INFORMAL FIDUCIARY ACCOUNTING: WHO, WHAT, WHEN, WHERE AND WHY

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Passing accounts in court is becoming less and less common,[1] even for trust companies. In large part, this is due to the expense usually involved. First, accounts must be put into court format, not an exercise an ordinary (or even professional in many cases) trustee[2] can or should attempt. Counsel must then draft and file the application documents, and will likely have to spend some time, often a lot of time, liaising with beneficiaries, counsel, representatives of the Public Guardian and Trustee and/or the Children's Lawyer, dealing with additional requests for information, discussing and/or negotiating compensation, etc., not to mention the added cost of preparing the request for increased costs documents and negotiating those costs. All in all, in many cases it is an unwieldy and far too expensive process, best avoided if possible.

In addition to the who, what, when, where and why of informal accounts, in this article I also discuss issues specific to releases in the context of an informal fiduciary accounting.

Informal Accounts and Guardians of Property or Attorneys for Property

An informal accounting process will be inappropriate for many situations involving guardians of property or attorneys for property, given that the incapable person, who arguably has the only real, certainly the only current, interest in their estate

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1. See also Jennifer J. Jenkins and H. Mark Scott, *Compensation and Duties of Estate Trustees, Guardians and Attorneys* (Aurora, Ontario: Canada Law Book, 2007) (looseleaf), at s. 6:10, p. 6-4.
2. In this article I refer to "trustees" but this term should be taken to encompass all types of fiduciaries, including estate trustees, executors, administrators, and trustees, as well as attorneys and guardians subject to the comments regarding attorneys and guardians.

(other than any creditors) does not have the requisite capacity to review accounts and is unable to sign a release. For guardians, it will often not be possible to avoid a court passing of accounts due to specific provisions in the judgment appointing the guardian or otherwise to pass accounts in court.

However, attorneys for property and guardians of property can use an informal process where the approval of family members or anticipated future beneficiaries of the incapable person's estate is all that is desired. Since the *Substitute Decisions Act, 1992*[3] allows attorneys for property to take compensation without prior approval (and the judgment on the guardianship appointment generally deals with payment of compensation to the guardian), it is not necessary for an attorney for property to pass accounts in order be paid compensation. The discussion below, accordingly, encompasses attorneys and guardians (except where noted), but the limitations of an informal accounting for such fiduciaries should always be borne in mind.

When to Consider a Court Passing of Accounts

Where the trustee wishes to obtain complete protection from possible claims by or on behalf of all beneficiaries, vested or contingent, and not all of the beneficiaries are *sui juris*, a court passing of accounts will be necessary unless guardians have been appointed who can provide approval on behalf of unborn, unascertained or incapable beneficiaries. It is, however, possible for a trustee to choose not to obtain approval on behalf of such beneficiaries, or to obtain proxy approval, such as from parents on behalf of minor children. It may also be acceptable to the trustee to provide a form of accounting to the Children's Lawyer or Public Guardian and Trustee, and rely on estoppel principles if no comments are forthcoming. In all cases, of course, the trustee should be aware of the risks involved (such as that a release signed by a parent is not binding on the minor child unless the parent has been appointed guardian of property for their child), and the possible future claims that can be raised by or on behalf of such beneficiaries if such an informal process is adopted in such circumstances.

It will also be prudent to pass accounts in court where circumstances dictate a more formal approval of the

3. S.O. 1992, c. 30, s. 40(1).

administration, for example, if the estate assets are insufficient to pay the total of all legacies, even if all beneficiaries are *sui juris*.[4] It may also be inefficient to attempt to obtain releases based on informal accounts where the trustee is of the view that the beneficiaries will not agree to sign them, or where conflict between the trustee and beneficiaries is such that a court passing is the more prudent process to choose. However, where conflict or animosity are present, a court passing of accounts may degenerate into a time and money-wasting, no-holds-barred airing of emotional grievances. The possibilities for compromise and negotiation in an informal accounting process may be more effective in achieving resolution and obtaining approval for the trustee.

Why an Accounting?

It is trite law that a fundamental duty of a trustee is to keep complete records of his or her administration.[5] However, the ultimate point of any accounting from the trustee's perspective is to protect the trustee from possible future claims regarding the administration of the trust, including the quantum of any distributions made (which includes the value of the assets administered and how the distributions are calculated), the types and amounts of expenses paid and the compensation proposed. For an informal accounting process, this should take the form of obtaining executed releases from or on behalf of all beneficiaries (to the extent possible as discussed above).[6] As stated in *Widdifield on Executors and Trustees*:[7]

> At first glance, the practice that sees trustees of continuing trusts voluntarily passing accounts at regular intervals seems to be unnecessary, except to obtain an award of the executor's compensation, or in case of dispute. The experienced trustee, however, is glad to pass his or

4. See, for example, *Compensation and Duties of Estate Trustees, Guardians and Attorneys*, *supra*, footnote 1, at s. 6:10, p. 6-6.
5. *Sandford v. Porter* (1889), 16 O.A.R. 565 (Ont. C.A.); and see *Widdifield on Executors and Trustees*, 6th ed., Carmen S. Thériault, ed. (Carswell: Toronto, 2002), s. 13.1, p. 13-1; and *Compensation and Duties of Estate Trustees, Guardians and Attorneys*, *supra*, footnote 1, at s. 12:30.10, p. 12-3.
6. See *Re Mitchell Estate* (1997), 152 D.L.R. (4th) 448, 1997 CarswellBC 2109 (B.C. C.A.); and *Re Sheard Estate*, 2013 ONSC 7729 (Ont. S.C.J.), additional reasons 2014 ONSC 807 (Ont. S.C.J.), in both of which the court held that a release was a bar to a beneficiary later requesting the executor pass accounts in court.
7. *Supra*, footnote 5, at s. 14.2.2, p. 14-2.

> her accounts simply to turn over to a clean sheet and close the book on the problems and perhaps contentions of a period of the administration.

One must always bear in mind too that claims against trustees may come not only from beneficiaries but also from beneficiaries' heirs or representatives and/or from creditors (either of the estate or of a beneficiary). Even where beneficiaries remain satisfied long after distributions are made, if one of them were to pass away, become incapable or declare bankruptcy, their executor, attorney, primary beneficiary, creditors or trustee in bankruptcy may not be so easy to satisfy.[8] While not every creative future claim can be foreseen, it usually pays to think defensively, especially in potentially contentious situations or where circumstances exist which may give rise to future claims (for example if a beneficiary is a spendthrift).

It is also important to remember that current contentment and satisfaction expressed by beneficiaries, or a lack of questioning or dissent received from beneficiaries, should never be relied on that there will not be future claims. Beneficiaries can prove to be extraordinarily forgetful of past benefits received and undocumented approvals given,[9] and can dispose of even large distributions remarkably quickly. Trustees and their advisors must bear this in mind in all matters, but particularly when considering distributions, compensation, accounts and releases. While defenses such as acquiescence, laches and the expiry of the limitation period to make a claim may assist a trustee in such circumstances, having to obtain a court decision to deal with the issue is not ideal.[10] Further, principles such as discoverability and time pressure on the beneficiaries in providing consents can override limitation periods or acquiescence depending on the circumstances.[11]

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8. *Rooney Estate v. Stewart Estate*, 2007 CarswellOnt 6560, [2007] O.J. No. 3944 (Ont. S.C.J.).
9. See, for example, *Gold v. Rosenberg* (1995), 129 D.L.R. (4th) 152, 25 O.R. (3d) 601, 1995 CarswellOnt 823 (Ont. C.A.), affirmed (1997), 152 D.L.R. (4th) 385 (S.C.C.).
10. See, for example, *Egnatios v. Leon Estate* (1990), 73 D.L.R. (4th) 137, 39 E.T.R. 138, 1990 CarswellOnt 502 (Ont. Gen. Div.) where the claimant admitted in correspondence to having no legal claim but still took the trustees to court regarding her claim to not having received what she was entitled to from the estate.
11. See for example *Mackey Estate v. Mackey* (1986), 24 E.T.R. 174, 1986 CarswellOnt 666 (Ont. H.C.), leave to appeal allowed (1986), 24 E.T.R. 174n

Who Should be Provided With Informal Accounts

The same parties as would be served on a court passing of accounts should receive informal accounts and, if possible, sign releases. In Ontario, this includes "each person who has a contingent or vested interest in the estate".[12] All contingent beneficiaries should be considered, and unpaid creditors should also not be overlooked where appropriate.

The procedure for passing accounts in Ontario is the same for guardians and attorneys as for executors and trustees, although in those cases it will likely be prudent to include family members who will in the ordinary course inherit from the incapable person in an informal accounting process, even though they do not have any interest in the incapable person's estate while that person is alive.

What to Provide as Part of an Accounting and What Format It Should Be In

General Principles and Considerations

Not too surprisingly, there are few reported decisions regarding the necessary form and content of informal fiduciary accounts. However, there is some guidance in the case law. In *Kulyski v. Kulyski,*[13] the court stated that informal accounts need to include a list of assets and show where the monies/assets went. In *Villa v. Villa,*[14] in rejecting complaints that the accounts provided were inadequate, the court approved the records kept by an attorney for property, stating he had kept a beginning list of assets, an ongoing list of assets acquired and disposed of, and information regarding monies received and paid out and investment transactions, which was sufficient in the circumstances.

The specific form of accounts used should be more or less detailed or comprehensive depending on a number of factors, some of which are set out below. However, this decision often

(Ont. C.A.); and *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4th) 495, 1986 CarswellBC 652 (B.C. S.C.).

12. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 74.18(3).
13. 2013 CarswellOnt 2335, 2013 ONSC 719 (Ont. S.C.J.), at para. 56.
14. (2013), 89 E.T.R. (3d) 49, 2013 CarswellOnt 5158, 2013 ONSC 2202 (Ont. S.C.J.), additional reasons 2013 ONSC 4421 (Ont. S.C.J.), affirmed 2014 ONCA 287 (Ont. C.A.).

also depends on which records are available and what notes the trustee has kept regarding the receipts and disbursements, and which records are lost, unavailable and/or not cost-effective to reproduce.[15]

Where the accounting is informal, the trustee can ultimately decide what format to use — there are no rules other than that the trustee should provide appropriate financial information that is necessary to make an informed decision on the matter before the party — in this context, generally whether it is appropriate to sign the requested release.[16] In other words, the trustee needs to provide a sufficient accounting to ensure the beneficiaries have enough information to be able to:

- understand what has happened in the trust administration;
- ask questions regarding any matters for which they require further information; and,
- understand in sufficient detail what they are approving.

What form informal accounts should take will depend on the circumstances. Examples of a few relevant considerations are:

- How large is the trust? Elaborate accounts may not be warranted where the expense is not proportionate to the trust property (although where disputes or complex assets are involved, more complex accounts may be necessary).
- What kind of records has the trustee kept?
- How formal a process is desired? Is the approval of the administration expected to be *pro forma*?
- How complex was the trust to administer, and how complex are the assets and transactions?
- How sophisticated are the beneficiaries? What relationship do they have to the trustee?

Should the Accounts be in Court-Passing Format?

In some cases, it might be best to provide accounts in court-passing format. This should be considered if, for example, any

15. It is important to note that where the accounts of the trustee are accurate, they should not be penalized for not keeping them in a specific form, unless the form of the accounts was deliberately confusing or necessitated proceedings — see *Widdifield on Executors and Trustees*, *supra,* footnote 5, at s. 13.1, p. 13-1.
16. See *Re Mitchell Estate*, *supra*, footnote 6.

of the following are present (although one of these factors alone may not be sufficient in itself):

- the accounts are simple and not expensive to put into this format;
- the trustee anticipates that a court passing may be necessary due to beneficiaries not agreeing to sign releases or raising objections or where there has been previous litigation;
- a more formal accounting format would be more helpful in reviewing the administration due to complex transactions or many different bank accounts being involved; and/or,
- one or more beneficiaries have retained counsel.

What Should be Included – the Basics

Assuming court-form accounts are not being prepared, generally for an uncomplicated estate an accounting will be sufficient where the following is provided:[17]

- A beginning list of assets;
- A complete set of copies of all financial account statements;
- Annotations for all transactions which are not obvious on the face of the statements provided;
- Information regarding the disposition of any assets not accounted for in the financial account statements; and,
- An ending statement of assets.

A distribution proposal/statement, including a calculation of the compensation claimed, should also be provided.

Financial Account Statements and Annotations

Financial account statements should be included not only for bank accounts but also for all investment accounts. Annotations can be in the form of a ledger, slip-sheeted notes to any statement requiring them, or handwritten notes on the statement copies themselves. Such a form allows beneficiaries to follow the administration and the receipts and disbursements throughout

17. See also *Compensation and Duties of Estate Trustees, Guardians and Attorneys*, *supra*, footnote 1, at s. 6:10, p. 6-4, the authors of which also recommend a copy of the will being provided if it has not been previously.

the period in question while providing them with the ability to review all transactions if desired.

Where multiple financial accounts co-exist in time, the statements can be grouped by account number or collated chronologically. Which method to use should depend on efficiency and ease of review. Where possible, stick to the principle that it is better to make things as easy as possible to follow, bearing in mind that the beneficiary will likely not be familiar with the details of the trust and may have a hard time following what the trustee or his or her counsel are familiar with and find easy to review.

Distribution Proposals

A distribution proposal or statement is a vital part of the informal accounting process. Just as the trustee needs to show what they've done during the accounting period in question, so they need to show what they propose to do on the contemplated distribution/transaction that is the subject-matter of the release being requested. It also makes concrete what may otherwise be an indecipherable general concept for a beneficiary — showing them what amount they are receiving on a distribution is much easier for most people to understand than "one equal share of the net residue/trust fund". It is also important to demonstrate the calculation of the distribution amount to reduce the number of questions in this regard (and to be able to show a court if necessary), even if the calculation is simple and seemingly obvious.

The distribution proposal should include all necessary information in order for the beneficiaries/creditors to understand the current asset balances and all anticipated deductions from those balances, including the proposed distribution(s). One suggested format is to provide the following (with explanatory notes as needed):

- First, the balance of the funds/assets available;
- Minus any outstanding bills or debts paid or owing since the end of the accounting period in question (for interim accounts);
- Minus any final professional fees or other bills contemplated;
- Minus the amount of the compensation claimed by the trustee;

- Minus the amount of the holdback for taxes and final expenses (if any);
- A subtotal of the above; and,
- The amount of the proposed distribution of monies or value of assets (or both) for each beneficiary, and a total of all such proposed distributions.[18]

If assets are being distributed *in specie*, a description of the assets being distributed and a breakdown of how they are being distributed should also be included, although if personal effects are to be included, a further schedule may be advisable to keep the distribution proposal easy to review.

The subtotal of the balance of the funds/assets available and the total amount of all proposed distributions should be come to the same figure. Also, the balance of funds/assets available should be explained in a note at the end of the distribution proposal if it is made up of multiple accounts or a note that this is the balance in the trust bank account as of the end date of the accounting period included. These equivalencies and calculations provide the necessary information to confirm the calculation of the distribution proposal is accurate and allow the beneficiary to double-check the trustee's calculations.

This format is only a suggestion, and can be modified to suit individual preferences or circumstances. Also, some estate administration software may assist with creating distribution proposals/statements.

Additional Documentation to be Included or Offered

In some cases, it should be considered whether to provide additional back-up documentation: whether this is reasonable or recom-mended will depend on the factors noted above and the individual circumstances. For example, where a trust controls a private corporation, financial statements for the corporation for the period of the accounting (to the extent possible, as the latest corporate financial statements may not overlap exactly with the accounting period in question) should be provided as a matter of course. A beneficiary cannot reasonably be expected to have enough information to provide an informed release for a trust which controls a private corporation without being provided with financial statements for the corporation, particularly where

18. See the addendum to this paper for a sample distribution proposal.

the shares' book value bears no relation to their fair market value or where significant assets are being administered within the corporation by the trustee in their capacity as the director of the corporation.

While certain information and documents should be provided up front, certain other documents and information can be offered to be provided upon request. For example, where a beneficiary has counsel, you can offer to provide copies of all professional accounts, on the assumption they will likely want to review them, but would not necessarily provide copies up front (unless they have previously been requested). This will show good will and a desire for transparency on the part of the trustee without necessarily having to go through the expense of providing documents that the beneficiary ultimately determines they do not need to review.

Where a lot of documentation has been provided, or even as an extra-prudent measure in complex or contentious matters, the beneficiaries can also be requested to sign an acknowledgement as to what documentation was provided to them as part of the accounting, to avoid future disputes in this regard.

Quantum of Compensation

In some cases, such as in situations where the administration has been particularly simple or where the trustee is also a beneficiary, the trustee may wish to consider claiming a lower amount of compensation than the tariff rate, particularly on an informal accounting. If this is done, it should be noted in the correspondence, and possibly also the release if the circumstances warrant, that the trustee is claiming less than the full tariff rate, and a (rough) calculation of the full tariff rate provided for comparison.

Also, in some circumstances the trustee may wish to reserve their right to claim the full tariff rate if one or more beneficiaries do not approve the informal accounts and sign the release requested and a court passing of accounts becomes necessary. If this is the trustee's wish, or even if the trustee may wish to keep his or her options open, this should be clearly noted in the documentation provided to the beneficiaries.

What to Include in Covering Letters

To avoid any confusion, and future claims to the contrary, the trustee's counsel should always advise the beneficiaries that they act for the trustee, not for the beneficiaries, and that counsel cannot act for or advise the beneficiaries as this would create a conflict of interest. Best practice appears to be to advise the beneficiaries to obtain independent advice if they wish to or if they require advice about the documents, accounts and release being provided prior to signing the release.[19]

Counsel for the trustee should also explain the alternate courses of action available to the trustee if all the beneficiaries do not sign the release, and, if it is the case, that the distribution contemplated, if any, will not be made prior to certain other matters being completed. Counsel for the trustee should not threaten to withhold the distribution if the beneficiary does not sign the release, as this has been held to equate to coercion and to be unreasonable conduct on the part of a trustee,[20] but the beneficiaries should be in no doubt as to what will happen if they don't sign the release requested. Any potential cost consequences of the contemplated alternate courses of action should also be noted, although briefly (so as to inform but not scare or anger the beneficiaries), as well as any possibility of an increased compensation claim, as discussed above.

Finally, counsel for the trustee should offer to entertain (but not necessarily answer)[21] questions and consider requests for

19. In *Rooney Estate v. Stewart Estate*, *supra*, footnote 8, the court stated that beneficiaries should be advised to seek independent legal advice before signing a release. However, in *Sheard Estate*, *supra*, footnote 6, the court stated that failure to do so was not fatal to the releases signed.

20. See, for example, *Rooney Estate v. Stewart Estate*, *supra*, footnote 8; and *Brighter v. Brighter Estate* (1998), 74 O.T.C. 329, 1998 CarswellOnt 3113 (Ont. Gen. Div.).

21. Some questions will not be reasonable or appropriate and should not be answered, and counsel should be careful not to be seen to promise to answer all questions raised. Often whether a question is reasonable is a judgment call in the context of the particular estate administration, but some guidance in the authorities is available. If the information or documentation requested would be available on a court passing of accounts, it should be provided. For a further discussion of the issue of the limits of a trustee's duty to provide information to beneficiaries, see, for example, Albert H. Oosterhoff, Robert Chambers, Mitchell McInnes and Lionel Smith, *Oosterhoff on Trusts: Text, Commentaries and Materials*, 6th ed. (Scarborough, Ontario: Thomson Carswell, 2004), at p. 986*ff*; and *Widdifield on Executors and Trustees*, *supra,* footnote 5*,* at s. 13.2.

further information/documentation, although always in the context that counsel for the trustee acts for the trustee alone and cannot offer advice to the beneficiaries.

What To Do When Record-Keeping is Lax

When advising a trustee from the beginning of the administration, proper record-keeping should be discussed, since one of the primary duties of a trustee is to keep accounts and provide them to beneficiaries upon reasonable notice of a request.[22] It is by far an easier task to account for a trust administration if accurate, detailed records are kept from the beginning, than to try to recreate records after even a few months have passed. In many cases, keeping accurate records may not involve much work for the trustee; in simple trusts annotations to complete account statements, along with an accurate opening asset statement and records regarding the disposition of any non-financial assets, may suffice (although all back-up documents such as bills and receipts should be kept for production if requested). A trustee may have a hard time remembering what small payments were for or how specific items of personal effects were disposed of, even after only a few months. But it should be assumed that beneficiaries will want to know (since they have a right to know), and if the trustee cannot provide this information, one likely result is that the beneficiaries will take this as a sign that the trustee is either negligent, or has disposed of assets for their own benefit.

If, however, the trustee did not have the benefit of good advice from the beginning of the trust administration, or failed to follow it, then counsel assisting the trustee to provide an accounting will have to work with what is available. The trustee should obtain all records available, such as from financial institutions, which will provide back copies of account statements, although sometimes a fee is charged. Financial institutions can often also provide further information regarding certain transactions, assuming the records are not too old (financial institutions typically only keep records for less (in some cases significantly less) than 10 years). The trustee should also provide whatever details and other records they can, including from e-mail correspondence and even text messages, to provide as accurate and detailed an accounting as is possible

22. See footnote 6 above.

and reasonable in the circumstances. Obviously, more time can reasonably be spent searching for information regarding large transactions than for small ones (although large and small are relative to the size of the estate, and whether a transaction is significant may be a matter of opinion differing between beneficiaries or between the beneficiaries and the trustee).

When to Provide an Accounting

It is most usual to provide an accounting to beneficiaries when any distribution is being contemplated (see below regarding releases that should accompany accounts). Further, unless a trustee[23] has been given the power to pre-take compensation in the trust instrument or will, prior approval of the beneficiaries will be necessary[24] before the trustee pays himself or herself compensation.

It is generally accepted that in most circumstances reimbursement for reasonable trust expenses does not require the same prior approval as a claim for compensation, although a trustee may wish to advise beneficiaries and even obtain pre-approval for certain expenses if they are of sufficient size or may be controversial in some way. The indemnification of trustees for expenses related to the trust is now codified in s. 23.1 of the *Trustee Act*:[25]

> (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
>
> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

However, as can be inferred from s. 23.1(2), such indemnification is not unlimited:

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23. As discussed above, this does not apply to attorneys and guardians.
24. While a trustee or executor may not pre-take compensation without the authority to do so in the trust instrument or will, approval of all the beneficiaries, if all are *sui juris,* is an acceptable alternative to court approval of the trustee/executor's compensation claim. See, for example, *Widdifield on Executors and Trustees*, *supra,* footnote 5, s. 11.11, p. 11-24.
25. R.S.O. 1990, c. T.23, s. 23.1.

> The starting point is that executors and trustees are personally liable for liabilities they incur to third parties — including legal counsel — in connection with the estate. They will be entitled to be indemnified, or reimbursed, out of the estate for amounts paid by them *only to the extent* that such liabilities were *reasonably* incurred for the purpose of performing their responsibilities in administering, or distributing, the estate or trust.[26] [emphasis added]

Even if a trustee does have the power to pre-take compensation, he or she may still wish to obtain pre-approval prior to paying himself or herself compensation to avoid future disputes or unnecessary bad feeling engendered with the beneficiaries. Where approval of compensation or expenses is sought, as for a distribution, an accounting should be provided as part of the approval process.

A Note About Approvals for Specific Administrative Steps

It may be also beneficial or prudent in some circumstances to obtain the prior approval of the beneficiaries in regards to a specific step or matter to be undertaken by the trustee, usually if it is unusual, particularly large in proportion to the overall estate value, or the value to be received (in the case of the disposition of an estate asset) might be disputed as too low. While certain information and documentation will be required to ensure the beneficiaries understand what they are agreeing to in enough detail to provide an informed approval, for this kind of approval, a trust accounting would not be necessary. What is suitable or necessary information and documentation will of course vary with the circumstances. For example, if the trustee wishes to obtain prior approval for the sale of real property, copies of the property appraisal(s) / valuation(s), proposed agreement of purchase and sale and listing agreement, if any, should be provided.

Where Should Records Be Kept, by Whom and For How Long

Assuming releases are drafted to allow for electronic copies to be circulated, accounting records, including the accounts, back-

26. *Martyn v. Taylor* (2003), 50 E.T.R. (2d) 220, 2003 CarswellOnt 1626 (Ont. S.C.J.), additional reasons 2003 CarswellOnt 2328 (Ont. S.C.J.), at para. 68. See also *Compensation and Duties of Estate Trustees, Guardians and Attorneys*, *supra*, footnote 1, at s. 8:20, p. 8-2.

up documentation, correspondence and executed releases, can be kept in digital format rather than paper, if preferred. As long as records are securely stored and can be accessed in the future if necessary, no concerns should arise as to the storage format. This does however require a consideration of whether the storage format to be used is secure and will continue to be accessible, given changing technologies and the vulnerability of certain storage mediums to corruption and accidental damage.

While it may be the trustee's responsibility to keep records, prudent counsel should keep a copy as well, since personal records can be more vulnerable to deterioration, loss, and accidental (or deliberate) destruction.

Theoretically, trust accounting records can be destroyed after the completion of the administration in question (although keeping records for at least the normal three-year income tax reassessment period should be considered). However, prudence dictates retaining records of at least the beneficiaries' approvals and consents to the trustee's administration indefinitely, including after the trustee's death. It is also recommended that copies of the accounting records be kept as well. Claims can and do arise after decades in trust and estate matters,[27] so standard document retainer policies may not be appropriate in this context.

Releases

This article is not intended to provide a comprehensive review of best practices regarding releases. However, as obtaining releases is an integral part of the process of the approval of a trustee's accounting for his or her administration, a discussion of releases in the context of an informal fiduciary accounting is included below.

When To Request a Release

Generally, providing accounts and requesting releases are done together. The accounts provide the information necessary for the beneficiaries to sign binding releases, and the releases are based on the accounts and the distribution proposal provided,

27. See, for example, *Cameron Estate v. Button* (2005), 16 E.T.R. (3d) 189, 2005 CarswellOnt 1557 (Ont. S.C.J.); and *Re Hipel Estate*, 2008 CarswellOnt 52, 163 A.C.W.S. (3d) 732 (Ont. S.C.J.), additional reasons 2008 CarswellOnt 661 (Ont. S.C.J.).

and evidence the beneficiaries' approval of the accounts and distribution proposal (if any). However, there may be circumstances in which a trustee wishes to provide accounts where a distribution is not contemplated and therefore releases are not necessary.

It is generally prudent to obtain releases for the administration of the trust to date when a distribution is being made. In some cases, if the distribution is an interim distribution and the amount is small relative to the overall trust fund, it may be that the trustee will not wish to incur the expense of obtaining releases. However, counsel should advise the trustee to obtain a release for every distribution and ensure that written confirmation of such advice and the trustee's decision is kept in counsel's file. It is a common scenario that when a trustee receives a claim against them which could have been avoided by obtaining appropriate releases, the trustee will claim it is his or her counsel's faulty advice that is to blame, whether or not this is an accurate recollection of the events in question.

Obtaining releases is particularly recommended when a trustee is making the final distribution from the trust to beneficiaries, or when something unusual is being contemplated, such as where one beneficiary is being preferred over others in a distribution. Not obtaining releases in these circumstances leaves the trustee vulnerable to future claims. Even if verbal consent and approval is obtained, the trustee will be left with the difficult task of proving the beneficiaries' consent and approval was obtained without the benefit of contemporaneous written evidence.[28]

In regards to timing, releases should be obtained before a distribution is made or the contemplated action/payment/compensation is done/paid. While there is case law which provides that a trustee cannot withhold a distribution to force a beneficiary to sign a release,[29] there is also case law that it is acceptable and even common practice for a trustee to request a release or pass accounts prior to a distribution.[30] A trustee should not threaten to withhold distributions if a beneficiary

28. However, it is worth noting that written approval is not necessary to constitute consent and approval by the beneficiaries — see, for example, *Compensation and Duties of Estate Trustees, Guardians and Attorneys*, *supra*, footnote 1, at s. 6:10, p. 6-2; and *Widdifield on Executors and Trustees*, *supra,* footnote 5, at s. 11.11, p. 11-24.

29. See footnote 20 above.

30. See *Denofrio v. Denofrio*, 2012 ONSC 3408 (Ont. S.C.J.), additional reasons 2012 ONSC 4019 (Ont. S.C.J.), affirmed 2013 ONSC 2106 (Ont. Div. Ct.), and *Sheard Estate*, *supra*, footnote 6.

does not sign the requested release, but can advise that they will have to pass accounts in court, at further expense to the trust, if beneficiaries are not prepared to approve the administration of the trust to date and evidence this by signing the release.

Form of Release

Everyone's drafting style is different, and individual counsel's releases should be in keeping with his or her style. However, the following elements should be considered for any release in this context:

- Recitals – to explain the facts in sufficient detail that anyone (*e.g.*, a judge) picking up the release with no prior knowledge of the matter can glean enough to follow what has happened and why the release was signed from the face of the release without needing further explanation, including such details as:
  - The history of the trust, such as when it was settled and what the foundational instrument is (or for estates information regarding the testator and the will), who were the original trustees and who are now the trustees, if different;
  - The entitlement of the person signing the release (which may differ among beneficiaries);
  - Any distributions which have previously been made and the accounts provided and releases executed in regards to that distribution;
  - The distribution that is being contemplated;
  - The fact that an accounting for a specified period (or the entire administration) and distribution proposal have been provided to the beneficiary along with the release;
  - Definitions for any terms or concepts likely to be used frequently in the release (such as the trustees, trust, distribution, distribution proposal, accounts, etc.);
- Refer to the receipt of any previous distributions and the proposed distribution as the consideration for the release (although the release should be signed, sealed and delivered and a physical or computer-generated seal used to ensure the release does not fail for lack of consideration);[31]

- Reserving rights in any remaining residue/trust fund (after payment of final expenses, compensation, professional fees etc.), acknowledge receipt of the accounts and distribution proposal and approve both, including specifically approving all professional fees, taxes and compensation paid / claimed;
- Waive any further accounting of the administration for the period in question (or generally if a final release) and any right to require a passing of accounts in court for it;
- Acknowledge receipt of any personal effects or *in specie* asset distribution and release the trustee with respect to such assets, if applicable;
- Provide a general release to the trustee in respect of the administration of the trust for the period in question (or the entire administration as appropriate);
- Confirm the release is binding on the heirs, legal representatives, etc. of the beneficiary and has the same effect as a passing of accounts;
- Provide an indemnity to the trustee regarding any claims made against the trustee or future trust expenses (to protect the trustee after he or she no longer has funds to pay such claims/expenses) arising from the administration of the trust (or against the deceased for an estate), although such indemnity should be limited to the amount(s) already received and to be received in the future from the trust by the beneficiary;
- Acknowledge the release is intended to cover known and unknown claims;
- Acknowledge and agree that the release may be raised as an estoppel to any claim made by the beneficiary or any person claiming through them in regards to the subject matter of the release;
- Acknowledge the trustee's counsel cannot advise the beneficiary and they have been advised to seek their own counsel and have done so or have declined to do so;
- Acknowledge the beneficiary has read the release and understands it and the nature and consequences of signing it;

31. For more on releases and seals see Anne Werker's article "Discharge of a Trustee by Deed of Release and the Function of a Seal" (2013), 41 A.Q. 451.

- State the release is binding on all heirs, legal representatives, etc. of the beneficiary and inures to the benefit of the heirs, legal representatives, etc. of the trustee.

If any specific expense or administrative step is being approved (or is also being approved), recitals should be included to provide enough information and reference to documentation, as appropriate, to explain the nature of the expense/step, why it is being contemplated by the trustee, and why it is reasonable, and a specific release paragraph should be included approving the matter and releasing and indemnifying the trustee in respect of it. If only a specific expense or matter in the administration is being approved, some of the above-noted elements will not be relevant or appropriate.

What Not to Put in Releases

While not strictly relevant to releases which are accompanied by accounts, since they are based on the information provided, gross negligence, fraud and/or mistake may be matters that should be carved out of a release of a trustee's administration, particularly when a broad-reaching blanket indemnity is being requested.[32]

Too often counsel try to cover too much and fail to appropriately limit the scope of releases where warranted. For example, an unlimited approval and release for the administration of the trust is not appropriate where only a specific period is being accounted for. Also, a blanket indemnity is only appropriate in limited circumstances, and usually should be limited to the value of the assets being distributed to a beneficiary. It is usually not appropriate to request an indemnity from a beneficiary that is unlimited as to scope, since the beneficiary may end up liable for more than they received from the trust, whereas the trustee has other defenses to claims (such as *plene administravit*).[33]

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32. It has been held that it is not appropriate to request a release which is broader than the scope of the allowed release in the trust deed — see *Dalewood Economy Ltd. v. Black Estate*, 2010 CarswellOnt 9210, 195 A.C.W.S. (3d) 292, 2010 ONCA 824 (Ont. C.A.). However, the applicability of this principle to a release provided with an accounting appears limited.
33. The defense of *plene administravit* or *plene administravit praeter,* basically that the assets of the trust were previously distributed and no or insufficient assets remain to satisfy the claim, will not always be successful, for example if the trustee has not acted reasonably. See Archie Rabinowitz's article "*Plene*

A Final Note: Precedents

It cannot be repeated too many times that unthinkingly following precedents without considering applicability, context and the unique needs of the circumstances can lead to unintended results, often involving negligence claims against the professional who used the precedent. "I used a precedent" is not an excuse or defense to such a claim. Since there is no form set out in any rules or legislation for either informal accounts or releases, the form and content is entirely adaptable to each individual situation, and counsel must be careful to ensure considerations appropriate to the circumstances in question have been duly incorporated into the documentation every time.

Administravit: Obscure But Not Obsolete" (2009), 28 E.T.P.J. 110 for further discussion of this defence.

ADDENDUM

Sample Distribution Proposal (Drafted as a Schedule to a Release)

Schedule "A"

[INTERIM] DISTRIBUTION PROPOSAL

Estate of ●

Balance as of ●	$	●*	A
Less payment of [*e.g.*, legal fees, accounting fees]	$	(●)	
Less Executor's Compensation	$	(●)	
Less holdback for tax and professional fees pending assessment of final estate tax return	$	(●)	
Amount Available for Distribution	$	●	B
Distributed as Follows:			
Name of beneficiary	$	●	B1
Name of beneficiary	$	●	B2
Name of beneficiary	$	●	B3

* Cash made up as follows: [list accounts/assets in Estate's name]

	$	●	
	$	●	
	$	●	
	$	●	
Total	$	●	A

Items "A" should be the same amount.

Items "B1", "B2" and "B3" should add up to the same amount as item "B".