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Providing Information to Beneficiaries (with Sample Forms)

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A. Introduction

1. *Traditional Thinking Regarding Treatment Of Beneficiary Complaints*

   a. Early in common law, authorities hoped that fiduciaries who took a sworn oath to place the interests of the beneficiary group above their own in connection with an estate or trust administration would voluntarily and unselfishly always carry out their sworn duty. In practice, however, this proved not to be the case.

   b. The process of in-court formal litigation was commenced when the equity court agreed to hear beneficiary complaints. Since few died with substantial wealth, formal litigation in the equity courts was a sufficient procedure for dealing with beneficiary complaints.

   c. Later, when corporate fiduciaries were allowed to serve as a fiduciary for a fee and many more persons died with wealth, estate and trust administration grew into a profitable and complex business.

   d. Corporate fiduciaries evolved into a powerful group and formed their own lobby, often influencing trust and estate policies in a way that favored their own interests over those of the beneficiary.

   e. Corrupt practices came to be accepted as a way to enrich fiduciaries at the expense of beneficiary groups who were not organized in a manner that would allow them to balance the power exerted by fiduciaries and their counsel.

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f. The result has been that the public has developed a fear of getting involved with lawyers, probate, and fiduciaries.

g. Beneficiaries who are not wealthy often find themselves locked out from any form of redress for claimed wrongs.

h. The following material suggests "best practice" procedures in three areas of trust administration:

i. Providing information and services to beneficiaries;

ii. Receipts and releases; and

iii. Fiduciary accounting.

i. These suggestions will help practitioners and trust administrators who wish to reduce the amount of litigation and bad feelings between beneficiaries and fiduciaries.

B. Providing Information And Services To Beneficiaries

1. *It Is In The Interest Of All Parties Involved In A Trust Administration That There Are Economically Efficient Hearing Procedures In Place For Beneficiary Complaints*

a. Trust beneficiaries are increasingly aware of the quality of service offered. Liberal removal provisions in a governing instrument make it more likely that if they are faced with poor service they will move to better service providers. The common practice of including provisions in the governing document allowing trustee removal now makes this a distinct possibility. In addition, the Uniform Trust Code's revised trustee removal provisions have significantly liberalized trustee removal. *See* Alan Newman, *Elder Law: The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?* 38 Akron L.Rev. 649, 695-698 (2005) (explaining how the Uniform Trust Code's trustee removal provisions significantly expand the common law grounds for changing trustees). For a discussion of how liberal trustee removal procedures permit trust beneficiaries greater freedom and flexibility in "shopping" for a fiduciary, *see* Ronald Chester and Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lens Help Clarify the Rights of Beneficiaries?* 67 Mo.L.Rev. 241 (2002). *See also* Robert A. Vigoda, *Powers to Replace Trustees: A Key Element of (and Risk to) Dynasty Trusts, 35* Estate Planning 20 (June 2008).

b. The expanding concept that "fiduciary duty" requires that every fiduciary, when called upon to do so by a complaining beneficiary, propose a "proper resolution procedure" that can efficiently and economically settle an unresolved dispute makes it essential that beneficiary complaints be dealt with fairly. *See* discussion below in section on "Fiduciary Accounting."

2. *Powerless Beneficiaries May Not Be Able To Receive A Fair Hearing Of Their Complaint*

a. If a complaining beneficiary is "powerless" or the complaint is not for a large amount, it may literally not be possible to retain a lawyer to represent the beneficiary. *See* Robert Whitman and Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries,* 16 Quinnipiac Prob.L.J. 64, 77 (2002). If the beneficiary is unable to pay an attorney on an hourly rate basis and the amount at issue will make a contingent fee arrangement unattractive to the attorney, it may not be possible to retain an attorney.

b. When the corporate fiduciary is a major bank in the area, attorneys may be faced with conflicts or they may choose not to take the case for fear that they will later be punished by the fiduciary by not being retained to represent it in other transactions. *See* Whitman and Paturi, *Improving Mechanisms, supra,* at 77.

c. Estate and trust administration often presents difficult issues in which the interests of a fiduciary and the members of the beneficiary group clash, and a proper balanced resolution of the issues presented is unclear.

d. Various members of the beneficiary group may have clashing interests. Questions of interpretation of the governing instrument, use of discretionary authority, reasonableness of fees, prudent investment, and diversification can commonly arise.

e. So when it comes to a "powerless beneficiary" there is a likelihood, particularly when a major corporate fiduciary is involved, that at least in some cases the beneficiary who asserts a relatively small claim may be unable to retain the services of a competent lawyer to represent the interests of the beneficiary, and that beneficiary consequently may be denied a fair hearing of the complaint.

3. *The Fiduciary Should Outline Its Internal Resolution Process At The Outset Of Administration*

a. In many cases, a fiduciary's prompt response to the complaint of a beneficiary can lead to the prompt resolution of a complaint.

b. Often there may be a lack of understanding on the part of the beneficiary group of the circumstances or the various competing factors that the fiduciary needs to consider in making decisions. "That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration .... [I]t is the duty of the trustee to give the beneficiary the information which he has asked." George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees* §961 (West rev. 2d ed. 1983); *see also* Jo Ann Engelhardt and Robert Whitman, *Administration with Attitude: When to Talk, When to Walk,* 16 Prob. & Prop. 12, 13 (May/June 2002) at 12, 13 ("The consensus is that if the fiduciary can improve its communications, it will avoid many problems and mitigate antagonism among the parties if problems occur."); Robert Whitman, *Representing Estate and Trust Beneficiaries and Fiduciaries,* Disclosure Strategies To Settle Complaints And Avoid Formal Litigation, Appendix D, SK089 ALI-ABA 481 (Feb. 2005) (response of James Wade stating, "It has been my experience that most disputes between beneficiaries and trustees are a result of poor communication, particularly a failure on the part of the trustee to see that the beneficiary understands the ground rules for estate and trust administration (including such items as pass through to the beneficiary of trust income, how charges for trustee and other administration expenses are charged against income or principal or a combination, and how investment receipts are allocated as between the principal and income accounts).").

c. Since a fiduciary is bound by fiduciary law to place the interests of the beneficiary above its own, failure to fully communicate or showing a lack of interest in seeing that the beneficiary's concerns are promptly and fully addressed appears to constitute an independent breach of fiduciary duty, quite apart from the original complaint.

d. Beneficiaries who are ignored become irate and overly suspicious. "For example, consider the plight of *RK*, a trust beneficiary who sought an accounting from her out-of-state trustees. *RK* believed she was entitled to approximately $30,000. After [the trustee's]consistent stonewalling, *RK* sent the trustees a letter in which, because of her total frustration, she accused them of being 'crooks' (which they may well have been). The trustees counterclaimed for defamation and received a default judgment against *RK* in their home state. *RK* could not afford to travel to court to defend herself. The judgment, by an allegedly 'friendly' judge, was for $2,000,000." Robert Whitman, *Resolution Procedures to Resolve Trust Beneficiary Complaints*, 39 Real Prop. Prob. & Tr. J. 829, 838 (2005); *see also* Robert Whitman, *Sorting Out Receipts and Releases*, 33 ACTEC J. 142, 143 (2007) ("Heavy-handed negotiating strategies, such as giving unreasonable ultimatums, may totally undermine goodwill. As an example, a trustee who requires the execution of a R[eceipt] and R[elease] without disclosing how much the beneficiary can expect at the distribution and the amount of trustee fees should expect the beneficiary to be cautious and suspicious").

e. Hopefully, to avoid getting started in a poor way, at the outset of administration, every fiduciary should outline to the beneficiary the fiduciary's written policies for internally resolving disputes. Many commentators recommend that a fiduciary present a written summary of the trust terms and a statement of both the fiduciary's duties and responsibilities, and the beneficiary's rights and remedies, at the beginning of the relationship. This lets the beneficiary know what to expect and allows the fiduciary to manage the beneficiary's expectations. Engelhardt and Whitman, *Administration with Attitude, supra,* at 13; *see also* Robert Whitman, *Representing Estate and Trust Beneficiaries and Fiduciaries, Sorting Out Receipts and Releases §1.3*, SN003 ALI-ABA 281, 288 (July 2007) ("The beginning of the fiduciary relationship presents significant tactical opportunities for fiduciaries to advise the beneficiary group regarding what will be happening at various stages of the administration. Hopefully, from the outset, the beneficiary group has no distrust or suspicion concerning the fiduciary. The fiduciary, at the beginning of the relationship, can review numerous administrative and procedural matters, outlining the benefits and responsibilities arising pursuant to the new fiduciary relationship. Presenting a clear picture of what will be coming avoids later unexpected surprises.")

f. Among the goals to be reached in formulating the fiduciary's policies should be the goal of allowing the beneficiary to work with the fiduciary in choosing the particular plan to be established to resolve the matter.

g. Depending on the circumstances of the case, arbitration, mediation, the appointment of an independent resolution officer, or any combination of those mechanisms that appears to meet the needs of the parties in a balanced way should be available. *See generally* Whitman and Paturi, *supra,* at 72 n. 12 (the authors argue for the possibility of a broad-based voluntary system for trust beneficiary insurance that would give powerless trust beneficiaries early access to competent legal advice. Another possibility would be for trustees to voluntarily set up independent fact-finding agencies to resolve complaints by mediation or arbitration); *see also* Bridget A. Logstrom, Bruce M. Stone, and Robert W. Goldman, *Resolving Disputes with Ease and Grace,* 31 ACTEC J. 235, 236-37 (2005) (This elucidates the advantages of arbitration of trust and estate disputes as opposed to formal in-court litigation. Among the advantages that the authors describe are the reduced cost and time of arbi-

tration and the benefit of allowing the parties to tailor the arbitration procedure according to the needs of their specific dispute.)

4. *Importance Of Alternative Dispute Resolution*

   a. In cases described above, where formal in-court litigation may not in practice be feasible, alternative dispute resolution becomes important.

   b. While beneficiaries who wish to opt for formal in-court litigation should never be prevented from taking that route, it is important that a complaining beneficiary understand: 1) the internal process of resolution that the fiduciary has, 2) the fiduciary's written policies with regard to providing a "proper resolution process," and 3) the beneficiary's right to participate in the process of designing a proper resolution process.

C. Receipts And Releases

1. *Overview*

   a. At the conclusion of trust administration, or at any other time disbursements are made to beneficiaries, the fiduciary may find it desirable to obtain a signed receipt and release (R&R) agreement from the beneficiary.

   b. Possible R&Rs range from simple acknowledgment of receipt of funds to a release from liability for specific instances of past breach of trust.

   c. Whatever form the R&R may take, the fiduciary should take care to deal openly and fairly with a well-informed beneficiary, to avoid both the souring of relations with the beneficiary and a potential legal challenge to the validity of the R&R.

   d. This outline describes the general requirements and proper procedure for securing an R&R, gives an overview of applicable law and common pitfalls, and provides samples of three common R&R formats.

2. *General Requirements*

   a. The standard form of R&R is in writing and contains both a receipt clause, acknowledging receipt of trust property, and a release clause, by which the signing beneficiary relinquishes a potential legal claim.

   b. An unwritten R&R may be binding depending on state contract law, yet the uncertainty of proving such a release means that the fiduciary or its counsel should avoid relying solely on an oral R&R.

3. *Potential Benefits Of An R&R*

   a. From the standpoint of the fiduciary, the primary purpose and benefit of the R&R is to secure notice and protection following the disbursement of funds. The amount of protection that can be secured must be kept reasonable (such limits are explored in detail below).

   b. If executed fairly and openly, the R&R can maintain trust and good relations between the beneficiary and the fiduciary.

c. From the standpoint of the beneficiary, the R&R offers a means for avoiding potentially high court costs and legal fees. This is because an R&R may render unnecessary a formal court fiduciary accounting.

d. If any breach of trust issues have occurred during administration, a well-drafted R&R can allow such issues to be compensated for and settled out of court.

e. As long as it is drafted fairly and protects the interest of the beneficiary, an R&R can potentially serve the interests of both parties.

4. *Communicate Early And Often With The Beneficiary*

a. The fiduciary can initiate discussion about the potential use of an R&R at any time during trust administration, yet it is beneficial for all parties for such discussion to take place early.

b. Early on in the fiduciary relationship, the beneficiary hopefully harbors no suspicion toward the trustee.

c. Presenting a clear picture of what may lie ahead concerning liability releases avoids future surprises and enhances trust between the parties.

d. If an R&R is first brought forward by the trustee at the end of the fiduciary relationship, the beneficiary may become suspicious.

e. This will particularly be true if the beneficiary perceives that the R&R unduly favors the interests of the trustee.

f. In a worst-case scenario, an R&R perceived as overly harsh by the beneficiary may actually prompt the beneficiary to retain outside counsel and engage in litigation against the trustee.

5. *Maintain Reasonable Expectations For The R&R*

a. Fiduciaries may naturally be inclined to seek maximum protection for themselves through the vehicle of an R&R.

b. Due to the limits on the legal enforceability of R&R agreements, it may be necessary for counsel to fiduciaries to temper outsized expectations about what the release can accomplish.

c. R&Rs secured using ultimatums and heavy-handed tactics are usually unwise.

i. Questionable tactics include trustees attempting to secure R&Rs without fully disclosing the amount of funds to be distributed or the exact amount of fees charged.

ii. This type of action may completely undermine the trustee-beneficiary relationship.

iii. Failure to fully disclose additional roles played by the fiduciary related to the trust and potential conflicts of interest has led to a court voiding an R&R secured through such means. *Matter of Freihofer,* 172 Misc.2d 260, 658 N.Y.S.2d 811 (N.Y.Sur. Ct. 1997).

iv. If the trustee employs the alternative tactic of threatening to subject the fund to the expense of a formal court accounting if the beneficiary refuses to sign the R&R, the trustee is inviting claims of breach of fiduciary duty, demands for surcharge, and motions for removal.

6. *Uniform Trust Code And The Second Restatement*

   a. Section 111 of the Uniform Trust Code (UTC) provides support for the proposition that beneficiaries and trustees may resolve issues of a trustee's liability by a non-judicial settlement. UTC §111 (d)(6) (2005).

   b. Section 111 underlies the UTC sections dealing more specifically with R&Rs.

   c. Section 1009 gives legal sanction to a contract in which the beneficiary absolves the trustee of liability for breach of trust, subject to two conditions. Under §1009, a release will be effective: "1) *unless*...the beneficiary was induced by improper conduct of the trustee, *or* 2) at the time of the... release ... the beneficiary did not know of [his or her] rights or of the material facts related to the breach." UTC §1009 (1)-(2) (2005).

   d. *Restatement (Second) of Trusts* §217 (1959), Discharge of Liability by Release or Contract, also recognizes the R&R as a vehicle for the beneficiary to absolve the trustee of liability.

   e. The Restatement adds two additional criteria to the conditions required by UTC §1009. For an R&R to be valid, the Restatement requires that: 1) the beneficiary not be incapacitated at the time of making the agreement and 2) the transaction not involve a bargain with the trustee that was unfair and unreasonable to the beneficiary. *Restatement (Second) of Trusts* §§217 (2)(a) and (2)(d).

   f. Combining the approach of UTC §1009 and the Second Restatement totals four requirements, and therefore four potential avenues of legal challenge, for an R&R.

      i. The beneficiary must not be induced to sign the R&R by improper trustee conduct.

      ii. The beneficiary must know its rights and the materials facts of the breach at the time of making the release.

      iii. The beneficiary must not be incapacitated at the time of the agreement.

      iv. The transaction must not involve an unfair or unreasonable bargain with the beneficiary.

7. *Common Legal Challenges And Case Law*

   a. *Improper Trustee Conduct.* Undue legal influence, such as withholding trust property to obtain an R&R from the beneficiary, is one example of the type of improper trustee conduct contemplated by the UTC. Courts have found this behavior sufficient to invalidate a release. *Ingram v. Lewis,* 37 F.2d 259 (10th Cir. 1930), *cert. denied,* 282 U.S. 842 (1930).

   b. *Lack Of Beneficiary Knowledge At The Time Of Making The Release*

      i. If information provided about the trust or any breach of duty is incomplete or misleading, the release will fail. *In re Capone,* 258 A.D.2d 581, 685 N.Y.S.2d 466 (N.Y.App.Div. 1999).

      ii. If the beneficiary lacked relevant knowledge because of mutual mistake by both the beneficiary and the trustee, the background principles of the forum's contract law will apply to determine the outcome. *Christensen v. Oshkosh Truck Corp.,* 12 F.3d 980, 989 (10th Cir. 1993).

      iii. If an R&R references known injuries, and substantial unknown injuries are later discovered, the beneficiary may avoid being bound by the R&R. This rule also applies to R&Rs not subject

to active bargaining (boilerplate) and includes those with clauses specifically purporting to include unknown injuries. 8 Am.Jur.2d *Proof of Facts* 617.

iv. If the beneficiary's lack of knowledge results from a failure to read the R&R, this may be found to amount to gross negligence by the beneficiary. Courts have little sympathy for this failure to read the release, often resulting in the R&R being upheld despite lack of beneficiary knowledge. *Sielcken's Estate,* 162 Misc. 54, 293 N.Y.S. 721 (N.Y.Sur.Ct. 1937).

c. *Beneficiary Incapacity*

i. One of the elements required by the Restatement Second for a valid R&R is that the beneficiary must not be incapacitated at the time of its making. Incapacity could take various forms, ranging from physical or mental incapacitation to not having yet reached the age of majority. Nicole Jennings Wade and Matthew Pearce, *Making Waivers Work: Release Provisions and Exculpatory Clauses,* SL003 ALI-ABA 463, 465 (Jul. 2005).

ii. When capacity of the beneficiary is uncertain, practitioners should consider having the R&R notarized and witnessed to establish capacity if later challenged.

d. *Unfair Or Unreasonable Bargain*

i. Transactions commonly held to be unfair or unreasonable according to UTC §1009 typically involve self-dealing or a failure of consideration.

ii. Inadequate or illusory promises resulting in the beneficiary's want of consideration are illustrative of transactions that also may be found unfair or unreasonable. *Making Waivers Work, supra,* at 467.

iii. A trustee's promises to pay past consideration in exchange for a release will likely invalidate the R&R. 8 Am.Jur.2d *Proof of Facts* 617.

iv. One or more beneficiaries may refuse to sign the R&R over the amount of the fee charged by the fiduciary. The yardstick used by the jurisdiction will determine what fee level would be unfair or unreasonable. Some jurisdictions use a "reasonable" standard while others have a statutory formula for estate administration fees.

e. *Multiple Beneficiaries*

i. If a fiduciary secures R&R agreements from less than all of a group of multiple beneficiaries, and a beneficiary who did not sign a release challenges the fiduciary in court for breach of duty, the fiduciary may be liable to the entire beneficiary class.

ii. If the dispute involves excessive charges and fees, the fiduciary may be liable for the full amount of the overcharge, rather than for a pro-rated amount adjusted for the percentage of beneficiaries who signed waivers. *In re Estate of Sweetland,* 770 A.2d 1017 (Me. 2001).

iii. In *Ricke v. Armco Inc.,* 1,440 of 1,465 employee-beneficiaries participating in a pension plan settled breach of duty litigation with their trustee. The court held that later claims made on behalf of beneficiaries who did not settle their previous claims were not extinguished. A release signed by

fewer than all of the beneficiary class does not bind the trust. *Ricke v. Armco Inc.,* 92 F.3d 720 (8th Cir. 1996).

f. *Third-Party Influence*

i. Beneficiaries may also be bound by releases executed by certain third parties. A settlor who retains right of revocation also retains the right to waive claims of breach against the fiduciary. *Making Waivers Work, supra,* at 465.

ii. In 2001, UTC §1009 was amended to grant guardians and other third-party representatives the right to grant consent, release, and ratification on behalf of incapacitated beneficiaries. *Id.*; *see also* Bogert and Bogert, *supra,* at §168.

D. Fiduciary Accounting

1. *Beneficiaries Should Receive Regular And Accurate Accounting Information*

a. Historically it has been assumed that the interests of the parties involved in an estate or trust administration are at odds.

b. Traditionally fiduciary accounting has been left to the end of administration. Fiduciary accounting reports have often been voluminous and difficult to comprehend.

c. In some cases, the hope may actually have been to prevent beneficiaries from asking questions. With the increased flexibility offered by the computer, this need not be the case. Uniform Probate Code §7-303 (c) (1969) provides that "upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee." If information were provided automatically rather than on request, beneficiaries would be able (by virtue of having pertinent information about their trust) to make informed requests of their fiduciaries as to the proper management and administration of the trust. T.P. Gallanis, *The Trustee's Duty to Inform,* 85 N.C.L.Rev. 1595, 1627 (2007) (This article explained the importance of the trustee's duty to inform the beneficiary and called for laws that make the trustee's duty to inform the beneficiary mandatory instead of upon request. "The duty to inform should result in the beneficiaries having sufficient information to safeguard their interests. This means sufficient information to monitor and evaluate the trustee's performance and, if necessary, to take action in the event of a breach of trust. Second, and related to the first, the duty to inform should not be limited to the provision of information upon request. There must be enough information provided automatically so that the beneficiaries can make an informed request"). Since providing information to the beneficiary is done only upon request and is not mandatory by law, beneficiaries are prevented from asking meaningful questions. *See also* Standish H. Smith, *Reinventing the Corporate Administration of Personal Trusts – A Marketing Opportunity for Banks,* Presentation to the Financial Analysts of Philadelphia (2000), available at www.heirs.net/downloads/reinventing.pdf. (The author writes that "trust accounting statements to which I have been exposed do not always appear to be models of clarity or disclosure.")

d. The new reality is that upgraded levels of accounting service can be provided. The rising global competition for estate and trust administration business will cause corporate fiduciaries who want

to establish and retain a reputation for excellence to want to see to it that beneficiaries receive accurate and clear accounting information as promptly as possible. *See, e.g., Foreign or Domestic, Trust Companies "Virtually Indistinguishable,"* Trust Regulatory News (June 2007) at 2 (discussing the increased competition domestic trust companies face as foreign banks establish branches in the United States to compete with them).

2. *Model Fiduciary Accounting Statute*

   a. Upon the creation of a trustee-beneficiary relationship, the trustee shall promptly inform the beneficiary group of the proposed plan for fiduciary accounting. If the proposed plan is objected to by any party, the parties shall work toward establishing a plan that reasonably meets the needs of all of the parties, provided, however, that the plan shall not conflict with the explicit provisions of the governing instrument or any provisions of overriding law or court rule. In the event the parties cannot reach agreement, the parties shall agree to terms under which a resolution officer shall determine an appropriate fiduciary accounting process.

APPENDIX 1

Three Sample R&R Formats

Affirmative Representation Of Proper Stewardship

[When the fiduciary believes that it has discharged its duties without any improper incident, consider using an R&R form that merely asks the beneficiary to attest to the fiduciary's proper conduct. This form avoids the moral and legal problems of attempting to seek an overly harsh R&R from a beneficiary. In addition, it avoids raising beneficiaries' suspicion because it makes no mention of improper conduct on the part of the fiduciary. Using this form, both parties can potentially avoid the expense and risk of a formal court accounting procedure. The following form may be used by a fiduciary seeking only an affirmative representation.]

FORM FOR RECEIPT, APPROVAL OF ACCOUNTS, RELEASE, AND INDEMNIFICATION AGREEMENT— FIDUCIARY REPRESENTING PROPER STEWARDSHIP

I received from _____ ("Trustee"), as Trustee of the _____ Trust and as Trustee of the _____ Trust (collectively, "Trusts") what has been represented to me by the Trustee to be a complete account ("Account") of [his] [her]administration of the Trusts as of _____.

It has also been represented to me that the Account fairly represents the stewardship of the Trustee and that the stewardship has been carried out in a proper manner.

I have also received a share of that certain real property ("Property") to which I am entitled under the instruments that govern the Trusts.

In consideration of the representations made to me and of my receipt of the Account and of my share of the Property,

__ I hereby accept the account.

__ I hereby accept the distribution by the Trustee.

__ I hereby request the Trustee to refrain from seeking a judicial settlement of the Account. To the extent that the Account reflects transactions and the representations of the Trustee to me prove to be correct, I hereby release and discharge the Trustee, both in his or her capacity as Trustee and individually, from any and all claims, liability, responsibility, and accountability for or by reason of [his] [her] acts and transactions in the administration of the Trusts during the period of time covered by the Account.

This Instrument will be binding upon and inure to the benefit of me and the Trustee and our respective heirs, personal representatives, successors, and assigns.

IN WITNESS WHEREOF, I have executed this instrument as of the the ____ day of _____.

_____

[NOTARY ACKNOWLEDGMENT]

Simple Form Of Receipt (No Release)

[There may be situations in which a fiduciary would prefer to seek only a form of receipt from the beneficiary. This approach may be advantageous as it avoids any suggestion to the beneficiary that the trustee is seeking release from improper conduct. In addition, the legal hurdles detailed above indicate that R&Rs may seldom be effective anyway if breaches of trust are uncovered. Fiduciaries desiring only a form for representation of simple receipt may use this form, proposed and drafted by American College of Trust and Estate Counsel member attorney Robert Brucken.]

FORM FOR RECEIPT

To [beneficiary receiving distribution]:

As trustee of the Sam Settlor trust created by him by trust agreement dated [date], I propose to make the distribution from it to you [and to the other beneficiaries now entitled to distribution] described in the attached schedule. If you object to the distribution, you must notify me of your objection within 30 days after this proposal was sent to you, when your right to object otherwise terminates.

Form Of Receipt And Release Indemnification Agreement

[If the fiduciary decides to seek the protection of a release, the scope of the liability covered in the R&R must be restricted to ensure that the release comports with applicable law. Only specific breaches of trust can be covered, and those breaches and the factual circumstances surrounding them must be explicitly documented in the R&R. Where a breach of trust has occurred, the fiduciary must act to disclose all information in its possession concerning the breach to the beneficiary. This should include a best estimate of current and future losses to the trust. The fiduciary may wish to be proactive and suggest that the beneficiary engage a neutral and independent expert to asses the situation. Counsel representing fiduciaries seeking stronger protection may consider the following form.]

FORM FOR RECEIPT, APPROVAL OF ACCOUNTS, RELEASE, AND INDEMNIFICATION AGREEMENT

I have received from _____ ("Trustee"), as Trustee of the _____ Trust and Trustee of the _____ Trust (collectively, "Trusts") what has been represented to me by the Trustee to be a complete accounting ("Account") of [his or] her administration of the Trusts as of _____. I have also received a share of that certain real property ("Property") to which I am entitled under the instruments that govern the Trusts. In consideration of my receipt of the Account and of my share of the Property, I hereby approve, ratify, and confirm all of the acts and transactions of the Trustee set forth in the Account, and I accept the Account as final and conclusive regarding the matters fairly represented therein.

Questions that were raised and independently investigated have been settled or resolved.

__ I hereby approve, ratify, and confirm the distribution by the Trustee to me.

__ I hereby request the Trustee to refrain from seeking a judicial settlement of the Account.

__ I hereby release and discharge the Trustee, both in [his] [her] capacity as Trustee and individually, from any and all claims, liability, responsibility, and accountability for or by reason of [his] [her] acts and transactions in the administration of the Trusts during the period of time covered by the Account.

__ I hereby undertake and agree to pay and be responsible for my pro rata share of all unknown claims and liabilities of any kind (including, but not by way of limitation, any tax claims arising from the Trustee's distribution of property of the Trusts) that may be asserted or established against Trustee, either as Trustee or individually, by reason of [his] [her] being or having been such Trustee, together with any interest and/or penalties thereon and any costs, expenses, and attorneys' fees reasonably incurred by the Trustee in connection therewith to the extent that such claims, liabilities, interest, penalties, cost, expenses, and/or attorneys' fees would be properly chargeable against the property of the Trusts.

This instrument will be binding upon and inure to the benefit of me and the Trustee and our respective heirs, personal representatives, successors, and assigns.

IN WITNESS WHEREOF, I have executed this instrument as of the ____ day of _____.

_____

[NOTARY ACKNOWLEDGMENT]

APPENDIX 2

Draft History Of Working Out Appropriate Language

First Draft Of Suggested Form Of Receipt And Release

To Tom Trustee:

I am a beneficiary of the trust created by Sam Settlor by trust agreement with [himself as initial trustee] dated [date]. I hereby acknowledge receipt from Tom Trustee, the current trustee of the trust, of assets and cash shown as distributed by him to me in his final accounting of his administration of the trust as he has furnished it to me. I hereby approve that accounting as to all matters disclosed in it, and hereby release Tom as trustee and individually from all liability to me with respect to those matters.

[signed by beneficiary]

Responses To First Draft

a) I would suggest the world "disclosed" be refined. What constitutes disclosure? I would suggest, "clearly disclosed." Otherwise you are inviting a lot of litigation over what "disclosure" means.

b) I am writing to suggest providing an alternative, like just taking a release, as you suggested to me. An intelligent beneficiary is going to realize that she is being asked to sign away rights when she has no idea what is in the accounting and does not want to pay someone to represent her and find out. To me, your idea of just taking a receipt makes the most sense. So why not offer that as an alternative?

c) One further thought. Do you really think that the wording as a whole is protective of the interests of the beneficiaries? Protecting their interests, of course, needs to be at the top of the list regarding what is wanted. Perhaps this needs to be rethought.

d) Would it make sense to offer several forms and let the lawyer choose the one that [he] [she] or the client wants? You recall that you taught me that one option is to just take a receipt. Why not offer that? I understand that this form is better than lots of others, but an intelligent beneficiary will realize that [he] [she] is being asked to give a release when [he] [she] has no real understanding of what the beneficiary is being given and does not want someone to represent [him] [her] at a cost to find out.

Second Draft

To Tom Trustee:

I am a beneficiary of the trust created by Sam Settlor by trust agreement with [himself as initial trustee] dated [date]. I hereby acknowledge receipt from Tom Trustee, the current trustee of the trust, of the assets and cash shown as distributed by him to me in the attached list [in his final accounting of his administration of the trust as he has furnished it to me. I hereby approve that accounting as to all matters adequately disclosed in it, and hereby release Tom as trustee and individually from all liability to me with respect to those matters.]

[signed by beneficiary]

If no accounting is prepared, or if it is not intended that the beneficiary must review an accounting (or retain counsel to assist him in reviewing it) to determine whether to sign a release, this form may be a receipt for stated assets and cash only, omitting the bracketed reference to an accounting and to the release based on it.

If the beneficiary declines to sign a requested release, the trustee may distribute without one and rely on the statute of limitations and offer to explain the accounting to the beneficiary and to discuss it with him or seek court approval of the accounting and release by the court.

Response To Second Draft

This seems much better. Please, however, consider the following:

As I read the material, there is no mention of what happens if a beneficiary asks the question, "What happens if I choose not to sign a release?" If the response is, "If you refuse to sign a release we will proceed to a formal court accounting at your expense," this will be seen as a breach of fiduciary duty on behalf of the fiduciary.

At least, that is the position take by Ed Halbach, the reporter for the Restatement (Third) of Trusts. I think that you have to alert the lawyers to this concern. So, the bottom line is the safest answer to the beneficiary's question would be, "Nothing happens if you refuse to sign a release, we just hope you will so we can put this away faster."

If the beneficiary is told that the lawyer asking for the release is not representing the beneficiary, is not coercing the beneficiary in any way, is ready and able to answer any question that might be raised, and if necessary arrange for a resolution officer to take care of any problem raised, you are home free. The beneficiary can feel that she is indeed very well treated and that the lawyer and the fiduciary run a first-class operation. This is what I think you want to get across to the lawyers, and by doing this you help them, you help the fiduciary, and you help the beneficiary.

Third Draft

To Tom Trustee:

I am a beneficiary of the trust created by Sam Settlor by trust agreement with [himself as initial trustee] dated [date]. I hereby acknowledge receipt from Tom Trustee, the current trustee of the trust, of the assets and cash shown as distributed by him to me in the attached list [his final accounting of his administration of the trust as he has furnished it to me. I hereby approve that accounting as to all matters adequately disclosed in it, and hereby release Tom as trustee and individually from all liability to me with respect to those matters.]

[signed by beneficiary]

If no accounting is prepared, or if it is not intended that the beneficiary must review an accounting (or retain counsel to assist him in reviewing it) to determine whether to sign a release, this form may be a receipt for stated assets and cash only, omitting the bracketed reference to an accounting and to the release based on it.