

Real Property, Probate & Trust



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Cleaning Up After the Rogue Fiduciary

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I. Introduction

This article is adapted from the presentation “Cleaning Up After the Rogue Fiduciary,” Real Property, Probate, & Trust Section, WSBA, Midyear Meeting and Seminar, 2012.

The primary issues that flow from the removal of a rogue fiduciary (i.e., a fiduciary removed for cause) are twofold: the routine administration of assets that would follow any change of fiduciary and the pursuit of any remedies for past wrongs of the rogue fiduciary. This article, which is based upon the observations and experiences of the author rather than a comprehensive analysis, focuses on the successor fiduciary pursuing remedies against the removed fiduciary. Section II describes the procedural status as a precondition to seeking remedial liability. Sections III and IV focus on imposing liability. Section V presents considerations for preserving a judgment against the rogue fiduciary if he seeks to discharge the liability in bankruptcy proceedings.

II. Understanding Current Status, Both Procedurally and Administratively

A. Procedural Status

Upon the appointment of a successor fiduciary, you should review the potential actions against the removed rogue fiduciary and any available remedies related to such actions. Consequently, you must learn the circumstances that led to the removal. To understand the procedural posture, you should determine whether the court has discharged the rogue fiduciary and whether the court has ordered the rogue fiduciary to deliver assets or to provide an accounting.

1. Discharge. The court has personal jurisdiction over court-appointed fiduciaries (i.e., when the person appointed files an oath for the purpose of qualifying, the court has *in personam* jurisdiction over him). This

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Following a growing WSBA trend, the RPP&T Newsletter is going green! Through the Summer 2012 edition, the RPP&T Newsletter will be distributed in its current print format. The Newsletter will be distributed in electronic format only beginning with the Fall 2012 edition. Because we want to be certain that you don't miss a single issue, detailed information about the distribution of electronic newsletters will be printed in a future edition of the Newsletter and posted on the section's website in advance of the conversion. Post-conversion, archive newsletters will remain available on the section's website. The conversion will not affect the content quality of the RPP&T Newsletter and, in fact, may enable us to provide more content, including more in-depth articles. Please contact Section Chair Michael Barrett if you have any questions about the conversion.

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personal jurisdiction over the fiduciary is a valuable tool to compel the personal representative to perform his duties and for the court to impose sanctions when the rogue fiduciary fails to perform. The issue of discharge is discussed more fully at III.C. below.

2. **Order To Account.** The accounting is a practical tool to understand the finances of the previous administration. It also sets the stage to pursue remedies against the former fiduciary. For a personal representative, see RCW 11.28.250 and for a trustee, see RCW 11.98.039.
3. **Other Notices and Time Tables.** The other notices and time tables of a routine administration must be observed, such as the notice of appointment to the interested parties, notice to any party filing a Request for Special Notice, the filing of an inventory, creditors, tax obligations, and any required periodic reports.

B. Status of Administration

All successor fiduciaries must review the current status of administration regardless of whether the predecessor was a rogue fiduciary. The new fiduciary must evaluate how to manage the tangible assets or accounts that come within his possession as well as organize a plan for the administration of such assets.

The new fiduciary must also review earlier tax returns, available records, and gather input from family, friends, or business associates. In addition to fulfilling the requirements of a routine administration, this information is also likely to give a rough picture of the diminution of assets during the administration of the rogue fiduciary, of potential taxable events, and of potential credits or debits to the distributive shares of heirs and beneficiaries.

Practice tip: It is wise to present a Petition for Approval of Administrative Plan that describes your goal and shows how you plan to reach that goal. The petition should set forth your hourly rate, any issues presented and how you intend to respond to them as well as how to invest funds or to sell or retain real estate or other assets, whether to seek an accounting from the predecessor, and authorization to commence litigation on any civil causes of action. The approval of such a plan will provide safety to the fiduciary if disgruntled heirs attack the administration. If the court does not approve the plan, then you should consider resigning.

III. Issues That Typically Follow Removal of Rogue Fiduciary

A. After Removal of a Trustee

The authority to compel an accounting is provided by statutes at RCW 11.106.030 - .070. RCW 11.106.030 sets forth specific information required in the accounting. RCW 11.106.070 provides that the court shall hear evidence, determine the "correctness"

of the account and "the validity and propriety of all actions of the trustee or trustees set forth in the account," shall either approve or disapprove the accounting, and then may take action "surcharging the trustee or trustees for all losses, if any, caused by negligent or willful breaches of trust."

B. After Removal of a Personal Representative

The removed personal representative must file an accounting and deliver assets pursuant to RCW 11.28.290. The lawyer drafting the order compelling the accounting and delivery should set forth a reasonable time for completing the accounting.

A personal representative who is removed may be liable for attorney's fees. RCW 11.68.070 provides that when a personal representative is either removed or has the non-intervention powers restricted "in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines." See also RCW 11.76.070, which provides that a personal representative may be personally assessed with liability for the attorney fees of the party who is "reasonably required to employ legal counsel" to compel an accounting.

Finally, RCW 11.96A.150 provides for broad authority to award fees to any party from any other party, from the estate, or from any non-probate asset that is subject to the proceeding "as the court determines to be equitable."

C. The Issue of Discharge

When the court "discharges" the personal representative, it no longer has *in personam* jurisdiction over the personal representative. This personal jurisdiction is very important because fiduciary administrations are otherwise *in rem* proceedings concerned only with the control of assets. The exception to *in rem* jurisdiction is the *in personam* jurisdiction over the person acting as the fiduciary.

The concept of personal jurisdiction over the fiduciary is very different from the court's *in rem* jurisdiction to administer the property. The court acquires personal jurisdiction over a personal representative when he signs an oath. A trustee, on the other hand, is typically made subject to *in personam* jurisdiction only upon service of process when he is sued. On occasion, an order removing a personal representative will be drafted inadvertently using the language of discharge. The use of the word "discharge" means that the court has released the fiduciary from the jurisdiction of the court regardless of whether he actually delivered the assets or the accounting. The discharge also provides an inference that the court has approved all of the acts of the former fiduciary. When the discharge occurs inadvertently, you can attempt to restore the court's jurisdiction over the rogue fiduciary by an Order Nunc Pro Tunc or by new service of process. An Order Nunc Pro Tunc runs the risk that jurisdiction was lost upon the entry of the first order and that there is no continuing jurisdiction to enter the corrective order.

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The word “discharge” appears to be used somewhat differently in RCW 11.98, Trusts. RCW 11.98.041 provides for the automatic discharge of a resigning trustee. But see RCW 11.98.039(4), which provides that the court may order discharge when an appropriate petition is filed. Counsel should review these provisions carefully to protect against an inadvertent discharge prior to resolving all issues caused by the rogue trustee who may voluntarily resign prior to judicial removal. It is also not clear if the word “discharge” has the same meaning in RCW 11.98 as in other chapters of Title 11 governing probate and guardianship.

D. The Issue of an Accounting

“Accounting” has no fixed definition. An accounting is the vehicle by which the activities of the fiduciary are presented for others to read and understand. It is also the vehicle by which the fiduciary may be brought to task for any inappropriate activities and the estate be made whole again. Consequently, the format of the accounting varies depending upon the nature of the assets and the kind of activities by the fiduciary. A simple accounting of a small trust may consist of a listing of income and disbursements whereas a trust with large, complex assets may produce an accounting that is complex and requires a CPA to assist with comprehending it.

Various professional associations for trustees, certified public accountants, and guardians define accounting standards. The primary issue for a lawyer in attacking or defending an accounting is whether the accounting meets the standard of an acceptable accounting in the relevant community. Whether it meets that standard is a judicial determination and should rely upon evidence and findings to support the adjudication.

The source of the duty is often found by statute and is supported by case law. The duty for personal representatives is set forth in RCW 11.68.065 for annual accountings, at RCW 11.28.290 upon removal, and at RCW 11.76.060 upon final accounting. For trustees, the duty is set forth at RCW 11.106.050 - .070 and 11.96A.030(4) and .080.

When pursuing a claim against a fiduciary, the court should enter an order compelling an accounting and fixing a reasonable date for compliance. If no accounting is delivered, then the fiduciary is in breach of the order and civil contempt would be the remedy. RCW 7.21.030. If an accounting is delivered, then the accounting should be evaluated as to whether it meets community standards.

If the accounting is acceptable, then the court should enter an order that approves the accounting.

If the accounting is not acceptable, then you should move to disallow the accounting and prepare for a contested hearing. The preparation should include an expert to opine on the adequacy of the accounting. The foundation for the testimony should be the experience of the expert and the expert’s familiarity with accountings. Ultimately he will opine on whether the accounting meets community standards and whether there are defects in the accounting. The expert should be prepared to discuss the defects.

The pool of expert witnesses to opine on an accounting is usually found among professional fiduciaries and professional accountants. On occasion, the accounting will be so profoundly flawed that a cross-examination of the fiduciary will suffice without an expert.

Practice tip: When representing the rogue fiduciary and defending an accounting, your client should retain a certified public accountant or a professional fiduciary to prepare the accounting. Although your client as fiduciary will have the ultimate responsibility for the accounting, the CPA or fiduciary will be the witness at trial rather than your client. This will give you better control of the scope of the examination in defense of the accounting and the vilification of the rogue fiduciary by opposing counsel. On the other hand, the cross-examination of the rogue fiduciary will be distilled to only those events that tend to vilify the rogue fiduciary when

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