Typical Problems in the Administration of Estates

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I. Multiple Fiduciaries:
An Overview of Their Roles and Responsibilities

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Opening Hypothetical

Dear Old Dad, Rex Lear, is dead and that is the only thing that Regan, Cordelia, and Goneril could agree upon. Children of the wealthy but irascible financial titan, Regan, Cordelia, and Goneril (despite the ease and comfort of their upbringing) never had an amicable relationship. Their disputes over the years usually pitted Regan and Goneril against Cordelia. Indeed, before he died, their father was subject to bitter litigation over his guardianship and the exercise of various and competing powers of attorney.

In a misguided attempt to be fair to them all, Dad divided his estate evenly among the three and named them co-executors as well as co-trustees of several testamentary trusts. (His spouse predeceased him.) As he stated to his counsel, "this will force them to get along and it will prevent a probate contest after I shuffle off this mortal coil." The estate was a large one, consisting of several houses, personal retainers, large parcels of real property, crown jewels, and cash. Luckily, Dad was able to take advantage of the new portability law and thereby obtain a second step-up in basis for his estate. Moreover, the cunning use of various discounting techniques, insurance trusts, zeroed-out charitable lead trusts (an ironic feature of an estate plan for a notoriously uncharitable individual), and environmental easements reduced Dad's exposure to taxation. Given his personalty, his family situation, and his avoidance of detested taxes, one could say that Mr. Lear died a happy man.

The will was admitted to probate and letters testamentary were issued to the three sisters. Regan and Goneril hired an attorney to help them to administer the estate. Cordelia did not agree with this selection and hired her own attorney. The attorneys immediately suggested that an arrangement should be agreed upon whereby they would not duplicate their efforts. The sisters reached no such arrangement. Cordelia objected when Regan and Goneril decided to sell the family mansion to pay estate taxes. Cordelia refused to participate in the transaction and Regan and Goneril proceeded without her, executing the deed without her signature. Their attorney, also a licensed real estate broker, agreed to broker the sale and agreed to take a reduced commission for the effort. When he produced a buyer willing to pay the fair market value for the property, Cordelia demanded to buy it for a sum that was both in excess of the mansion's appraised value and in excess of the offered purchase price. Regan and Goneril refused Cordelia's offer and said to her that she would never live in Dad's house. In revenge, Cordelia proceeded to sell the antiques that filled the mansion against the wishes of her sisters.

Some issues to ponder:

1. Can Regan and Goneril sell the mansion without Cordelia's signature on the deed?

2. Can Regan and Goneril ask the Surrogate to compel Cordelia's cooperation on the sale of the real property?

3. Can two attorneys represent three co-executors during the administration of the estate?

4. Are the fees of both counsel reasonable administration expenses payable from estate funds?

5. Can Cordelia sell the antiques without the consent of her co-fiduciaries?

6. Is the broker-attorney entitled to a commission for selling the mansion?

I. Introduction: Statutory Authority - EPTL 10-10.7

§ 10-10.7. Exercise of powers by multiple fiduciaries; joint and several powers

Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointment, conferred upon three or more fiduciaries, as that term is defined in 11-1.1, by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such fiduciaries, or by a majority of survivor fiduciaries, or by the survivor fiduciary. Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power. A fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his dissent is expressed promptly in writing to his co-fiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided. A power vested in one or more persons under a trust of real property created in connection with the salvaging of mortgage participation certificates may be executed by one or more of such persons as provided in such trust. This section shall not affect the right of any one of two or more personal representatives of a decedent to exercise a several power.

Whether administered by a single fiduciary or by multiple fiduciaries, the estate is a single entity and the fiduciaries act and speak for it. For example, co-executors who have qualified and have been issued letters testamentary are considered to be in the law as one person, a single entity. (See, e.g., *Lawrence v. Townsend*, 88 N.Y. 24 (1882) ; *Despard v. Churchill*, 53 N.Y. 192 (1873) ; *In re Hammer*, 237 A.D. 497, 261 N.Y.S. 478 (4th Dep't 1933) , aff'd sub nom., *In re Ehlert*, 261 N.Y. 677, 185 N.E. 789 (1933) The Court of Appeals stated:

> Co-executors, however numerous, constitute an entity, and are regarded in law as an individual person. Consequently the acts of any one of them in respect to the administration of estates, are deemed to be the acts of all, for they have all a joint and entire authority over the whole property.

Barry v. Lambert, 98 N.Y. 300, 308 (1885).

A joint power conferred upon three or more fiduciaries (other than powers of appointment) may be exercised by a majority of the fiduciaries, or both the fiduciaries if there are only two, unless the governing instrument provides otherwise (EPTL 10-10.7)..

This statute applies to those powers (other than powers of appointment) exercised by administrators, executors, preliminary executors, administrators d.b.n., administrators c.t.a., ancillary executors, ancillary administrators, trustees.

After *Matter of Rothko*, 84 Misc 2d 830, 379 NYS2d 923 (Sur.Ct. New York Co. 1975); modified, 56 AD2d 499, 392 NYS2d 870 (1st Dept 1977); *affd* 43 NY2d 305, 401 NYS2d 449 (1977); *on remand* 95 Misc2d 492, 407 NYS2d 954 (1978), the practitioner has been made keenly aware of the liability that attaches to a passive fiduciary who acquiesces in a breach of fiduciary duty committed by his or her fellow fiduciaries.

In this context, it is useful to keep in mind that EPTL 10-10.7 exonerates a fiduciary from liability for the conduct of the other fiduciaries but only in a very circumscribed manner. A fiduciary who is "absent" or under a disability or who dissents in writing from the action of a majority of the co-fiduciaries will be absolved from all liability for those actions except in two instances: 1) that the liability stems from failure to join in the reasonable administration of the estate; or 2) the failure to prevent a breach of the co-fiduciaries' duties. The latter example is the basis for the *Rothko* liability. The former example may be illustrated by *Matter of Garvin*, (210

AD2d 331, 620 NYS2d 401 [2d Dept 1994]). In *Garvin*, the recalcitrant fiduciary was compelled to execute the necessary documents for the sale of real property approved by his co-fiduciaries. The Surrogate not only compelled his compliance but also surcharged the respondent for the costs of the proceeding to compel her cooperation. Other cases suggest that it is not the place of the Surrogate to compel the fiduciary to take an action he or she believes is not in the best interest of the estate (*see, Matter of Murphy*, 185 A.D.2d 819, 587 N.Y.S.2d 846 (2d Dept 1996).

II. The distinction between joint and several powers.

The general rule is that a fiduciary may exercise several powers pursuant to EPTL 11-1.1 "unilaterally, even without the consent of co-fiduciaries" (*Matter of Stanley*, 240 A.D.2d 268, 269). Joint powers, however must be exercised by at least the majority of the fiduciaries. However, the scope of EPTL 10-10.7 prompts a discussion of the distinction between fiduciary powers that are joint and powers that are several. Actions that are deemed joint in nature require application of the principles of EPTL 10-10.7. Hence, where there are three co-fiduciaries at least two of them must join in exercising a joint power. Where there are two executors, then both must consent to exercise a joint power. Actions that are deemed to be several in nature may be exercised in a valid and binding fashion by any one of the fiduciaries.

The distinction between powers joint and several is not always a clear one. Some writers suggest that a several power is ministerial in nature while a joint power is a discretionary act requiring prudence and good judgment on the part of the co-fiduciaries acting together. In general, the decisions define a joint power as one which requires the exercise of discretion (*Fritz v. City Trust Co.*, 72 App. Div. 532, 533, 76 N.Y.S. 625, aff'd, 173 N.Y. 622, 66 N.E. 1109; *Matter of Ehret*, 70 Misc. 576, 579, 127 N.Y.S. 934). On the other hand, those powers which are purely ministerial (collect assets, deposit funds of the estate in a bank, etc.) are considered several powers. The case law can be misleading. The following acts have been found to be several in nature and exercisable by one fiduciary:

1) drawing a check on an estate account. (*Barry v Lambert*, 98 NY 300 [1885]),

(Of course, few banks will permit the uncertainty of single signature authority when dealing with multiple fiduciaries);

2) assigning a promissory note (*Matter of Hammer*, 261 NY 677);

3) compromising a claim (*Matter of Leopold*, 259 NY 274 [1932]);

4) paying a debt; (*Matter of Hollinger*, 93 Misc. 2d 926, 403 N.Y.S.2d 857 [Surr.Ct. Nassau Cnty 1978]);

5) Commencing a discovery proceeding (Warren's Heaton Law and Case Digest vol 5 no.1, Feb 2001).

The following acts have been found to be joint in nature requiring the consent of all or a majority of the fiduciaries:

1) executing a deed to real property (*Matter of Henback*, 165 Misc 196, 300 NYS2d 802 [Sur Ct, Kings County 1937]);

2) extending a lease (*Rabinovitz v Williamson*, 194 Misc 17, 86 NYS2d 5 [Sup Ct, Kings County, 1948], *affd* 275 AD 841, 88 NYS2d 370 [2d Dept 1949]);

3) borrowing money (*Bryan v Stewart*, 83 NY 270 (1880);

4) making investment decisions (*Matter of Farley*, 186 Misc.2d 500, 717 N.Y.S.2d 500 [Sur.Ct., Onondaga Co., 2001]);

5) making tax elections.

In *Matter of Leopold*, *supra*, the decedent was the defendant in a suit when she died. Two co-administrators were appointed. Negotiations with the plaintiff produced a proposed settlement that was agreeable to one administrator but not the other. The willing administrator petitioned the Surrogate to approve the settlement and to compel the co-administrator to join with him in its payment. The Court of Appeals ruled that any one of several fiduciaries may collect, discharge, or compound a debt. Of course, the fiduciary will be subject to a review of his or her action at the time of the accounting (*see also, Matter of Stanley*, 240 AD2d 268, 660 NYS2d 107 [1st Dept 1997]).

Statutory authority for this holding is clear. EPTL 11-1.1 (b)(13) and (22), respectively, empower fiduciaries to contest any claim or settle any claim in favor of the estate and to pay

administration expenses including reasonable counsel fees. Indeed, a fiduciary may exercise, in his or her discretion, the above powers unilaterally, even without the consent of co-fiduciaries.

In a relatively recent decision from Surrogate Wells, the court ruled that investment decisions, while ordinarily a joint power, may be exercised unilaterally with the consent or acquiescence of the passive co-fiduciary. In *Matter of Farley*, 186 Misc.2d 500, 717 N.Y.S.2d 500 [Sur.Ct.Onondaga Co., 2001]*),* the court was presented with a fairly common occurrence, a corporate co-trustee serving with a relative of the grantor as the other co-trustee. The layperson was of little assistance to the corporate trustee, but did acquiesce in the investment decisions made by the accounting co-trustee. Surrogate Wells ruled that the passive trustee may be held liable for damages to the trust as a result of his or her inaction or neglect.

As Warren's Heaton on Surrogate's Court Practice relates, "An exception to the requirement that co-fiduciaries act collectively (by a decision of the majority) is in the case of an emergency. For example, in *Matter of Burke,* 129 Misc. 2d 145, 492 N.Y.S.2d 892 (Sur. Ct. Cattaraugus County 1985) , one of the two trustees entered into a contract for repairs of the trust property without consulting with the other trustee. However, the real property "had suffered water damage, was rotted and was in danger of collapse into the cellar" and "the front porch was unsafe and rotting and could not be walked upon." The court held that emergency repairs were necessary to protect the trust property and thus the trustee had the authority to contract for the necessary repairs." (5-61 Warren's Heaton on Surrogate's Court Practice § 61.01.)

The Delegation of Duties Corollary

"The duty of a fiduciary is personal and cannot be divested by delegation." 41 NY Jur.2d, Decedent's Estates §1479 at p.84. Consequently, the power of attorney and its description of the delegation of powers relevant to estate transactions do not apply to one fiduciary delegating his or her duties to a co-fiduciary. Therefore, a fiduciary is not authorized to give a general power of attorney (Matter of Jones, NYLJ, 10/31/2003 N.Y.L.J. 22, (col. 3) [Surr. Ct. Broome Co.]). The

delegation of such a non-delegable duty may result in the delegating fiduciary being surcharged. (See, e.g., *Woodbridge v. Bockes*, 59 A.D.503 (4th Dept. 1901); *Matter of Badenhausen*, 38 Misc.2d 698 (Surr. Ct. Richmond Co.1963); *In re George Ringler and Co.* 70 Misc. 576 (Sup.Ct. New York Co. 1911); Restatement of Trusts, 2d §171, cmt.c; Scott on Trusts, §171.1 at 439.

The foregoing notwithstanding, the courts have recognized a form of acceptable quasi-delegation where one co-fiduciary possesses a degree of expertise on certain matters that the other fiduciary does not. See, for example, *Matter of Farley*, 186 Misc. 2d 355, 717 N.Y.S.2d 500 (Surr.Ct., Onondaga Cnty, 2000). In *Farley*, Surrogate Wells recognized the long standing corollary to the non-delegation rule and held that a fiduciary is allowed to delegate the exercise of a joint power to a co-fiduciary when the co-fiduciary has an expertise in the matter. However, the passive trustee may be held liable for damages to the trust as a result of his or her inaction, if negligent. Nonetheless, the rule is clear, a fiduciary's duty is a nondelegable one. It is worth noting that with the new power of attorney statute (General Obligations Law § 5-1501B) some people have wondered if the sweep of the new law allows a fiduciary to delegate a power to a non-fiduciary. The answer is no. While a fiduciary may delegate the exercise of a joint power to a co-fiduciary, especially if the co-fiduciary has an expertise in the delegated power, but this does not relieve the fiduciary of his or her duty to the estate or trust nor does it relieve the fiduciary from liability for the estate or trust.(*In re Goldstick*, 177 A.D.2d 225, 581 N.Y.S.2d 165 (1st Dep't 1992) , modified, 183 A.D.2d 684, 586 N.Y.S.2d 490 (1st Dep't 1992) . It is clear, however, that a fiduciary may not delegate his or her entire fiduciary obligation to anyone, even to a co-fiduciary, even if the purported delegation is by power of attorney. (*In re Jones*, 1 Misc. 3d 688, 765 N.Y.S.2d 756 (Sur. Ct. Broome County 2003) .

- The Power to Deviate from EPTL 10-10.7

The drafter should be aware that EPTL is a default statute and may be changed by the terms of the governing instrument. See, for example, *Matter of Rubin*, 147 Misc. 2d 981, 559 N.Y.S.2d 99 (Surr.Ct. Nassau Cnty, 1990).

III. Multiple Commissions

And now, a change of pace. The subject of commissions for multiple fiduciaries is governed by SCPA 2313. It is a default statute whose terms may be amended by the will. It applies to wills of persons dying of lifetime trusts established after August 31, 1993.

The statute provides that if there are more than two executors or trustees then they must share the value of two commissions unless the instrument otherwise provides. Care should be taken to consider this section in the context of SCPA 2307 and 2309, the former law is still applicable to estates created prior to August 31, 1993.

Under the new law (SCPA 2313), the maximum number of commissions is two, unless the instrument provides otherwise. That amount must be apportioned among the fiduciaries according to the services rendered by them unless they have agreed in writing to a different apportionment which, however, shall not provide for more than one full commission for any one of them.

Under the previous law (SCPA 2307, 2309), if the estate or trust was at least $400,000 for a trust or $300,000 for an estate, then three full commissions would be allowed to be shared among the three or more fiduciaries. For estates less than $100,000, then the fiduciaries would share one commission. Finally, for estates between $100,000 and $300,000, the full compensation for multiple fiduciaries would be limited to two commissions.

IV. Liability and Other Problems

Passive Liability

The leading case that stands for the proposition that a fiduciary may be equally liable for sins of omission as well as sins of commission is *Matter of Rothko*, (43 NY2d 305 [1977]). You,

of course, recall that Mark Rothko was one of the country's premier abstract expressionists when he died in 1970. The misanthropic Rothko had hoarded much of his work, amassing almost 800 paintings. His daughter accused the executors of his estate (three of them) and a third-party (the owner of the Marlborough Gallery) of conspiracy and fraud and conflict of interest in selling the works, in effect, enriching themselves by self-dealing. They were found liable to the estate and severely surcharged. The owner of the gallery was separately convicted of criminal charges of tampering with evidence.

Rothko is significant on two counts. One reason involves poor Morton Levine, one of the three executors. Within three weeks of the will's admission to probate, two of the executors had entered into contracts to sell the entire collection of paintings on terms that were patently unfair. To give an illustrative example: 700 paintings were consigned to the Marlborough Gallery to be sold over a twelve-year period at a 50 percent commission. One of the executors was a director and officer of Marlborough who had previously had a hand in representing Marlborough in negotiating a deal with Mark Rothko whereby Marlborough would receive a 10 percent commission on sale of the artist's paintings. Whether this inter vivos contract survived Rothko's death was obviously a problem that a fiduciary in a dual position could not have impartially faced.

Back to poor Mr. Levine. He was not financially interested in these dealings. He was the only one of many people involved who did not stand to gain from the various transactions. Nevertheless, because he did not protest or seek to restrain his co-fiduciaries, he was held equally liable for a surcharge in excess of $6,000,000. Would Mr. Levine have been saved had he protested the conduct of his co-fiduciaries in writing, as provided in EPTL 10-10.7? Not at all. That statute will not insulate a fiduciary from such egregious examples of a breach of a fiduciary's duty such as self-dealing. It is important to keep in mind that EPTL 10-10.7 will protect the passive fiduciary from conduct that is done in good faith but nevertheless found to be surchargeable, but only under certain conditions (*see, e.g., Matter of Farley, supra*).

There is a second feature of the *Rothko* decision that bears mentioning. The Court of Appeals also ruled that the self-dealing of the fiduciaries will subject them to an enhanced measure

of damages, one that is based on a "loss-of-profits" calculation. This is to be distinguished from the recent holding of the Court of Appeal in *Matter of Janes*, (90 NY2d 41, 659 NYS2d 165), that looks to a calculation of damages based upon loss of capital.

Selling Real Property

EPTL 11-1.4 establishes a ten (10) year period of limitations for questioning title to real property sold by less than all the fiduciaries. The section provides that any deed, mortgage, or lease duly executed by one or more, but not all, of the executors, who qualified conveys the full title and interest of the decedent and is effective as if all the fiduciaries had executed the deed or lease after a period of ten years. How does this provision for a voidable title square with EPTL 11-1.1 (b)(13) which authorizes three or more fiduciaries to act by majority vote when exercising a joint power? One thing must be stated to put minds at ease. The statute protects the transferee who succeeds to the property interest in good faith and for valuable consideration. Nonetheless, one must conclude that these provisions must be read in light of EPTL 10-10.7 which, of course, provides that where the power is created in three or more fiduciaries then it may be exercised by a majority of such fiduciaries, or by the survivor fiduciary, unless otherwise provided for in the instrument creating the power.

A small digression is in order. It seems to me that one question is begged to be asked when considering some of these situations. The question is simple: may a single attorney represent multiple fiduciaries? The answer is equally simple: yes. The case law is clear that in the absence of a conflict of interest, the attorney is free to represent multiple fiduciaries. That does not detract from two or more fiduciaries being free to retain different attorneys.

Let us focus for a minute on the situation when the happy relationship between two co-executors and their attorney breaks down within the context of an administration of an estate. The NYSBA Committee on Professional Ethics was presented with the following fact pattern:

One lawyer represents two co-executors: one is a trust company and the other is a residuary

beneficiary of the estate. The trust company has allegedly extended the administration of the estate long past the time it should have been settled. Under these circumstances, the Committee was faced with the following question.

1. May the lawyer institute a compulsory accounting proceeding on behalf of the executor-beneficiary?
The Bar Association ruled: No.

2. If the executor beneficiary retains other counsel to initiate the compulsory accounting proceeding, may the lawyer represent the bank in defense of the proceeding?

The Bar Association ruled: No.

3. May the lawyer continue to represent the executors in connection with any other matter relating to the estate?

The Bar Association ruled: Yes.

Opinion 512, New York State Bar Association

Why? The committee labeled the prospect of the attorney litigating against either of his former clients as "turncoat representation" even where there may be no misuse of confidential information.

cf., Matter of Hof, 102 AD2d 591, 478 NYS 2d 39 (2d Dept. 1984) *and Matter of Dix*, 11 AD2d 555, 199 NYS 2d 958 (3d Dept 1968).

In *Hof*, the decedent nominated two executors in his will: his then current wife and his son from a previous marriage.

The two co-fiduciaries did not regard each other in as trusting a manner as the decedent did. Nonetheless, they were initially united in interest and worked together to retain a single firm to represent them. The inevitable falling out soon occurred. The attorney chose sides and represented the son in the accounting proceeding. The stepmother moved to disqualify. The Surrogate denied the motion but the Second Department reversed. The court held as follows:

"The critical issue here is not the actual or probable betrayal of confidence, but the mere appearance of impropriety and conflicts of interest."

Matter of Hof, 102 AD2d at 593, 478 NYS2d at 40.

Deadlocked Fiduciaries

Until recently, it was easy to make money in the stock market: buy low, sell high - and not necessarily in that order. Well, times have changed and I'd like you to imagine the following scenario. There are two co-trustees administering a trust estate and they are at loggerheads: one wants to cut losses and sell, the other just knows in his heart that Lucent will come back. What to do?

Surrogate Roth had an interesting idea in *Matter of Duell*, (NYLJ, 7/23/96 p 23, col 1). She appointed a very well-regarded trusts and estates attorney to act as a "special co-fiduciary" with the limited authority to resolve the deadlock between the two fiduciaries. When it became apparent to the court that this situation would occur again and again, the attorney was eventually appointed as a third fiduciary (an administrator c.t.a.) "to resolve deadlocks and avoid the expense and delay of repeated applications to the court for relief."

Some courts have upheld provisions in wills that provides for unique solutions to the problem of deadlock. In *Matter of Rubin*, (143 Misc 2d 303, 540 NYS2d 944 (Nassau County, 1989). Surrogate Radigan permitted a will provision to be effective that designated two

non-fiduciaries to be the arbiters of disputes between the two fiduciaries.

In *Matter of Winston*, (NYLJ, 12/24/90, p 33, col 3 [Westchester]), Surrogate Emanuelli approved a provision in the will that altered the majority rule requirement of EPTL 10-10.7. The will of the jeweler Harry Winston provided that in the event of a dispute between testamentary trustees, the viewpoint of one (the decedent's son) would prevail.

Finally, where there is a deadlock among multiple fiduciaries, SCPA 2102(6) provides that any one of the fiduciaries may apply to the court for advice and direction. This proceeding should be distinguished from an Advice and Direction proceeding pursuant to SCPA 2107. In the latter, the Surrogate exercises his or her discretion in order to entertain a proceeding relating to the value of estate property or other complex issues the Surrogate chooses to take. The Surrogate's discretion to entertain a SCPA 2102 (6) may be more circumscribed than it is under SCPA 2107.

The upshot of all this is clear: sometimes two heads are not better than one.

Additional cases of co-fiduciaries at loggerheads:

- *Matter of Weinstock*, NYLJ, p.31, col.3 Oct. 10, 2000 (Surr. Ct. Kings Cnty.)
"Those powers which are purely ministerial (such as collecting assets, depositing funds of the estate into a bank, etc.) are considered several powers. Such powers can be exercised by each fiduciary individually where there are more than two fiduciaries (Matter of Leopold. 259 NY 274, 278, 181 N.E. 570; Geyer v. Snyder. 140 N.Y. 394, 35 N. E. 784; Matter of Heubach, 165 Misc. 196, 300 NYS 802)."

- *Matter of Murphy*, NYLJ, p.31, col. 3, Apr.14, 1994 (Surr. Ct. Richmond Cnty)

Return to the Opening Hypothetical

1. Yes, Regan and Goneril can sell the mansion without Cordelia's signature on the deed. - EPTL 10-10.7

2. Because Cordelia's cooperation is unnecessary, the Surrogate may deny such an application (*cf. Matter of Murphy*, 185 AD2d 819, 587 NYS2d 846[2d Dept 1996] and *Matter of Garvin*, 210 AD2d 331, 620 NYS2d 401 [2d Dept 1994]).

3. Yes, the retention of counsel is a several power of the fiduciaries and may be exercised individually (*Matter of Schwarz*, 240 AD2d 268, 660 NYS2d 107 [1st Dept 1997]). However, keep in mind that a Surrogate will be loathe to approve "more than one fee" for the administration of the estate absent special circumstances.

4. Yes, unless the Surrogate decides otherwise.

5. Yes, the sale of personal property is deemed to be a several power exercisable by any one of the fiduciaries (subject, of course, to the review of that exercise at the accounting).

6. No, the attorney for the fiduciary may be treated as a fiduciary and, as such, the commission may be held to be self-dealing (*see, Matter of Kellogg*, NYLJ, Dec. 30, 1999 [Sur.Ct. N.Y. Co, Preminger,J.]).

The lesson, with additional apologies to Mr. Shakespeare (who must have had his own testamentary issues because he bequethed his wife his "second-best bed") :

"How sharper than a serpent's tooth it is to have a thankless co-executor."

II. The Devil is in the Details, The Trustees' Dilemmas

The problems of multiple fiduciaries aside, it is a truism that just as every attorney believes it is easy to draft a Will for a client, so to do many people believe that they can handle the administration of an estate as a fiduciary, either as an executor or as a trustee. Would that it were so. A trusts and estate litigator is expert on administration issues because he or she has had a severe teacher, the estate whose administration is botched and results in litigation. This outline is intended to illustrate some of the common problems encountered in order to serve as warning to the representation of fiduciaries, with emphasis on trustees.

A. The Duty Owed to the Estate

B. The Role of the Trustee[1]

1. Collection, titling, and safekeeping of assets
2. Investment of assets
3. Mastering the terms of the trust
4. Ignorance of the beneficiaries is no excuse
5. Record keeping

C. Termination and Accounting

A The Duty Owed to the Estate

[1] Some of the following material is taken from an excellent presentation authored by the attorneys at Davidson, Dawson & Clark, LLP. Always averse to re-inventing the wheel, I would like to thank P. Gregory Hess for permission to use the material. He is a true gentleman and a scholar of the law and litigating with him several years ago was practice of law as it was meant to be.

A problem frequently encountered by experienced trusts and estates attorneys is the lack of awareness of the scope of a duty the trustee owes to the trust estate, especially when the trustee or trustees are not professionals. The formulation of a trustee's duty by Judge Benjamin Cardozo remains as cogent today as when it was first penned in 1928:

> A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion of particular exceptions."[2]

The practical effect of this judicial eloquence should not be lost on the trustee and his or her attorney. This standard of conduct is the lens through which the court will examine the affairs of any fiduciary, but most particularly the trustee. The court takes these responsibilities very seriously and will expect and demand a corresponding display of scrupulous good faith from the fiduciary. When the trustee stands in violation of this rigorous code of conduct, the court will respond severely. It can revoke the fiduciary's letters, it can hold the fiduciary personally liable and surcharge him or her for any damage to the estate, or it can deny the commissions. If the trustee acts in a manner that the court considers in bad faith or in a self-interested way, then the court can punish the trustee even in the absence of proven damages. For example, a decision from Surrogate Preminger appears to expand the duty of the fiduciary's attorney to the beneficiaries of the estate. If it stands in stark warning to an attorney, then it should be all the greater lesson to the fiduciary.

[2] *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

In Matter of Kellogg (NYLJ, Dec. 30, 1999, p 25, col 4), Surrogate Preminger was faced with the following facts. The primary asset of Mercy Kellogg's estate was a townhouse in Greenwich Village. The administrator c.t.a. was besieged with calls from brokers for permission to list the property. The attorney for the administrator c.t.a. was approached by the fiduciary and asked to broker the sale of the property. The attorney owned a real estate company on eastern Long Island and told the fiduciary he would use his contacts to procure a buyer. In fact, he found a buyer who was willing to pay $2,675,000 for the property, well above the value set on the property by two independent appraisals obtained by the attorney. At the subsequent accounting, the decedent's residuary beneficiary challenged the $160,000 commission to the attorney as the product of self-dealing. Surrogate Preminger agreed and, on summary judgment, ordered the attorney to disgorge the commission and return it to the estate.

The Kellogg decision is interesting on two levels. On one level, it is one of the few decisions that imposes a duty on the fiduciary's attorney that runs to the beneficiaries of the estate. The court distinguished this case from others that found no duty because in cases involving self-dealing a fiduciary's attorney has a duty to the beneficiaries of the estate to refrain from such conduct. Therefore, the attorney's duty as a broker was not to obtain a fair price for the property. The taint of self-dealing could only be removed if the attorney-broker was able to prove that he obtained the highest possible price for the property. That is like proving a negative. The case displays the court's reaction to a hint of self-dealing.

This decision generated a fair amount of controversy. In their Surrogate's Practice column in the New York Law Journal, Charles Gibbs and Marilyn Ordover disagreed with the result in Matter of Kellogg (*see*, Gibbs and Ordover, Duty of Fiduciary's Attorney to Beneficiaries, NYLJ, Feb. 28, 2000, p 3, col 1). The practicing attorney or the corporate fiduciary never wants to end up as the subject of discussion in the Law Journal.

B. The Role of the Trustee

1. Collection, titling, and safekeeping of assets

Upon qualifying, the trustee becomes responsible for seeking out, identifying, and taking control of the assets given to the trust by the grantor or decedent. The Will or Trust Agreement specifies those assets transferred to the trust, or their value. In addition, a trust may be the beneficiary of an insurance policy or employee benefit plan. A trustee who succeeds another trustee is generally responsible for being sure his predecessor delivered all the trust assets to him. The first task is to inventory the assets of the estate. This involves determining the title, ownership, and income tax basis of all assets in the estate

When assets are received, the trustee should be sure they are safe from harm, loss or theft, and are identified as belonging to the trust.[3] For example, in the case of cash or securities, the trustee should establish a separate bank, brokerage or custody account in the name of the trust. The trust can be identified for this (and all other) purposes in any number of ways, but the following examples are sufficient:

"Jane Doe and her successors[4] as trustees under Article FIFTH of the Will of John Doe"

"Jane Doe and her successors under Agreement dated January 1, 1990, with John Doe, grantor"

The trustee should also ask an accountant or attorney to obtain a tax identification number for the trust. This is the equivalent of a Social Security Number.[5]

2. Investment of assets

[3] The attorney advising a trustee should be cognizant of the fact that liability of the fiduciary may extend to a period of time before the fiduciary qualifies. See, e.g., EPTL 11-1.3; *Matter of Yarm*, 119 AD2d 754.

[4] Keep in mind that your bank may balk at trustees "to be named later" for obvious reasons. In all likelihood, the account will have to be denominated with the nakme of the serving trustee(s) with a change when successors come on board.

[5] Please keep in mind that some trusts may not require a separate tax identification number and the grantor's social security number can be used if the income is going to be taxed back to the grantor.

There has been a revolution in the analysis of a trustee's investment of trust assets in the past generation. At one time, the trustee could be held responsible for each act of imprudence (usually defined erroneously by a beneficiary as a stock that does not appreciate in a sufficiently robust fashion). No more. New York has a modem "Prudent Investor Act" which allows trustees broad flexibility in investing. It also measures the fiduciary's liability on his, her, or its performance as a whole. The trustees are required to exercise reasonable care, skill, and caution, and to consider the purposes, terns and provisions of the trust. Within this framework, however, they may consider such factors as taxes, inflation, economic conditions, income and resources of the beneficiaries, in choosing investments. The trustee must, however, diversify investments unless the trustee reasonably determines that the interests of the beneficiaries dictate otherwise. The selection of the portfolio as a whole must be reasonable and prudent; individual assets may be risky if they are balanced by other investments.

The trustee must review trust investments immediately upon receipt and continually thereafter. He may delegate investment management to a carefully selected professional, so long as he, she, or it periodically reviews the professional's actions. The trustee's efforts are judged by the methods utilized, not by results, so proper procedures are important.[6]

3. Mastering the terms of the trust

You may think you understand the terms of the trust, but its language must always be in your mind as new developments arise. The trustee should review the trust instrument with a professional to familiarize himself with his rights as soon as the trust is established. Likewise, the trustee should develop a method of examining the possible problems that may be posed as the trust is administered.

Typically a trust will, at a minimum, require or allow income to be paid to a beneficiary for a specific period of time. In such case the trustee must calculate the income, deduct income-related expenses, and distribute the net amount regularly as the trust requires. The trustee may also be able to spend the income for the beneficiaries rather than disbursing it directly to them. For example, the trust may permit the trustee to pay educational expenses directly.

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[6] Written above the desks of all trustees should be the admonition, "Document, Document, Document!" See *In re Janes*, 165 Misc. 2d 743, 630 N.Y.S.2d 472 (Sur. Ct. Monroe County 1995) , modified, 223 A.D.2d 20, 643 N.Y.S.2d 972 (4th Dep't 1996) , aff'd, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 (1997) for a cautionary tale of failures.

4. Ignorance of the beneficiaries is no excuse

The administration of a trust is not a mechanical matter, there are guidelines, but there are no formulae that can be applied without the exercise of care and particularized attention. In order to select the best types of investments for the beneficiaries and exercise any discretionary power over distributions wisely, the trustee should also know the circumstances and needs of the beneficiaries.

A trust may have one or more beneficiaries. Typically some will be entitled to income and/or distributions of principal for specified purposes. Others (called "remainder beneficiaries") may be entitled to receive the balance left over in the trust after a specified event, such as the death of the income beneficiary. The trustee must be fair to all these beneficiaries.

The attorney and the trustee may be too expert in their fields and fail to take into account the relative ignorance of the beneficiaries about trust law in general and the trust at hand in particular. Consequently, a class of trust beneficiaries who are all Nobel laureates in Physics should not be presumed to know, understand, accept what is happening in the trust, they must be educated if only to prevent the later deterioration of a relationship.

5. Record keeping

I alluded above to the critical importance of keeping adequate records, of instituting procedures of periodic review of trusts, their administration and their investment portfolios. Keep in mind that beneficiaries of the trust (including remainder beneficxiaries) are entitled to assurances that the trust funds have been properly managed. Unless they sign waivers from time to time, they are entitled to a complete review of all trust transactions for the entire lifetime of the trust! The trustee will therefore make complete and orderly record keeping a high priority. Trust records should never be discarded until after a trust is terminated (and probably not for several years thereafter). Good records are also needed to ensure that accounting difficulties and tax problems do not make the administration of the trust unnecessarily expensive.

C. Termination and Accounting

The trustees owe a duty to account to the trust estate’s beneficiaries. The process of accounting not only provides the beneficiaries with an opportunity to understand what has been done in the trust, it

also allows the trustee to be discharged from any liability for acts or omissions during the term of that accounting. The following is offered as an overview of the typical objections one may encounter in a fiduciary's accounting.

Introduction

A fiduciary is a person who acts for the benefit of another. For example, decedents' estates have administrators or executors; children and disabled adults have guardians; trusts have trustees; and many people have an attorney-in-fact operating under a power of attorney. Whatever the form, the fiduciary's relationship to his or her charge defines one of the highest standards of conduct recognized by the law. The definition of this duty has occasioned some of the most eloquent expressions found in the Common Law. The formulation of a fiduciary's duty by Benjamin Cardozo remains as cogent today as when it was first penned in 1928:

> A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion of particular exceptions."[7]

The practical effect of this judicial eloquence should not be lost on the fiduciary and his or her attorney. This standard of conduct is the lens through which the court will examine the affairs of a fiduciary. The court takes these responsibilities very seriously and will expect and demand a corresponding display of scrupulous good faith from the fiduciary. When the fiduciary stands in violation of this rigorous code of conduct, the court will respond severely. It can revoke the fiduciary's letters, it can hold the fiduciary personally liable and surcharge him or her for any damage to the estate, or it can deny the commissions.[8] There have even been instances when a fiduciary has found himself behind bars for failing to heed the orders of the Surrogate.[9]

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[7] *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

[8] *Matter of Bozzi*, Sur Ct, Nassau County, NYLJ, Mar. 31, 1999, p 36, col 6.

[9] *Matter of Fox*, Sur Ct, Nassau County, NYLJ, Feb. 4, 1997, p 30, col 3; July 8, 1996, p 29, col 5.

The accounting process has a two-fold function. It operates to give the beneficiary an opportunity to review the fiduciary's performance and it serves to discharge the fiduciary from personal liability when the account is submitted to the court and approved in a decree.

It would not be too cautious to advise the fiduciary that the accounting process begins with the administration of the estate itself. A contemporaneous attention to record-keeping during the course of a fiduciary's management of the estate will save many anxious moments when the account has to be prepared and objections may be expected. The scope of this presentation is limited to the typical objections in an accounting proceeding. Nevertheless, an ounce of prevention is worth a pound of cure. So, along with considering typical objections, some space should be devoted to the practical considerations in preparing the account.

7. Practical Considerations in Preparing the Account

1. **Continuing Obligations**. One of the goals of the accounting fiduciary is to be discharged from personal liability in administering the estate. It must be kept in mind that such a discharge, by itself, does not revoke the letters issued to the fiduciary. The letters remain in full force and effect even after the decree and the subsequent distribution, unless the accounting decree specifically revokes them. Nonetheless, the fiduciary has continuing authority to act and collect additional assets when they are discovered.[10] If it is a final accounting, then the petition should include a prayer for relief that the letters be terminated as well.

N.B. The fiduciary is not discharged with the decree itself, but only when the receipts for the payments directed in the decree are filed with the court. This is a rule more frequently honored in the breach than in the practice, but it is a rule nevertheless.

[10] *See*, *Krimsky v Lombardi*, 78 Misc 2d 685, 357 NYS2d 671 (Sup Ct, Albany Co., 1974), *aff'd* 51 AD2d 600, 377 NYS2d 785 (3d Dept, 1976)

2. **Date of Death Values**. As a starting point, the values listed in the schedules of the account should conform to the values of the estate assets listed in the estate tax return or the estate inventory forms. Care should be taken by the fiduciary in this regard because the accounting period may differ from the estate tax return if the fiduciary makes an election of an alternate date of valuation of estate property. In other words, the date of death value may differ from the alternate valuation date value used for tax purposes. The fiduciary is accounting for the former, not the latter.[11]

3. **Are all interested parties cited?** It is important to remember that the decree is conclusive and binding only upon all parties who have been served with process or who have appeared and only with respect to those matters embraced in the accounting. Refer to SCPA 2210 for the list of interested persons to be cited. Keep in mind that a surety is a necessary party to the accounting.[12] The citation to a bonding company may prove useful in the event the bonded fiduciary is surcharged and is judgment-proof.

Schedule H requires a list of interested parties. But it also requires that a "search statement" be included with the account. This statement certifies that a diligent search has been made for powers of attorney, assignments, and any encumbrances that have been filed with the court.

4. **Complete all the schedules**. The account filed with the court should include all schedules that are part of the approved set of forms. If there is nothing to report in a schedule, then the fiduciary should mark that schedule "none." An example of this is Schedule D that lists claims against the estate. This schedule has five (5) subdivisions and each must be completed, if only to state "none."

5. **A complete prayer for relief.** Make sure the prayer for relief in the petition and the citation to settle the account is complete. Generally, the court is without the authority to grant relief beyond that which is demanded. Such an omission may be corrected, but it may delay the proceedings by requiring the issuance of supplemental citations encompassing the amendment.

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[11] *See, e.g., Matter of Hoff,* 186 Misc 684, 65 NYS2d 234 (Sur Ct, N.Y. Co., 1945), *aff'd* 270 AD 891 62 NYS2d 574 (1st Dept, 1946), *aff'd* 296 NY 650, 69 NE2d 814 (1946).

[12] SCPA 2210(2).

6. **Items the Court will examine closely.** Aspects of the account that are statutorily prescribed will be subject to close scrutiny by the court. In this category are: the computation of commissions;[13] the apportionment of estate taxes;[14] the calculation of an elective share;[15] accounting adjustments.[16]

7. **A copy of the will**. The account of an executor or of a trustee of a testamentary trust must include a copy of the will.

8. **Commissions**. The commission schedules are broken down as follows: one-half of the statutory commission for receiving and one-half for paying. Normally, it does not matter if you don't give a breakdown, but if you are paying out less than you received (*e.g.*, if there are Schedule B losses), the you must have the appropriate paying-receiving breakdown on the commissions. Consult 22 NYCRR 207.40 (e) for other computations relevant to the computation of commissions.

9. **Virtual Representation**. If you are seeking to dispense with service of process because of virtual representation (SCPA 315), then be sure to consult SCPA 315 (7) and 22 NYCRR §207.18 for the appropriate procedure. The rule requires affidavits of the representor and the attorney if the request is made for horizontal virtual representation.[17] However, always consult with the court's Accounting Department to see if these same affidavits will be required of applications for vertical virtual representation. The court will frequently proceed cautiously in this area and order explanatory affidavits not otherwise required by the rules.

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[13] SCPA 2307

[14] by terms of the will or by EPTL 2-1.8

[15] EPTL 5-1.1 or 5-1.1-A

[16] *See, e.g., Matter of Warms*, 140 NYS2d 169 (Sur Ct, NY Co., 1955); EPTL 11-1.2 (a)

[17] SCPA 315 (5)

10. **Unsold Real Property**. Schedule A of the account should not include unsold real property (this only serves to inflate the commission base). If property is sold by the fiduciary, then only the net proceeds from the sale should be included in Schedule A because only that portion of the sales price is subject to commissions. A copy of the closing statement should be annexed to the account.

11. **SCPA 2209 affidavit**. Each account filed in the court must include an affidavit of the accounting party attesting to the completeness of the account.

12. **Tax considerations**. Generally, an executor or administrator is required to account to estate beneficiaries only for probate property in the estate that is subject to his or her control. However, non-probate property is generally part of the decedent's gross estate for federal and state estate tax purposes[18] and will affect the account in a variety of ways that should be reflected in Schedules I and K (*e.g.* proper apportionment of estate taxes, proper calculation of a right of election, etc.).

13. **Claims by the fiduciary**. If the accounting fiduciary is also a creditor of the estate, then he or she must seek approval of the court for payment of the claim in the accounting proceeding and must submit a separate affidavit in support of the claim.[19]

14. **Other Reliefs**. The accounting proceeding is also authorized to be the process by which a host of other miscellaneous issues may be resolved by the court. These include:

a) hearing on a disputed claim (SCPA 1808);
b) construction of a will (SCPA 1420);
c) apportionment of estate taxes (EPTL 2-1.8);
d) calculating the elective share of the surviving spouse (SCPA 1421);
e) directing the disposition of real property (SCPA 1904, 1907);
f) turning over exempt property to decedent's spouse or child (SCPA 2101 [b], 2102 [2]);

[18] IRC § 2031

[19] SCPA 1805

g) directing the payment of reasonable funeral expenses (SCPA 2101 [b], 2102 [3]);

h) determining legal fees (SCPA 2101 [b], 2110); or

i) determining kinship (whether absent distributee is dead) (SCPA 2222 - 2225).

8. Typical Objections in Accounting Proceedings

The title is something of a misnomer if it is taken to mean that routine "boiler plate" objections may be served by the respondent. The fiduciary has the right to specificity in the objections and vexatious or "boiler plate" objections will not be tolerated by the court. "A surcharge will not be predicated upon a ground neither alleged nor proved."[20]

However, there are objections that are routinely litigated in the court, arising from the fiduciary's duty to marshal the assets, to preserve and augment those assets, to pay claims and expenses, to accurately account, and to distribute the net assets as appropriate.

Any party to whom process has been issued pursuant to SCPA 2210 may file objections to the account. Once objections have been filed, the attorney for the fiduciary should determine who has the burden of proof on the objections.[21]

Generally, the accounting fiduciary has the burden of proving that he or she has fully accounted for all the assets of the estate.[22] However, the account itself and supporting affidavits are sufficient to make a *prima facie* showing of accuracy and completeness. The objectant then bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete. After the objectant has met his or her burden of coming forward, the burden of coming forward shifts back to the accounting party to show by a preponderance of the evidence that the account is accurate and complete.[23]Where the objectant alleges investment imprudence on the part of the fiduciary, then the

[20] *Matter of Schaiach*, 55 AD2d, 914, 915, 391 NYS2d 135 (2d Dept, 1977); *see, also*, *Matter of Gil*, 67 AD2d 779, 412 NYS2d 682 (3d Dept, 1979).

[21] *Matter of Pollack*, NYLJ, Sep. 17, 1998, p 24, col 4 (Sur. Ct., Nassau County).

[22] *Matter of Schnare*, 191 AD2d 859; 594 NYS2d 827 (3d Dept, 1993); *app den* 82 NY2d 653, 601 NYS2d 582 (1993).

[23]*Matter of Shulsky*, 34 AD2d 545; 309 NYS2d 84 (2d Dept, 1970), *appeal dismissed*; 27

objectant bears the affirmative burden of proof.[24]

Typical Objections:

1. Investment Imprudence

The investment decisions of the fiduciary, most especially the trustee, stand at the center of a storm of conflicts and second-guessing. It is almost inevitable that the investment practices of a fiduciary are among the most common and substantial objections found in accountings. The trustee is required to exercise prudence in preserving and augmenting the monies entrusted to him or her. The trustee has a duty of impartiality between the income beneficiary and the remainder interests. An investment portfolio heavily weighted toward growth investments will be favorable received by the remainder beneficiaries while detrimental to the present income needs of the income beneficiary. Likewise, the portfolio weighted toward income will spawn objections from the remaindermen. Indeed, this distinction between principal and income, long enshrined in trusts and estates law, is increasingly viewed as outmoded. The day is coming when the fiduciary will be accountable for the total return received from a diversified investment portfolio with set percentages paid to income interests. But until that day arrives, we must continue to muddle along with the law's sharp distinction between principal and income.

NY2d 743; 314 NYS2d 993 (1970).

[24] *Matter of Newhoff*, 107 Misc 2d 589, 435 NYS2d 632 (Sur Ct, Nassau Co, 1980).

The fiduciary will suffer the consequences of failing to prudently manage investments. The law has recently redefined the duty of the fiduciary. All investments made or held by a trustee (or any fiduciary for that matter) after January 1, 1995 are governed by the Prudent Investor Act.[25] All investments prior to that date are governed by the Prudent Person Rule. [26] It is beyond the scope of this presentation to discuss the differences between the statutes in depth. Suffice it to say, the new law seeks to modernize the treatment of estate assets to reflect the modern investment theory, portfolio management, and new investment vehicles. There is less difference between the laws *vis a vis* the general duties owed by the fiduciary and the resulting damages for breach of that duty. Along these lines, the Court of Appeals analysis in *Matter of Janes* (90 NY2d 41, 659 NYS2d 165) is essential to read.

In a nutshell, the fiduciary is duty-bound to exercise prudence in managing investments.[27] The fiduciary should refer back to the governing instrument for initial guidance on investments, keeping in mind the court's refusal to honor clauses in the governing instrument that exonerates the fiduciary from exercising prudence.[28]

The fiduciary's management of investments will be judged by conduct, not performance.[29] A fiduciary who is also a professional investment advisor, bank, or trust company will be held to a higher standard than a "civilian" fiduciary.[30]

2. Failure to Collect All Assets

A fiduciary will be surcharged if he or she fails to act prudently in marshaling the assets of the estate. Of course, the account itself and supporting affidavit will establish a *prima facie* showing that the fiduciary has met this burden. The object will be required to come forward with some evidence of

[25] EPTL 11-2.3

[26] EPTL 11-2.2

[27] EPTL 11-2.2 (a) (1); 11-2.3 (b)

[28] EPTL 11-.3(a), 11-1.7; *Matter of Hubbel*, 302 NY 246, 97 NE2d 808 (1950)

[29] *Matter of Bank of New York*, 35 NY2d 512, 364 NYS2d 164 (1974)

[30] EPTL 11-2.2 (a) (1); 11-2.3 (b) (5)

negligence in failing to collect the assets of the estate. The following illustrations of failure to discharge this duty are taken from Castelluccio, Barnosky, Groppe, Filing the Accounting, NYSBA Publication - Fall 1997 "Estate Litigation."

- *Matter of Gandy*, 14 Misc 2d 472, 166 NYS2d 529 (Sur Ct, Nassau Co, 1957)
  - failure to collect rent to real estate held by the estate
- *Matter of Kitzes*, 109 NYS2d 673 (Sur Ct, Queens Co, 1951)
  - failure to take possession of decedent's business
- *Matter of Kessler*, 173 Misc 716, 18 NYS2d 772 (Sur Ct, NY Co, 1940
  - uncollected debt
- *Matter of Lechie*, 54 AD2d 205, 388 NYS2d 858 (4th Dept, 1976)
  - failure to collect trust proceeds over which the testator had power
- *Matter of Koch*, 184 Misc 1, 52 NYS2d 435 (Sur CT, Bronx Co, 1944)
  - failure to collect bank accounts (see below)

It should be noted that the duty to marshal and preserve estate assets may arise before letters are issued to the fiduciary.[31]

3. Self-Dealing

Judge Cardozo was not the first to remind us that one cannot serve two masters. In New York, the concept of undivided loyalty goes back to at least *Meinhard v Salmon*[32] , where Judge Cardozo held that it is impossible to do just that. The fiduciary's conduct that benefits himself or herself is subject to the closest scrutiny. In this regard, *Matter of Rothko*[33] is an important decision in a number of respects. It should be distinguished from *Matter of Janes.*[34] In *Janes* the measure of damages for

[31] See, Matter of Skelly, NYLJ, June 11, 2001, at p. 30 (2d Dept. 2001); Matter of Yarm, 119 AD2d 754, 501 NYS2d 163 (2d Dept. 1986).

[32] 249 NY 458, 164 NE 545 (1928)

[33] *Matter of Rothko*, 43 NY2d 305, 401 NYS2d 449 (1977)

[34] 90 NY2d 41, 659 NYS2d 165 (1997)

investment imprudence was a "lost capital" measure. Whereas in *Rothko*, the court approved a "lost profits" measure of damages because the fiduciary's misconduct consisted of deliberate self-dealing and faithless transfers of trust property. The former measure of damages is usually less than the latter, at least in a bull market.

4. Failure to Keep Proper Records

The compensation received by a fiduciary by way of commission is intended, *inter alia*, to compensate him or her for maintaining records of the estate. The failure to keep proper records forms the basis of an objection that has many implications. One can imagine that the failure to keep proper records does not, by itself, cause damage to the estate. Nevertheless, if the conduct of a fiduciary is challenged on another basis, the failure to keep proper records will result in the court resolving the issue against the fiduciary[35]

5. Failure to Properly Compute Commissions

The fiduciary is responsible for all properties that come within his or her control. The computation of the commission will be based upon those assets under the fiduciary's control. Consequently, assets that pass directly to a beneficiary may not be used as the basis to calculate commissions under SCPA 2307, 2308, and 2309. The salient example of this is real estate. Generally, there are no commissions on real estate unless it has been sold, and then the commission is based on the net equity realized on the sale (sales price less closing costs less mortgage balance.[36] Other examples of non-commissionable assets are specific legacies[37] and uncollectibles.[38]

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[35] *Matter of Shulsky*, 34 AD2d 545, 309 NYS2d 84 (2d Dept 1970), *app den*, 27 NY2d 743, 314 NYS2d 993 (1970)

[36] *See, e.g.*, *Matter of Ostem*, 11 Misc 2d 179, 177 NYS2d 990 (Sur Ct, Richmond Co, 1958)

[37] *Matter of Steinberg*, 208 Misc 135, 143 NYS2d 341 Sur Ct, Kings Co, 1955)

[38] *Matter of Ryan*, 201 Misc 632, 107 NYS2d 641(Sur CT, NY Co, 1951), *modified by* 280 AD 410, 114 NYS2d 1 (1st Dept 1952)

6. Improper Handling of Estate Tax and Estate Income Taxes

The fiduciary is usually responsible for penalties assessed against the estate for the late filing of estate tax or estate income tax returns. The fiduciary will be surcharged for both interest and penalty caused by the late filing.[39] The various tax elections made by a fiduciary are also subject to challenge and surcharge if made imprudently.[40] Those tax elections, in turn, may require principal and income adjustments and the failure to accomplish this may result in a surcharge.[41]

7. Payment of Excessive or Unnecessary Charges

a) generally. A fiduciary is obliged to assert all defenses against a claim on the estate (Statute of Frauds, for example) and will be surcharged for paying various administration expenses the court finds unreasonable (funeral expenses, accounting fees, attorneys' fees).[42]

b) executorial services. An additional exposure to surcharge arises when the estate's attorney performs work that is executorial in nature and bills it to the estate as legal services. The executor, not the attorney, receives a commission for services that are executorial in nature.

c) accountants. It is the rule that accounting services in preparing the account, preparing the estate tax, or the estate income tax are to be performed by the fiduciary or the attorney and are not subject to separate compensation to an outside accountant. There is a difference of opinion in the Surrogates' Courts as to whether any payment of routine professional accountant fees should be borne by the fiduciary's commission or by the attorney's fee.

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[39] *Matter of Newhoff*, 107 Misc2d 589, 435 NYS2d 632 (Sur Ct, Nassau Co, 1983)

[40] *Matter of Rappaport*, 121 Misc 2d 447, 467 NYS2d 814 (Sur Ct, Nassau Co, 1983)

[41] *Matter of Warms*, 140 NYS2d 169 (Sur Ct, NY Co, 1955)

[42] As to attorneys' fees, see *Matter of Potts*, 123 Misc 346; 205 NYS 797, (Sur Ct, Columbia Co, 1924), *aff'd* 213 AD 59, 209 NYS 655 (4th Dept, 1925), *app dism* 241 NY 510, *aff'd* 241 NY 593 (1925).

8. Failure to Earn Reasonable Income on Uninvested Cash

Cash on hand is not meant to be idle. Like investments, the fiduciary is expected to act with prudence in managing estate assets. Therefore, uninvested cash balances should be held in interest bearing accounts.[43] The failure to do this may result in a surcharge for the lost interest.

9. Failure to Distribute Estate Assets in a Timely Manner

A fiduciary need not wait until the accounting in order to make distributions to beneficiaries. In a solvent estate, there may be circumstances after the expiration of seven months from the issuance of letters when the fiduciary should make distributions to beneficiaries. Indeed, the aggrieved beneficiary (or creditor for that matter) has recourse to EPTL 11-1.5 (SCPA 2102 [4] for the creditor) to compel payment. The fiduciary may be liable for interest on those unpaid distributions.

10. Failure to Act Against the Misconduct of Another Fiduciary

Again, we must refer to *Matter of Rothko*[44] to illustrate the liability of a fiduciary for the flagrant misconduct of a co-fiduciary. The law will impose a duty of a fiduciary not to stand by idly while a co-fiduciary misbehaves. Remember, sins of omission can be as surchargeable as sins of commission.

11. Advance Payment of Commissions

Commissions are generally payable at the accounting. The fiduciary may apply to the court for advance payments. A trustee may withhold yearly commissions but only if that fiduciary has made

[43] *See, Matter of Buck*, 184 Misc 29; 52 NYS2d 294 (Sur Ct, Westchester Co, 1944)

[44] 43 NY2d 305, 401 NYS2d 449 (1977)

adequate disclosure to the beneficiary, usually in the form of annual financial statements.[45]

12.

13. Attorney-Fiduciary

Contrary to popular opinion, SCPA 2307-a does not prohibit an attorney who drafts the will from being designated its executor. The section does, however, impose strict disclosure requirements in this regard and an economic sanction for its violation (halving the statutory commission). Nevertheless, keep in mind that SCPA 2307-a does not preclude an attack on the validity of the appointment of the attorney as fiduciary at the accounting, based on allegations of fraud, overreaching, or undue influence. One very prominent trusts and estates attorney relates how he will include a prayer for relief in the probate proceeding validating his appointment as executor. He will then cite all the beneficiaries along with the distributees. This resolves the issue earlier rather than later.

13. Bank Accounts

The problems created by various types of bank accounts are many. . A traditional joint account, created under Banking Law § 675, gives rise to a presumption that making such an account displays the intention of the depositors to create a joint tenancy with right of survivorship. The burden of proof is upon the party challenging the title of the survivor. In *Matter of Camarda*[46] the objectant at the accounting charged that the executrix had failed to include in the accounting funds from bank accounts that had been held by the decedent and the executrix in accounts that complied with all the formalities of creating a right of survivorship. However, the court held that the objectant met her burden of proving by clear and convincing evidence that the account was created as a matter of convenience for the decedent.

The law now recognizes accounts for the convenience of the depositor (Banking Law § 678). Effective January 6, 1991, a depositor may allow another person to have withdrawal rights in the

[45] *See*, *Matter of Pollock*, NYLJ, Sep. 17, 1998, p 24, col 4 (Sur. Ct., Nassau County). *See also* SCPA 2310, 2311 for methods of obtaining payments on account of commissions.

[46] 63 AD2d 837, 406 NYS2d 193

account for his or her convenience without giving rise to any presumption of joint ownership or right of survivorship.

See also EPTL 6-2.2 and its requirements for creating a joint tenancy in dispositions of personal property to two or more people.

N.B. The accounting proceeding may well see an objection to the survivorship of the joint account and of the Totten Trust account by allegations of fraud or undue influence. Also, see *Matter of Weinberg*[47] for an interesting set of facts on the use of Totten Trusts to defeat the claims of creditors *post mortem.*

14. Improper Inclusions and Other Technical Defects

a] Following up on the discussion above, one should be aware that the improper inclusion of various assets in Schedule A will have the effect of inflating the fiduciary's commission. You will note that the major defects found in Schedule A are the inclusion of these types of assets as estate assets: joint accounts, trust accounts, IRA account, insurance benefits.

b] A common error in the account is the inclusion on Schedule A-1 of the disposition of assets that did not result in an increase upon disposition. Such a disposition is properly placed in Schedule B, if only to show the loss as "$ 0.00."

c] Any disposition of securities, whether in Schedule A-1 or in Schedule B must include the number of shares involved and the dates of acquisition and disposal.

d] A general category in Schedule C that lists disbursements in the aggregate is improper. Each disbursement must be separately itemized.

[47] 162 Misc 867, 296 NYS7 (Sur Ct, Kings County 1937)

e] A common error is to account for the sale of real property all across the schedules, with the gross sales price reflected at Schedule A, expenses associated with the sale stated at Schedule C, etc. This is improper. The sale of real property should be accounted for as follows: Schedule A shows the net amount realized on the sale (sales price less fees and expenses) and Schedule J shows the actual reconciliation path from gross sales price to net amount received. In addition, a copy of the closing statement should also be attached to the account.

f] Occasionally, the account will show the unpaid commissions at Schedule C-1. This is an error. Schedule I is the proper to calculate commissions. As to commissions, see Uniform Rule § 207.40 (e) (22 NYCRR § 207.40 [e]).

In conclusion, the practitioner should keep in mind that the accounting of a fiduciary involves more than accounting, it involves accountability.