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Sorting Out Receipts and Releases

by Robert Whitman
*Hartford, Connecticut**

I. INTRODUCTION

At the conclusion of trust administration, or at any earlier time that the fiduciary plans to make significant distributions of funds to beneficiaries, the fiduciary may wish to obtain from each beneficiary a receipt and release agreement. In this article that agreement is referred to as the "R and R." Reference in this article to the fiduciary is also meant to include those who may assist her, such as her attorney, accountant, or financial planner.

It is the author's view that in order to be successful in obtaining the R and R, and to avoid some of the potential misunderstandings with beneficiaries that can arise, fiduciaries should adopt procedures and employ tactics that are both open and fair. In addition, if the fiduciary wishes to avoid raising the beneficiary's suspicions, the timing of the fiduciary's request for the R and R will be important.

To help the fiduciary avoid creating beneficiary concerns, early discussions about the R and R are strongly suggested. Ordinarily, at the time of the submission of the R and R to a beneficiary or the beneficiary group, the fiduciary will usually also be providing the beneficiary with some form of a fiduciary accounting. If the fiduciary accounting is clear, understandable, and easily read, and if from the start of administration it was explained to the beneficiary group that the R and R would be sought prior to distribution, there is likely to be less chance of a beneficiary having undue concerns.

Before offering the R and R to a beneficiary, the fiduciary must first determine whether the R and R is the appropriate document to use in the circumstances. If it is, the fiduciary needs to decide which form of R and R best suits the situation. Failure to make these determinations prudently can result in the creation of unnecessary hostility between the parties or even the needless destruction of what had become a good relationship during the course of administration.

Practitioners counseling fiduciaries must be mindful of local laws and customs. To prepare to discuss the use of the R and R with the beneficiary group, a practitioner advising the fiduciary should review the procedures followed in the probate court having jurisdiction over the matter in order to determine the exis-

tence of any local practices and procedures regarding the use of the R and R. The practitioner will also want to review with the fiduciary disclosure tactics in order to decide upon the most appropriate way to confer with the beneficiary group to explain the reasons why the use of the R and R makes sense in the circumstances. Beneficiary goodwill is more likely to be earned when a beneficiary understands that using the R and R can save both time and money, as compared with submitting a formal court fiduciary accounting to the supervising court.

The purpose of this article is to provide fiduciaries and their lawyers with information about the general requirements and proper procedures for drafting the R and R, to suggest tactics to be used to avoid damaging the relationship with beneficiaries when seeking the R and R, and to suggest approaches for fiduciaries to maximize the benefits of the R and R for both parties. Three distinct approaches to drafting the R and R are considered below, and forms of R and Rs for each approach are provided as examples that can be adapted for use.

II. PLAN AHEAD TO AVOID LATE SURPRISES

The fiduciary can explain the use of the R and R to the beneficiary group in numerous ways. While a discussion about the use of the R and R can be held at any time during administration, it is suggested that the discussion be held early on.

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 administrative and procedural matters with the beneficiaries and outline the benefits and responsibilities arising pursuant to the new fiduciary relationship. Presenting a clear picture of what will be coming avoids later unexpected surprises. If the fiduciary delays communication and presents the beneficiary with the R and R for the first time right before the parties are preparing to part ways, and the R and R is drafted to heavily favor the fiduciary, a beneficiary may become overly concerned. In a worst-case scenario, lack of early discussion can create suspicion, delay termination of the relationship, and even cause a beneficiary to retain counsel to investigate on behalf of

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the beneficiary group. A potentially simple and quick R and R procedure may turn into formal litigation.

Inviting queries by the beneficiary group throughout the administration is another way to reduce misunderstandings and complications at the end of the fiduciary relationship. By providing comprehensive answers to questions raised by beneficiaries as soon as questions arise, clarifications can be made promptly. In short, early answers dispel concerns.

III. REASONABLE BENEFITS TO EXPECT FROM THE R AND R

In preparing to draft the R and R, the fiduciary may inform her counsel about her hopes for various gains from the R and R. At one extreme, some fiduciaries may hope to achieve iron-clad protection against beneficiaries who may later express concerns. In order to attempt to gain this type of blanket protection for the fiduciary, her counsel may draft clauses that may be draconian in nature. Other fiduciaries might plan to delay terminating administration unless an R and R is first executed by a beneficiary who wishes to raise questions. In both cases, the fiduciary may need to be educated about the limited results that can be gained from the R and R.

Attempting to extract the R and R from a beneficiary under such circumstances can become counterproductive and should be discouraged. Even if a harsh R and R is obtained, it may be later challenged in court and not pass judicial muster. Similarly, it is probable that a threat to hold up terminating administration before gaining the R and R without answering questions will result in a charge of fiduciary breach of trust and a motion for removal of the fiduciary.

At the other extreme, some fiduciaries may put little or no stock in the effectiveness of any release clause and simply employ a form of receipt, a tactic that entirely circumvents the need to negotiate over the terms of a liability release.

Underlying a fiduciary's hopes for an iron-clad R and R may be a lack of understanding as to what reasonable benefits a fiduciary can properly expect to receive from gaining the R and R. The R and R in any case can only be effective to the extent that the fiduciary accounting presented with it is accurate, complete, shows proper stewardship, and is both readable and understandable. Beyond this, overreaching tactics used to gain the R and R can backfire. Heavy-handed

negotiating strategies, such as giving unreasonable ultimatums, may totally undermine goodwill. As an example, a trustee who requires the execution of an R and R 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. Another heavy-handed strategy that can backfire is for a fiduciary to threaten to move for a formal court accounting at the expense of the fund unless the beneficiary signs the R and R without alteration. Such a tactic, if pursued, may invite a claim of breach of fiduciary duty, a demand for surcharge, and a motion for removal.

*Matter of Freihofer*¹ illustrates how unreasonable requests or demands made by fiduciaries can place the fiduciary in jeopardy. In *Freihofer*, the plaintiff beneficiary of a testamentary trust sued the defendant trustee to render and file an account for the trust. The trustee previously served as the plaintiff beneficiary's lawyer. Impacting the validity of the R and R was the issue of whether the defendant trustee had a conflict of interest when offering counsel to the plaintiff beneficiary. In addition to his lawyer and trustee status, the defendant trustee also had financial interests in the company whose stock was a part of the trust corpus.²

The defendant trustee obtained an R and R from beneficiary prior to the suit. In dismissing the defendant trustee's motion for summary judgment based on the R and R, the court held that as a matter of law the R and R was void and noted that defendant trustee had failed to disclose the many and potentially conflicting roles that he played for the plaintiff beneficiary and his family prior to obtaining the R and R.³ The court was troubled by the defendant trustee's conduct, "particularly since he sought his own discharge from liability to the beneficiary while at the same time representing that beneficiary individually."⁴

Whether the R and R will be upheld will always be a fact-specific determination for the reviewing court. In *Rodgers v. Piscopo*,⁵ a dispute between two sisters resulted in an arm's-length settlement agreement that provided, *inter alia*, that the defendant would execute an agreed-upon R and R. Although it was found that the R and R agreed to by the parties was not overreaching, the defendant still refused to execute it.⁶ The defendant argued that a condition precedent to her execution of the R and R failed because the plaintiff had not provided additional details about a breach of trust. The court found to the

¹ 658 N.Y.S.2d 811 (Sup. Ct. 1997).

² *Id.* at 813.

³ *Id.*

⁴ *Id.*

⁵ 2006 NY Slip Op 50062U, 2006 N.Y. Misc. LEXIS 84, 814 N.Y.S.2d 564 (Sup. Ct. 2006).

⁶ *Id.* at 2.

contrary and held that the details had already been fully disclosed to the defendant.⁷

The court was skeptical about the defendant's assertion for two reasons. First, financial reports furnished to the defendant for approximately eight years leading up to the agreement in dispute went unquestioned by the defendant. Second, the plain meaning of the agreement contradicted the condition precedent alleged by the defendant, a condition which the court noted could easily have been drafted unambiguously into the settlement agreement considering the number of lawyers involved in the case.⁸ Unpersuaded by the defendant's assertion of a failed condition, the court ordered the defendant to execute the R and R.⁹

IV. THE R AND R GENERALLY

The standard form of an R and R ordinarily is in writing and contains both a receipt clause, which acknowledges the receipt of property, and a release clause, which purports to relinquish a right or claim held by a beneficiary.

A. Beneficiary's Waiver of Fiduciary Breach

One benefit of an R and R is that it allows the parties to settle disputes over breaches in trust without judicial intervention. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") recognized this benefit when it promulgated Uniform Trust Code ("UTC") Section 111—Non-judicial Settlement Agreements.

UTC Section 111 lists a variety of matters that fiduciaries and beneficiaries can resolve by non-judicial settlement. Included in the disputes eligible for such resolution are those which relate to the "liability of a trustee for an action related to a trust."¹⁰ UTC Section 111 also provides the underlying support for other sections of the UTC that deal more specifically with R and Rs, such as Section 1009, Beneficiary's Consent, Release, and Ratification, and Section 817, Distribution upon Termination.

Under UTC Section 1009, beneficiaries can absolve trustees of their liabilities arising from breaches in trust by a release agreement. Section 1009 further provides that a release will be effective "unless (1) the ... release ... was induced by improper conduct of

the trustee; or (2) at the time of the ... release...., the beneficiary did not know of the beneficiary's rights or of the material facts related to the breach."¹¹

The Restatement (Second) of Trusts ("Restatement Second") also recognizes the beneficiary's ability to absolve the trustee by release. Section 217, Discharge of Liability by Release or Contract, states that a beneficiary may preclude himself from holding the trustee liable for a breach of trust by a release or contract "effective to discharge the trustee's liability to him for that breach."¹² Similar to the conditions of UTC Section 1009, the Restatement Second requires that (1) the beneficiary not be incapacitated at the time of making the agreement, and that (2) the transaction not involve a bargain with the trustee that was unfair and unreasonable to the beneficiary.¹³

The execution of a valid R and R may release liabilities which might otherwise cause fiduciary conduct to be found conclusively invalid, such as conduct that involves a conflict between the trustee's fiduciary obligations and her personal interests.¹⁴

UTC Section 817 applies to complete or partial termination of a trust. Section 817(c) substantially mirrors the provisions of UTC Section 1009 regarding improper inducement and inadequate disclosure of material facts involving a breach. UTC Section 817 provides procedures to be followed by fiduciaries to begin the trust termination process. Section 817(a) states that "upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution" and that upon receipt of this proposal, beneficiaries may exercise, within 30 days, their statutory right to object to the distribution plan.¹⁵ If the trustee disclosed to the beneficiary in the trustee's proposal this statutory right to object and no objection was forthcoming from the beneficiary within the statutory period, the trustee's proposal for distribution will become final.¹⁶ The 2005 comments to Section 817 provide that a "release requires an affirmative act by a beneficiary and is not accomplished upon a mere failure to object."¹⁷

B. Release By Agreement

The release is an express contractual agreement that reflects both the parties' desire for a voluntary settlement of claims and admission of liabilities

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ UNIF. TRUST CODE § 111(d)(6) (2005).

¹¹ UNIF. TRUST CODE § 1009 (2005). Section 1009 also requires that the beneficiary have "capacity" at the time of the release.

¹² RESTATEMENT (SECOND) OF TRUSTS § 217 (1959).

¹³ RESTATEMENT (SECOND) OF TRUSTS § 217(2)(b) (1959).

¹⁴ See UNIF. TRUST CODE § 802 (b)(4)(2005).

¹⁵ UNIF. TRUST CODE § 817(a) (2005).

¹⁶ *Id.*

¹⁷ UNIF. TRUST CODE § 817 comment (2005).

existing between them. Unless otherwise provided by state law, an oral R and R may be binding. However, because of the difficulty of proof, a fiduciary or lawyer representing the fiduciary will never plan to rely solely on an oral release.

Beneficiaries who execute the R and R are bound only to its express terms. In a written R and R, any ambiguous or imprecise drafting may allow one of the parties to subject the R and R to a construction proceeding. R and Rs that provide absolution for past or future acts of ordinary negligence generally are binding. Harsher or more overreaching clauses will likely be tested for their appropriateness and effectiveness.¹⁸

The question of a trustee's future negligence may be among the considerations relevant to termination of the trustee-beneficiary relationship. State law may require that the trustee's duties continue until the trust is wound up.¹⁹ Depending on the size and complexity of the trust estate, the winding up period may extend to a date significantly after the execution of the release. Thus, the release should be drafted with the winding up period in mind.

V. WILL COURTS UPHOLD R AND Rs?

A. Judicial Construction

Due to the finality involved with terminating the fiduciary relationship and the imbalance of power between fiduciaries and beneficiaries, a court will have considerable flexibility to decide on whether and to what extent the R and R will be enforced.

When construing an ambiguous R and R, a court may consider extrinsic evidence, such as the parties' intentions when they made the agreement.²⁰ Although extrinsic evidence may be helpful in arriving at an equitable result, a court may be reluctant to consider extrinsic evidence bearing on a dispute involving an unambiguous agreement. In *Tourangeau v. Uniroyal, Inc.*,²¹ the court granted the plaintiff's motion to dismiss a third-party defendant's cross claim that sought indemnification for legal fees owed to the defendant on the grounds that the R and R agreement made between

the parties unambiguously released the plaintiff from liability. The third-party defendant argued that the R and R must be interpreted in the context of the complex three-party arrangements made between the plaintiff, defendant and the third-party defendant. The court disagreed and stated that "the court must not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity."²²

B. Burden of Proof

If the R and R is to be later tested in court, evidentiary burdens may play an important role in equalizing the disparity in power between beneficiaries and fiduciaries. Where inequality of position exists between the parties, courts have shifted the burden of proof to the party that held the superior bargaining posture.

In *Gordon v. Bialystoker Center and Bikur Cholim, Inc.*,²³ the plaintiff estate administrator sued the defendant hospital over gifts purportedly donated by the mentally and physically disabled decedent prior to his death. In affirming the judgment of the appellate court with costs, the New York Court of Appeals held that the inequality of position between the defendant hospital and decedent required the defendant hospital to bear the burden of proving that it had not obtained the purported donations through fraud, duress, or undue influence.²⁴

In *re Amuso's Estate*,²⁵ the court considered whether a beneficiary's release was valid. In arriving at its decision that the release was valid and a defense to the action, the court stated that the fiduciary must demonstrate clearly that fairness demands that the release stand in view of the fiduciary's superior bargaining position.²⁶

C. Uninformed Beneficiaries

In assessing whether a beneficiary was uninformed, both the Restatement Second Section 217 and UTC Section 1009 focus on the beneficiary's knowledge of her legal rights and the material facts related to the transaction.

¹⁸ 8 AM. JUR. 2D *Proof of Facts* § 617.

¹⁹ See, e.g., *First Midwest Bank/Joilet v. Dempsey*, 509 N.E. 2d 791 (Ill. App. 1987). The appellate court affirmed the trial court ruling that a trustee may withhold distribution to the beneficiary until after the trust is terminated. "One of the privileges of a trustee to help compensate for its burdens of the office (and while it still has funds available to it) is a right to a determination of the propriety of its accounts before making a final distribution. Under Illinois law, a trust continues beyond termination until it is finally wound up." *Id.* at 797.

²⁰ See, e.g., *Vaughn v. Didizian*, 648 A.2d 38 (Pa. Super. 1994), where the Court remanded a summary judgment ruling in

favor of the plaintiff-patient on the grounds that the parties' intent in making a general release purporting to discharge defendant-doctor from liability arising from plaintiff-patient's known and unknown injuries must be determined by reviewing the instrument and by considering all of the conditions and circumstances.

²¹ 117 F. Supp. 2d 178 (D. Conn. 2000).

²² *Id.* at 181 (citing *Pesino v. Atlantic Bank of New York*, 709 A.2d 540 (Conn. 1998).

²³ 385 N.E. 2d 285 (N.Y. 1978).

²⁴ *Id.* at 289.

²⁵ 187 N.Y.S. 2d 519 (Sur. Ct. 1959).

²⁶ *Id.* at 520-521.

In situations in which the trustee exploited her position of knowledge and power over the beneficiary, such as where material facts related to a breach are omitted or a beneficiary is hindered from seeking independent counsel, the release will fail.²⁷ To avoid this result, a fiduciary should disclose to the beneficiary group her knowledge of facts material to any breach. The fiduciary might consider meeting face to face with the beneficiary group to discuss the advisability of a complete fiduciary accounting, information about any allegations of breach of duty, or information about any other concerns arising from executing the release.

The information disclosed to the beneficiary must also be accurate. If a beneficiary executes the R and R in reliance on inaccurate information, such as a materially misstated accounting, the beneficiary will not be bound to the R and R.

In *In re Capone*,²⁸ the court affirmed a ruling by the lower court requiring the executor to file a formal accounting with the court even though the executor obtained an R and R from the plaintiff beneficiary and provided interim accountings to the plaintiff beneficiary. The court reasoned that although "a release executed in the absence of bad faith, fraud, duress, and with full knowledge of the estate's status, will generally be upheld[,] ... brief summaries, [that] failed to provide a complete picture of the estate and significantly understated the estate's tax liability ... failed to show that the petitioner executed the release with full knowledge."²⁹

In situations in which both parties were unaware of a material fact, the parties may seek a rescission by demonstrating a mutual mistake. In the absence of improper conduct, a mutual mistake would be governed by normal principles of contract law. Thus, equity would excuse the parties from their performance upon a showing of proof establishing their mistake was mutual, was material to the transaction, and qualified as a legal mistake (i.e., the result of an incorrect assumption). Supporting this principle is the time-honored and venerable *Sherwood v. Walker*³⁰ decision, in which a mistake over a cow's fertility went to the substance of entire agreement between parties. The party seeking the rescission must show the existence of a mutual mistake made over a past or present fact, rather than a mere mistake of opinion about the future course of existing inquiries.³¹

Where a beneficiary executes the R and R with reference only to known injuries and she subsequently discovers a substantial injury that is presently in existence, but previously unknown, she may avoid being bound to the release. This rule is also applied to R and Rs that were not subject to the bargaining process, such as a form or "boiler-plate" R and R, and includes those with clauses purporting to pertain to all unknown and unanticipated injuries.³²

The law may be less favorable, however, to those who make unilateral mistakes. In order to avoid a release because of a unilateral mistake, the beneficiary must prove that the trustee knew or should have known the mistaken fact was material to the R and R. In *Smith v. Frey*,³³ the Court of Appeals of Louisiana held that the plaintiff could not avoid her release because the insurer neither knew nor should have known that the release was signed in unilateral error. The plaintiff's attorney alleged that documents the plaintiff was signing were represented to her as not containing a release of the insurance company's liability and that plaintiff signed the documents without reading or questioning them, believing that she was rejecting the settlement offer that had been made to her. In fact, the documents accepted the offer and released the insurance company. In arriving at its holding that the plaintiff was to be held to what she had signed, the court stated that "fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill[;] ... all plaintiff had to do was read the page on which she affixed her signature three times."³⁴

Courts may show little sympathy for beneficiaries who fail to read R and Rs. In *In re Stelcken's Estate*,³⁵ the Surrogate's Court of New York explained that "if [the beneficiary] could read the instrument, not to have read it was gross negligence, if the beneficiary could not read it, not to procure it to be read was equally negligent; in either case the writing binds her."³⁶

D. Unfair or Unreasonable Receipt and Release

Transactions that are often held to be unfair or unreasonable involve self dealing or a failure of consideration. Self dealing transactions that involve the R and R must be fair and reasonable to be binding on the

²⁷ UNIF. TRUST CODE § 1009(2) (2005).

²⁸ 685 N.Y.S. 2d 466 (App. Div. 2d 1999).

²⁹ *Id.*

³⁰ 33 N.W. 919 (Mich. 1887).

³¹ See *Artery v. Allstate Ins. Co.*, 984 P.2d 1187 (Colo. App. 1999).

³² 8 AM. JUR. 2D *Proof of Facts* § 617.

³³ 703 So. 2d 751 (La. App. 1997).

³⁴ *Id.* at 752.

³⁵ 293 N.Y.S. 721 (Sur. 1937).

³⁶ *Id.* at 739 (citations omitted).

beneficiary.³⁷ A release must be based on consideration and, a lack of consideration will allow the releasor to avoid the release.³⁸ The consideration given by the releasee must be valuable and must consist of something other than the performance of an act that the releasee is obligated to perform already.³⁹

E. Improper Conduct

If a beneficiary was improperly induced to sign the R and R by the fiduciary, the release so obtained will be held invalid.⁴⁰ In *Ingram v. Lewis et al.*,⁴¹ it was determined that an R and R was procured as a result of undue influence. The court held that the trustee committed duress when it improperly withheld property to which the beneficiary was rightfully entitled in order to induce the beneficiary to execute a release absolving the trustee of its breaches in trust.

F. Multiple Beneficiaries

Obtaining R and Rs from multiple beneficiaries for the purpose of seeking to settle beneficiary claims can be difficult. Where there is not complete agreement among the beneficiaries, the R and Rs executed by some beneficiaries may not extinguish claims of the other beneficiaries. The resulting uncertainty of liability may cause third parties to be reluctant to settle because the beneficiaries willing to execute the R and Rs cannot deliver adequate assurance that the third party will be able to avoid exposure to liability.

In *Ricke v. Armco Inc.*,⁴² a group of 1,440 of 1,465 employee beneficiaries settled litigation from a previous case with the defendant related to the defendant's failure to meet its responsibilities as a contributing sponsor of an ERISA pension plan. Subsequent to the settlement, the plaintiff trustee appointed by the Pension Benefit Guarantee Corporation filed suit against the defendant to recover unfunded pension amounts. In affirming the lower court decision to deny the defendant's motion for summary judgment, the Eighth Circuit sitting *en banc* held that a release by less than all of the beneficiaries does not bind the trust.⁴³ All of the beneficiaries must act to release the claim because the release affects the interests of all of the beneficiaries.⁴⁴

G. Incapacitated Beneficiaries

Beneficiaries who enter into the R and R lacking sufficient capacity (such as lack of capacity as a result of age or mental incapacity) have a defense to

contract formation.⁴⁵ Practitioners should be cautious when a releasor's mental capacity is in question. Though beyond the scope of this article, practitioners might consider utilizing witnesses or other techniques to document contractual capacity.

H. Binding Third-Party Releases

Beneficiaries may also be bound by the actions of third parties who forgive or release fiduciaries from liabilities related to their breaches of trust, such as where the settlor of a self-settled revocable trust has released or exonerated a trustee's acts during the period when the trust was revocable.⁴⁶ The UTC also allows third party representatives to bind protected persons and beneficiaries.⁴⁷

VI. THREE APPROACHES AND ILLUSTRATIVE FORMS

A. The Pragmatic Approach: The Trustee Representation of Proper Stewardship

To save both time and money in situations where the fiduciary believes that she has discharged her duties without any improper incident, a practitioner might consider advising the fiduciary to provide in the R and R a representation affirming that the fiduciary has properly discharged her duties. Over the long term, the benefits, both tangible and intangible, of this practice may be substantial.

Beneficiaries and trustees, as well as their respective counsel, may conclude that the overall benefits sought to be received by harsh R and R agreements are problematic. The reason for this view may be based on economics, such as where the cost to the parties in making the R and R exceeds the benefit expected to be received. A trustee might also decide against a harsh R and R for ethical reasons, such as where the beneficiary is at a disadvantage because of the lack of knowledge necessary to sign away her right to sue. The rationales underlying such an approach are two-fold. First, fiduciaries are obligated to serve beneficiaries and, within reason, place their interests first, and second, fiduciaries are compensated to accept risk.

In the "common variety" case, a well-advised trustee may decide to turn the tables and provide in writing an affirmative representation stating that she faithfully discharged her fiduciary duties without incident. This strategy is particularly useful to avoid rais-

³⁷ UNIF. TRUST CODE § 1009 Electronic Pocket Part Update (2006).

³⁸ 8 AM. JUR. 2D *Proof of Facts* § 617, § 2.

³⁹ *Id.*

⁴⁰ UNIF. TRUST CODE § 1009(1) (2005).

⁴¹ 37 F.2d 259 (10th Cir. 1930).

⁴² 92 F.3d 720 (8th Cir. 1996).

⁴³ *Id.*

⁴⁴ *Id.* at 726.

⁴⁵ RESTATEMENT (SECOND) OF TRUSTS §217 cmt. (a) (1959).

⁴⁶ UNIF. TRUST CODE §1009 cmt. (2005).

⁴⁷ UNIF. TRUST CODE §303 (2005).

ing a beneficiary's suspicions in situations in which the fiduciary failed to make early disclosure about the R and R to the beneficiary. Thus, instead of wondering about what the fiduciary did to warrant a request for a full release of liability, the beneficiary may gain new-found trust for the fiduciary for representing the propriety of her conduct during administration. Upon receiving this statement, the beneficiary may likely sign the R and R holding no ill will for the fiduciary. Both parties save; both parties win.

The following form may be used by a fiduciary prepared to make an affirmative representation of proper stewardship:

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

I received from _____
(the "Trustee"), as Trustee of the _____ Trust and as _____ Trustee of the _____ Trust, (collectively the "Trusts") what has been represented to me by the Trustee to be a complete accounting (the "Account") of h___ 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 (the "Property") to which I am entitled under the instruments which 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,

1. I hereby accept the Account.
2. I hereby accept the distribution by the Trustee.
3. 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 h___ capacity as Trustee and individually, from any and all claims, liability, responsibility, and accountability for or by reason of h___ 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 _____, 200__.

[NOTARY ACKNOWLEDGMENT]

B. The Middle Ground: Simple Form of Receipt Without Release

If the practitioner decides to advise her client not to attempt to depend on any form of release as protection, a practitioner may suggest the use of only a simple form of receipt.

American College of Trust and Estate Counsel (ACTEC) Fellow Robert Brucken, a member of the State Laws Beneficiary Rights subcommittee, offers the following arguments in favor of using a simple receipt and not asking for a release

I generally recommend to trustees that they obtain a receipt only, no release. That way, there is no suggestion to the beneficiary that he needs a lawyer to search for breaches of trust; and if a breach later is uncovered, chances are that a release would not be effective anyway. I favor this procedure *except* where there is disagreement, in which event a procedure may be used that puts the problem on the table and resolves it before distribution. Refusal to sign and return the distribution schedule is a good sign of

a problem, even if only [due to] inattentiveness or lack of understanding [because,] ... once the trustee makes [the] distribution, it will be difficult ... to get it back [emphasis added].⁴⁸

Mr. Brucken offers the following form and comments for notifying the beneficiary of a proposed distribution:

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.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444

[According to Mr. Brucken:]

There is no [provision in the form for] a release other than a blank where it might appear. A receipt covers simply the cash and/or securities distributed, period. A common Ohio practice is to send out a distribution statement, showing what is in the account and the proposed distribution to the one or more beneficiaries, with a request to the beneficiary to approve the statement, usually by signing a copy and returning it, and to give instructions for the security transfer. The distribution is then made. The actual receipt may then be the canceled check, or acknowledgment of receipt from the broker or other to whom the securities are transferred. Very little paperwork.

This approach is also encouraged by [Ohio Rev. Code Ann.] Sec. 817 ..., except that [Sec. 817] requires that the beneficiary also be informed of [her] right to object to [the proposed distribution in termination of trust] and ... its finality if [the beneficiary] does not object within the [thirty-day] statutory period.⁴⁹

C. The Pro-Fiduciary Approach: Form of Receipt and Release and Indemnification Agreement

If a practitioner decides to advise her client to seek the protection of a release, the release should restrict the scope of liability coverage only to those liabilities arising from specific breaches of trust and the practitioner should ensure that the breaches are clearly and explicitly documented within the R and R.

In situations where a breach of trust has occurred, it may be wise for the fiduciary to attempt to obtain the R and R from the beneficiary group. To facilitate the process, the trustee should disclose whatever information she has in her possession about the nature and extent of the breach. The disclosure should also include the fiduciary's best estimate of current and future loss arising from her breach. Depending on the nature and materiality of the breach, the fiduciary may wish to be proactive and suggest that the beneficiary engage a neutral and independent adviser or expert to assess the situation.

Upon learning of the breach, the beneficiary group will likely desire to assess the magnitude of the projected loss and, if it appears material, engage its own advisers. Two primary advisers that the beneficiary might consider engaging are independent counsel and a certified public accountant. The result of the intervention may be that the alleged breaches are found to be inconsequential. Alternatively, some may be agreed upon and settled. At that point, the beneficiary group may be ready to move ahead with the R and R.

Practitioners should consider using the following sample R and R form where the fiduciary chooses to adopt this approach:

RECEIPT, APPROVAL OF ACCOUNTS, RELEASE, AND INDEMNIFICATION AGREEMENT

I have received from
_____ (the "Trustee"),

⁴⁸ Email exchange with Robert R. Brucken, of Baker & Hostetler LLP (copy on file with the author.)

⁴⁹ *Id.*

as Trustee of the _____ Trust and as Trustee of the _____ Trust, (collectively the "Trusts") what has been represented to me by the Trustee to be a complete accounting (the "Account") of h___ administration of the Trusts as of _____. I have also received a share of that certain real property (the "Property") to which I am entitled under the instruments which govern the Trusts. In consideration of my receipt of the Account and of my share of the Property,

1. 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.

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

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

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

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

6. 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) which may be asserted or established against the Trustee, either as Trustee or individually, by reason of h___ 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, costs, 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 _____, 200__.

[NOTARY ACKNOWLEDGMENT]

VII. CONCLUSION

R and Rs can provide fiduciaries with significant benefits. To be effective and not jeopardize the parties' relationship, the R and R ideally should be discussed early and explained thoroughly to beneficiaries. If a fair and objective approach is taken from the onset of administration, the procedures used to obtain the R and R can prove to be both highly efficient and effective.

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