TRUST ACCOUNTING:
WHO IS ENTITLED TO INFORMATION?
HOW MUCH AND HOW OFTEN?

Ellen M. Deeter
Of Counsel
Dale & Eke, P.C.
9100 Keystone Crossing, Suite 400
Indianapolis, IN 46240
317/844-7400
edeeter@daleeke.com

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INTRODUCTION

One of the fundamental duties of a trustee is to furnish information to the beneficiaries so that the beneficiaries can protect their interests. The only access to information that a beneficiary has is through the trustee. Even if the beneficiary knows the name of the bank or brokerage firm that holds the assets, she cannot march down to the office and obtain a copy of a statement on the trust assets. She is not the account owner, the trustee is. The trustee has legal title to the trust assets; the beneficiary has an equitable interest, or beneficial interest, in the trust assets. The importance of furnishing information to the beneficiaries cannot be overstated. The mere fact that information was not provided can lead to a breach of trust claim. The underlying activities that the information would have disclosed may give rise to more breaches. Sometimes lack of information is simply a failure to provide information when everything else has been done correctly. But, with human nature being what it is, a lack of information frequently leads to suspicion and often is a reflection of the trustee’s neglect or malfeasance. However, a trust often has many beneficiaries with different interests. Which beneficiaries are entitled to information about trust? How much information? How frequently? Keep in mind, too, that a trustee has a duty of undivided loyalty, a duty of impartiality to the beneficiaries of a trust, and a duty to keep accounts (which is a separate duty from the duty to inform).

OVERVIEW

There are different points of contact from a time standpoint when a trustee will (should) be communicating with a beneficiary. There are certain beneficiaries to whom the trustee is

1 Uniform Trust Code, § 706 (2010), cmts. “A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee’s duty to keep beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary’s request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations.”
required, proactively, to furnish information. There are other beneficiaries to whom the trustee has a duty to furnish information if the beneficiary requests it. It also makes a difference whether the trust is a revocable trust or an irrevocable trust. These materials will look at the types of beneficiaries defined in the Indiana Trust Code, the different points in time that a trustee may be in contact with the beneficiaries, and how the duties to different types of beneficiary vary.

WHO IS A BENEFICIARY?

There are definitions for four different types of beneficiaries in IC 30-4-1-2, which also incorporates definitions from other sections of the trust code. The four types of beneficiaries are:

- Beneficiary
- Income Beneficiary
- Qualified Beneficiary
- Remainder Beneficiary

These terms are found throughout the Indiana Trust Code. When reading a section containing one of these terms, it requires careful attention to which term is being used. The four definitions found in IC 30-4-1-2 are as follows:

1. **“Beneficiary”** has the meaning set forth in IC 30-2-14-2.
   
   *IC 30-2-14-2 states that beneficiary means, in the case of a trust, an income beneficiary and a remainder beneficiary.*

2. **“Income Beneficiary”** has the meaning set forth in IC 30-2-14-5.
   
   *IC 30-2-14-5 states that income beneficiary means a person to whom net income of a trust is or may be payable.*

3. **“Qualified Beneficiary”** means:
   
   (A) A beneficiary who, on the date the beneficiary’s qualification is determined:
       
       i. Is a distributee or permissible distributee of trust income or principal;
ii. Would be a distributee or permissible distributee of trust income or principal if the interest of the distributee described in item (i) terminated on that date;

iii. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;

iv. Has sent the trustee a request for notice;

v. Is a charitable organization expressly designated to receive distributions under the terms of a charitable trust;

vi. Who is person appointed to enforce a trust for the care of an animal under IC 30-4-2-18; or

vii. Is a person appointed to enforce a trust for a noncharitable purpose under IC 30-4-2-19; or

(B) The attorney general, if the trust is a charitable trust having its principal place of administration in Indiana.

(15) “Remainderman” means a beneficiary entitled to principal, including income which has been accumulated and added to the principal.

“Remainder beneficiary” is also defined in IC 30-2-14-11 and the definition there is somewhat different than the definition found in IC 30-4-2-1(15). It states that “remainder beneficiary means a person entitled to receive principal when an income interest ends.”

**DISTINCTIONS BETWEEN REVOCABLE AND IRREVOCABLE TRUSTS**

A trustee’s duties commence upon its acceptance of the appointment as trustee. But to whom are these duties owed? Is a distinction made between revocable trusts and irrevocable trusts? From a common sense standpoint, it would seem that when a settlor has executed a revocable trust that the duties of the trustee (who is often also the settlor) are only to the settlor. After all, when a testator executes a will the beneficiaries of the will have no claim upon the
testator’s property until his death. The testator has the ability to freely deal with his property – to buy, sell, pledge, give away, even destroy it. The testator has the ability to freely change the will to name different beneficiaries. Why would/should it be different when the property owner has decided to put assets into a revocable trust during lifetime? The Indiana Code\textsuperscript{2}, the Restatement Third of Trusts\textsuperscript{3}, and the Uniform Trust Code\textsuperscript{4} all contain explicit provisions regarding a trustee’s duties being to the settlor in a revocable trust.

The issue of whether a trustee owes duties to future beneficiaries of a revocable trust went all the way to the Indiana Supreme Court in \textit{Fulp v. Gilliland}, 998 N.E.2\textsuperscript{nd} 204 (Ind. 2013). In this case, a Settlor, Ruth Fulp, placed her farm in a revocable trust, naming herself as trustee. Ruth retained the right to amend or revoke the trust, and she was the sole beneficiary of the trust during her lifetime. At her death the trust was to be divided among her three children. While still serving as trustee Ruth sold the farm to her son, Harold Fulp, Jr. for a below market price. (It was, in fact, the same price for which she had sold a different parcel of the farm to her daughter, Nancy Gilliland.) Prior to the sale closing Ruth resigned as trustee and Nancy became the successor trustee. Nancy refused to close on the sale, arguing that Ruth had breached her fiduciary duty to Nancy by agreeing to sell the farm for less than it fair market value, and that the sale would deprive Nancy of her share of the trust. Harold sued for specific performance. In a case of first impression, the Supreme Court of the State of Indiana held that Ruth as trustee owed no duty to her children while her trust was revocable. The Court pointed out that if it were to follow Nancy’s argument that Ruth’s duty as trustee extended to the remainder beneficiaries it would essentially make the trust irrevocable. The Court noted both § 603 of the Uniform Trust Code and IC 30-4-3-1.3 (which was enacted during the pendency of the case) in its decision.

\textsuperscript{2} IC 30-4-3-1.3, as added by P.L. 99-3013, SEC.9 eff. July 1, 2013
\textsuperscript{3} Restatement (Third) of the Law of Trusts, §74 (2003)
\textsuperscript{4} Unif. Trust Code, §603 (2010)
Statutes and treatises addressing duties in a revocable trust.

IC 30-4-3-1.3 Duties of trustee owed to settlor; duties

(a) While a trust is revocable and the settlor has the capacity to revoke the trust:
   (1) the rights of the beneficiaries are subject to the control of; and
   (2) the duties of the trustee are owed exclusively to;
   the settlor.
(b) A settlor is presumed to have capacity for the purposes of subsection (a) until the
trustee receives from at least one (1) licensed physician written certification that the
settlor lacks the capacity to revoke the trust.
(c) If a revocable trust has more than one (1) settlor, the duties of the trustee are owed to
all of the settlors having capacity to revoke the trust.
(d) During the period the power may be exercised, the holder of a power of withdrawal
has the rights of a settlor or a revocable trust under this section to the extent of the
property subject to the power.
(e) If a trustee reasonably believes that a settlor of a revocable trust lacks capacity to
revoke the trust, the trustee is authorized to provide information to the settlor’s
designated agent (even if the designated agent is one (1) of two (2) or more trustee(s) or
to any beneficiary who, if the settlor were deceased, would be entitled to distributions
from the trust.
(f) A person who becomes a successor trustee of a revocable trust upon the death,
resignation, or incapacity of a trustee who was also a settlor is not liable for any act or
failure to act by the settlor while the settlor was trustee.
(g) A successor trustee of a revocable trust who succeeds a trustee who was also a settlor
of the trust does not have a duty to:
   (1) investigate any act or failure to act by the predecessor trustee;
   (2) review any accounting of the predecessor trustee; or
   (3) take action on account of any breach of trust by the predecessor trustee.5

5 Contrast this with IC 30-4-3-13 which imposes liability on a successor trustee who fails to take action to deliver
trust property or to compel a redress of a breach of trust committed by the predecessor trustee (which therefore
requires a successor trustee to examine the accounts provided by the predecessor trustee and inquire into the
predecessor trustee’s acts and omissions).
Restatement Third of Trusts § 74. Effect of Power of Revocation

(1) While a trust is revocable by the settlor and the settlor has capacity to act:

(a) The trustee

(i) has a duty to comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee’s normal fiduciary duties, if the direction is communicated to the trustee in writing in a manner by which the settlor could properly amend or revoke the trust; and

(ii) may comply with a direction or act in reliance on an authorization of the settlor although the direction or authorization is contrary to the terms of the trust or the trustee’s normal fiduciary duties, even if the direction or authorization is not manifested in a manner by which the settlor could properly amend or revoke the trust.

(b) The rights of the beneficiaries are exercisable by and subject to the control of the settlor.

UTC Section 603. Settlor’s Powers; Powers of Withdrawal

(a) while a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. ⁶(emphasis added)

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⁶ UTC §603 cmts. “This section recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity. If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor’s control. The beneficiaries are then entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries’ rights will again be subject to the settlor’s control.”
IRREVOCABLE TRUSTS

The focus of the rest of this presentation will be on irrevocable trusts that are not set up as silent trusts. And so the question remains - to whom must the trustee provide information, how much, how often, and when? Keep in mind that the duty to provide information is so that the beneficiary is able to protect his interest.

INCEPTION INFORMATION/COMMUNICATION

It is logical that the first time the trustee will communicate with a beneficiary is upon the trustee’s acceptance of the appointment as trustee. This may be either upon the creation of the trust (e.g. a trust that is irrevocable upon its terms from inception) or upon the death of the settlor of a revocable trust, at which point in time the revocable trust becomes irrevocable.

UTC § 813 provides very specific direction for the trustee for actions it should take upon its acceptance as trustee. It states “(a) trustee: . . .

(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee’s name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust’s existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee’s report as provided in subsection (c);”

7 UTC §103(13) defines a qualified beneficiary as a beneficiary who, on the date the beneficiary’s qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
The Restatement Third of Trusts, §82 states:

(1) Except as provided in §74 (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty:

a. promptly to inform fairly representative beneficiaries\(^8\) of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship;

b. to inform beneficiaries of significant changes in their beneficiary status; and

c. to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information need by beneficiaries for the protection of their interests.

(2) Except as provided in §4 or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty to promptly respond to the request of any (emphasis added) beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect documents, records, and property holdings.

In Indiana, the duty to let a beneficiary know of the existence of a trust is implied in IC 30-4-3-6(b)(7), which states that the trustee has a duty to keep certain (but not all) beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for the beneficiaries to protect their interests. The two categories of beneficiaries that the trustee is required to keep apprised are:

\(^8\) Restatement Third, Cmt. a(1): “Language in Subsection (1) refers flexibly to “fairly representative” beneficiaries, balancing considerations of practicability for trustees and the importance in most trusts of reflecting the diversity of the beneficial interests and the beneficiary concerns. Thus, the trustee’s duty under this requirement is to make a good-faith effort to select and inform a limited number of beneficiaries whose interests and concerns appear fairly representative of – i.e., likely to coincide with – those of the trust’s beneficiaries generally, thereby affording a reasonable opportunity for monitoring the trustee’s duty of impartial (§ 79) as well as faithful, prudent (§§ 76-78) administration of the trust.”
(1) a current income beneficiary and
(2) a beneficiary who will become an income beneficiary upon the expiration of the term
of the current income beneficiary (hereinafter “next in line” beneficiary).

Note that the latter is not necessarily the remainder beneficiary – it might, in fact, be a
successive income beneficiary.

Example: Trust provides for income to spouse for life, then income to children for life,
then upon the death of the last to survive of the children, distribution outright to the
grandchildren. Under the current version of IC 30-4-3-6(b)(7) the trustee has a duty to
keep the spouse and the children informed. The grandchildren are not included in this
code section because if the current income beneficiary dies (the spouse) the beneficiaries
who will become income beneficiaries are the children. Once the spouse dies, however,
then there is a shift, and now the grandchildren will become “next in line” and the trustee
should be including them in communications.

Per IC 30-4-3-6(b)(7) a trustee satisfies the requirements to keep a current beneficiary or
next in line beneficiary informed, upon his written request, by providing access to the trust’s
accounting and financial records concerning the administration of trust property and the
administration of the trust.

Additional Information To Be Sent to Start the Time Limit Running for a Trust Contests

Just as there are time limits for filing a will contest, there are time limits for filing a trust
contest. IC 30-4-6-14 states:

(a) A person must commence a judicial proceeding to contest the validity of a trust that
was revocable at the settlor’s death within the earlier of the following:
(1) Ninety (90) days after the person receives from the trustee a copy of a trust certification required by IC 30-4-4-5 and a notice that:

(A) informs the person of the trust’s existence;

(B) states the trustee’s name and address and

(C) states:

(i) the person’s interest in the trust, as described in the trust document; or

(ii) that the person has no interest in the trust; and

(D) states the time allowed for commencing the proceeding.

(2) Three (3) years after the settlor’s death.

Unless there are compelling reasons to not do so, upon acceptance of the appointment as trustee of an irrevocable trust the trustee should promptly notify the qualified beneficiaries of:

1. the existence of the trust,
2. the trustee’s acceptance of the appointment as trustee,
3. the name, address, and telephone number of the trustee,
4. the identity of the settlor or settlors,
5. the right to request a copy of the trust instrument,
6. the right to receive a trustee’s report under IC 30-4-5-12,
7. a trust certification,
8. any other information required by IC 30-4-6-14(a)(1), and
9. the time limits for commencing a proceeding to challenge the validity of the trust (for a trust that was revocable during the settlor’s lifetime and has become irrevocable as a result of his death).
This list is not exhaustive, of course, of the type of information that it is appropriate to give a beneficiary. Further discussions with the beneficiaries will likely include information about the assets of the trust, how those assets will be invested, provisions for discretionary distributions, how to make a request for a discretionary distribution, and the fees that the trustee will charge.

This suggestion exceeds the requirements of IC 30-4-3-6(b)(7), which requires that the trustee keep only the current income beneficiaries and the beneficiaries who will become income beneficiaries upon the expiration of the term of a current income beneficiary reasonably informed. In this respect the provisions of UTC § 813 are generally better for protecting the interests of the beneficiaries in that it requires the trustee to provide notice to the qualified beneficiaries.9

**Circumstances Where the Settlor May Wish to Relieve the Trustee of the Duty to Communicate with a Beneficiary (aka “Silent Trusts”)**

The idea of a settlor being able to create silent trusts is not without controversy. On one side is the argument for freedom of testation and on the other side the argument that a beneficiary cannot enforce his or her rights if their existence is unknown. What are some reasons that a Settlor may not want a beneficiary to know about a trust?

1. The beneficiary is young or immature.
2. The beneficiary has substance abuse problems.
3. The beneficiary has money problems.
4. The beneficiary is mentally ill (although not adjudicated incapacitated).
5. The settlor is concerned that the existence of the trust may be a disincentive for the beneficiary to seek gainful employment.

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9 The definitions of qualified beneficiary in the UTC and Indiana Trust Code are similar, but not identical.
6. The settlor is concerned the existence of the trust may encourage a dissolute lifestyle.

7. The settlor is concerned about privacy, identity theft, or even kidnapping if the extent of the family’s wealth were known.

If the Settlor desires to keep information from a particular beneficiary or group of beneficiaries, under the Indiana Code the trust agreement can modify the statutory duties of the trustee. If this is going to be the case the Settlor may want to designate someone as an agent for the beneficiary to receive information, notices, etc., preferably someone who will have actual knowledge of the circumstances of the beneficiary who can inform the trustee of needs of the beneficiary. For example, it would be unfortunate that a beneficiary didn’t receive funds for a medical emergency because he/she did not know of the existence of the trust and the trustee did not know the beneficiary well enough to know the need existed.

UTC § 105(b) establishes certain duties that may not be overridden, such as the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. UTC § states: The terms of a trust prevail over any provision of this [Code] except: . . .

[(8)] the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee’s reports;]

[(9)] the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust;]
The fact that the two subsections above are in brackets means that the NCCUSL considers them to be optional and has left it up to the individual states to decide whether to make these duties mandatory (and thus not able to be overridden by the trust agreement).

**WHO IS ENTITLED TO THE TRUST AGREEMENT?**

IC 30-4-3-6(b)(8) states that, unless the terms of the trust provide otherwise, when a trust becomes irrevocable, either by the terms of the trust agreement or upon the death of the settlor, the trustee has a duty to promptly provide a copy of the complete document to an income beneficiary or a remainder beneficiary who makes a written request for it. *Quaere: If the trustee doesn’t notify the remainder beneficiaries of the existence of the trust, how can they enforce their rights to request a copy of the trust agreement?*

The right of a beneficiary to receive a copy of the trust agreement is addressed in UTC Section 813(b), which states “a trustee upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument.” The Restatement Third states in Section 82(2) that “a trustee ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.”

What if there are multiple trusts created in one single document? Is the trustee still required to provide a copy of the entire agreement when it contains trusts for other beneficiaries?

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10 See also Cmts e. on Subsection (2): “Because one’s enforcement of his or her rights as a trust beneficiary normally requires an awareness not only of the trust’s existence but also of the terms of the trust, a beneficiary is ordinarily entitled to obtain a copy of the trust….By the terms of the trust, however, the settlor can limit the trustee’s duty to disclose trust provisions or information on a reasonable basis, in order, for example, to lessen the risk of unnecessary or unwarranted loss of privacy, or the risk of adverse effects upon youthful or troubled beneficiaries, even underage beneficiaries about whose motivation or responsibility the settlor has concerns. Even limitations of these types, however, cannot properly prevent beneficiaries, even underage beneficiaries (or their duly appointed representatives), from requesting and receiving information to the extent necessary to the protection of their interests in accordance with principles stated in Comment a(2).”
This was the issue in *Fletcher v. Fletcher*, 480 S.E.2d 488 (1997) where the Supreme Court of the State of Virginia stated:

(t)he information not disclosed may have a material bearing on the administration of the Trust Agreement insofar as the beneficiary is concerned. For example, without access to the Trust Agreement (even though there are numerous separate trusts established), the beneficiary has no basis upon which he can intelligently scrutinize the Trustee’s investment decisions made with respect to the assets revealed on “Schedule A.” The beneficiary is unable to evaluate whether the Trustees are discharging their duty to use “reasonable care and skill to make the trust property productive”. Also, the beneficiary is entitled to review the trust documents in their entirety in order to assure the Trustees are discharging their duty to deal impartially with all the beneficiaries within the restrictions and conditions imposed by the Trust Agreement.

What about recipients of specific bequests - are they entitled to a copy of the complete trust agreement? In *Schrage v. Seberger Living Trust*, 52 N.E.3d 45 (2016) the Indiana Court of Appeals ruled that the recipient of a specific distribution was not entitled to receive the entire trust agreement.

**ANNUAL STATEMENTS**

Once the initial communication to the beneficiaries has taken place the trustee has a duty to provide information annually to the income beneficiaries. IC 30-4-5-12 states that:

a. Unless the terms of the trust provide otherwise or unless waived in writing by an adult, competent beneficiary, the trustee shall deliver a written statement of accounts to each income beneficiary or his personal representative annually. The statement shall contain at least:

1. All receipts and disbursements since the last statement,
2. All items of trust property held by the trustee on the date of the statement at their inventory values. (emphasis added)

Pay attention to “sprinkle spray” trusts and multiple permissible income beneficiaries. It is important for the trustee to distinguish between multiple, permissible income beneficiaries and income and remainder beneficiaries. Credit trusts are often structured to be a sprinkle spray trust, with the spouse and the children all being permissible income recipients. The trust document might state that the primary purpose of the trust is to support the surviving spouse and that he/she shall receive first consideration when deciding to whom to distribute the income. And the trustee may be distributing all the net income to the spouse. In this situation, however, the spouse and the children are income beneficiaries (the definition of an income beneficiary includes a person to whom net income of a trust is or may be payable) and all should be sent annual statements.

McNeil v. McNeil, 798 A.2nd 503 (2002) is a well known case on this topic. Henry S. McNeil, Jr. (“Hank”) was one of the four children of Henry S. McNeil, Sr., who created multiple trusts from the proceeds of a company he sold to Johnson and Johnson. McNeil Sr. established individual trusts for each of his four children (called the “Sibling Trusts”) and a fifth trust, called the “Lois Trust” (Lois was his wife), which named his wife and the children as permissible income recipients. Initially the children believed their interest in the Lois Trust to be that of remaindermen only – they were not informed that they had a current interest. At some point in time Hank became estranged from the rest of the family and was removed as a beneficiary from his father’s will. While the other siblings learned what their actual status was, when Hank inquired about the Lois Trust the trustees rebuffed his inquiries. Ultimately the trustees were found to have breached their fiduciary duties, not only in failing to inform Hank of his
beneficiary status but also for showing partiality to the other beneficiaries. The Co-Trustees were surcharged one-fifth of their compensation for the period from 1987 to 1996.

**Does the written statement of accounts under IC 30-4-5-12 require any special format?** No it does not. An Excel spreadsheet that has a list of all transactions (receipts, disbursements, sales, purchases) and inventory value of the assets is sufficient. (Of course it is a good idea to also include fair market value of the assets.) If the assets are held in a brokerage account, then the trustee can simply send a copy of the brokerage statement to the beneficiaries. Or, better yet, the trustee can ask the broker to set up the beneficiaries to receive statements automatically. Another alternative is to include language in a trust agreement that states that the trustee can provide a copy of the trust’s fiduciary income tax return to the beneficiaries. The format is not as important as making sure the required information is included.

**What about a breakdown between income and principal – is it required?** Ideally the annual statement will include a breakdown of receipts and disbursements between accounting income and accounting principal. The statute does not, in fact, require it for the annual statement. Nonetheless the trustee must be able to provide this information and must keep track of it from the inception of the trust until its termination under its duty to keep accounts (which is separate from and in addition to its duty to provide information). Any trustee who is required to pay out the net income must be prepared to show how net income was calculated. Secondly, the allocation of receipts/disbursements between income and principal has a direct impact on the rights of an income beneficiary versus a remainderman. *Quaere: Can a trustee truly be said to

\[11\] IC 30-4-3-6(b)(6) requires the trustee to maintain clear and accurate accounts with respect to the trust estate. See also the Restatement Third of Trusts, § 83 and UTC § 810.
be complying with the requirement of keeping a beneficiary informed about the administration of
a trust and of the material facts necessary for the beneficiary to protect his or her interest if the
trustee is not showing what is allocated to income and principal?

Is the trustee required to send annual statements to remainder or other beneficiaries?

May/should the trustee send annual statements to remainder or other beneficiaries?

IC 30-4-5-12 refers only to income beneficiaries. This code section does not require the trustee
to send statements to anyone other than an income beneficiary. May the trustee send annual
statements to beneficiaries other than the income beneficiary? Yes. Should the trustee
automatically send copies of the annual statement to the remainder beneficiaries? Perhaps. It is
not required by the statute and it can be a very touchy subject. Unless there is a good reason to
not do so (see the discussion on page 11), it can be a good practice not only for allowing
beneficiaries to have information needed to enforce their interest but also for helping to protect
the trustee. The fact the future beneficiaries are told about the trust and have the opportunity to
ask questions and receive information may avoid future litigation. If there are going to be
problems, they can (hopefully) be resolved in real time instead of rearing their head at the time
the trustee is trying to terminate the trust. It may also provide the trustee with the opportunity to
receive approval on statements, and thus limit future claims.

What about relieving the trustee of the duty to account in the trust agreement? I have seen
many trust agreements that routinely state that the trustee is not required to provide annual
statements unless requested to do so by a beneficiary. I will confess I am not fond of these
My concern is that when a trustee is not providing regular statements to someone then he or is operating in secrecy. With accountability lacking the temptation for misconduct increases. The goal of the trustee should be transparency. The statements do not have to be in the format of a formal accounting. Copies of bank statements, brokerage statements, excel spreadsheets, and copies of the fiduciary income tax returns can be practical, cost effective ways for a trustee to provide information to a beneficiary.

**REQUESTS FOR INFORMATION**

The provision for sending annual statements requires action by the trustee without waiting for a request. There are other code sections that impose a duty on the trustee to respond to requests for information. In IC 30-4-3-6(b)(7) a trustee satisfies the requirement to keep the current income beneficiaries and “next in line” beneficiaries reasonably informed about the administration of the trust by, upon written request of those beneficiaries, giving them “access to the trust’s accounting and financial records concerning the administration of trust property and the administration of the trust.”

Under a prior version of IC 30-4-3-6(b)(7) the trustee had a duty to give a beneficiary (not just an income beneficiary) complete and accurate information concerning any matter related to the administration of the trust and to permit the beneficiary (without any modifier) to inspect the trustee’s account. Beneficiary means, in the case of a trust, an income beneficiary and a remainder beneficiary. I believe that there is a gap in this code section in regards to the

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12 Note, this comment is not in regards to the use of silent trusts. Many lawyers who draft wills and trusts regularly have basic provisions that are routinely included in their documents. My recommendation is against the routine use of this clause. The intent of such a provision is likely for the purpose of making the trustee’s job easier, but can lull a trustee into complacency or worse.

13 The code section was changed in 2014.
omission of remainder beneficiaries in the group of beneficiaries the trustee must keep informed.\textsuperscript{14}

Does the right to request information extend to contingent beneficiaries? This was the situation in \textit{Marshall & Ilsley Trust Company, N.A. v. Woodward}, 848 N.E.2d 1175 (Ind.Ct.App.2006). In this case, Robert Woodward Jr. created an irrevocable life insurance trust that named his wife and children as beneficiaries. The trust made provisions for distributions to each child until age 40, at which time that child’s share was to be distributed outright. In the event that all the Settlor’s children died prior to distribution of his share without issue, the contingent remainder beneficiary was Woodward Sr. Woodward Sr. requested an accounting from the bank, who refused. The court ruled that Woodward Sr. was a remainder beneficiary and that he was entitled to receive the accounting. The court’s discussion focused on the definitions found in the Indiana Trust Code and on IC 30-4-3-6(b)(7), which at that time required a trustee to provide “the beneficiary” complete and accurate information. The word beneficiary, without any qualifier, means an income beneficiary and a remainder beneficiary. Would the result in this particular situation be different under the 2014 revision to IC 30-4-3-6(b)(7)? I do not believe it would be different, in this particular fact situation. At the time the case was brought, none of the three Woodward sons had children. Therefore, had their interest ended, the “next in line” beneficiary would still have been Woodward Sr. However, if any of the sons had children, then Woodward, Sr. would not have been a next in line beneficiary.

UTC § 813(a) states that “unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the

\textsuperscript{14} This does not mean that a remainder beneficiary is without recourse. The remainder beneficiary is still entitled to request information and the trustee’s duties extend to the remainder beneficiaries. If the trustee refuses to provide information the remainder beneficiary, under IC 30-4-5-12(c) may request the court to direct the trustee to provide a verified written statement of accounts containing the information listed in IC 30-4-5-13.
trust. Note that this section says “a beneficiary.” The comments to this section make it clear that the trustee’s duty to respond to a beneficiary’s request is not limited to requests from qualified beneficiaries, but is owed to all beneficiaries.

The Restatement Third of Trusts also emphasizes that the duty to respond to requests is owed to all beneficiaries. Section 82(2) states:

Except as provided in § 74 or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings. (emphasis added)\(^\text{15}\)

### DISCHARGE – THE TRUSTEE’S DESIRE TO BE RELIEVED OF LIABILITY

#### Interim Accounts

A trustee may wish to have its accounts approved and be discharged prior to the termination of a trust. This may particularly be true when the trust has quarrelsome and antagonistic (litigious) beneficiaries. There are two methods under the Indiana Code by which this can be achieved. The first is provided for in IC 30-4-5-14(a). This section states;

With respect to the annual written statement required by 30-4-5-12(a), a beneficiary or his personal representative will be deemed to have discharged the trustee from liability as to that beneficiary for all matters disclosed in the statement if he approves in writing the trustee’s statement. (emphasis added)

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\(^\text{15}\) Restatement Third, §82, \textit{cmt. e} on Subsection (2): “Under the general rule of Subsection (2), a trustee ordinarily has a duty to provide information that is requested by any beneficiary, a right not limited to fairly representative beneficiaries. The trustee is also to grant access to books and records of the trust, and to permit inspection of the trust’s property holdings to any beneficiary, including with the participation of the beneficiary’s accountant, attorney, or other advisor.”
One problem with this method is that the troublesome beneficiary most likely will not approve the statement in writing and return it.

The second option for the trustee is to docket the trust and seek court approval of its accounts. IC 30-4-3-18(b) states that a trustee is entitled to a review and settlement by the court of the accounts of his administration. The trustee does not have to wait until the trust is closing to avail itself of this relief. However, the information that is required for a verified written statement of accounts filed with the court is more detailed than that required under IC 30-4-5-12(a). These requirements are found in IC 30-4-5-13:

(a) A verified written statement of accounts filed with the court under 30-4-5-12 or by the trustee under 30-4-3-18(b) shall show:

(1) the period covered by the account;
(2) the total principal with which the trustee is chargeable according to the last preceding written statement of accounts or the original inventory if there is no preceding statement;
(3) an itemized schedule of all principal cash and property received and disbursed, distributed, or otherwise disposed of during the period;
(4) an itemized schedule of income received and disbursed, distributed, or otherwise disposed of during the period;
(5) the balance of principal and income remaining at the close of the period, how invested, and both the inventory and current market values of all investments;
(6) a statement that the trust has been administered according to its terms;
(7) the names and addresses of all living beneficiaries and a statement identifying any beneficiary known to be under a legal disability;
(8) a description of any possible unborn or unascertained beneficiary and his interest in the trust estate; and

(9) the business address, if any, or the residence addresses of all the trustees.

Note that the information required under this code section does require a breakdown of all receipts and disbursements between accounting income and accounting principal.

The problem with the second method (obtaining court approval) is that it makes the trust, its assets, transactions, and beneficiaries public.

**Termination of a Trustee’s Role**

A trustee whose role is about to end will also want discharge and release from liability. This may occur due to the trustee’s resignation, its removal, or because the trust is terminating. If the trust is going to continue with a new trustee, the successor trustee is going to want to be relieved of liability or responsibility for acts or omissions of its predecessor. One option for the trustee is to obtain judicial relief under IC 30-4-3-18 and IC 30-4-5-14.

IC 30-4-3-18(b) states that the trustee is entitled to a review and settlement by the court of the accounts of his administration. IC 30-4-5-14(d) states that “(u)pon request for approval of a verified written statement of accounts and the filing of objections, if any, the court shall determine the correctness of the statement and the validity and propriety of all actions of the trustee described in the statement and may take any additional action that it deems necessary.

From a practical matter, frequently neither the trustee nor the beneficiary want to go the route of docketing the trust, and preparing and submitting a formal accounting. It is time

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16 In truth, not only will the successor trustee want to be relieved of liability for acts or omissions of a prior trustee, he will want to be able to accept the assets delivered to it without reviewing the assets or accounts at all, i.e. a fresh start. Of course the trust agreement can include language to this effect.
consuming and expensive, particularly when the trust has been in existence for a long time and has had many assets and transactions. 17

But the trustee still will want to know that it has been discharged and doesn’t have potential liability lurking. As an alternative many trustees ask the beneficiaries to waive a judicial accounting and to release the trustee from liability. (Some of the releases also ask the beneficiary for indemnification.) Now, if you are the remainder beneficiary of a trust for which you have never received statements how inclined are you going to be to want to waive an accounting and sign a release? But, if you don’t do so it may take months before you actually receive your distribution from the trust. On the other hand, if you as the remainder beneficiary have received annual statements from the inception of the trust, have had the opportunity to talk with the trustee and to ask questions along the way, you may be totally comfortable with waiving a formal accounting and signing a release. This is a good reason for providing the remainder beneficiaries with information throughout the duration of the trust.

Drafting Solution:

An alternative is to include language in the trust agreement that both requires the trustee to provide an accounting of some kind and that imposes a deadline for objecting to an account. The accounting does not necessarily need to be in the format of a verified statement of accounts, but preferably it will include a break down between income and principal, particularly in trusts where there is mandatory payout of net income to one class of beneficiaries and when principal goes to a different group. This will enable both classes of beneficiaries to see how net income was determined, and also makes it clear to the remaindermen when principal invasions have occurred. By including language that states

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17 This assumes the trustee even has the underlying records to use to prepare an accounting. How many individuals can go back 20, 30, or 50 years and find each and every transaction that took place in their bank or brokerage accounts?
that a beneficiary's right to object must be done within a specified time period (for example, within 90 days), the trustee is able to receive some closure. If a beneficiary does object, then the objection will be to something that has occurred within the recent past and not decades earlier.

**STATUTE OF LIMITATIONS**

IC 30-4-6-12 contains the statute of limitations for trust actions. It states:

Unless previously barred by adjudication, consent or limitation, any right against a trustee for breach of trust shall be barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the right is commenced within three (3) years after receipt of the final account or statement if, being an adult, it is received by him personally or if, being a minor or person with a disability, it is received by his personal representative. The rights thus barred do not include the rights to recover from a trustee for fraud, misrepresentation or inadequate disclosure related to the settlement of the trust. (emphasis added)

**CONCLUSION**

It is very important to stress to your clients serving as a trustee the importance of excellent recordkeeping, of communicating with the beneficiaries of the trust, and being prompt to respond to inquiries. Many a trust dispute could have been avoided had the trustee adhered to these principles.