

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 personality, 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 bequeathed his wife his "second-best bed") :

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