Real Estate Council Alberta

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RECA Resource
Information Bulletins

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Trust Money Disbursements and Dusputes

Purpose

This bulletin applies to all real estate and mortgage licensees who receive funds in trust. It explains a broker's responsibilities to accept, hold, and disburse trust funds in accordance with the terms of trust, including potential dispute mechanisms.

Regulatory status: Information Bulletins provide guidance on how RECA interprets and applies existing legislative requirements. They do not create new legal requirements or amend the *Real Estate Act* or the *Real Estate Act* Rules.

Why this matters

When a brokerage holds money in trust, the broker's role is that of a trustee: holding the trust monies for the parties to the transaction, and keeping and disbursing money only in accordance with the terms of trust. The broker acting as trustee does not act on behalf of, or in favour of, either party, even a party the brokerage represents in the trade. RECA's experience indicates that the majority of trust disputes arise when the terms of trust are not clear or specific, and failure to act diligently in disbursing trust funds may be conduct deserving of sanction.

What the Rules require

The *Real Estate Act* requires that:

- licensees (brokerages) must not accept trust funds without express terms of trust; and
- the terms of trust must be in writing, and all parties to the deal or trade must agree to those terms.

The broker acting as trustee must have the written consent of the parties to change the terms of trust.

Delegation of broker duties as trustee. The broker may delegate their trustee duties for the trust account to qualified licensees of the brokerage and must ensure the delegation complies with section 52 or 68 of the Rules. The broker remains responsible for the trust

account, and the delegated person should report any issues with the terms of trust to the broker immediately.

Broker fees from funds held in trust. Brokers acting as trustees may be entitled to receive fees from the trust and may disburse funds to the brokerage, for example, when there is improper notice to cancel a property management agreement with early-cancellation fees, or when a buyer forfeits a deposit. The broker must be proactive and explain why they will disburse trust money to the brokerage.

Examples of the broker acting as a trustee

1. When one of the parties to a trade claims the deposit or objects to the brokerage disbursing it, one party argues that the other did not take reasonable steps to meet the terms of the contract; the other disagrees. The facts of the situation direct the trustee broker: the broker has a duty to keep or disburse the deposit in accordance with the written terms of trust.
2. A real estate contract requires the brokerage to deposit the trust funds in an interest-bearing account at a specific bank. The interest rate is higher at another bank, so the broker deposits the funds there instead. The broker, acting as trustee, does not have that authority. Trustees must act only within the authority granted under the terms of the contract.
3. The broker represents one of the parties in the trade, and that party argues the broker also represents them in dealings with the trust funds. That party is incorrect: the broker acting as trustee does not act on behalf of, or in favour of, either party. Their duty is to receive and disburse funds in accordance with the terms of the trust.
4. In a residential mortgage transaction, after the borrower accepts a commitment to fund and receives an effective Cost of Credit Disclosure, the borrower pays a brokerage fee that includes a refundable portion if certain conditions are not met. The refundable portion must be held in trust until it is either earned or returned. A dispute may arise if the brokerage releases the refundable portion prematurely, applies it to its own fees, or cannot account for the funds when the borrower requests a refund after a condition is not met.
5. In a commercial mortgage transaction, a borrower pays an upfront fee to the mortgage brokerage, with a portion refundable if financing does not proceed. The refundable portion is trust money and must be held in either the brokerage's trust account or a lawyer's trust account. A dispute may arise if the brokerage treats the refundable portion as earned revenue, fails to hold it in trust, or delays returning it after the deal collapses.

Trust money disputes

When a dispute arises, brokers must comply with the terms of trust and attempt to resolve trust disputes as quickly as possible. Brokers are responsible for ensuring they disburse trust funds in accordance with the terms of trust.

Best Practices

Best practices go beyond the minimum requirements above. They are not mandatory, but they reflect the level of service RECA encourages licensees to provide.

To prevent disputes, brokerages should have clear policies that require licensees to:

- draft clear and explicit conditions; the more precise the condition, the less difficulty the broker acting as trustee will have in disbursing trust funds;
- ensure their clients understand the terms of the trust;
- explain to a seller that the condition "subject to the buyer doing their due diligence" means the deposit will be returned to the buyer unless the buyer removes that condition;
- explain to a seller that the condition "subject to a home inspection satisfactory to the buyer" means the buyer can walk away from the deal and receive the return of the deposit for cosmetic defects or imperfections; and
- include dispute resolution processes in the contract, in the event the broker acting as trustee cannot reach a reasonable conclusion about disbursing the trust monies.

To help resolve disputes, the broker acting as trustee should:

- review and understand the terms of trust and the application of all conditions in the contract;
- obtain all information needed to determine whether the buyer or seller satisfied the conditions or terms of trust; if the terms concern financing, determine whether the buyer applied for financing and the outcome, including whether a lender issued a written commitment before the borrower backed out;
- make inquiries if the information is unclear;
- if the terms of trust are difficult, request each party's submissions on their understanding of the terms; and
- obtain legal advice if the terms of trust are unclear. RECA recommends that the lawyer receive the terms of trust, all relevant information, and a copy of this bulletin to ensure they understand the broker's responsibilities as trustee under the Act and the *Trustee Act*.

If a Reasonable Conclusion Cannot Be Reached

Where there is no reasonable conclusion on how to disburse the trust funds, the brokerage has the following options:

- exercise dispute resolution options set out in the terms of trust;
- consult an Applications Judge in accordance with section 43 of the Trustee Act [original reads "Master in Chambers"; Alberta retitled Masters as Applications Judges in 2022; Legal to confirm the current statutory language];
- negotiate with all parties terms of trust that set out the process for determining who will receive the trust funds; the parties may agree to have the brokerage or another person hold the funds in trust until any legal process through the courts is complete; or
- apply to the courts to request that the brokerage be relieved of its trustee responsibility.

Reminders

Brokers acting as trustee must:

- keep all parties aware of any actions to resolve the trust dispute;
- be diligent and take reasonable steps to disburse trust funds in accordance with the terms of the trust; failure to act may be conduct deserving of sanction;
- not hold a deposit in trust without letting the parties to the trade attempt to resolve the issue; and
- not pay the money into court or to a lawyer's trust account when a reasonable determination can be made; courts have the discretion to assess damages against licensees who abuse trust dispute resolution options.

RECA's closing remarks

It is a difficult and, at times, controversial task for brokers to act as trustees. RECA does not consider it conduct deserving of sanction when a broker, acting as a trustee, follows these guidelines and exercises due diligence in reaching a reasonable decision, even if the courts ultimately do not agree with the broker's decision.

Related Information

Legislation	Relevant Sections
Real Estate Act	ss. 18, 25

Real Estate Act Rules	ss. 52, 68
Trustee Act	ss. 40, 43
Additional Resource: Information Bulletins	Brokers - Delegation