaining legal fees set forth on Schedule C, Maria first argues that Willkie Farr's Affidavit of Legal Services is insufficient because it is not supported by contemporaneous time records. However, although not made part of the record initially, the firm's contemporaneous time records were filed as part of the executors' post-trial submissions. Thereafter Maria did not raise any issues with respect to them.

Next, Maria contends that the legal fees attributable to the preparation of "post-trial attorneys' fees affidavits" should be disallowed because time spent in support of fee applications is not compensable. Willkie Farr does not dispute that legal fees in contested accounting proceedings have been reduced on this basis (see e.g. *Matter of Schwartz*, NYLJ, Apr. 11, 2019, at 26, col 5 [Sur Ct, NY County 2019]; *Matter of Marshak*, NYLJ, Apr. 30, 1996, at 1, col 6 [Sur Ct, NY County 1996]). Here, it is difficult to determine the time charges attributable to such services with precision. However, the court is not required to make an exact calculation (see *Matter of Schwartz*, NYLJ, Oct. 17, 2017, at 22 col 5 [Sur Ct, NY County 2017][citation omitted]). Upon review of the record, the court determines that a reduction of \$7,500 is warranted.

Maria's remaining arguments consist almost entirely of complaints regarding the executors' failure to set forth each attorney's hourly rate and his or her "experience, ability or reputation." However, the hourly rates of the attorneys involved are easily determined from the information the firm provided in its Affidavit of Legal Services, *i.e.*, the number of hours each attorney billed and the fees those hours generated. The court finds that those hourly rates are reasonable. In addition, a supplemental affidavit submitted by the firm closed any gaps regarding the background and experience of Patry's attorneys. Thus, these arguments do not support a further reduction in Willkie Farr's fees.

Although the firm's fees are substantial, the executors have established their reasonableness with the exceptions noted above. The detailed Affidavit of Legal Services and contemporaneous time records reflect the extensive work required to represent Patry as co-executor. The firm's services also span a period of more than nine years. During this time, counsel provided legal services not only related to the general administration of this complex estate, but also to other matters, including the supplementation of the Interim Account and the necessary defense the executors mounted to Maria and Marlin's objections. Under these circumstances, the time spent (approximately 1160 hours) is reasonable. However, to the

extent that some time entries are not sufficiently descriptive or reflect duplication of efforts, most of the firm's invoices were discounted between 10% and 15%, which more than offsets these issues.

Under all the circumstances, and in accordance with the factors to be considered in determining reasonable attorneys' fees, the court fixes Willkie Farr's compensation for services rendered from May 1, 2009, to August 31, 2018, in the reduced amount of \$815,961.02. The reduction reflects the court's determination that the \$13,025.20 in legal fees set forth on Schedule C-1 have not been substantiated and that an additional \$7,500 reduction is warranted for the reasons stated above. In addition, the court has disallowed \$2,438.34 of the disbursements the executors paid because they were for items considered "part of normal law office overhead" (see *Matter of Herlinger*, NYLJ, Apr. 28, 1994, at 29, col 3 [Sur Ct, NY County 1994]).

Trachtenberg

This firm also represented Patry in connection with her cross-petition impleading RSM and her cross-claim against Isaacs. As reflected on Schedule C, the executors paid the firm \$7,536.74 for services rendered between January 26, 2010, and July 12, 2015.

Although Maria objected to the firm's fees, her post-trial submissions offer no specific support for this objection. The

firm's legal fees are adequately supported by an affidavit of services to which contemporaneous time records are attached. Upon consideration of the usual factors in fixing compensation, the fees of Trachtenberg are fixed in the amount of \$7,500, a reduction of \$36.74 to reflect unidentified disbursements.

Greenfield Stein

Schedules C and C-1 of the Final Account reflect that petitioners paid Greenfield Stein & Senior \$344,096.44 for services rendered to Isaacs between March 1, 2010, and December 31, 2018, and that an additional \$3,092 is owed.³

As an initial matter, the executors also failed to substantiate the legal fees owed to Greenfield Stein as reflected on Schedule C-1, notwithstanding Maria's specific objection to those fees. Because the court has no basis upon which to evaluate these fees, the objection is sustained.

As to legal fees set forth on Schedule C, the firm defended Isaacs against the objections to the Interim Account for more than eight years. Its fees are amply supported by a detailed Affidavit of Legal Services and contemporaneous time records, which Maria does not challenge.

³ The firm's internal time records exceed the amounts reflected on Schedule C and C-1 of the Final Account by approximately \$2000 (\$350,264.94 versus \$348,188.44). There is no explanation for the discrepancy. The court will consider the lower total set forth in the Final Account as the amount at issue.

The court recognizes that the total compensation paid to Greenfield Stein is substantial, but the firm obtained excellent results in a hotly contested accounting that included significant motion practice and a trial. Maria does not dispute that it was appropriate for Isaacs and Patry to have separate counsel. Nor does she claim that inefficiencies resulted. The court noted when it determined Maria's legal fee objections to the Interim Account that firms representing each co-executor "coordinated their efforts, leveraging each firm's expertise" (see *Matter of Otto*, 2018 NY Slip Op 32083[U] at *20)). The record supports the same conclusion here. Consequently, the more than 570 hours firm lawyers spent over the course of many years is reasonable.

Accordingly, based upon the usual factors in fixing compensation, Greenfield Stein's compensation is fixed in the reduced amount of \$342,354.02 for services rendered between March 1, 2010, and December 31, 2018. The reduction reflects the court's determination that the \$3,092 in legal fees set forth on Schedule C-1 have not been substantiated. In addition, the court has disallowed \$2,742.42 of the disbursements the executors paid because they were for items considered "part of normal law office overhead" (see *Matter of Herlinger*, NYLJ, Apr. 28, 1994, at 29, col 3).

Sonnenschein

Schedule C reflects that the executors paid Sonnenschein \$94,628.26 for services rendered to Isaacs between February 9, 2009, and April 28, 2010, when Greenfield Stein was retained as Isaacs' counsel. This is in addition to the more than \$1 million in legal fees and disbursements the firm (and its predecessor firm) received for services rendered during the period of the Interim Account.

Maria argues that Sonnenschein's legal fees are excessive because the two attorneys who provided the bulk of the services were inefficient in the use of their time. Maria identifies 16 instances involving time valued at more than \$13,000 where she claims the two attorneys billed for almost identical services. It is evident from the contemporaneous time records that both attorneys attended and then billed for the same conferences with attorneys at other firms. Sonnenschein has not sufficiently demonstrated why it was necessary for both attorneys to be present. However, because many of the time entries Maria identifies are "bundled" and include other services as well, the total Maria cites overstates the complained of inefficiencies. Under these circumstances, a fee reduction of \$7,000 is warranted to reflect the duplication of efforts and additional inefficiencies in the record. The remainder of the fees at issue

are supported by the firm's Affidavit of Legal Services and contemporaneous time records.

Based upon consideration of all relevant factors, the court fixes the fees for services rendered in the amount of \$87,144.80. This reflects a reduction of \$7,000 for the inefficiencies described above and the disallowance of all the firm's disbursements (\$483.46). It is noted that some disbursements would have been allowed had they not been bundled with items not subject to reimbursement (see *Matter of Herlinger*, NYLJ, Apr. 28, 1994, at 29, col 3).

The Scarola Firms

As set forth on Schedule C, the executors paid the Scarola Firms \$253,104.62 for representing Isaacs from April 1, 2009, to June 27, 2012. The Scarola Firms and Sonnenschein represented Isaacs at the same time because a partner at Sonnenschein, who had been an integral part of Isaacs' legal team, moved to the Scarola Firms.

Maria's argument regarding these fees is that they are supported by an affidavit of services from a lawyer at Greenfield Stein, who did not work for the Scarola Firms and therefore has no personal knowledge of all the services performed. However, subsequently, an attorney with personal knowledge submitted an Affirmation of Legal Services in support of the firms' legal fees

and disbursements. She confirmed the accuracy of the contemporaneous time records previously submitted and the description of the services performed. Thereafter, Maria did not challenge the affirmation or raise any other arguments regarding the Scarola Firms' fees.

The Scarola Firms represented Isaacs during a period when significant legal services were required relating to the executors' defense of the Interim Account and to general administration matters as well. The services performed are supported by contemporaneous time records and the affirmations of services. The court finds that the expenditure of more than 500 hours over a period of more than three years is reasonable in the circumstances here. Based upon consideration of all relevant factors, the court fixes the Scarola Firms' compensation for services rendered in the amount requested or \$253,104.62. All disbursements included in that total were allowable (see *Matter of Herlinger*, NYLJ, Apr. 28, 1994, at 29, col 3).

In summary, the court fixes legal fees and disbursements in the amount of \$1,506,064.46 as follows: 1) Willkie Farr - \$815,961.02, 2) Trachtenberg - \$7,500, 3) Greenfield Stein - \$342,354.02, 4) Sonnenschein - \$87,144.80, and 5) Scarola Firms - \$253,104.62. The court recognizes that the total of these legal fees and disbursements is significant and that the total is in

addition to the almost \$1.8 million paid during the interim accounting period. However, this estate has been embroiled in conflict and litigation for more than 19 years. When viewed in this context, the total legal fees are not disproportionately high. They simply reflect the reality that this estate required continuous legal representation for complex administration issues and the defense of the executors from claims of wrongdoing. By any standard, the results achieved by the executors' attorneys were excellent. Together they prevailed on almost every issue they litigated, including those at trial.

Allocation of Legal Fees Under Matter of Hyde

Maria also objects to the executors' request that the court allocate to her share of the residuary estate the legal fees that the executors incurred "in defense of the prior interim accounting." In their accounting petition, the executors do not quantify the amount of these fees. However, in their submissions addressed to Maria's objections, they ask the court to allocate \$2,308,360.14 in legal fees to Maria. This amount includes not only the fees reflected in the Final Account, but also approximately \$750,000 in legal fees and disbursement fixed as an estate expense in the March 2019 decree settling the Interim

Account.⁴ According to the executors, the fees fixed in the March 2019 decree that require allocation were for services performed by Willkie Farr, Sonnenschein and the Scarola Firms during the period January 30, 2007, the date that Maria filed her objections, to April 30, 2009, the end date of the Interim Account.⁵

The executors base their request on *Matter of Hyde* (15 NY3d 179). There, the Court of Appeals "restore[d] the plain meaning of SCPA 2110[2]: to place discretion in the hands of the trial courts to allocate expenses when ordering that fiduciaries be indemnified by an estate for attorney's fees" (*id.* at 186). The court encouraged a multi-factor assessment when exercising that discretion:

"These factors, none of which should be determinative, may include: (1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; (2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding; (3) the extent of an individual beneficiary's participation in the proceeding; (4) the good or bad faith of the objecting beneficiary; (5) whether there was justifiable doubt regarding the fiduciary's conduct; (6) the portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and (7) the

⁴ The executors do not specify what portion of the \$2,308,360.14 is reflected in the decree settling the Interim Account, but if the court subtracts the total legal fees and disbursements at issue in the Final Account (\$1,541,382.62) from the total fees and disbursements the executors seek to have allocated (\$2,308,360.14), the amount is \$766,977.52.

⁵ Greenfield Stein and Trachtenberg did not provide services to the executors during the period of the Interim Account.

future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally."

Id. at 186-87 [citation omitted]).

Of note here is that *Matter of Hyde* was decided in June 2010, eight months after the executors supplemented the Interim Account. Although at that point the contest over the Interim Account was still in its infancy, the executors never sought to amend their petition to request that the court allocate legal fees in accordance with this new case law as they could have (see *Matter of Marsh*, NYLJ, Apr. 9, 2013, at 22, col 3 [Sur Ct, NY County 2013][granting motion to amend accounting petition to seek allocation based on *Matter of Hyde*]). The Interim Account was settled by decree, which fixed as payable from the estate a portion of the legal fees that the executors now seek to allocate to Maria.

Neither the executors nor Maria addresses whether the decree settling the Interim Account forecloses the executors from seeking allocation of the approximately \$750,000 in fees that were fixed in that decree. Whether the court is nonetheless obligated to resolve the issue need not be decided, however, because, under the multi-factor approach set forth in *Matter of Hyde*, allocation of these legal fees would not be warranted in any event.

The executors ignore that Marlin, as trustee of trusts

comprising a substantial part of the residuary, was also pursuing objections during the period at issue (January 30, 2007, to April 30, 2009) and that some of his objections, particularly those regarding RB Holdings and the executors' accounting fees, overlapped with Maria's objections. The contemporaneous billing records of Willkie Farr and Sonnenschein are replete with references to Marlin and his objections. Marlin did not withdraw the bulk of his objections, including those relating to RB Holdings until June 18, 2009 - after the end of the the interim accounting period. Under these circumstances, the executors' argument that the approximately \$750,000 in legal fees incurred between January 30, 2007, and April 30, 2009, were solely the result of Maria's objections and should be allocated to her alone is not supported by the record.

The remaining question is what, if any, of the legal fees and disbursements at issue in the Final Account should be allocated to Maria under *Matter of Hyde*. As indicated above, the court has fixed the compensation of all counsel in the amount of \$1,506,064.46. Thus, this is the maximum amount subject to allocation. However, the executors' submissions raise several issues regarding the potential allocation of this amount.

The executors request allocation of \$2,308,360.14 in legal fees paid during the periods of the interim and final accounts

without quantifying how much applies to each account. Further, according to the executors, the total reflects a reduction of \$215,927.21⁶ for services that the executors concede were unrelated to their defense of Maria's objections, such as time spent handling general administration matters and effectuating the partial withdrawal of Marlin's objections. However, the executors do not identify the specific time charges upon which they based the reduction. Therefore, the court cannot determine what portion of the \$215,927.91 reduction came from time charges reflected in the Interim Account as opposed to those reflected in the Final Account. Moreover, it appears that the \$215,927.91 includes some fees reflected on Schedule C of the Final Account. Thus, the executors themselves were never seeking to allocate all of the fees at issue in the Final Account to Maria's share of the residuary estate.

In addition, it is unclear how the executors could have determined the amount of time spent on matters unrelated to the contested accounting with any precision. Even a cursory review of the relevant contemporaneous time records reveals that many of the time entries are "bundled" without any effort to allocate time to each service. In many instances, this makes it impossible to

⁶ The reductions were as follows: 1) Willkie Farr - \$120,322.50, 2) Sonnenschein - \$86,742.96, 3) Scarola Firms - \$2,720.25, and 4) Greenfield Stein - \$6,141.50.

determine what portion of a time entry is unrelated to the contested accounting.

Apart from these issues, the executors fail to offer a compelling case for allocating legal fees to Maria much beyond the one-third share she will pay in any event. For example, the executors downplay the unassailable fact that Maria was not the sole objectant during much of the final accounting period. Although Marlin withdrew many of his objections in June 2009, he continued to object to accounting fees and Isaacs' commissions until days before the 2015 trial. Yet, the executors ignore this fact in their calculation of fees they seek to allocate to Maria.

Maria and Marlin had a basis for their concerns about Isaacs. In addition to serving as co-executor, he provided accounting services to the estate, as did two firms with which he was affiliated, Edward Isaacs & Co. LLP and RSM. Patry was concerned enough about possible liability from the accounting fee objections that she filed a cross-petition in December 2009, impleading RSM and asserting claims against it and Isaacs in relation to those fees. The court ultimately reduced accounting fees in the Interim Account by \$42,881 for services Isaacs claimed he had performed as a consultant to RSM but did not substantiate (*see Matter of Otto*, 2018 Slip Op 32083[U]). Thereafter, Isaacs agreed to deduct from his commissions the amount by which RSM's fees had been reduced,

and Patry agreed to discontinue her cross-petition, a resolution that enured to the benefit of the estate as a whole.

Nonetheless, the executors argue that the court's allowance of most of the accounting fees demonstrates that Maria's objections were unfounded and made in bad faith. However, Marlin pursued even broader objections relating to the accounting fees and Isaacs. He also challenged Isaacs' commissions, and he did so for more than eight years. During this time, the executors incurred substantial legal fees. Even after Isaacs' deposition was completed in 2012, Marlin did not withdraw his objections.

Marlin's pursuit of these objections placed him in no different position from Maria until he withdrew them. Yet, the executors would have the court allocate to Maria no less than all legal fees "incurred in defense of the prior interim accounting." Fairness does not dictate such a result, and neither does *Matter of Hyde*.

There is no evidence that Maria pressed her objections to accounting fees in bad faith. Given the substantial accounting fees the executors paid while Isaacs and the firms with which he was affiliated were providing accounting services to the estate, it was reasonable for Maria, who would be paying a third of those fees out of her share of the residuary estate, to object and then insist that the court determine the reasonableness of those fees. That the objections ultimately yielded only a modest benefit to

the estate is not dispositive. Nor is the fact that Marlin, for reasons unclear in the record, agreed to withdraw his remaining objections days before the trial.

The executors do not attempt to quantify the time spent in defense of the objections to accounting fees since they contend that all legal fees that the executors incurred in relation to the contested accounting should be allocated to Maria. This raises yet another issue for the court. The executors have submitted hundreds of pages of time records containing thousands of individual entries. Many of the entries "bundle" descriptions of multiple tasks, with no allocation of time to each task. Even if it were possible to allocate time to each task, it would still be nearly impossible to determine with any degree of certainty the amount of time the executors' attorneys spent defending against the objections to accounting fees.⁷

Also without basis is the executors' request for allocation of the legal fees generated by Patry's cross-petition impleading RSM and her cross-claim against Isaacs. In its affidavit of services, Willkie Farr, as counsel to Patry, described these fees as a product of a dispute between fiduciaries arising from Isaacs'

⁷ Maria attempts to quantify the time spent on matters related to the objections to accounting fees by identifying the date and total amount she claims was billed for such services during the period of the Final Account, but she does not identify the specific time entries that make up the total.

conduct:

"Isaacs, as Co-Executor and employee of RSM made decisions related to the Estate administration without consulting [Patry], leading her to cross-claim against Isaacs so he would share in the liability for any fees [Patry] would be responsible for reimbursing to the Estate, in addition to impleading his accounting firm."

In addition, although the executors characterize Maria as highly litigious, she was not a serial movant during the more than nine years of this contested accounting. Moreover, although the court often rejected the positions Maria took, she was not without some successes.

For example, in June 2009, the executors sought a protective order regarding Maria's requests for discovery relating to RB Holdings and Maria cross-moved to compel such discovery. Although Maria's efforts were mostly unsuccessful, the court did allow her limited discovery to substantiate that the professional fees reflected in the Interim Account "were not incurred by and paid from RB Holdings" (*see Matter of Otto*, 2011 NY Slip Op 51696[U], at *10).

There was no additional motion practice until January 2012, when Maria made a motion to vacate the executors' Note of Issue on the ground that discovery was outstanding. The executors claim that motion was baseless, but after a court conference, the executors produced additional documents, and Isaacs was deposed for an additional day. Upon the completion of that discovery,

Maria withdrew the motion (see *Matter of Otto*, NYLJ, July 10, 2013, at 22, col 2 [Sur Ct, NY County 2013]).

Maria also prevailed on part of her dispute with the executors over the parties' respective positions regarding the matters to be tried. The executors characterize her Counterstatement of the Issues, which prompted the executors' motion to strike, as "an attempt to inject issues for trial for which she had not objected." However, as discussed above, although the court denied her motion for leave to amend, one of the issues in her Counterstatement of the Issues withstood the executors' motion to strike and proceeded to trial along with her objections to professional fees. (*Matter of Otto*, NYLJ, Mar. 25, 2015, at 22, col 4).

No doubt Maria did not fare well at the bench trial of her objection that the fiduciaries failed to investigate the propriety of decedent's transfer of control of the Real Estate Entities to his son Jonathan for \$10,000. Nonetheless, it cannot be said that she pursued her objection in bad faith. Although she could not establish her claim that the executors failed to determine that the agreement at issue was a forgery, it was reasonable for her to have relied on experienced trial counsel and the opinion of a handwriting expert that the objection had merit. As for her objections to professional fees, she was largely unsuccessful, but

again, given the amount of legal and accounting fees and Isaacs dual role, her concerns were reasonable.

The executors point to the facts that Marlin ultimately withdrew all of his objections, and none of the beneficiaries of the residuary trusts of which Marlin was trustee filed objections after their trusts (which comprised 50% of the residuary estate) terminated upon their reaching age 35. However, that is not a dispositive fact, particularly since Patry, along with her two siblings, were beneficiaries to which the executors refer. The executors ignore that this is not a case where the objectant had a minor interest in the estate, and thus would not be responsible for paying a significant part of the legal fees generated by her objections. Maria has an interest in 50% of the residuary estate either outright (33 1/3%) or in trust (16 2/3%) and therefore had a substantial interest in ensuring that the estate was properly administered.

Nonetheless, the executors position is not without some support in the record. Maria's efforts to challenge the executors' conduct as it related to RB Holdings after executing the 2001 Settlement agreement are difficult to justify and resulted in the generation of substantial legal fees in this court and as a result of Maria's unsuccessful appeal. Likewise, Maria's Counterstatement of the Issues included matters that could not be reasonably

implied from her pleading. Significant legal fees resulted from the executor's motion to strike and Maria's unsuccessful effort to cure a defect in her cross-motion to amend her objections.

The court is mindful of the following statement in its post-trial decision noted by the executors: "From the court's vantage point, objectant's conduct significantly prolonged the administration of the estate and caused a substantial increase in professional expenses" (*Matter of Otto*, 2018 NY Slip Op 32083[U] at *17). However, the court made this statement in connection with its determination of professional fees for the period August 18, 1999, to April 30, 2006. Consequently, the statement is unrelated to the current issue before the court - whether the legal fees the executors incurred beginning May 1, 2009 should be allocated to Maria under *Matter of Hyde*.

As to that issue, the Court of Appeals made clear that such a determination falls squarely within the court's discretion (see *Matter of Hyde*, 15 NY3d at 186). Thus, although the cases the executors and Maria cite in support of their respective positions are informative as to how court's have exercised such discretion, they are fact specific and offer only limited guidance in this case. Here, under all the circumstances described above and considering the factors set forth in *Matter of Hyde* (15 NY3d 179), the court concludes that Maria should pay a total of 50% of the

legal fees fixed above out of the portion of the residuary estate that she receives outright. Maria will thus be responsible for paying an additional 16 2/3% above the 33 1/3% she would pay in any event. This allocation ensures that Maria's share of the residuary estate does not absorb the cost of legal fees unrelated to the contested accounting or that are related to the contested accounting but should not be allocated to Maria for the reasons discussed above.

This decision constitutes the order of the court.

Dated: September 29, 2022



S U R R O G A T E