Defensive Trustee Reporting:

How to Keep the Beneficiaries from Going on the Offensive

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Defensive Trustee Reporting: How to Keep the Beneficiaries from Going on the Offensive[1]

I. The Duty to Disclose and Report

A fundamental and mandatory duty of a trustee is the duty to disclose trust financial information. The Revised Code of Washington ("RCW") and Oregon's Uniform Trust Code ("UTC") codifies the duty to inform and report in RCW 11.98.072[2] and ORS 130.710. The primary purpose of this duty is for the trustee to communicate with beneficiaries information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce their rights and to prevent or redress any breach of trust. See Restatement (Second) of Trusts Section 173 cmt. c (1959). It is also important to note our trust laws, in Washington and Oregon, must be supplemented with the common law of trusts and principles of equity.

The intention of this paper is to only summarily discuss the fundamentals of trust reporting and more fully expand on defensive strategies. I will also address what happens when a report is not done properly or is refused, and the potential impact on both the trustee and beneficiary. Although this paper focuses on trustees and their accounting, many of the topics included here can be applied to other fiduciaries, such as personal representatives or conservators.

A. When to Disclose

A trustee has an affirmative duty to account at least once a year and when a trust terminates, pursuant to ORS 130.710(3). RCW 11.106.030 is the same, however, the accounting due at termination is discretionary citing it "may" be filed by the trustee.

The trust document may alter this duty to report, but not entirely. A trustee always has the duty to inform the beneficiaries and the distributees have the right to request a report of an irrevocable trust. See RCW 11.106.020; ORS 130.020(2)(h).

Early on in the administration, the trustee should consider providing detailed asset information to the beneficiaries, as of date of death or when the trustee began acting as trustee. Disseminating financial information sooner than later should satisfy some questions and desire for the details by the beneficiaries. Relaying this financial information can also start the statute of limitations running for the benefit of the trustee, discussed more later. Distributing a report early in the administration may also flesh out any problems the beneficiaries have with the administration and potentially force their objection. An early objection can be helpful to allow time for remedial action and properly managing expectations.

Beneficiaries can certainly object during the statute of limitations period, but what if the statute of limitations has expired? One should use care in voluntarily distributing an accounting that provides information that may allow a beneficiary to raise claims for periods which

[1] Caveat: Please note I am licensed and practice in Oregon, not Washington, so this paper was originally written pursuant to Oregon law, with the subsequent minimal additions of some relevant Washington State trust law. I am not familiar with the practice of Washington's laws, so please use caution with those references herein.
[2] See also *In re Estate of Ehlers,* 80 Wash. App. 751, 757, 911 P.2d 1017, 1021 (1996).

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otherwise might be barred. For example, if the statute of limitations has expired or old information is barred by the doctrine of laches, consider the argument that newly distributed information re-starts or waives the statute of limitations. When terminating a trust, where earlier accountings have been provided, it may be advantageous for a trustee to choose to limit any accounting to the most recent period (eg. 1 year in Oregon or 3 years in Washington), rather than open up earlier periods to objection (eg. the past 5 or 10 years). It could be very unfortunate for the trustee to open up matters that they were already statutorily protected against, so a thoughtful analysis at the onset of such a situation is helpful here.

1. Co-Trustees and New Trustees; Oregon

Regarding particulars for cotrustee's reporting, the official comment to ORS 130.710(3) clarifies: "Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the trustee's resignation or removal…" (emphasis added).

When a new trustee is taking over a trust administered by a predecessor trustee, they should demand a complete accounting and require the predecessor trustee deliver possession of all the trust property reflected in the records. See ORS 130.630(3).

B. How Much to Disclose

As a general rule under fiduciary law and trust law, disclosure of information is favored as the better policy for the benefit of the trustee and the beneficiary. While the RCW's use the term "annual statement" and "account", Oregon's UTC intentionally uses the term "report" regarding a trustee's duty to disclose financial information, versus the term "accounting," with the intent toward flexibility in its compliance. The terms report and accounting are often used simultaneously in practice and this article uses both terms interchangeably. The official comment to ORS 130.710 elaborates on the UTC drafters' selection of trustee "reports":

> The Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

The flexible nature of trustee reports can work in your favor on the one hand, or be difficult to ascertain a minimum level of information necessary to meet the statutory requirements on the other hand.

A trustee has the burden to provide accurate accountings and documentation regarding all trust assets. This is a strict duty and all doubts are resolved against a trustee who maintains an inadequate accounting system. When accountings are convoluted and/or difficult to produce due to inadequate record keeping, the court is likely to consider this in assessing damages. See RCW

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11.96A.150, ORS 130.815. So a trustee should err on the side of more disclosure than less disclosure, as well as complete disclosure.

C. Who is Entitled to a Report

1. Types of Beneficiaries; Washington

Permissible distributees are entitled to receive annual accountings, pursuant to RCW 11.106.020. A "permissible distribute" means a trust beneficiary who is currently eligible to receive either trust income or principal, whether the distribution is mandatory or discretionary. RCW 11.98.002 (same definition as ORS 130.010(10)). Yet all beneficiaries may request an inventory of the trust assets from the trustee at any time. RCW 11.106.020. Regarding revocable trusts, the beneficiaries' rights are subject to the control of the trustor and the duties of the trustee are owed only to the trustor. RCW 11.103.040. See generally below.

2. Types of Beneficiaries; Oregon

Basically, there are tiers or levels of beneficiaries that should be analyzed to determine who the trustee owes a duty to report to. The trustee only owes a duty to report to beneficiaries entitled to current distributions. To categorize, there are essentially three types or tiers of trust beneficiaries: 1.) current beneficiaries, 2.) vested remainder beneficiaries, and 3.) contingent remainder beneficiaries. ORS 130.710(3)(a) requires a trustee to, "send a trustee report…to the permissible distributees of trust income or principal and to other qualified beneficiaries who request the report." A "permissible distributee" is a beneficiary who is currently vested and able to receive distributions of either mandatory or discretionary trust income or principal. ORS 130.010(10). So a permissible distributee includes tier 1 beneficiaries, meaning a trustee owes an affirmative duty to report to currently vested beneficiaries, and may include tier 2 beneficiaries if they are entitled to present income or principal of the trust.

The trustee owes different duties to contingent remainder beneficiaries. Either a vested or contingent remainder beneficiary that is ascertainable may receive information, but it is only mandatory if it is requested by that beneficiary. The official comment to ORS 130.710 clarifies the trustee's ability to expand who they give information to: "The trustee may, but is not required to, respond to any other beneficiary's request for information related to the administration of the trust if reasonable under the circumstances." The trustee does not have an affirmative duty to inform and report to tier 2 and 3 remainder beneficiaries, yet they may use their discretion to do so. In appropriate situations, the trustee should consider providing reports to ascertainable vested and/or contingent remainder beneficiaries, for purposes of either starting the statute of limitations to protect the trustee, for clarification purposes, or to mitigate future disputes.

In summary, the trustee *must* give reports to current beneficiaries, even if they do not ask for them. The trustee *may* provide reports to vested remainder beneficiaries, but only *must* do so if that beneficiary requests a report. The trustee *may* provide reports to contingent remainder beneficiaries, but it is within the trustee's discretion.

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3. Default Provisions; The Settlor's Intent

A settlor can alter the duty to report in the trust document somewhat, but not entirely. RCW 11.98.072(5); ORS 130.020 (the UTC's annual reporting provision is primarily a default provision). A settlor cannot completely waive accountings, because that would violate the fundamental duty of the trustee to provide information to the beneficiaries to keep them apprised of their rights. If the settlor is restrictive in the trustee's accounting requirements, that trustee may find it difficult to balance honoring the settlor's intent while providing sufficient information to the beneficiaries. The Restatement (Second) of Trusts Section 173 cmt. c (1959) provides some guidance:

> Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust. *Id.*

4. Settlor and Surviving Spouse[3]

While the settlor of a revocable trust is alive, all mandatory reporting provisions of RCW 11.98.072(3) and ORS 130.710(9) are overridden and only the settlor has the right to receive notice, information, and reports. ORS 130.510(1) is consistent, "While the settlor of a revocable trust is alive, rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee are owed exclusively to the settlor. Beneficiaries other than the settlor have no right to receive notice, information or reports under this chapter." *See also Tseng v. Tseng* 271 Or App 657 (2015).

Only the settlor's spouse is to be provided information and reports required, pursuant to RCW 11.98.072(3)(a) and ORS 130.710(8), in these circumstances:

a. The spouse survives the settlor;
b. The spouse is capable ("financially capable" in Oregon);
c. The spouse is the only permissible distributee of the trust; and
d. All of the other qualified beneficiaries of the trust are descendants of the spouse.

D. Who Pays for Reporting?

The terms of the trust may also control who pays for trust reporting. Most commonly, the trust estate pays the fees associated with the preparation and distribution of any reports. Exceptions are mentioned below.

[3] See ORS 106.340 which grants parallel rights and more to domestic partners, same as spouses.

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1. Reporting by Former Trustees; Oregon

Revised in 2013: "A successor trustee or the court may require a trustee that has resigned or been removed to send a report as provided in ORS 130.710(3). Reasonable compensation for preparation of the report, and reasonable fees and costs incurred in the preparation and distribution of the report, shall be paid by the trust." ORS 130.630(3).

2. Reporting by Current Trustees

"A trustee may charge a reasonable fee to a beneficiary for providing information under this section." ORS 130.710(5). In Washington, the court has broad discretion (but not the trustee) to order costs paid by any party, including a beneficiary. RCW 11.96A.150. One might be careful to consider full disclosure of trust information to start a beneficial statute of limitations for the trustee's protection versus asking for a beneficiary to pay for requested information and possibly exacerbating a beneficiary's dissatisfaction.

A tougher question is whether these costs should be allocated to the income account or the principal account of the trust estate. Equity may dictate these expenses should be allocated against the interest of the beneficiary seeking the information (e.g. if an income beneficiary demands information then the costs should be allocated against the income, and if a remainder beneficiary requests information then the costs should be allocated to the principal). If the expenses are substantial, however, a trustee may want to file a petition for instructions for guidance from the court. The trustee should be careful not to allocate costs in a manner that would constitute retaliation against the beneficiary who requested the information.

In addition, a trustee of an irrevocable trust has a duty to respond to reasonable requests for information or reports. See ORS 130.710(1) and ORS 130.020(2)(i).

E. Waivers of Reporting

As stated in ORS 130.710(4), "A qualified beneficiary may waive the right to a trustee report or other information otherwise required to be furnished under this section. A qualified beneficiary may withdraw a waiver at any time for the purpose of future reports and other information." RCW 11.106.100 more generally allows "any adult beneficiary" to waive an accounting in a writing delivered to the trustee. Additionally, a beneficiary entitled to advance notice of significant nonroutine transactions under RCW 11.100.140 can waive the notice requirement.

Remember that a waiver means trust information is not disclosed to the beneficiary, the beneficiary is not on notice, therefore any relevant statute of limitations has not begun. The official comment to ORS 130.820 (statute of limitations) clarifies, "The one-year period does not begin to run against a beneficiary who has waived the furnishing of a report as provided in ORS 130.710(4)." It can be advantageous for the trustee to give trust information for the purpose of starting the statute of limitations, because a statute of limitations defense is a very strong defense and protection for a trustee.

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F. Considerations in Reporting

1. Summary of Report

In addition to the reporting requirements, a trustee's duty to provide information and communicate is helped when a trustee provides a written summary explaining the report itself and the beneficiaries' related rights under the trust. This allows the beneficiaries to further understand the accounting and the extent of their beneficial rights. A written summary provides the trustee with an opportunity to help the beneficiaries understand the financials, clarifying the figures, and in turn hopefully manage the beneficiaries' expectations, among other things. A trustee's summary of the report is never mandatory, but may be helpful. Some ideas of specific topics to include in a trustee's summary of report may include, but are not limited to:

a. Extraordinary or problematic assets;
b. Restrictions or unusual terms of the trust;
c. Mandatory or discretionary standards for income distributions;
d. Balancing the interests of the life beneficiaries with the remaindermen, or balancing the interests of members of the same class, and any trust guidance here (analyze and document analysis);
e. Provisions for mandatory or partial terminating distributions of principal from the trust;
f. Specific powers of the beneficiaries, such as the right to remove and replace a trustee;
g. Inter vivos and testamentary powers of appointment and rights of withdrawal;
h. Asset investment analysis and performance; and
i. Trustee compensation.

2. Documenting Trustee Decisions

Court cases seem to illustrate that they want to know the trustee understands the legal standard that is applicable to their fiduciary duties and that the trustee has conducted an evaluation of the law and facts during the administration and reporting period. Consider having the trustee document in writing their investigations and analysis of problematic or potentially problematic issues. As an example, consider discretionary distributions of principal from a trust: before the principal is invaded the trustee must analyze the reasonableness and necessity of any request for principal assets, since money is being taken from the remainder beneficiaries by accessing the principal, and this could be documented. Also beware because such documentation can cut both ways and also potentially hurt the trustee if the analysis is unsound and a problem arises later. A trustee who does *something* appears to be a better situation than a trustee who does nothing, though ideally the trustee and his counsel have documented their reasonable analysis to back up their appropriate actions or inactions.

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II. Who Gets What - Allocating Assets

A. The Principal and Income Act

Regarding how a receipt or disbursement is to be categorized between the trust income and principal during the administration, see RCW's Chapter 11.104A on the Washington Principal and Income Act of 2012, and ORS Chapter 129 for Oregon's Uniform Principal and Income Act (herein collectively called the "UPIA"). Primarily, the UPIA is the determination of *what is income* versus *what is principal* for the receipts and disbursements of a trust or estate. So the UPIA is an important factor for everyone involved with trusts. The UPIA rules can be modified, however, depending on the trust document.

An important accounting concept is the difference between principal and income. The principal of an estate or trust is the amount originally received, plus capital gains, less expenses, debts, and capital losses. The principal is sometimes called the "corpus" or "res" of the estate to be distributed when the trust terminates. The income is the interest, dividends, and other income earned by the principal. The trustee must account *separately* for income and principal, because the people who are entitled to receive income may not be the same people entitled to receive the principal.

The UPIA rules governing how a receipt or disbursement is to be categorized (principal versus income) will determine which beneficiary will receive the benefit of any receipt or whose interest will be reduced by a disbursement. This creates a conflict that the trustee must be careful about. A trustee's assignment of all receipts to either the income or principal side of the trust dictates how trust accounting income is calculated, an amount that determines how much money the income beneficiary is entitled to receive (or not receive).

The UPIA is a complex topic that I wanted to mention with reporting, but a detailed discussion and application of the UPIA is beyond the scope of this article.

B. Earmarking Trust Assets

A trustee has a duty to segregate trust property by not commingling personal funds or other non-trust assets with trust assets. This more obvious duty is made more complex when you have multiple trust shares under one trust agreement, or many family business interests under the trustee's administration. Is a trustee commingling assets when a beneficiary's specific trust share is consolidated with the residual beneficiaries' trust shares? The answer is yes, as explained below, specifically for Oregon (ORS) and generally for Washington (Restatement of Trusts):

ORS 130.695 details a trustee's duty to keep adequate records and addresses the duties in earmarking assets. ORS 130.695(1) requires a trustee to "keep adequate records of the administration of the trust." This duty to keep adequate records is also contained in ORS 130.665's duty to act with prudence and ORS 130.710's duty to report to beneficiaries.

ORS 130.695(3) provides "…a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other

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than a trustee or beneficiary." The official comment clarifies:

> Subsection (3) makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) Section 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. *Id.*

ORS 130.695 goes above and beyond the Restatement (Second) of Trusts, Section 179, which provides:

> The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust, and to see that the property is designated as property of the trust.

The Comment to Section Restatement (Second) of Trusts, Section 179, Subsection c's "duty not to mingle funds of separate trusts" clarifies:

> It is ordinarily the duty of the trustee not to mingle property held upon one trust with property held upon another trust, whether the two trusts are created by separate settlors or by the same settlor.

III. Predecessor Trustee Problems

A. Authority Upon Resignation or Removal

A former trustee may continue to have some authority and duties to the trust. Unless a co-trustee remains in office, a resigning or removed trustee has continuing authority until the trust property is actually delivered to a successor trustee or an authorized agent of the successor trustee. ORS 130.630. This former trustee remains liable for any breaches of duty committed during the former trustee's administration. So the former trustee may want to seek an immediate discharge of liability through releases or a judicial accounting. In addition, if a co-trustee remains in office, the former trustee does not need to submit a final trustee's report because the trustee remaining in office can account for the administration. ORS 130.710(3).

B. Liability

Under common law, a successor trustee is not liable for a predecessor trustee's breaches of duty and is only liable for their own breaches of duty as trustee. The successor trustee, however, can become liable where the successor knows of the prior trustee's breach and allows it to continue or does not facilitate a remedy of the breach. RCW 11.98.039(5)(a-b); Restatement (Second) of Trusts Section 223(2) (1959). This equates to an affirmative duty of the successor trustee to review the predecessor's administrative actions and inactions to avoid liability for continued breaches or problems in need of remedial action. So all successor trustees should

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receive and review the predecessor trustee's accounting, tax returns, etc. For protection against future liability, the successor trustee may seek a complete release and hold-harmless agreement from the beneficiaries regarding all prior predecessor trustee acts. This is a nice clean starting point, but may be inapplicable if the successor trustee has actual knowledge of prior bad acts. The successor trustee can also consider obtaining an indemnification from the predecessor for any actions taken prior to the current administration, to differentiate the actions and administrations of the different fiduciaries.

A cotrustee should also be mindful of their actions or inactions regarding potential or actual breaches of duty that may or may not be reported. Depending on the facts, a cotrustee must analyze whether their dissent alone is sufficient, or they need to take action to rectify a serious breach of trust. See ORS 130.610, especially the official comment, stating: "Cotrustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (6) protects cotrustees who refused to join in the action…However, the protections provided by subsections (6) and (8) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (7) may impose liability against a dissenting cotrustee for failing to take reasonable steps to rectify the improper conduct."

C. Death and Disability

What if the prior trustee is now deceased or became mentally incapable, so unable to provide a current report to the successor trustee? ORS 130.710(3) clarifies that if the vacancy occurred because of the former trustee's death or financial incapability, a report may be provided by the former trustee's personal representative, conservator, or guardian. In circumstances where the successor trustee faces challenges with receiving trust information from a former trustee who is unable to assist, formal discovery of the financial information may be pursued by subpoena or by obtaining an order pursuant to ORS 114.425 (requiring a person to appear and give deposition testimony).

D. Separation of Accounts

When a successor trustee inherits a trust from a former trustee who may have harmed the trust, often one of the primary concerns is safekeeping the trust property. Consider setting up all new bank accounts at a different financial institution to secure the trust accounts and cleanly separate banking from the prior trustee's knowledge and potential access.

E. Exculpatory Clauses

The successor trustee should also review the trust agreement and applicable state law for any options with limiting liability involving the prior trustee's acts, including exculpatory clauses (discussed previously), which may provide some protection to either the predecessor or successor trustee.

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IV. Ways To Turn Off Trustee Liability

A. Trust Terms; Exculpatory Clauses

Look to the express trust terms to determine possible issues regarding the trustee's duties and liabilities. An exculpatory clause contained in the trust may limit the trustee's liability regarding reports. The default in Washington is an exculpatory clause is unenforceable, "unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the trustor." RCW 11.98.107(2).

Oregon law deems exculpatory clauses to be unenforceable to the extent they purport to waive a trustee's bad faith or reckless indifference to the interests of the beneficiaries. ORS 130.835, see also *Mest v. Dugan,* 101 Or.App. 196, 790 P.2d 38 (1990).

B. The Three Year Statute of Limitations; Washington

In Washington, a beneficiary may bring an action against a trustee for breach of trust but only within three years after the date a trust accounting was delivered. RCW 11.96A.070. This three year SOL is conditioned on: 1) the report adequately disclosing the existence of a potential claim for breach (if relevant), and 2) the trustee must inform the beneficiary that they are allowed only 3 years to commence a proceeding pursuant to RCW 11.96A.070. So ensure every accounting disseminated contains these prerequisites.

C. The One Year Statute of Limitations; Oregon

In Oregon, ORS 130.820(2) addresses the one year statute of limitations following a trustee's report to a beneficiary, which is the default rule if no other action cuts off fiduciary liability sooner. Yet to invoke this one year statute of limitation, there are also prerequisites:

1. A copy of ORS 130.820 must be attached and referenced. So include a copy of this statute and expressly reference ORS 130.820 in every report that is distributed; and

2. As detailed in the official comment to ORS 130.820(2), the one year statute of limitation only applies "if the trustee has furnished a report specifically disclosing information about a potential claim. The report <u>must include a custom-tailored disclosure</u> that alerts the beneficiary to the existence of the potential claim. A standardized annual report with a statement that the beneficiary will have one year to bring a claim based on the matters covered by the report will <u>not</u> be adequate." (emphasis added).

If the one year statute of limitation in ORS 130.820(2) does not apply to the trustee's report, then either a 2 year, 6 year or 10 year statute of limitations would apply, as detailed in ORS 130.820(1) and (3).

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D. Notice of Proposed Action Procedures ("NOPA")

1. Washington; Notice of Significant Nonroutine Transactions

RCW 11.100.140 clarifies a trustee has a duty to inform the income beneficiaries (primarily) at least 20 days in advance, in writing, before taking action related to a nonroutine transaction, and to obtain an independent appraisal or sell property on the open market.

Presumably, if a trustee gets objections within the 20 day period, they need to justify their proposed action or modify their proposal. This is a mandatory duty of the trustee for significant nonroutine transactions, yet there is no express release or limit of liability for the trustee in the statute. This statute is illuminated by the case of *Allard v. Pacific National Bank,* 99 Wash. 2d 394, 663 P.2d 104 (1983), decided just prior to the 1984 passage of RCW 11.100.140. Following the sale of the sole trust asset in a private sale, against the wishes of the trust beneficiaries who found out about the sale a month later, the Court in *Allard* held that "the trustee's fiduciary duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests." *Allard* at 404.

2. Oregon; Passive Consent Not Allowed for Trust Reporting

The new notice of proposed action procedure allowed in ORS 130.733 is an option trustees can use when they want to limit liability regarding a specific action or inaction, at any time during the trust administration. For example, if a trustee inherits problematic trust assets and has already spent ample time and expense investigating, reporting and remedying the estate, they may want to notify all beneficiaries of their intent to stop further investigations. The trustee could inform the beneficiaries in the notice of proposed action about how their research, analysis and remedies are sufficient and how further time and expense in doing so would not be in the best interest of the trust. With sufficient notice, the procedure in ORS 130.733 would allow the trustee to either obtain all beneficiaries' consent, either actively or passively if no beneficiary objects after 45 days. If a beneficiary timely objects to the notice of proposed action, the trustee may either address the specific objection with the objector and possibly modify the notice (and then re-notice), or bring the matter to court for a final determination in an effort to relieve the trustee of liability.

ORS 130.733 expressly excludes: "(a) Allowance of trustee's compensation;" and "(b) Settlement of trust accounts or the trustee's report," because these tasks are deemed self-interested acts by a fiduciary who has heightened legal duties, where more deference is given to the beneficiary. A fiduciary's self-interested acts require affirmative consent by the beneficiary; passive consent by a beneficiary is insufficient to release the fiduciary of liability. So a trustee's self-interested acts may only be approved by either the court or by all of the beneficiaries' advance written consent.

E. Affirmative Consents and Releases; Oregon

When beneficiaries provide the trustee with written consent after appropriate notice, they have provided an affirmative consent. Sometimes the term "acquiescence" is used to indicate an advance approval of an act. Affirmative conduct by a beneficiary, for example by written consent

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to a transaction in the trustee's distributed report, may affect the trustee's rights and actions. After a valid consent, a beneficiary cannot allege a breach of trust by the trustee pursuant to ORS 130.840.

> ORS 130.840 allows a beneficiary to affirmatively consent (either before or after the action at issue) to:
>
> 1. Conduct that amounts to a breach of trust by the trustee;
> 2. A self-dealing transaction by the trustee; and
> 3. To ratify a transaction by the trustee that constitutes a breach of trust.

For an affirmative consent to be valid, the requirements are: 1.) full and adequate disclosure, 2.) the beneficiary must act voluntarily and be capable, 3.) the trustee cannot act wrongfully in obtaining the consent, and 4.) the beneficiary must be advised of the legal effects of his consent. See also Restatement (Second) of Trusts Sections 216-218 (1959).

A trustee's request for a written affirmative consent and release of their report and their actions during the reporting period can accompany any report. At termination, the trust's final distribution can be conditioned on the trustee obtaining a release from all beneficiaries, although a beneficiary can always refuse to sign any release. When a trustee cannot obtain a beneficiary's release voluntarily, their only recourse is to obtain court approval of the accounting, or hold back a sufficient reserve of trust assets and negotiate a resolution. See ORS 130.730(1). A trustee can never demand or force a beneficiary's consent or release.

V. When Things Go Bad (there's a price to pay via RCW 11.96A.150 & ORS 130.815)

A trustee can be found personally liable for damages in a trust administration, including liability related to the accounting, and be required to pay under RCW 11.96A.150 or ORS 130.815. In addition to attorney fee liability, these statutes also gives the court authority to award costs and expenses to any party to be paid by another party, or paid from the trust. An attorney is well advised to warn a recalcitrant trustee of their risk of liability, both personally and as a fiduciary, because of these statutes. Consider including this liability risk in engagement letters when representing trustees in trust administrative cases, particularly trust disputes, in order to both advise the fiduciary and protect the attorney in the event fees are prohibited from being paid from the trust and/or assessed against the trustee individually. You never want a trustee to be angry that they were both saddled with a significant personal liability after litigation, and their counsel failed to warn them of this risk.

With trust litigation pleadings (often stemming from trust accountings), remember to include a request for fees and costs pursuant to RCW 11.96A.150 or ORS 130.815. When appropriate, the Oregon court will consider the requesting party's entitlement to fees pursuant to ORS 20.075(1) which details the factors considered in the court awarding attorney fees.

It has proven particularly problematic when the trustee is given notice or made aware of problems with the report (eg. by the CPA or beneficiaries), and the trustee and/or their counsel fails to remedy the situation. Failure to take corrective action risks the trustee's liability for attorney fees and even discovery costs (think expensive and numerous expert witnesses),

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pursuant to RCW 11.96A.150 and ORS 130.815. A trustee's attorney can also be sued for malpractice for their preparation and advocacy of a faulty accounting, particularly if they have been warned in advance by another that their accounting is inaccurate or insufficient and the attorney fails to take corrective measures.

VI. Judicial Involvement with Accounting

A. During Administration

A beneficiary may always initiate proceedings against a trustee in order for the trustee to comply with the terms of the trust or as detailed in RCW 11.80.030, 072 and ORS 130.710. If the trustee fails to comply with a beneficiary's informal requests for a report, the beneficiary can escalate the matter to the court via a petition to compel the trustee to report. See ORS 130.050. Then a court order may be granted compelling the trustee to report, ideally by a certain deadline. Regarding known breaches of trust, ORS 130.800 says the court may order a trustee to account in an effort to remedy a breach of trust that has occurred.

If the trust is before the court for whatever reason, then the trustee should be proactive to ensure the court approves all fiduciary actions for their entire administration and seek a "discharge" as trustee. Ideally the trustee is also indemnified in such a situation, but this would be pursued with the beneficiaries, not the court.

From the beneficiary's perspective, time is typically of the essence when a fiduciary fails to report. A beneficiary's petition to compel the trustee to report will also likely include the standard request for reasonable attorney's fees and costs to be paid by the trustee, personally, pursuant to RCW 11.96A.150 and ORS 130.815. It is advantageous for the trustee to file timely reports to start the statute of limitations, minimize the risk the trustee may be held liable for attorney fees and costs, as well as avoid matters getting unnecessarily problematic with a court action.

B. Trust Termination

When the trustee is ready to fully distribute and terminate the trust, yet wants court approval of the final accounting and final plan of distribution, they may file a petition to approve all matters with the court. See ORS 130.050. The above-mentioned requests for consent and release would also be relevant in such a petition, as well as requesting the trustee's discharge. Trustees can consider obtaining the court's approval of their accounting at termination in lieu of obtaining releases from all beneficiaries or maintaining a reserve until the statute of limitations has passed. A nonjudicial settlement agreement may also be helpful to approve the trustee's report and administration at the time of final distribution and termination. See RCW 11.96A.220 – 250, and ORS 130.045.

When going to court to approve all final transactions, it is important to do so before making the final trust distribution and maintaining a reserve. This avoids the trustee exhausting the reserve and being required to pay for their legal defense out of pocket if they are sued at a later stage, since a trustee is legally entitled to their defense (in good faith) being paid by the trust estate. A trustee is never likely to be successful in seeking reimbursement from a

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beneficiary after final distributions have been made out of the trust. In anticipation of trust termination, analyze holding back a reserve account; the trustee may hold back “a reasonable reserve” for final administrative expenses and taxes. RCW 11.98.145 and ORS 130.730(2).

VII. Trial and Alternate Triers of Fact

With trust disputes involving accountings, there are options that should be weighed to best serve the trustee and the trust estate.

A. Trial Judges

A trial on the objections to a trustee’s report may entitle the parties to a right to a jury trial. If the legal issues consist of all equitable issues of fact for a bench trial, there is generally no right to a jury trial. If money damages are involved then there would likely be a right to a jury trial. ORS 111.205.

Be aware of joinder of other parties and analyze whether other parties (such as other beneficiaries or co-fiduciaries) are indispensable parties. See ORS 130.200; *Walsh v. Centeio*, 692 F2d 1239 (1982).

B. Mediators/Arbitrators

Carefully select a mediator or arbitrator to ensure their style and qualifications are well suited for your case.

C. Forensic Accountants

A forensic accounting is often a historical analysis and construction of prior financial transactions by a qualified professional. Forensic accountants can provide assistance during trust disputes in the following ways: 1) discovery assistance in knowing which specific information to request, and identifying the appropriate individuals to interview or depose, 2) developing a comprehensive and clear analysis and report that communicates the appropriate findings and conclusions, and 3) providing testimony in either a deposition, trial, arbitration, or other dispute resolution forum. A cost benefit analysis should be made before the expense of a forensic accounting is pursued. Yet a forensic accountant can be very helpful and their report illuminating when there are prolonged messy financial transactions. The parties can agree on both the forensic accountant and a maximum amount the trust will expend on the accounting.

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