

Strategic Approaches to Reviewing the Actions of Executors and Trustees through Accounting

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Preliminary Matters

- ▶ A primary duty for any fiduciary is to account for their actions.
- ▶ Executors, Trustees (both testamentary and *inter vivos*), Guardians, and Agents under Power of Attorney are all required to account.

Statutory References

- ▶ A personal representative may settle his account or be required to settle his account in the Superior Court.—
3B:17-2
- ▶ A guardian or [testamentary] trustee shall settle his account in the Superior Court at intervals as the court may require.—3B:17-3
- ▶ A nontestamentary trustee shall have the right, in addition to and not in limitation of any other remedy now or hereafter provided, from time to time to settle his intermediate and final accounts in the Superior Court.—
3B:17-10

Form of Accounting

- ▶ What is a Formal Accounting?
- ▶ What is an Informal Accounting?

Fiduciary Accounting Principles

1. Accounts should be stated in a manner that is understandable by persons who are not familiar with practices and terminology peculiar to the administration of estates and trusts.
2. A fiduciary account shall begin with a concise summary of its purpose and content.
3. A fiduciary account shall contain sufficient information to put the interested parties on notice as to all significant transactions affecting administration during the accounting period.

Fiduciary Accounting Principles (cont.)

4. A fiduciary account shall include both carrying values—representing the value of assets at acquisition by the fiduciary—and current values at the beginning and end of the accounting period.
5. Gains and losses incurred during the accounting period shall be shown separately in the same schedule.
6. The account shall show significant transactions that do not affect the amount for which the fiduciary is accountable.

Starting an Accounting Action

- Most often an action to compel an accounting begins with a demand by a beneficiary
- But it can also start with the fiduciary presenting an informal accounting to the beneficiary and demanding that the beneficiary sign off on the accounting before a formal accounting is prepared and filed
- Accounting actions are expensive, and it is usually beneficial to all parties to be able to work out differences outside of court

Accounting Action Overview

- ▶ See Rule 4:87
- ▶ Actions to settle the accounts of executors, administrators, testamentary trustees, non-testamentary trustees, guardians and assignees for the benefit of creditors shall be brought in the county where such fiduciaries received their appointment. The action shall be commenced by the filing of a complaint in the Superior Court, Chancery Division, and upon issuance of an order to show cause pursuant to R. 4:83. A non-testamentary trustee shall annex to the complaint a copy of the written instrument creating the trust and stating its terms. The order to show cause shall state the amount of commissions and attorney's fee, if any, which are applied for.

Accounting Action Overview (cont.)

- ▶ Form of Account must be in accordance with Rule 4:87-3.
- ▶ The Account must be attached to the complaint with all exhibits.
- ▶ If all of the beneficiaries are known, include their names and addresses.
- ▶ If they are not known, then give notice to the Attorney General and file an affidavit of inquiry with the court.
- ▶ List creditors and any other interested party if the estate is insolvent.
- ▶ Use a genealogy report.

Answering the Complaint

- ▶ How should you respond to the Complaint?
 - ▶ File an Answer
 - ▶ File Exceptions
 - ▶ File a motion
- ▶ Generally, you have one bite at filing exceptions
- ▶ Exceptions do not need to be filed with an answer, but they generally must be filed within 5 days before the return date.

Exceptions to Account

- ▶ Rule 4:87-8
- ▶ In all actions for the settlement of accounts, other than plenary actions, any interested person may, at least 5 days before the return of the order to show cause or within such time as the court allows, serve the accountant with written exceptions, signed by that person or his or her attorney, to any item in or omission from the account, including any exceptions to the commissions or attorney's fees requested. The exceptions shall state particularly the item or omission excepted to, the modification sought in the account and the reasons for the modification. An exception may be stricken because of its insufficiency in law.

Exceptions to Account (cont.)

- ▶ For example, maybe the account fails to list mom's engagement ring. Then state: "The Account omits items of jewelry such as the Decedent's engagement and wedding rings. The administrator is required to account fully for all items of tangible personal property."
- ▶ The Account reports closing costs on the sale of the Decedent's property located at _____, New Jersey at \$22,158.39. However, the closing statement reports closing costs at just \$18,306.00. The administrator must account for this difference.

Exceptions to Account (cont.)

- ▶ Other examples:
- ▶ “The Account includes as corpus a HELOC advance of \$21,870.42 taken by the administrator. This inclusion is improper and should be disallowed.”
- ▶ “The Account reports a payment made to Smith & Smith in the amount of \$9,807.00 on January 10, 2013. This was before the date of the Decedent’s death. The executor must explain the nature and propriety of this payment.”
- ▶ “The Account reports a cash payment to “Bob Smith” on June 1, 2014 in the amount of \$550. The administrator must explain the nature and propriety of this payment.”

Return Date

- ▶ On the return date, the court is going to hold a hearing and attempt to resolve those exceptions that can be resolved.
- ▶ The court will likely provide for discovery for those exceptions that remain.
- ▶ Unless the court instructs you otherwise, be prepared to defend the actions taken by your client, if you represent the executor, or be prepared to discuss your exceptions, and any response received from your adversary.

Burden of Proof

- ▶ The burden of proving an exception claim falls on the person taking the exception.
- ▶ The burden of showing that there are more assets in an estate than are acknowledged by the executors in their account rests on the person taking the exception and the latter's contention's "must be sustained with reasonable certainty". In re Perrone, 5 N.J. 514, 521 (1950).
- ▶ Burden is on fiduciary to show any asset not marshalled was worthless. 7 Clapp, NJ Prac. Rev. 3rd Ed. §1469
- ▶ Similar application in insolvent estates. In re Mild's Estate, 25 N.J. 467, 488 (1957).

Damages

▶ Monetary Damages

- ▶ Recovery may be had from the fiduciary for either the amount that the devisee or heir lost by the breach of trust, or the amount the fiduciary gained thereby. 7 Clapp, N.J. Prac. Rev. 3rd Ed. §1122.

▶ Sanctions

▶ Removal of Fiduciary

- ▶ See NJSA 3B:14-18
- ▶ Also, a fiduciary that has been removed must deliver to his or her successor all assets and settle his or her account within 60 days of being removed. 3B:14-5

▶ Forfeiture of Commissions

Surrogate Fees – NJS 22A:2-30

- ▶ For filing complaint and one page of accounting, **\$175.00.**
- ▶ For auditing, stating, reporting and recording, microfilming or photostating, accounts of executors, administrators, guardians, trustees and assignees, including drawing judgment, but exclusive of advertising costs:
 - ▶ In estates up to and including \$2,000.00, no additional fee.
 - ▶ In estates from \$2,001.00 to and including \$10,000.00, **\$100.00.**
 - ▶ In estates from \$10,001.00 to and including \$30,000.00, **\$125.00.**
 - ▶ In estates from \$30,001.00 to and including \$65,000.00, **\$150.00.**
 - ▶ In estates from \$65,001.00 to and including \$200,000.00, **3/10 of 1% but not less than \$300.00.**
 - ▶ In estates exceeding \$200,000.00--**4/10 of 1%, but not less than \$400.00.**
- ▶ For each page of accounting in excess of one, \$5.00.

Timing

- Unless for special cause shown, a personal representative shall not be required to account until after the expiration of one year after his appointment. –3B:17-2

Timing (cont.)

- There is no statute of limitations on a fiduciary's obligation to account. see Phair v. Melosh, 125 N.J. Eq. 497 (Ch. 1939).
- Rule 4:85-1, which provides for a 4 or 6 month statute of limitations against will challenges does not apply
- However, the doctrine of laches can be applied.

Timing (cont.)

- For example, in an unpublished opinion, the Appellate Division held that dismissal of a beneficiary's accounting action was proper where the beneficiary executed a release and refunding bond and waited 5 years to allege mismanagement. In re Klausner, 2014 WL 2807480 (App.Div. 2014).
- In re Estate of Francesco Racamato, unpublished, Appellate Division decided Oct. 18, 2010.

When is Accounting Unnecessary?

- A fiduciary need not render or settle an account if the fiduciary files with the court a release or discharge from the beneficiary who has reached majority and is not incapacitated. The release or discharge shall be executed and acknowledged as provided for deeds of real estate to be recorded— N.J.S.A. 3B:17-1
- Also, see Rule 4:87-9 Dispensing with Accounting by Agreement

Non-judicial Settlement

- Unless the governing instrument expressly provides otherwise, an instrument settling or waiving an account, executed by all persons whom it would be necessary to join as parties in a proceeding for the judicial settlement of the account, shall be binding and conclusive on all other persons who may have a future interest in the property to the same extent as that instrument binds the person who executed it. –3B:17-3

Settling Account Language

- The Beneficiaries consent to and approve all of the transactions of the Trustees in connection with the administration of the Trust, including the investments, changes of investments and all reinvestments of the Trust property, as set forth in the statements, and the distribution of income and principal from the Trust, together with the payment of all income taxes, trust administration expenses, including but not limited to the payment of Trustees' commissions and all investment, legal and accounting fees, and the allocation of such expenses to income or principal, as the case may be, and do hereby ratify, confirm and approve all of the acts and proceedings of the Trustees as set forth in the statements.

Release Language

- The Beneficiaries do for themselves, their heirs, successors, assigns, and born and unborn descendants, remise, release and forever discharge the Trustee from any claim, loss, obligation, demand, action, cause of action, account, reckoning and liability of every kind and nature for and on account of every matter and thing whatever arising from or in any manner related to the administration of the Trust.

Release (cont)

- Generally, a beneficiary that has executed a release or discharge cannot later compel the fiduciary to account.
- However, in at least one case, the Superior Court required an Executor to account after the Executor received a release and refunding bond from the beneficiary. Bartel v Clarenbach, 114 N.J. Super. 79 (Ch.Div. 1971)
 - The general rule is that when all of the interested parties agree to an informal accounting and sign release and refunding bonds ..., none of them can later compel the fiduciary to account formally.... This rule is limited in its application to those instances where fraud, misrepresentation, mismanagement, or undue influence of the fiduciary or a substantial misunderstanding by the legatee are not shown.

46:2B-8.13 (Power of Attorney)

- An attorney-in-fact has a fiduciary duty to the principal, and to the guardian of the property of the principal if the principal has been adjudicated an incapacitated person, to act within the powers delegated by the power of attorney and solely for the benefit of the principal.

46:2B-8.13 (POA cont.)

- The attorney-in-fact shall maintain accurate books and records of all financial transactions. The principal, a guardian or conservator appointed for the principal, and the personal representative of the principal's estate may require the attorney-in-fact to render an accounting.
- The Superior Court may, upon application of any heir or other next friend of the principal, require the attorney-in-fact to render an accounting if satisfied that the principal is incapacitated and there is doubt or concern whether the attorney-in-fact is acting within the powers delegated by the power-of-attorney, or is acting solely for the benefit of the principal.

46:2B-8.13 (POA cont.)

- **Key considerations for representing the Agent:**
 - Advise your client to keep all statements, records, and transaction history;
 - Prepare annual reports as a form of accounting to the Principal, if possible, or the Principal's legal guardian, and have the Principal (or guardian) sign off on the accounting;
 - Consider filing a motion to recover statements and information necessary to account;
 - Don't forget payment of fees 46:2B-11(o)!

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