Early Detection of Possible Pitfalls In Fiduciary Obligations Can Prevent Later Problems

This is the second in a series of two articles devoted to the conflicts that can arise when an attorney represents multiple fiduciaries, the difficulties faced when fiduciaries serve in more than one capacity, the practical implications of the duty of impartiality and the need to avoid any appearance of self-dealing. The article in the November-December issue examined these issues from the attorney's perspective. This article considers the fiducim-y's perspective.

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From the fiduciary's perspective, the conflicts of interest that generally arise are traceable to the fiduciary relationship itself. Early recognition and treatment of the potential legal and ethical pitfalls can avoid later problems and expensive litigation.

The basic principles that govern the relationship between and among fiduciaries are embodied in New York Estates, Powers and Trust Law {hereinafter "EPTL") 10-10.7, which requires that fiduciaries act by majority rule in important matters. *(See box, page 23.)*

The statute draws a distinction between the exercise of "joint" and "several" powers, without defining them. "Several" powers are those that are purely ministerial in nature and do not involve the exercise of fiduciary discretions. The cases hold that matters such as collecting estate assets, paying debts, compromising a claim, selling personal property at fair market value and paying of funeral expenses are ministerial in nature and may be exercised by a single fiduciary.1

Because most powers exercisable by a fiduciary involve the exercise of discretion *(e.g.,* investment decisions, the sale of real property, tax elections; *see* EPTL 11-1.1), they are joint powers and are subject to the EPTL 10-10.7 mandate that the majority rules. Because fiduciaries can be held responsible for the actions of their co-fiduciaries, *e.g., In re Rothko,2* it is imperative for an attorney representing a fiduciary who disagrees with a proposed majority action to advise the client to express the dissent in writing to the co-fiduciaries. If this is done, the client "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."[3] In other words, if the proposed conduct appears to be a potential breach of fiduciary duty, or is tainted with fraud or gross negligence, in addition to dissenting in writing, the fiduciary should take affirmative action and seek instructions from the court. Otherwise, if the attorney guesses wrong and it is later determined that the proposed action was a breach of duty, the written dissent will not be worth the paper that it is written on.

A case in point is the estate of a woman named Florence Murphy, who named her four children as co-executors. Three were represented by one attorney, and the fourth by a second attorney. From the start, it was dear that on most issues the fiduciaries were split, three to one. Despite being aware of their ability to override their sister by majority vote, the majority was reluctant to sell any of the decedent's real estate without the consent of their sister, the fourth co-executor. They were afraid of claims later being brought by their sister. Even the Surrogate seemed to agree, holding that all four must agree on sales and sale prices, and if they did not, the Public Administrator would be appointed for the

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purpose of selling the real estate. As a result of this impasse, no real estate was sold for several years. The issue was resolved by the Appellate Division, which held in unequivocal te'm s that EPTL 10-10.7 applied and that the majority decision would govem.[4] The real estate was thereafter promptly sold.5

Although majority rule is the norm, the governing instrument can provide otherwise. In *In re Winston,6* the trustees of Harry Winston's estate fought over the meaning of a will provision, which read:

> If at any time a dispute shall arise in respect of the administration of any trust created by this will, I direct my trustees to take such action with respect to the matter in dispute as my son, . . . while serving as a trustee hereunder, shall determine.

In upholding the son's construction that the clause meant what it said, Surrogate Brewster held that the clause was

> a [vaild] direction by testator for the fiduciaries, in the event of a dispute, to take such action as [his son] may direct provided such directed action is made in good faith and is not in violation of a fiduciary duty, or tainted with fraud or gross negligence, in which event the dissenting fiduciary is required to seek instructions from the court.7

Designation clauses similar to the one used in *Winston* have repeatedly been upheld by the courts.[8] In *In re Riker,*[9] the decedent appointed his wife, son and daughter as his fiduciaries and directed that:

> (I]n the event that the Executors and Trustees cannot agree on any matter, then, the decision of [MY WIFE) shall prevail and be binding upon the remaining Executors and Trustees.

Surrogate Lambert gave effect to the plain and everyday meaning of the words and held that the clause meant exactly what it said, *viz.*, that the testator "[i]ntended to give his wife the authority to bind the other fiduciaries even if those fiduciaries reach a conclusion contrary to that of the wife."10 The Surrogate rejected the arguments that (1) the clause was invalid as a matter of law and (2) the clause only applied when there was a difference of opinion among the three fiduciaries.

Similarly, in *In re Langdon,*11 the decedent appointed both an individual and a corporate fiduciary. His will provided:

> In the -event of a difference of opinion between my executors and trustees in the interpretation and carrying out of the provisions of this my Will, it is my wish and I hereby direct that the preference of my sister or my nephew shall prevail.

The Surrogate held that the clause meant what it said: "[I]n the event of a difference of opinion between the executor trustees herein regarding the affairs of the estate, the decision should be made by the sister."

In *In re Rubin,*[12] the will provided that in the event of a dispute between the fiduciaries, two non-fiduciaries were designated by the decedent as the arbiter of such disputes. This provision was enforced by Surrogate R - digan, who held that this was a valid limitation on the power of his fiduciaries, citing *In re Langdon.*

Regardless of whether the fiduciaries' action is governed by a majority vote or by the testator's designation of a "deadlock breaker," the majority may not act without consultation with and in disregard of the minority. Although the EPTI., is silent on the issue, case law makes it clear that there must be a reasonable effort to reach accommodation; in sum, there should be joint meetings and joint consultations. The majority may not seize control and act without regard for the voice of the minority. The minority is entitled to air its views and attempt to persuade and make other proposals. The continued disregard of the minority and the subversion of majority power may be redressed by the Surrogate.[13]

The issue of how to resolve an impasse created when there could be no "majority vote" because there were two fiduciaries and the will did not contain any direc-

Text of EPTL ·10-10.1

Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointmen_t, co err d upon three or more fiduciaries, as that term 1s defined m 11-1.1, by the terms of such instrument, or by statute, or arising by operation of Jaw, 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 create c?nnection with the salvaging of mortgage particrpation 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.

tion for breaking deadlocks between fiduciaries was addressed by Surrogate Roth, in *In re* Duell,[14] who fashioned a creative solution. The initial dispute between the co-executors concerned a distribution of the estate and whether it should be made fractionally, in various properties owned by the estate, or by way of outright ownership of individual buildings. Because the executors could not agree, the Surrogate appointed a well-known estate attorney as a special co-fiduciary with the limited authority to either resolve the deadlock or to make an alternate recommendation to the court. However, it soon became apparent that there were too many disputes to be addressed, and that the appointment of the attorney as a third fiduciary (an administrator, c.t.a.), would have to be made to "resolve deadlocks and avoid the expense and delay of repeated applications to this court for relief." The administrator was directed "to participate in the administration of the assets of this estate at such time as the co-executors are unable to agree."[15]

Each fiduciary may retain counsel and obtain reimbursement for reasonable counsel fees. In *In re Stanley*,[16] an individual and a corporate fiduciary disagreed about use of estate funds to commence litigation. The individual fiduciary, who wished to pursue the litigation, moved for summary judgment granting him mutually exclusive signature powers to estate accounts held by the corporate fiduciary. The Surrogate denied the motion, relying on the general rule that litigation expenses are paid initially by each party and, at the conclusion of the proceeding, the court may order that costs and allowances be paid either by a party personally, from estate assets, out of any person's share or interest, or from the foregoing in such proportion as justice requires.

If efforts to reach accommodation are ignored and common sense does not prevail, you must seek redress from the Surrogate.

The First Department reversed, stating that a fiduciary is unilaterally empowered (i.e., without the consent of a co-fiduciary-a several power) to contest claims or settle claims in favor of the estate and to pay administration expenses including reasonable counsel fees, and that by virtue of his office, each fiduciary is entitled to the custody of the assets of the estate or fund. Accordingly, the individual fiduciary was held to have as much right to pay administration expenses as the corporate fiduciary. The court noted:

> There is no legal authority that bars a fiduciary, who is also a legatee, from using estate funds to administer the estate in his or her discretion. The fact that Mr. Schwarz may benefit personally from, *inter a/in,* the re-litigation of the Erbschein, the prosecution of the claims against the widow in Florida and the successful challenge to the Bank's account claims is not relevant. Nor is it relevant that he may be able to recover the costs of these proceedings pursuant to SCPA 2301, 2302(2) and 2110(1). Mr. Schwarz is a fiduciary and should be able to use estate funds to cover administration costs (EPTL 11-1.l(b)(22); *Matter of Rubin, supra).* The litigation costs at issue herein are such administration costs since they are related to the recovery of estate assets.[17]

The Court did caution the individual fiduciary that

> to the extent that such costs do not constitute administration costs, or if [the individual fiduciary], in his capacity as fiduciary, uses the funds to the disadvantage of any person interested in the estate, then, as the Surrogate's Court aptly indicated, he "acts at his peril," exposing himself to liability *(Matter of Leopold, supra; Matter of Rubin,* supra). Accordingly, to the extent that Mr. Schwarz uses estate funds to pursue an action against the widow, which appears likely, and to the extent that such action infringes on her rights under the will, he can be held accountable. Indeed, if the widow, or any other legatee, can show that Mr. Schwarz is mismanaging or misusing estate funds, he may be removed as a fiduciary *(see,* SCPA 711). Further, to the extent that the Bank, as co-administrator, disagrees with petitioner's use of estate funds, it may petition the court for direction (SCPA 2102(6]; *Matter of Rubin,* supra).18

Attorneys representing separate fiduciaries should agree upon a division of services, a division of fees and a joint application. Separate tax returns should not be filed unless an agreement cannot be reached. Separate accountings should not be submitted unless claimed errors and omissions cannot be handled effectively by objections to the account. Common sense and good judgment should prevail in reaching reasonable accommodation. Meetings of the executors at regular intervals at mutually convenient locations are recommended. If efforts to reach accommodation do not meet with success, keep a detailed record of what has been done. One of the better ways of maintaining a log is by letters to the co-executors (or their counsel) with respect to all of your proposals and confirmation of all telephone calls.

If efforts to reach accommodation are ignored and common sense does not prevail, you must seek redress from the Surrogate.[19] In 1993, SCPA 2102(6) was broadened and now authorizes a proceeding to require a fiduciary "[tJo comply with such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate."20

As a practical matter, the application to the court should be limited to specifics such as the failure to vote estate stock, to keep you fully informed, to meet and discuss estate matters, to exchange data in respect of estate assets and a refusal to agree on a united course of action. The moving papers should contain a factual presentation and be devoid of personal attacks and apoplectic arguments. Just recite the chronology of the efforts, attach copies of the correspondence that was sent and submit a log of telephone cal s. If the conduct of the co-fiduciary went beyond mere lack of cooperation and was hostile and intransigent, consider seeking removal. The expenses and attorneys' fees incurred by the fiduciary in the defense of the hostile and intransigent conduct may be charged against the other fiduciary personally.[21]

Self-Dealing

Self-dealing is forbidden. It is dealt with severely and with rigidity. The question of personal gain or loss of the fiduciaries is not reached. Fairness or adequacy of consideration are not germane. The inquiry stops and the sanctions are imposed upon the discovery of the self-dealing. The benefit or gain to the estate is of no moment.22

Perhaps the most well known contemporary case of self-dealing involved the estate of Mark Rothko, the famous abstract expressionist painter.[23] One of the arguments made against surcharge in that case was that while there was a conflict of interest, there was no showing of self-dealing, and, absent self-dealing, it was argued that "a challenged transaction must be shown to be unfair."[24] The Court of Appeals answered this argument by pointing out that there was more than sufficient evidence in the record to support the findings that had been made of self-dealing and unfairness. Nonetheless, the point is well taken that every conflict of interest does not necessarily involve actual transactions of self-dealing. Often, a fiduciary is able to maintain a balance between his or her competing loyalties and the various hats being worn.

If self-dealing is found, however, and there is no exoneration clause in the will and no consent by those affected, the courts will apply a "no further inquiry" rule, ignoring "whether the deal was fair or the price adequate or whether the fiduciary had any personal gain."25 The paramount need for a fiduciary to maintain undivided loyalty, and not be guilty of self-dealing, regardless of the circumstances, has resulted in the courts holding that if you are in violation, the transaction is void, and you will be liable for any damages, including lost profits.26 In effect, there is a form of strict or absolute liability. An example is *In re Hirschhorn.*[27] There, the co-trustees lent trust funds to a corporation in which they and the trusts had an interest. The Surrogate, in surcharging the co-trustees, made the following comments:

> A trustee cannot properly lend trust funds to himself or herself (IIA, Scott, Trusts [4th ed], 170.17; Bogart, Trusts and Trustees [2d ed] 543U)}. Such a loan is improper even where the terms of the trust give the trustee the widest power of investment *(Carrier v. Carrier,* 226 N.Y. 114). Such a loan is also improper where the trustee has a substantial personal interest in the loan such as being a partner in the partnership to which the trust lends money *(Matter of Myer,* 131 N.Y. 409). It is therefore long and well settled law that for a trustee to lend trust funds to a corporation which he owns all or a substantial part of the shares or to a corporation [in) which the trustee is a principal officer is improper *(Matter of Keene,* 95 Misc. 25; *Matter of Rowe,* 42 Misc. 172; *see generally,* m Scott, Trust, *supra* at 227.8; Uniform Trust Act 3). This is particularly egregious where the loans are made without any security for the trusts.
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> Having stated these fundamental principles of a trustee's duty, the trustee, ... defends his actions on the basis of mistake of law and reliance on the advice of counsel. Simply his defense appears to be that he did not know he could not make loans from the trusts to Standard Steel Sections and other entities. It is clear however, that where a trustee fails to perform the duties imposed upon a fiduciary, it is no defense that the failure was due to a mistake of law if the trustee was negligent in making the mistake (ill Scott, Trusts, [4th ed],) Moreover, where a trustee makes a mistake of law as to the extent of his powers or duties as a trustee, it is no defense that he relied upon the advice of an attorney, even though the attorney was competent. *(Matter of Rothko,* 84 Misc. 2d 830, *aff'd,* 56 A.D.2d 499, *aff'd,* 43 N.Y.2d 305). The subjection of a trustee to absolute liability in these circumstances where he might not be actually at fault because of non-negligent ignorance and mistaken legal advice is harsh but required because he can escape liability by submitting the matter to a court for advice and direction *(City Bank Fam1ers Trust* Co. *v. Smith,* 263 N.Y. 292).
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> Under any standard of care, the transactions of these trustees were conflict ridden, smacked of self-dealing and are permeated with the breach of the duty of undivided loyalty *(Matter of Schulman,* 165 A.D.2d 499). Persons who accept the role or office of trustee must be assumed to accept it with the responsibility for acting with ordinary care and prudence. No matter how well intentioned a trustee, it will not excuse him or her from the required amount of diligence and prudence. The conduct of these trustees while perhaps acceptable in the marketplace is not sufficient for a trustee *(Meinhard v. Salmon,* 249 N.Y. 458, 464).

A "no further inquiry" rule may be harsh, resulting in absolute liability despite good intentions and perhaps what might otherwise be considered a reasonable and

fair transaction. The solution, as pointed out by the Surrogate in *Hirschhorn*, is to bring an advice and direction proceeding. Another solution, when possible, is to have all those concerned approve of the transaction in writing, after being *fully informed* about the transaction and their rights and remedies.[28] This requires that the persons interested are adult and competent; otherwise a court proceeding will be required.

Where distributions are made pro rata to legatees pursuant to the will, new appraisals at the time of distri ution would not be required.

Self-dealing may be authorized by the court. This might eventuate in the situation where the executor may be the sole market or is willing to pay the highest price for an asset or interest of the decedent's estate. The court, upon a proper showing, including a full and complete disclosure of all relevant information by the fiduciary, may permit the executor to purchase an estate asset.[29] In *Scarborough*, the Court held:

> (T]he rule against self-dealing has not been applied, and does not apply, to interdict the purchase of trust property by a trustee where the court, after conducting a full adversary hearing at which all interested parties are represented, approves and authorizes the sale [citations omitted].30

The decedent may authorize self-dealing and may dispense with the rule of undivided loyalty by express language and in some cases by implication.31

> No doubt, the rule of undivided loyalty due from a trustee (citations omitted) may be relaxed by a settlor by appropriate language in the trust instrument in which he, either expressly or by necessary implication, recognizes that the trustee may have interests patentially in conflict with the trust (citations omitted); at least, our courts under these conditions enforce the desire of the settlor to secure the services of a person to act as trustee in whom he has confidence, when, without the existence of exculpatory provisions, the trusteeship would be declined by the designee (citations omitted). That is not to say that the settlor's directions allow the trustee free rein to deal with the trust; the law interposes to require that the trustee always exercise good faith in his administration (citations omitted). "No matter how broad the provision may be, the trustee is liable if he commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust" (3 Scott, Trusts (3d ed.), § 222.3, p. 1777). Moreover, the language limiting the general rule is strictly construed so that the trustee's actions will not be approved if he trespasses outside the boundaries of the powers granted (citations omitted).[32]

Although such an exoneration clause in a will or trust permitting self-dealing transactions, in "explicit, clear, and unmistakable" language, may be the safest path, it does not give the fiduciaries a license to self-deal.[33] Even with strong and unambiguous exoneration language, the fiduciary who self-deals must always act in good faith and with care regarding the interest of the beneficiaries.34 Further, more than mere general exoneration language is required.[35] If you do not have clear language in your will, and you do not have the consents of the parties affected, you must seek approval from the Surrogate, if the transaction is not to be voided and the fiduciary surcharged for damages, which can include loss of profit.[36]

Distributions from the Estate

Conflicts of interest often arise in the context of distributions to beneficiaries. In *In re Rappaport,37* the Surrogate was asked for advice and direction where the co-executors were divided on whether administration expenses should be taken as a fiduciary income tax deduction or an estate tax deduction. The will provided for an outright fractional marital deduction formula bequest, stated in terms of one-half the adjusted gross taxable estate, with the second part of the residuary going in equal shares to his three children. If the very large litigation fees were taken as income tax deductions, the adjusted gross estate would increase and the marital deduction would grow by 50 percent of those expenses. Such a choice would virtually eliminate that portion of the residuary for the children. On the other hand, taking the deduction on the income tax return would result in payment of more estate taxes.

The Surrogate balanced various fiduciary duties, including the duty to minimize the tax burden on the estate and its beneficiaries, the duty of impartiality, and the duty to abstain from self-dealing. The court was particularly concerned that a fiduciary who is also a beneficiary should not make "a tax election unfairly favoring his beneficial interest over that of another beneficiary."38 The court held that all administration expenses should be taken on the estate tax return, with the petitioning children of the decedent placing a sum in escrow for the purpose of reimbursing the estate for "the total tax savings which could have been realized by deducting administration expenses on the fiduciary income tax return."[39]

Where distributions are made pro rata to legatees, pursuant to the will, new appraisals at the time of distribution would not be required. However, non-pro rata distributions are frequently authorized by instruments, and are expressly authorized under EPTL 11-1.l(b)(20).

In such an instance, the fiduciaries, to avoid a charge of unfairness, should generally obtain new appraisals so that fair market valuations are utilized at the time of the distribution.[40] However, new appraisals are not always required. For example, in *In re Lawrence,*[41] Surrogate Roth concluded that appraisals should not be required, despite non-pro rata distribution, because the appraisals alone would cost "some ten million dollars."

In another case, the will provided that the property to go to the wife "shall have an aggregate fair market value fairly representative of the appreciation or depreciation value to the date or dates of each allocation of all property then available for allocation. Any properfy so allocated for such purpose shall be valued at the value as finally determined for federal estate tax purposes."42 An issue in the accounting was whether distribution to the spouse of the decedent's interest in a leasehold could help satisfy the bequest to the spouse, and if so, what was its value. The Surrogate concluded that there were issues of fact, stating that the terminology in the will "suggested that the final federal determination is a starting point, the basis used to determine the value at the time of distribution."43 The court also expressed concern that "assignment of the leasehold interest may implicate the fiduciary's duty of impartiality to all beneficiaries."44

The Fiduciary as Corporate Director or Officer

The responsibilities of a fiduciary when he or she is also an officer or director of a corporation in which the estate has an interest pose special problems. The vulnerability of the fiduciary extends to the conduct of a corporation, the stock of which is controlled by the estate.[45] He may not purchase estate assets for his personal use nor may he borrow estate funds. He may not pay fees to an accounting or legal firm of which he is a member without court approval; the concealment of self-dealing by the use of dummies will not be countenanced.46

-The responsibilities of a fiduciary when he or she is also an officer or director of a corporation in which the estate has an interest pose special problems.

The fiduciary's conduct in the managing of the corporation may be oppressive and constitute overreaching as applied to the estate's beneficiaries. Thus, in one instance, the Appellate Division removed a trustee who had used his control of the corporate stock to make himself president and paid himself a large salary to the detriment of the beneficiaries who were dependent upon the income received from the stock for their support.[47]

In what circumstances does the fiduciary's duty to account extend not only to the estate or trust, but also to the corporation in which the estate or trust has an interest? The answer is that it depends. In one recent case, the trustee argued that he was not accountable for his actions in his capacity as president of a corporation, because the trust held less than a majority of the corporation's outstanding shares. Both the Surrogate and the Appellate Division disagreed, because the trustee "exercised working control of the corporation, such that he is accountable in the Surrogate's Court for any breach of trust, fraud or self dealing which injures the trust (citation omitted)."48 At the very least, even if a full accounting from the corporation is not required, inquiry may be made of the fiduciary with respect to his or her conduct as an officer of the corporation to ascertain whether his or her conduct as such was motivated by self interest to the injury of the trust beneficiaries.49

It should not, however, be concluded that because the Surrogate's Court may inquire about a trustee's actions as a corporate officer, it necessarily follows that the Surrogate can also compel the declaration of dividends by the corporation. The Second Department held that the inquiry into the trustee's role in managing the corporation would be "limited to the issues of whether there was a breach of trust or negligence, and whether a surcharge should be imposed on the trustee (citations omitted)."50 The Appellate Division went on to suggest that the Surrogate might have authority to require the declaration of dividends, where the corporation was entirely owned by the trust. However, in all other cases, "the issue of whether dividends should be paid by the corporations and the amount of those dividends is generally determined by corporate directors in their discretion, and the court is not justified in interfering absent evidence of bad faith, fraud, clear abuse of discretion or dishonesty on the part of the directors (citations omitted). Moreover, a cause of action to compel the declaration of a dividend is of a derivative nature, belonging to the corporation (citations omitted)."51

Investment Decisions

Co-fiduciaries may disagree on investment policy. An example might be where one co-trustee is an income beneficiary and seeks to promote investments yielding high income, while the other trustee wishes to encourage growth for the benefit of the remainderpersons. Just such a case was *In re lskyan.*[52] There, the individual co-trustee refused to approve an investment by the corporate co-trustee of some portion of trust funds to protect the remainderpersons. The Surrogate held that under EPTL 10-10.7, the "duty to invest funds is one which requires the exercise of judgment and discretion and accordingly requires that the trustees act jointly [and, in

this case, unanimously because there were only two] in selecting investments (citation ornitted)."[53] The court noted that it had authority to intervene because of the individual co-trustee's refusal to participate, and if the facts supported the corporate co-trustee's contentions, the court could direct the individual to join with her co-trustee and to exercise the power. The court also noted that not only *did* the corporate co-trustee have the authority to come to the court to solve the problem, it also had a "duty to apply to the court for directions."[54]

The use by fiduciaries of an investment advisor is clearly appropriate, and in many instances, the wisest course. As with all complicated estate matters, the use of experts often pays dividends when it co.mes to defending the attorney's or the client's conduct on a contested accounting. Showing the prudence in the choice of the investment advisor in the first instance, and then showing the thorough job done by both the advisor and the fiduciary in detenni.ning investments, sales, purchases, etc., can only help when there are objections to investment performance.[55] The Prudent Investor Act, EPTL 11-2.3, expressly permits the delegation of investment powers, but, of course, the fiduciary must exercise prudence in the selection of his or her advisor.[56]

A fiduciary has general authority as a fiduciary to employ agents. While EPTL 11-1.1 provides no explicit authorization for hiring agents, and a fiduciary may not delegate her or his discretionary authority, "there is no prohibition against delegating to others the power to act upon decisions he has made."[57] As one court held, "a fiduciary can employ agents to do work he legitimately cannot do himself . . . the facts in each estate will determine whether or not the retention of agents is warranted."[58]

As with the investment advisor, the employment of other professionals on complicated or technical matters may serve the estate well and assist in protecting the fiduciary in the event of a contested accounting.

Moreover, it is the authors' experience that, at times, the employment of agents by multiple fiduciaries who find themselves unable to agree is helpful in easing the administration of the estate. For example, if the estate owns commercial real estate, a professional managing agent may not only be necessary because of the nature of the assets, but such may also help avoid conflicts between the fiduciaries. Of course, care must be taken by the fiduciaries to stay involved and to avoid any over-delegation of authority that might amount to an abdication of fiduciary responsibility.

Conclusion

The question has been asked, perhaps rhetorically, "Who then is the faithful and sensible steward?"[59] Judge Cardozo gave one, now classic, answer: "A trustee is held to something stricter than the morals of the market place. 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."[60]

Stating these principles and applying them are, of course, two different things. For the fiduciary with multiple hats, or in conflict with other fiduciaries, or in estates with beneficiaries who have very differing interests, and for the attorney called in to assist in such cases, applying these principles requires a particular sensitivity. The fiduciary or attorney should always err on the side of caution and be willing, if necessary, to decline qualification or tum down the representation. When in doubt, apply to the court for assistance!

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1. *See In re Leopold*, 259 N.Y. 274 (1932); *In re Bulova*, 60 Misc. 2d 151,301 N.Y.S.2d 1008 (Sur. Ct., N.Y. Co. 1969)
2. 84 Misc. 2d 830,379 N.Y.S.2d 923 (Sur. Ct., N.Y. Co. 1975), *modified*, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't), *aff'd*, 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977) *on remand*, 95 Misc. 2d 492,407 N.Y.S.2d 954 (1978).
3. EPTL 10-10.7.
4. *In re Murphy*, 185 A.D.2d 819,587 N.Y.S.2d 846 (2d Dep't 1992).
5. As anticipated, the fourth co-executor did seek to surcharge her co-executors as a result of the sales which did take place. *See [Il re Murphy*, N.Y.L.J., Sept. 15, 1999, p. 32, col. 5 (Sur. Ct., Richmond Co.).
6. N.Y.L.J., Dec. 24, 1990, p. 33, col. 3 (Sur. Ct., Westchester Co.).
7. *Id.*
8. *See, e.g., In re Riker*, N.Y.L.J., Mar. 10, 1982, p. 12, col. 5; *In re l.Angdon*, 154 Misc. 252, 277 N.Y.S. 581 (Sur. Ct., Westchester Co. 1935). *See generally* Roth, *Multiple Fiduciaries And Their Powers*, N.Y.L.J., Apr. 25, 1982, p. 1, col. l; ***cf*** Ill *re* Rubin, 143 Misc. 2d 303, 540 N.Y.S.2d 944 (Sur. Ct., Nassau Co. 1989).
9. N.Y.L.J., **Mar.** 10, 1982, p. 12, col. 5 (_Ct.,_Co.).
10. *Id.*
11. 154 Misc. at 253-54 (emphasis in original).
12. 143 Misc. 2d 303.
13. *Cf In re Martin*, 29 Misc. 2d 271, 215 N.Y.S.2d 278 (Sur. Ct., Kings Co. 1961).
14. N.Y.L.J., July 23, 1996, p. 23, col. **1** (Sur. Ct., N.Y. Co.).
15. *Id.*
16. 240 A.D.2d 268, 660 N.Y.S.2d 107 (1st Dep't 1997).
17. *Id.* at 269.
18. *Id.* at 270.
19. *See* In *re Martin*, 29 Misc. 2d 271,215 N.Y.S.2d 278 (Sur. Ct., Kings Co. 1961); *In re Philippe*, 37 Misc. 2d 893,235 N.Y.S.2d 594 (Sur. Ct., N.Y. Co. 1962).
20. Formerly this subdivision only authorized a proceeding where the dispute concerned the custody of money or other property of the estate committed to them.
21. *Ill re De Beixedon*, 262 N.Y. 168, 186 N.E. 431 (1933).
22. *In re Ryan*, 291 N.Y. 376, 52 N.E.2d 909 (1943); *see Meinhard v. Salmon*, 249 N.Y. 458 (1928).
23. *See In re Rotliko*, 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1977).

24. *Id.* at 318.
25. Margaret Valentine Turano & C. Raymond Radigan, New *York Estate Administration* 406 (1991).
26. *Rothko,* 43 N.Y.2d 305.
27. N.Y.L.J., Apr. 29, 1998, p. 30, col. 3 (Sur. Ct., Nassau Co.).
28. *See Birnb,mm v. Birnbaum,* 117 A.O. 2d 409, 503 N.Y.S.2d 451 (4th Dep't 1986).
29. *In re Scarborough Properties,* 25 N.Y.2d 553,307 N.Y.S.2d 641 (1969).
30. *Id.* at 558-59. *See In re Tuttle,* 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958) (court-approved payment of accounting fees to executor/trustee); *In re Rosenberg,* 165 Misc. 92, 2 N.Y.S.2d 300 (Sur. Ct., Richmond Co. 1937) (removal denied where trustees relied on informal advice of Surrogate in exceeding their investment powers); IIA Austin Wakeman Scott, *The Law of Trusts* 170.7 (4th ed. 1987); George Gleason Bogert, *The Law of Trusts and Trustees* 543 (rev. 2d ed., 1991 cum. pocket part at 55) ("Court approval of an otherwise disloyal transaction will relieve the trustee of liability.").
31. In *re Ridings,* 297 N.Y. 417 (1948); *In re Durston,* 297 N.Y. 64 (1947); *In re Roche,* 259 N.Y. 458 (1932); *In re Lonas,* 197 Misc. 678, 93 N.Y.S.2d 115 (Sur. Ct., Broome Co. 1949).
32. *O'Hayer v. De St. Aubin,* 30 A.D.2d 419, 423, 293 N.Y.S.2d 147 (2d Dep't 1968).
33. Charles Bryan Baron, *Self-dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Invalving Trust Praperh;?,* 72 St. John's L. Rev. 43 (1998).
34. *O'Hayer,* 30 A.D.2d at 423 (citing Austin Wakeman Scott, *The* Lnw *of Trusts* 222.3 (3d ed. 1967). *See* In *re Lawrence,* 242 A.D.2d 416, 662 N.Y.S.2d 36 (1st Dep't 1997)).
35. *In re Amaducci,* N.Y.L.J., Nov. 2, 1999, p. 36, col. 4 (Sur. Ct., Westchester Co.).
36. In *re Rothko,* 43 N.Y.2d 305; In *re Hirschhorn,* N.Y. L.J. Apr. 29, 1998, p. 30, col. 3 (Sur. Ct., Nassau Co.).
37. 121 Misc. 2d 447,467 N.Y.S.2d 814 (Sur. Ct., Nassau Co. 1983).
38. *Id.* at 451.
39. *Id.* at 452.
40. *See In re Blazer,* N.Y.L.J., July 22, 1992, p. 26, col. 3 (Sur. Ct., Nassau Co.).
41. N.Y.L.J., Nov. 2, 1998, p. 30, col. 4 (Sur. Ct., N.Y. Co.).
42. In *re Allen,* File No. 284129, Dec. No. 733 (Sur. Ct., Nassau Co., Oct. 7, 1999).
43. *Id.*
44. *Id.,.*
45. *In re Soss,* 71 N.Y.S.2d 23 (Sur. Ct., N.Y. Co. 1947).
46. *In re Tuttle,* 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958).
47. *In re Hirsch,* 116 A.O. 367, 101 N.Y.S. 893 (1st Dep't 1906).
48. *In re Scuderi,* 247 A.D.2d 392, 667 N.Y.S.2d 913 (2d Dep't 1998); *see* In *re Steinberg,* 153 Misc. 339,274 N.Y.S. 914 (Sur. Ct., Kings Co. 1934).
49. *In re Shehan,* 285 A.O. 785, 141 N.Y.S.2d 439 (4th Dep't 1955).
50. *In re Goer/er,* 227 A.D.2d 479, 480, 642 N.Y.S.2d 923 (2d Dep't 1996).
51. *Id.* at 480-81; *see also In re Cashman,* 14 N.Y.2d 426, 252 N.Y.S.2d 447 (1964).
52. N.Y.L.J., Oct. 12, 1994, p. 28, col. 3 (Sur. Ct., Nassau Co.).
53. *Id.*
54. *Id.*
55. *See, e.g., In re Marshak,* N.Y.L.J., Aug. 11, 1994, p. 23, col. 4 (Sur. Ct., N.Y. Co.).
56. *See In re Younker,* 174 Misc. 2d 296, 663 N.Y.S.2d 946 (Sur. Ct., N.Y. Co. 1997); *see also In re Axe,* 132 Misc. 2d 137, 502 N.Y.S.2d 943 (Sur. Ct., Westchester Co. 1986).
57. Linda B. Hirschson et al. eds., Warren's Heaton on Surragates' Courts, 361.01{5}, (6th ed. 2000).
58. bi *re Grace,* 62 Misc. 2d 51, 57, 308 N.Y.S.2d 33 (Sur. Ct., Nassau Co.), *aff'd,* 35 A.D.2d 783,315 N.Y.S.2d 816 (2d Dep't 1970).
59. *Luke* 12:42 (New American Standard Bible).
60. *Meinhard,* 249 N.Y. at 464

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