

# Practical Considerations of Fiduciary Accountings

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# Speakers



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# Selection, Duties and Responsibilities of a Fiduciary

# Selection of a Fiduciary

- Spouse
- Adult child or children
- Other relative (brother/sister, aunt/uncle, etc.)
- Family friend
- Beneficiary
- Attorney
- Accountant
- Bank or Trust Company

# Duties of a Fiduciary

- Loyalty
- Honesty and Integrity
- Good Faith to the Beneficiaries
- Impartiality (“Duty to Disappoint Equally”)
- Diversification (unless instruments directs otherwise)
- Maintain clear and complete records
- Account for assets

# Responsibilities of a Fiduciary

- Determine Trust Objective and Investment Strategy
- Manage/Invest/Safeguard all assets
- Collect Income - Make Mandatory and/or Discretionary Distributions
- Make Mandatory and Discretionary Principal Distributions
- Prepare and file Fiduciary Tax Returns
- Pay necessary expenses
- Maintain clear and complete records
- Prepare Intermediary and Final Accountings

# To Account, or Not to Account

- Fiduciary duty to account for assets
- Generally, no requirement for judicial accounting
- Release Agreements may not be enough
- Informal accountings take many forms

# Informal Accountings

- No accounting (not recommended)
- Waiver in Release Agreement
- Transaction Statements attached
- Partial/Selective Schedules
- Fully Scheduled



# Receipt and Release Agreement

# Receipt and Release

- Required to close an estate in many Courts
- Best practice even when not required
- <http://ww2.nycourts.gov/forms/surrogates/accounting.shtml>
- Form JA-2
  - But don't be fooled: the "Receipt and Release" form is not enough!
    - You need to worry about the disclosure behind the R & R.

# Receipt and Release

- a. Acknowledges that each fiduciary named above has fully and satisfactorily accounted for all assets of the estate;
- b. Approves the written account verified on September 9, 2019, as submitted to the undersigned;
- c. Acknowledges receipt of money paid or property transferred or delivered as follows:
  - Money (cash or check): **\$145,908.61**.
  - The following property: \_\_\_\_\_ valued at \$ \_\_\_\_\_.
  - The following payment is in full payment or distribution of:
    - a legacy under **Article VIII.** of the will or trust;
    - a claim against the estate;
    - the amount directed to be paid by a decree of this court dated ;
    - other *[specify]*
- c. Releases and discharges each fiduciary named above from all liability to the undersigned for any and all matters relating to or derived from the administration of the estate; waives the issuance and service of a citation to attend any and all proceedings for the judicial settlement of the account; and authorizes the Surrogate to make and enter a decree settling the account and fully releasing and discharging each fiduciary named above as to all matters embraced therein.

# A case everyone should read

- Accounting of Diana Carney, Will of Anton Spacek, NYLJ 11/9/14 (Surrogate McCarty)
  - Informal settlement of accounting consisting of:
    - R & R instrument
    - Disclosure:
      - estate tax return, showing:
        - » Amount each beneficiary gets
        - » Schedule E joint accounts
      - Estate checking account ledger
      - Consolidated & monthly Ameritrade accounts
      - Closing statement for sale of decedent's home

# A case everyone should read

- All benes except one signed the R & R backed up by the disclosure mentioned.
- Diana was one of benes who did sign. She & the one bene who did not sign later compelled judicial accounting.
- Executor filed the judicial accounting.
- Diana & other bene filed objections.
  - Issue: joint account held by decedent & executor
- Diana also filed motion for Court to set aside her signature of the R & R

# A case everyone should read

- Court cited Surrogate Bennett (Matter of Amuso), who acknowledged conflict between:
  - (1) Court's policy of encouraging informal settlements of accountings and
  - (2) Court's requirement that fiduciary acts with utmost honor in his dealing with estate beneficiaries

# A case everyone should read

Court noted:

1. In every case ultimate duty of fiduciary is to account in some form.
2. The form depends on nature of estate and its circumstances.
3. Regardless of form, accounting (disclosure, not just a R & R instrument) should be complete UNLESS the opportunity to provide disclosure is fairly made AND the bene affirmatively waives his right to the disclosure.
4. An executor "acts at his peril if he relies on a general release without EVIDENCE" of sufficient disclosure.
5. Court's warning: be mindful of bene who signs release but sleeps on right to disclosure only to show up later to attack the release.

# A case everyone should read

- Court's denies Diana's motion to set aside her signature of R & R because:
  - Executor's disclosure did show existence of joint account and that executor was joint owner.
    - Executor did not flag the joint accounts, but she also did not hide them
  - There was no misrepresentation of fact, no mistake, no collusion AND adequate disclosure was made



# A case everyone should read

Lessons:

1. Make adequate disclosure.
2. Be able to EVIDENCE that disclosure was made.
3. Have beneficiary waive any right to additional disclosure.

# Essential Elements of R & R

- Recite relevant facts: decedent, fiduciary appointment, admission of will to probate, relevant terms of will.
- State that parties voluntarily choose to have accounting settled by agreement rather than a judicial proceeding.
- Explicitly list in detail in the R & R every document provided (or offered to be provided) to the beneficiaries. These documents, together with the recitals of fact, should be defined as the “Account”. It is this Account that is being approved by the beneficiaries.

# Essential Elements of R & R

Documents to disclose typically include:

1. Will/trust
2. Account statements
3. Estate tax return, including exhibits/appraisals
4. Decedent's final income tax return
5. Estate's (fiduciary) income tax returns
6. Closing statement for real estate that's sold
7. Calculation of commissions

# Essential Elements of R & R

(Cont. of documents typically included)

8. Consolidated statement of income received, disbursements and distributions previously made, legal & accounting fees, proposed distribution schedule.

# Essential Elements of R & R

## OTHER KEY PROVISIONS FOR THE AGREEMENT

1. Beneficiaries should explicitly waive right to additional disclosure.
2. Beneficiaries state that they have reviewed and approve the Account, release Executor from any liability regarding Account.
3. Beneficiaries waive Citation, right to compel judicial accounting, consent that order issued approving the Account.
4. Beneficiaries acknowledge receipt of assets listed in proposed distribution schedule.

# Essential Elements of R & R

## OTHER KEY PROVISIONS FOR THE AGREEMENT

5. Beneficiaries agree to refund Executor distributed asset (or proceeds of the reinvestment thereof) for any estate expense he incurs after distribution (no personal liability).
6. Beneficiaries agree to indemnify Executor for any estate expense he incurs after distribution (personal liability, sometimes capped at value of distribution).
7. Beneficiaries represent they have not assigned their interest in estate.

# Essential Elements of R & R

## OTHER KEY PROVISIONS FOR THE AGREEMENT

8. Integration clause: nothing agreed upon is outside 4 corners of the R & R.
9. Choice of law provision: New York

## ISSUES TO CONSIDER:

Who are necessary parties to agreement?

Can virtual representation be helpful (SCPA 315)?

What if necessary party is a minor? (Parental indemnity?)

# Uniform Principal and Income Act



# Uniform Principal & Income Act (UPIA)

- History
- EPTL Article 11-A
- Principal vs Income Receipts
- Principal vs Income Disbursements
- Importance in a Trust Accounting
- Implication to Trustee Commissions

# UPIA Nuances

- When Right to Income begins & Ends (11-A-3.1)
- Receipts from Entities (11-A-4.1 – 4.3)
- Insurance (11-A-4.7)
- Deferred Compensation & Annuities (11-A-4.9)
- Liquidating Asset (11-A-4.10)
- Depreciation (11-A-5.3)
- Income taxes (11-A-5.5)

# NYS Format of Accounting

# Trust Accounting Format

## Principal

<b>Schedule A</b>	Principal Received
<b>Schedule A-1</b>	Realized Increases
<b>Schedule B</b>	Realized Decreases
<b>Schedule C</b>	Funeral & Administration Expenses and Taxes
<b>Schedule C-1</b>	Unpaid Administration Expenses
<b>Schedule D</b>	Creditor's Claims
<b>Schedule E</b>	Distributions of Principal
<b>Schedule F</b>	New Investments, Exchanges & Stock Distribution
<b>Schedule G</b>	Principal Remaining on Hand

## Income

<b>Schedule A-2</b>	Income Collected
<b>Schedule C-2</b>	Administration Expenses Chargeable to Income
<b>Schedule E-1</b>	Distributions of Income
<b>Schedule G-1</b>	Income Remaining on Hand
<b>Schedule H</b>	Interested Parties
<b>Schedule I</b>	Computation of Commissions
<b>Schedule J</b>	Other Pertinent Facts and Cash Reconciliation

# Estate Accounting Format

<b>Schedule A</b>	Principal Received	<b>Schedule E</b>	Distributions of Principal
<b>Schedule A-1</b>	Realized Increases	<b>Schedule F</b>	New Investments, Exchanges & Stock Distribution
<b>Schedule A-2</b>	Income Collected	<b>Schedule G</b>	Principal Remaining on Hand
<b>Schedule B</b>	Realized Decreases	<b>Schedule H</b>	Interested Parties
<b>Schedule C</b>	Funeral & Administration Expenses and Taxes	<b>Schedule I</b>	Computation of Commissions
<b>Schedule C-1</b>	Unpaid Administration Expenses	<b>Schedule J</b>	Other Pertinent Facts and Cash Reconciliation
<b>Schedule D</b>	Creditor's Claims	<b>Schedule K</b>	Estate Taxes Paid and Allocation of Estate Taxes

# Commission Calculations

Surrogate's Court Procedures Act (SCPA)

**Estates § 2307**

**Trusts § 2309**

# Estate Commissions

- Fair Market Value at Date of death (Alternate value irrelevant)
- Real Estate Commissions
- Multiple Executors

# Executor Commissions

## SCPA § 2307

Receiving & Paying	< \$100,000	5%
Receiving & Paying	< \$200,000	4%
Receiving & Paying	< \$700,000	3%
Receiving & Paying	< \$4,000,000	2.5%
Receiving & Paying	< \$5,000,000	2%



## SCHEDULE I - STATEMENT OF COMPUTATION OF COMMISSIONS

Estate of Sample Estate Accounting  
For Period 8/22/2015 Through 10/31/2019

### Commission for Receiving

Schedule A - Principal Received	\$ 2,182,840.25	
Schedule A-1 - Realized Increases	96,060.00	
Schedule A-2 - Income Collected	49,082.27	
Less non-commissionable amount	<u>0.00</u>	
Basis for Receiving Commissions		\$ 2,327,982.52

#### Computation

2.50% on \$100,000.00	2,500.00	
2.00% on \$200,000.00	4,000.00	
1.50% on \$700,000.00	10,500.00	
1.25% on \$1,327,982.52	<u>16,599.78</u>	

Total Receiving Commission		\$ 33,599.78
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### Commission for Paying

Schedule C - Funeral, Administration and Taxes	147,165.02	
Schedule D - Creditor Claims Paid	42,636.29	
Schedule E - Distributions of Principal	1,020,032.58	
Schedule G - Property Remaining on Hand	1,091,253.62	
Less non-commissionable amount	<u>0.00</u>	
Basis for Paying Commissions		2,301,087.51

#### Computation

2.50% on \$100,000.00	2,500.00	
2.00% on \$200,000.00	4,000.00	
1.50% on \$700,000.00	10,500.00	
1.25% on \$1,301,087.51	<u>16,263.59</u>	

Total Paying Commissions		33,263.59
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### Total Commissions

		<u>\$ 66,863.37</u>
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# Commission Calculation-Trust

- Presumptive Value vs Fair Market Value
- Beginning of the year vs End of the Year
- Proration
  - Short year
  - Principal contributions & Distributions
- Annual Commission
- Commission for paying Principal
- Multiple Trustees
- Real Estate commissions

# Trustee Commissions

## SCPA § 2309

- Annual Commission
  - \$10.50 per \$1,000 – first \$400,000
  - \$4.50 per \$1,000 on next \$600,000
  - \$3.00 per \$1,000 on all additional principal
- Terminating Commission 1%

# Trustee Commissions - Sample

## SCHEDULE I - STATEMENT OF COMPUTATION OF COMMISSIONS

Sample Annual Trust Accounting  
For Period 1/1/2019 Through 12/31/2019

Commission on Trust Assets			
Schedule G - Principal Remaining on Hand	\$ 1,619,899.44		
Prorated value of principal distributions	5,590.33		
Prorated value of additional contributions	0.00		
Total value of trust assets subject to commission		\$ 1,625,489.77	
Computation			
1.05% on \$400,000.00	4,200.00		
0.45% on \$600,000.00	2,700.00		
0.30% on \$625,489.77	1,876.47		
Annual commission based on value of trust assets		8,776.47	
Annual proration factor	X	100.00%	
Prorated annual commission			\$ 8,776.47
Total commission			\$ 8,776.47

# Judicial Accounting Proceeding

# Judicial Accounting Proceeding

How are they commenced?

1. Voluntarily (SCPA 2208) by the fiduciary

or

2. Compulsory (SCPA 2205) by, among others, beneficiary, fiduciary of deceased beneficiary, creditor, PA, AG, co-fiduciary after he files his own judicial account and petition for settlement.

# Key Features of Judicial Accounting Proceeding

First issue: getting jurisdiction over all necessary parties.

- Again, Virtual Representation (SCPA 315) can be your friend.
  - If relying on VR, be mindful of Rule 207.18 of Uniform Rules for Surrogate's Court, which under certain circumstances requires affidavits of the petitioner and the virtual representor
- Minor beneficiaries will have a Guardian ad Litem (attorney) appointed. Selected by the Court. Fees paid by Estate.

Jurisdiction is a topic worthy of its own CLE.

# Key Features of Judicial Accounting Proceeding

Next issue: Discovery (SCPA 2211).

There are two types of discovery:

1. Pre-objection discovery
  - Fiduciary may be examined (e.g., deposition)
  - Document discovery pursuant to CPLR Article 31 (any document that's relevant).and
2. Post-objection discovery (filing of objection is start of "lawsuit")
  - CPLR Article 31 (includes deposition of any person, but not fiduciary if already examined before objections filed)



# Key Features of Judicial Accounting Proceeding

If objections are filed:

- Court schedules a pre-trial conference
  - Narrows the issue for trial or settlement
  - Court encourages settlement
  - Court encourages mediation
- Motion Practice (can take years)
  - Petitioner can move to dismiss objections (i.e., no legal basis for objection)
  - After discovery, either party can move for summary judgment (i.e., no undisputed facts & moving party should prevail as a matter of law)

# Key Features of Judicial Accounting Proceeding

If motion practice fails to resolve the objections, matter proceeds to trial.

Most accounting issues are decided by the Surrogate (equitable issues) and not by a jury (legal issues).

If Court finds that fiduciary breached his fiduciary duty and that such breach caused damage to the estate/trust, the Court will decide the remedy.

# Fiduciary Liability

# Fiduciary Liability

If the Court finds that the fiduciary breached his fiduciary duty, the Court could do the following:

1. Deny commissions (punitive)
2. Surcharge the fiduciary to make the estate/trust whole.
  - Personal liability: fiduciary dips into his pocket.
  - Court imposes pre-judgment interest
    - Court has discretion in setting interest rate. A higher rate can be form punitive in nature.
3. Remove the fiduciary from office.

# Fiduciary Liability

Appreciating the potential extent of what is required to make the estate/trust whole.

Consider the numerous ways an estate/trust can be harmed:

- Imprudent investments.
  - Lack of diversification, lost opportunity
- Operating business – failure to monitor.
- Improper tax payments/filings that cannot be refunded.
- Improper distributions or disbursements that cannot be recovered.

The background features a series of classical columns in shades of blue and brown. A repeating watermark of the word 'GRASSI' is visible in the upper right corner. The word 'Questions?' is centered in a large, white, sans-serif font.

# Questions?



**Lisa Rispoli, CPA, AEP, TEP**

*Partner, Trust & Estate Services  
Leader*

Lisa Rispoli is the Partner-in-Charge of Trust & Estate Services at Grassi and leader of the firm's Private Client Services group. She has over 30 years of experience in accounting, estate planning & valuation, as well as gift, estate and trust taxation. Lisa is adept at working with clients and their professional advisors to develop estate plans to transfer family, business and personal wealth to the next generation and charitable organizations. Lisa currently serves as President of the New York City Estate Planning Council.

Lisa assists executors and trustees, providing administration and fiduciary services – including litigation support tax compliance, income tax planning, and court-prescribed accountings. Her expertise in post-mortem planning and compliance guides executors through the complex process of administering estates. Her attention complements her knowledge in these areas to detail and the individual needs and unique financial circumstances of her clients.

Lisa is well recognized as an Estate Accounting Expert by various Surrogate Courts and works closely with many of the Tri-State's leading attorneys. She is recognized by the National Association of Estate Planners & Councils (NAEPC) as an Accredited Estate Planner (AEP). She holds the Trust and Estate Practitioner (TEP) designation from the Society of Trust and Estate Practitioners. Long Island Business News has recognized her as 2023's biggest influencer in accounting, while the Long Island Herald has spotlighted her as a top finalist for the Best Accountant award.



**Lisa Rispoli, CPA, AEP, TEP**

*Partner, Trust & Estate Services  
Leader*

Prior to joining Grassi in 2015, Lisa was the president of her own firm which she founded in 2000 after transitioning from a successful career at a Big 4 firm. Among her many professional and civic accolades, Lisa was recognized by Crain's New York Business among the 2021 Notable Women in Accounting & Consulting. She has been honored by Long Island Business News (LIBN) as one of the Top 50 Women in Business and has appeared in the publication's Who's Who for Women in Professional Services. She was also a 2017 Midas Award recipient, an honor that recognizes individuals who exemplify quality in their professions and communities.

Lisa earned her BBA in accounting from Adelphi University and her master's degree in taxation from Long Island University. She is an active member of the New York State Society of CPAs, AICPA, Estate Planning Council of New York City and Nassau County, Columbian Lawyers, and the Westchester Bar Association. She has written for Crain's New York Business, New York Law Journal, Palm Beach Daily News, Newsday, CNN, and Bar Association journals on topics relating to Estate and Trust Planning & Administration. She has served on the Board of Bethany House, an organization that provides emergency shelter and services for women and children. Crain's New York has recognized her in recent years as one of the most Notable Women in Accounting.





## **Joseph T. La Ferlita, Esq.**

*Partner*

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Joseph T. La Ferlita practices trusts and estates law, with an emphasis on estate planning, estate and trust administration, and tax controversy. He counsels individual planning clients, beneficiaries, individual and corporate fiduciaries and not-for-profit entities, including public charities and private foundations in connection with a multitude of estate- and trust-related matters in the Surrogate's Court and the United States Tax Court.

Joe's work includes drafting wills and trusts, estate and generation-skipping tax planning, audits of estate tax and income tax returns, the formation of not-for-profit entities, obtaining private letter rulings from the Internal Revenue Service, probate proceedings, administration proceedings, judicial accounting proceedings, judicial proceedings for advice and direction on behalf of executors and trustees, spousal elective share proceedings, and proceedings for the construction and reformation of wills and trusts. He also has drafted proposals for new and amended estate-related New York statutes.

Joe is a Board Member and Secretary of the Nassau County Estate Planning Council, and is both Co-Chair of the Estate Planning Committee and Member of the Executive Committee of the Trusts and Estates Section of the New York State Bar Association. Joe was named a Super Lawyer in the Metro New York Area for Estate & Probate in 2023.



**Richard G. Chalifoux, J.D., AEP®**

*Senior Managing Director / Fiduciary Services  
Webster Bank*

Richard G. Chalifoux is a Senior Managing Director of Fiduciary Services at Webster Private Bank. He has more than 35 years of experience in estate planning and trust services. Prior to joining Webster Private Bank, Rick was a Managing Director and Senior Trust Officer at First Republic Trust Company in Garden City, NY. Prior to his experience at First Republic, Rick served as a Senior Vice President at U.S. Trust Company of New York, he headed the Estate and Trust Administration Department for North Fork Bank and was a member of the Estate and Trust Administration Group at Morgan Guaranty Trust of New York. Rick also was a law practitioner for several years with concentrations in trust and estate administration and planning.

He is the immediate past-president of The Estate Planning Council of Nassau County, Inc. (2006, 2020-2022) and also currently serves as the Council's representative to the NAEPC. In 2022, he received the Council's inaugural Gary H. Friedenberg Service Award in recognition of outstanding leadership and service. Rick is also a past co-chair of The Suffolk County Bar Association's Surrogate's Court Committee. In addition, he is a member of the American, New York State, Nassau County and Suffolk County Bar Associations. He is a frequent lecturer on various trust and estate topics.

Rick is certified as an Accredited Estate Planner® by the National Association of Estate Planners and Councils (NAEPC). In 2022, he received the NAEPC's inaugural Robert E. Fox Volunteer Service Award in recognition of exceptional volunteer service to his local Estate Planning Council, community and NAEPC.

Rick is a graduate of The College of the Holy Cross and Albany Law School of Union University. He resides in Islip, NY.