New York Law Journal

The Fiduciary Duty To Account

By **Bruce M. DiCicco**

One of the most common issues arising in the context of estate and trust administration in my experience is the refusal or failure of a fiduciary to account to the beneficiaries and/or the cestui que trust. Related to that issue are demands for an accounting when there is no right to request an accounting. The method of accounting, informal versus formal, has been written about in numerous places so it is not the purpose of this article to elucidate those matters here. (See for example, "The Basics of Settling an Executor's Account" by Patricia C. Marcin, New York State Bar Journal, Spring 1999.) This article targets the variety of reasons as to why a fiduciary does not account and when a fiduciary can rightfully refuse to render an account.

Requirement to Account

The general rule is that all fiduciaries are required to account to the beneficiaries for whom they hold the estate. 42 NY Jur. 2d Decedent's Estate §2079; *Matter of Iannone,* 104 Misc.2d 5, 431 NYS2d 904 (Surr. Ct. Monroe Cty. 1980). Remarkably, some fiduciaries think that a close personal association with the decedent and a high degree of familiarity in their personal relationship relieves them of the responsibility to account; it does not. The duty to account is absolute and is not varied by the amount of knowledge that a beneficiary may possess respecting the actions and transactions of the fiduciary in the performance of his or her duties. So beneficiaries that know from other sources or even informally from the fiduciary as to what transpired in the administration may still request an accounting.

The executor of an estate has the duty to make a complete disclosure of all relevant data pertaining to the estate and to render a full and accurate account of his or her proceedings. Am. Jur. 2d Executors and Administrators §832. "An essential element of a trust is accountability of the trustee for its administration. Accordingly, a trustee has a duty to keep proper and accurate accounts and to make reasonable disclosures to the beneficiaries upon request. A trustee must, just as does an executor, render a full and accurate account of all transactions in the performance of its trusts." 106 N.Y. Jur. 2d Trusts §375.

> The duty to account is absolute and is not varied by the amount of knowledge a beneficiary may possess respecting the actions and transactions of the fiduciary in the performance of his duties.

The duty of an agent to account for monies of his or her principal coming into the hands of the agent is well recognized and includes agents operating under a power of attorney. 2A N.Y. Jur 2d Agency and Independent Contractors §239; *Estate of Dorothy Shea*, NYLJ, June 3, 2003, p. 20, col. 2 (N.Y. Cty. Surr. Ct., Preminger, Surr.)

A co-executor can compel the other co-executor(s) to account. *Estate of Anna Helen Solomon,* NYLJ, May 11, 1993, p. 23, col. 3 (Bronx Cty Surr. Ct., Holzman, Surr.) However, a co-fiduciary who is equally culpable for the breach of duty cannot prevail in a claim against his co-fiduciary for breach of a fiduciary obligation shared by both. *Matter of Zimmerman,* 242 AD2d 203 (1st Dept. 1997). So in *Estate of Jack Mcintosh,* NYLJ Oct. 6, 2014, p. 21, col. 6 (N.Y. Cty. Surr. Ct., Anderson, Surr.) the court held that a co-trustee could not recover against the other fiduciary for the failure to claim a refund of income taxes since the duty to collect and pay taxes is a shared fiduciary duty. In essence the effect of the ruling was that a shared fiduciary duty did not give rise to the right to demand an accounting on that issue. But where co-fiduciary #1 knew or participated in the breach of duty, co-fiduciary #2 does not escape liability (and must account) to the beneficiary even though the beneficiary is co-fiduciary #1.

In *Estate of Harvey Littleton*, NYLJ, June 16, 2014, p. 21, col. 5 (N.Y. Cty. Surr. Ct., Anderson, Surr.), HSBC Bank USA N.A., as trustee, moved to dismiss the objections of the beneficiary/co-executor; those objections claimed that the bank breached its fiduciary duty by its failure to timely dispose of a concentrated position in Corning Glass stock. Objectants contended that for eight years after the initial funding the bank did virtually nothing to develop an investment plan, meet with and determine the income needs of the beneficiary, meet with the remainder persons, or diversify the portfolio.

The bank countered that the beneficiary as a co-executor of the estate from which the trust was funded knew the investment position held by the trust and participated in the decision to fund the trust with the stock. The court held that the bank could not rely on the acts of others to escape its duties. The passage of time alone does not relieve the duty to account. *Estate of Isidore Penn,* NYLJ Dec. 30, 1993 (N.Y. Cty. Surr. Ct., Roth, Surr.)

Authority of Court

The court on its own motion may also require an accounting from a fiduciary. SCPA §2205 (1). The court is guided by the best interests of the estate in determining whether to allow a request to compel an account. *Matter of Taber,* 96 AD2d 890 (2d Dept. 1983); *Estate of Jean Kennedy,* NYLJ June 14, 2013, p. 23, col. 1 (N.Y. Cty. Surr. Ct.. Anderson, Surr.) The court also has the authority to "take and » Page 8

BRUCE M. DICICCO *is an attorney in Manhattan; his practice is limited to estate planning, trust and estate administration and litigation in the Surrogate's Court.*

Account

« Continued from page 4

state" the account of the fiduciary. This power allows the court to make findings of fact with respect to the receipts and disbursements that are to be charged or credited to the fiduciary and enables the court to enter a decree judicially settling an account in accordance with SCPA §2215 from an account rendered by someone other than the fiduciary to be bound. Once the court does so, the fiduciary whose account was taken and stated is bound by the findings made pursuant to the account.

In *Estate of William L. Harmony,* NYLJ July 10, 2007, p. 31, col. 1 (Westchester Cty. Surr. Ct., Scarpino, Surr.) the court revoked letters of trusteeship, appointed successor trustees, directed the removed trustees to account and directed that if the removed trustees did not account, the successor trustees should do so. The removed trustees did not account so once the account was submitted by the successor trustees the court "took and stated" the account as presented.

The failure to have or retain relevant records does not relieve the duty to account. *In Re Estate of Julius Feinberg,* 21 Misc.2d 715, 196 NYS2d 393 (Surr. Ct. N.Y. Cty. Surr. Ct., DeFalco, Surr. 1959). The failure to keep records may result in all doubts being resolved against the fiduciary. *Matter of Shulsky,* 34 AD2d 545, 309 NYS2d 84 (2d Dept. 1970).

A creditor can also compel an accounting. SCPA §2205(2)(a). But where a creditor brought an action in Supreme Court against the executor to enforce its claim, the Surrogate denied a subsequent application by the creditor seeking to compel an account because one of the respondents in the action was a living third party. In the case, Rhem Air Conditioning and Mechanical Corp. was a subcontractor that had provided services to the decedent during his lifetime and to a general contractor of the decedent.

The court noted first that under SCPA §1808, Rhem was given the opportunity to determine the validity of its creditor claims before an accounting proceeding so as to avoid the expense and delay of a full-blown accounting. Instead of starting the Supreme Court action, Rhem could have sought a determination of its claim in Surrogate's Court without an accounting under SCAP §1808. Second, the court noted that the action in Supreme Court by Rhem included causes of action against the general contractor. The general contractor was a living party. The existence of the living general contractor meant that the dispute in part involved a matter between living persons.

The court therefore directed that the estate merely not distribute funds to any beneficiaries without enough in reserve for payment of the claim of Rhem until the Supreme Court action was decided. *Estate of Charles D. Seaman a/k/a Charles Seaman,* 146 Misc.2d 563, 551 NYS2d 454 (Nassau Cty. Surr. Ct., 1990).

The court has even held a de facto fiduciary liable to account. In *Matter of M.C.,* NYLJ July 27, 2009, p. 20, col. 3 (Dutchess Cty. Surr. Ct., Pagones, Surr.), the court ordered the account of the respondent who was neither an executor, trustee or agent under a power of attorney but who collected money ostensibly for a scholarship fund for the children of their deceased father. The court stated that "a fiduciary relationship exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence."

A contingent remainderman can compel an accounting. In a case where decedent set up a trust, the remainder beneficiaries, even though they would only take if they survived the income beneficiary, could compel an account. *Matter of Ruth Hunt,* 84 AD 159, 82 NYS 538 (3d Dept. 1903), aff'd 179 NY 570 1904). SCPA §2205(2)(b) provides the general rule that "a person interested" may seek an order to compel and account. Contingent remainder beneficiaries are considered persons interested. Courts have, however, also denied the contingent beneficiary an account where several layers of contingencies had to occur before the demanding beneficiary would take under the will. See, for example, *Estate of Daniel Moloney,* NYLJ May 13, 2014 (Suff. Cty. Surr. Ct., Czygier, Surr.)

The court has allowed an informal account to suffice rather than requiring a judicial accounting when it showed that the demanding party would not have an interest in the estate since the party already received her 50 percent share left under the governing instrument in other assets. *Estate of Jean Kennedy*, supra. The existence of an action in federal court requiring an account under the RICO statute (18 USCA §1961) did not relieve the fiduciary of a duty to account in the Surrogate's Court because the relief in the RICO action was not necessarily dispositive of the issues in the accounting proceeding. *In Re Cohen,* NYLJ March 13, 1995, p. 32, col. 3, (Nassau Cty. Surr. Ct., Radigan, Surr.).

Even if the fiduciary did not collect any assets during his or her administration, he could still be required to account where the court determines it is in the best interest of the estate to do so. See for example *Estate of Anthony Mecca,* NYLJ Dec. 22, 1993, p. 25, col. 1 (N.Y. Cty. Surr. Ct., Roth, Surr.) allowing such a request. But see *Matter of Taber*, supra. and *Estate of Bernard Leyden,* NYLJ March 1, 2010, p. 25, col. 2 (N.Y. Cty, Surr. Ct., Glen, Surr.) denying the request where there was no purpose to the account that would benefit the estate.

Documents and Waiver

All documents relevant to the administration must be supplied when demanded by a party in interest to an accounting. But requests for personal tax returns of the fiduciary are a sensitive subject and usually will be denied. *Estate of Jennie Waugh Callahan*, NYLJ Jan. 16, 2009, p. 38, col. 5 (Westchester Cty. Surr. Ct., Scarpino, Surr.).

The fiduciary duty to account cannot be waived unilaterally for the fiduciary because the failure to account is a failure of reasonable care, diligence and prudence. EPTL 11-1.7; *Matter of Brush,* 46 Misc.2d 277 (Surr. Ct. NY Cty. 1965). *Potter v. McAlpine,* 3 Dem. 108, 128, decided in 1885, held that a provision dispensing with an inventory was invalid. The court said, "If a testator can dispense with the making of an inventory by will, many of the safeguards thus thrown around the estate which comes to the hands of the executor would be thrown down, and fraud and misrepresentation of the trust property would be rendered much easier and less liable to detection than at present. It is against public policy to permit such interference with the forms of procedure established by law, or to remove the barriers designed to protect estates from misappropriation. The safety, preservation and honest distribution of decedent's estate require that provisions like the one in question should be declared invalid and of no effect."

All documents relevant to the administration must be supplied when demanded by a party in interest to an accounting. But requests for personal tax returns of the fiduciary are a sensitive subject and usually will be denied.

In *Matter of Curley,* 151 Misc. 664, 675, mod. on other grounds 245 App. Div. 255, aff'd. 269 N.Y. 548 decided in 1934, it was held that the attempted exoneration of a fiduciary from neglect or misconduct was "a waste of good white paper." See also, *Matter of Burden,* 5 Misc.2d 558; *Matter of Uran v. Uran,* 24 Misc.2d 1069, 1071; 2 Scott, Trusts [2d ed.], §172). *Matter of Lubin,* 539 NYS2d 695 (Bronx Cty. Surr. Ct., Holzman, Surr. 1989).

As set forth above, fiduciaries must keep accurate and complete records of their administration or risk facing findings of malfeasance leading to surcharge. While some requests for an account can land out of bounds (remote contingent beneficiaries and personal tax information) the exceptions are few and far between.