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Accountings in Estate and Trust Proceedings, Part I: Informal Accountings

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It is well settled law in New York state that every fiduciary of an estate or trust must account to the beneficiaries that he or she serves (see *Matter of Rappaport*, 96 N.Y.S.2d 741, 743 (Kings Cty. Sur. Ct. 1950); see also *Matter of Grove*, NYLJ, June 27, 1989, p. 23, col. 1)) and to render a full and accurate account of his proceedings as fiduciary (see *Matter of Donner*, 82 N.Y.2d 574; *Matter of Lasser*, NYLJ, March 13, 1996, p. 30, col. 5). However, that does not mean that every fiduciary's account must be settled judicially in the Surrogate's Court. In fact, most estate and trust accountings are settled without the need to file a formal or judicial accounting in the Surrogate's Court. This article, which will be the first in a series, will discuss settling fiduciary accounts informally rather than the fiduciary being compelled pursuant to Surrogate's Court Procedure Act (SCPA) §2205 or through the voluntary judicial settlement process as prescribed in the SCPA §2210.

Informal accounts sound exactly like their title, informal. However, numbers written on a piece of paper will not suffice as an informal account. When representing a fiduciary, counsel must be mindful that the protection an informal accounting provides the fiduciary are only as good as the disclosure the account provides to the beneficiaries.

It has long been the law in New York state that a fiduciary may settle his or her account by an informal accounting out of court, and such an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree. *In re Kahn's Will,* 144 N.Y.S.2d 253 (Westchester Cty. Sur. Ct 1955) aff'd 2 A.D.2d 893; see also *In re Spacek*, 155 A.D.3d 747 (2d Dept. 2017*); In re Lifgren*, 36 A.D.3d 1042 (3d Dept. 2007). *In Matter of Salomon's Will*, the court stated: "The principles have repeatedly been affirmed that the courts of our state have generally recognized the validity of settlements in estates in the absence of bad faith or fraud and have given such settlements vigorous support since the expense and delay of a formal accounting proceeding are avoided." *In Matter of Salomon's* Will, 175 Misc. 264, 267, (Kings Cty. Sur Ct 1940). Where the agreement is made fairly, and without coercion, imposition or misrepresentation, it

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is conclusive upon the party signing it. See *Kahn*, supra, citing *In Matter of Blodgett's Estate*, 171 Misc. 596, 598 (New York Cty. Sur. Ct. 1939). Accordingly, an agreement to discharge the fiduciary and settle an account will be binding provided that (1) all interested parties who would be necessary parties in a judicial proceeding pursuant to SCPA §2210 settling the account sign the agreement, (2) the fiduciary has made full disclosure of in an account circulated to all signatories to the agreement, and (3) all signatories to the agreement are competent adults. *In re LeoGrande*, 13 Misc.3d 1070 (Nassau Cty. Sur. Ct. 2006).

A receipt and release obtained by a fiduciary will be subject to careful scrutiny. *Matter of Estate of Alford*, 158 A.D.3d 1188 (4th Dept. 2018). If the instrument of

settlement is attacked, the fiduciary has the burden of proving that the beneficiary was dealt with fairly and that there was no fraud or misrepresentation practiced in obtaining the release. *In re Amuso's Estate*, 13 Misc.2d 686 (Nassau Cty. Sur. Ct. 1958). The fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars. *In re Lifgren*, 36 A.D.3d 1042 (3d Dept. 2007). The fiduciary must have made full disclosure of material facts which the beneficiary knew or should have known. See *Alford*, 158 A.D.3d at 1190. However, even though a fiduciary is under a duty to disclose all the facts, he or she is under no duty to advise adult beneficiaries of the legal effect of their acts. *In re Schoenewerg's Estate*, 277 N.Y. 424 (1938); *In re Ohrbach's Trust*, 4 Misc. 2d 964 (Sup. Ct. Special Term, New York Cty. 1955).

In many uncontested matters, attorneys for fiduciaries assist their clients in settling trusts and estates informally and simply place the executed receipt and release agreements in their files for safekeeping. However, pursuant to SCPA §2202 an attorney or fiduciary may file or record in the Surrogate's Court any instrument settling an account in whole or in part executed by one or more fiduciaries interested party, creditors, or in the case of any beneficiary under a disability, by the guardian, of his or her property or the person receiving payment (usually those appointed under SCPA Article 17, 17-A or Article 81 of the Mental Hygiene Law). Every such instrument to be recorded must be acknowledged and, if recorded, the record thereof, or a certified copy of the record or instrument constitutes presumptive evidence of the contents of the instrument and its due execution. Thus, a fiduciary may account informally by obtaining receipts and releases from interested parties regarding the handling of the estate or trust and the SCPA permits the fiduciary to file and record the receipt and release agreements with Surrogate's Court. *In re Hunter*, 4 N.Y.3d 260 (2005).

Under SCPA§2202 where an instrument settling an account has been recorded, the record or a certified copy of the record or instrument constitutes presumptive evidence of the contents of the instrument and its due execution. The presumption may be overcome by establishing that the instrument of settlement was obtained through fraud or failure on the part of the accounting party to make a full disclosure; the failure to make full disclosure will nullify the release and will render the instrument of settlement ineffective.

A slightly more "formal" means of informally settling an account is provided for under SCPA §2203. Under this section, the executor may file with the court a petition for a decree releasing and discharging him or her as executor. Unlike SCPA §2202, only final accounts may be settled under this section.

The petition must show the names and addresses of all interested parties, that all taxes have been paid (or that none were due), and that the petitioner has fully accounted and made full disclosure in writing of his or her administration of the estate to all persons who would be required to be served with process in a proceeding under SCPA §2210 (although, of course, this is not such a proceeding). SCPA §2203(1).

In addition to filing his or her petition, the petitioner must also file with the court duly acknowledged instruments executed by all interested parties, as defined in SCPA §2210, or, in the case of a person under a legal disability who has been paid, executed by such person's legal representative or the person who actually received payment, which approve the account of the petitioner and release and discharge him. It is suggested that the instruments filed under this section be recorded as provided under SCPA §2202, to invoke the statutory presumption of due execution and of the contents of the instrument described above.

While there is no requirement that a copy of the account provided to all parties who have executed such instruments be filed with the court, SCPA §2402(5) provides that a filing fee shall be charged based on the gross value of the assets accounted for, including principal and income, computed in accordance with the schedule stated in SCPA §2402(7). Thus, since the statute requires that some form of written account be prepared and exhibited to the interested parties in order to obtain their informed releases, it would seem prudent to file a copy of the account with the court, so as to avoid any question with respect

to the proper amount of the filing fee. Upon filing the petition and duly executed instruments of all interested parties and payment of the filing fee, and the court being satisfied upon its review of these documents, the court may "make a decree releasing and discharging the petitioner and the sureties on his bond, if any, from any further liability to all persons interested." SCPA §2203(4)

Now, being aware of the relevant law, what kind of informal account is sufficient to protect the fiduciary?

The Nassau County Surrogate's Court in *Matter of Leogrande* held that "the annual income accountings for informational purposes only and that receipt of these accountings absent a corresponding release covering the period of the accounting did not serve to discharge the co-trustees." It appears that the income accountings provided were similar to the annual statements required to be provided to an income beneficiary pursuant to SCPA §2306. Simply by receiving the annual income accountings, did not implicitly waive the right to a judicial accounting. See 13 Misc.3d at 1076.

In Gee's Estate, the fiduciary submitted to the distributees a paper containing some figures written in longhand, which indicated that the total moneys in the estate to be accounted for amounted to $64,810.68. From this was deducted three sums designated as follows: Federal Tax ($4,500), State Tax ($840) and Premium on U.S. F & G Bond ($340) for a total of 5,680.

This left a balance of $59,130.68 which was multiplied by 60% (the other 40% being the attorney fee retained) producing the sum of $35,478.40 which was divided by three, the number of distributees, the ultimate sum thus arrived at being $11,826.13. A check in this amount was given to each of the distributees, who in turn executed a general release. This instrument acknowledged receipt of $64,810.68 as full payment of the distributive shares in the estate and waived an accounting, but it released, the surety upon its bond, not the fiduciary. It was executed on a printed form furnished by the surety company itself. The Queens County Surrogate's Court held that submission of this very informal accounting and the delivery of the checks do not support any argument that the release was intended to discharge the fiduciary. See *Gee* supra at 665.

By way of example, in a relatively simple estate an informal accounting can consist of copies of all of the estate account statements and a copy of the fiduciaries check register. If there was real property sold by the fiduciary a copy of the closing statement should be provided to the beneficiaries. These documents, along with a receipt and release agreement could be a sufficient informal accounting.

For some estates, there could be a combination of an Excel spreadsheet showing transactions and statements showing brokerage account activity provided to the beneficiaries. Again, if there was real property sold a copy of the closing statement should be provided to the beneficiaries. This along with a receipt and release agreement could be a sufficient informal accounting.

In a more complicated estate, or if an attorney wants to be extra cautious, an accounting that is prepared in the schedule format required in a judicial accounting with a receipt and release could be sufficient disclosure. I reiterate, if there was real property sold a copy of the closing statement should be provided to the beneficiaries. Providing an accounting in this format comes with the advantage of being ready to file judicially if needed, if one of the beneficiaries will not sign the receipt and release agreement.

The next article in the series will focus on compelling a fiduciary to file an accounting through the compulsory accounting process.

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