

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of PATRICIA L. BROCKWAY  
TRUST NO. 1.

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LOUIS H. BROCKWAY and P. BRUCE  
BROCKWAY III,

UNPUBLISHED  
July 16, 1999

Petitioners-Appellants,

v

No. 208504  
Ingham Probate Court  
LC No. 96-013414 TI

MICHIGAN NATIONAL BANK,,

Respondent-Appellee.

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Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Petitioners, Louis H. Brockway and P. Bruce Brockway III, appeal as of right from a probate court order granting partial summary disposition of their claims arising out of the alleged mismanagement of two trusts by respondent-trustee, Michigan National Bank.<sup>1</sup> The probate court ruled that, pursuant to MCL 700.819; MSA 27.5719 and MCL 700.5805(8); MSA 27A.5805(8), petitioners' claims were barred by the statutes of limitation, and therefore, summary disposition in respondent's favor was proper under MCR 2.116(C)(7). Because we find that petitioners' claims were subject to and barred by a three-year statute of limitations, and not the six-year limitation period found in MCL 600.5813; MSA 27A.5813, we affirm.

On February 24, 1974, petitioners' mother, Patricia L. Brockway, created a trust entitled Patricia L. Brockway Trust No. 1. Patricia Brockway died on April 27, 1974. Pursuant to the terms of the Patricia L. Brockway Trust No. 1, upon Patricia's death, the trust was divided into two separate trusts. Trust A was for the benefit of Patricia Brockway's surviving spouse, P. Bruce Brockway, Jr. (Bruce Jr.). Patricia's trust instrument, also granted to Bruce Jr. a general testamentary power of appointment over the assets of Trust A. Trust B was for the benefit of Patricia's descendants, i.e.,

petitioners. Respondent was the trustee of all the Brockway trusts. The instrument creating the Patricia L. Brockway Trust No. 1 provided that the trustee pay to Bruce Jr., in convenient installments, all of the net income of Trust A. The instrument further provided that the trustee could use for Bruce Jr.'s benefit, income from Trust B if it were necessary to enable Bruce Jr. to live in the manner in which he lived prior to Patricia's death. The trustee was further authorized to invade the principal of Trust A and Trust B if the income generated from those two trusts was insufficient to support Bruce Jr. in the stated lifestyle, provided that Trust A be exhausted before any principal were distributed from Trust B.

Between 1979 and 1992, the trustee dispersed to Bruce Jr. income from Trust A and Trust B as well as principal from Trust A. Bruce Jr. died on May 3, 1992. Upon Bruce Jr.'s death, and pursuant to the authorization of the Patricia L. Brockway Trust No. 1 and the terms of Bruce Jr.'s own separate trust, the corpus of Trust A was placed into the P. Bruce Brockway Trust No. 1. This trust, provided for the payment of benefits to petitioners and to Oleta Brockway, Bruce Jr.'s second wife whom he married in 1975. The payments would be made during Oleta's lifetime with any remainder distributed outright to petitioners at her death. With respect to Trust B, upon Bruce Jr.'s death, it was divided into separate trusts for each of the petitioners.

On January 13, 1997, petitioners filed a petition in the probate court alleging that respondent trustee breached its fiduciary duties in the course of its administration of Trust A and Trust B. In particular, petitioners alleged that between 1979 and 1992, respondent, in violation of the terms of Patricia's trust, made excessive distributions to Bruce Jr. which permitted him not to simply maintain the lifestyle to which he and Patricia were accustomed, but to enjoy a much more elaborate lifestyle. Petitioners sought an accounting, removal of the trustee and surcharge of the trustee for breaches of fiduciary duty. Upon the filing of respondent's motion for summary disposition, the probate court found that petitioners' claims were barred by the statutes of limitation. We agree.

This Court reviews de novo a motion for summary disposition brought pursuant to MCR 2.116(C)(7). *In re Beglinger Trust*, 221 Mich App 273, 276; 561 NW2d 130 (1997). A motion under this court rule should be granted only if no factual development could provide a basis for recovery. *Smith v YMCA of Benton Harbor/Saint Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

Respondent-trustee contends that petitioners' claims arising out of its administration of Trust A are time barred because, pursuant to the provisions of MCL 700.819; MSA 27.5819, petitioners failed to file a claim within three years of their receipt of the final account. The three year limitation period provided by Section 819 of the Revised Probate Code is triggered by the beneficiary's receipt of a final account :

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who 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 claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement

in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary. [MCL 700.819; MSA 27.5819.]

In response, petitioners argue that the limitation period provided by MCL 700.819; MSA 27.5819 does not apply because they were never served with a document that qualifies as a final accounting. Because we conclude that the trustee provided to petitioners an adequate final account, we hold that MCL 700.819; MSA 27.5819 was the proper statute of limitations to apply to petitioners' claims.

In May, 1992, respondent provided petitioners with an account statement which it contends constituted the final accounting for Trust A. Petitioners argue that because this statement did not explicitly disclose a termination of the trust relationship, did not fully disclose the breach of trust and was allegedly not provided in good faith, it does not qualify as a final account. We disagree. While the revised probate code does not specifically define what must be disclosed in a "final account," it does, within the provisions requiring the trustee to provide a statement of the accounts of the trust upon termination, require that the "trustee shall keep the presently vested beneficiaries of the trust reasonably informed of the trust and its administration." MCL 700.814; MSA 27.5814. Thus, if the statement at issue satisfied this requirement, we conclude that it was an acceptable final account as the term is used in MCL 700.819; MSA 27.5819.

The May, 1992, account statement reflected that all of the assets of Trust A were dispersed by virtue of being transferred to the P. Bruce Brockway Trust No. 1.<sup>2</sup> The trust was left with an ending account balance of \$0.00 as of May 8, 1992. In addition, the statement indicated that a "final fiduciary income tax return" was filed. Thus, we conclude that the May 9, 1992, account statement constituted a final accounting for purposes of the statute and that respondent complied with the requirements of MCL 700.819; MSA 27.5819.<sup>3</sup>

As noted above, MCL 700.819; MSA 27.5819 bars actions filed later than three years after a final account has been issued for a trust. Because petitioners' claims relative to Trust A were not filed within three years of the receipt of the final account, we conclude that these claims were time barred.

Because no final account has been issued relative to Trust B, the foregoing analysis does not apply. However, we similarly find that the claims relative to and arising out of respondent's management of Trust B were also filed untimely. In *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977), this Court held that an action alleging a breach of fiduciary duty sounds in tort and is therefore controlled by the general three-year statute of limitation.<sup>4</sup> See also, *Smith v First Natl Bank & Trust Co of Sturgis*, 177 Mich App 264, 270; 440 NW2d 915 (1989).

A claim accrues at the time the wrong upon which the claim is based was done, regardless of the time damage results. MCL 600.5827; MSA 27A.5827. The time of the wrong that triggers the running of the limitations period is the date on which the plaintiff was harmed by the defendant's act.

*Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995); *Nelson v Ho*, 222 Mich App 74, 85; 564 NW2d 482 (1997).

Petitioners, in their lower court motion to surcharge the trustee, alleged that respondent-trustee's wrongful acts occurred from 1979 until 1992. Petitioners acknowledge receiving quarterly reports regarding Trust B from 1979 until the present time, yet claim they were not aware of respondent's wrongful acts until 1997, when they received information from respondent while settling the estate of Bruce Jr. Petitioners, therefore, contend that their claims did not accrue until 1997. As cited above, accrual of a claim occurs when the wrong is committed. Any wrongs committed by respondent with regard to Trust B occurred prior to 1992, therefore petitioners' claim accrued in 1992 at the latest. Because petitioners' claims were filed in 1997, well beyond three years from the date of accrual, they are time barred.

Petitioners argue that the probate court should have utilized the discovery rule, which would have postponed the accrual of their causes of action and therefore delayed the running of the statute of limitation. *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963). If a court utilizes the discovery rule, the limitation period does not start to run until the date of discovery, or the date when, by the exercise of reasonable care, the plaintiff should have discovered the wrongful act. *Id.* at 379. Petitioners acknowledge receiving quarterly reports regarding the trusts, they also received a copy of the trust instrument in 1992 and admit intimate knowledge of their father's lifestyle. They thus possessed all the tools necessary to discover respondent's allegedly wrongful acts in 1992. Consequently, the benefits of the discovery rule do not work to petitioners' advantage.

Notwithstanding the foregoing analysis and conclusions, petitioners argued that in light of their allegations of fraud, the six-year catch-all statute of limitations applies to their claims. MCL 600.5813; MSA 27A.5813. In the alternative, petitioners contend that the fraudulent concealment provisions of MCL 600.5855; MSA 27A.5855 toll the running of the statute of limitations. We find neither argument persuasive.

In support of their claims of fraud against the trustee, petitioners contend that respondent fraudulently failed to comply with its statutory obligations when it provided inadequate accountings which did not disclose the prerequisite justification for its invasion of the trust principals. Put another way, petitioners contend that respondent had an obligation to "reveal that the trustee had invaded the principal of Trust A without obtaining any supporting evidence of the beneficiary life style in 1974, or in some fashion justify the invasion of principal." This is the only act upon which petitioners rely in support of their claim of fraud. This Court is not bound by the label affixed to a claim, but may look beyond the label to determine the exact nature of the allegations made. *Randall v Harrold*, 121 Mich App 212, 217; 328 NW2d 622 (1982). Because we find that petitioner's claim of fraud is merely a restatement of their tort action for breach of fiduciary duty, the six-year statute of limitations applicable to fraud claims is not invoked.

"[T]he beneficiary of a trust is always entitled to such information as is reasonably necessary to enable him to enforce his right under the trust or to prevent or redress a breach of trust." *In re Childress Trust*, 194 Mich App 319, 328; 486 NW2d 141 (1992). Further, we note that MCL

700.814; MSA 27.5814, requires that a trustee keep beneficiary reasonably informed of the trust and its administration. Regardless of the semantics, the essence of petitioners' claims is that the trustee failed to comply with its fiduciary obligations. This claim, as discussed above, is subject to a three year statute of limitation.

Although it is not before us, we seriously question petitioners' claim that respondent-trustee failed to comply with its statutory obligations. We find that petitioner was provided with information of the nature required by the Revised Probate Code. Petitioners received quarterly accountings which revealed the manner in which the income and principal of the trust were being disseminated. See, e.g., *In re Ansell Family Trust*, 224 Mich App 745, 751; 569 NW2d 914 (1997) (This Court held that a beneficiary was kept reasonably informed about the assets of the trust where the trustee was informed of the decision to sell the property). In 1992, petitioners also received a copy of the trust instruments. Petitioners appear to have been reasonably informed of the trust and its administration.

Further, we reject petitioners' argument that the statute of limitations was tolled by respondent's fraudulent concealment of the cause of action. MCL 600.5855; MSA 27A.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitation.

The fraudulent concealment which will postpone the running of a statute of limitation must be concealment of the fact that plaintiff has a cause of action. *Weast v Duffie*, 272 Mich 534, 539; 162 NW2d 410 (1935). "If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know. . . ." *Id.*

The fraudulent concealment provision does not resurrect petitioners' claims because, despite respondent-trustee's conduct, petitioners knew or should have know of their cause of action by April 3, 1992, and they did not file a claim within two years of that date. Petitioners admit that on April 3, 1992, they received a copy of Patricia's trust documents. Thus, they knew the extent of the respondent-trustee's authority. Petitioners' also admit that they were familiar with Bruce Jr.'s lifestyle. These facts, coupled with petitioners' regular receipt of trust account statements, armed petitioners with adequate information to investigate a possible cause of action. Because petitioners did not file their petition within two years of when they knew or should have know of their cause of action, their claims are time barred.

Finally, petitioners argue that the lower court erred in ruling that their claims were barred, not only by the statutes of limitation, but by the doctrine of laches as well. A lower court's determination regarding laches is reviewed de novo. *Schneider v Fox*, 73 Mich App 595, 601; 252 NW2d 530 (1977). Generally, courts are reluctant to apply laches where a relationship of trust and confidence

exists between the parties. *O'Toole v Hurley*, 115 Mich 517, 521; 73 NW 805 (1898); *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990); *Prine v Hatfield*, 5 Mich App 57, 62; 145 NW2d 809 (1966). While the probate court's reference to the doctrine might have been inappropriate because of the fiduciary relationship between the parties, the error is harmless in light of the court's correct ruling that petitioners' claims were barred by the statutes of limitations.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Mark J. Cavanagh  
/s/ Brian K. Zahra

<sup>1</sup> By their petition in the probate court, petitioners also sought the removal of the trustee. However, that request for relief was not addressed by respondent's partial motion for summary disposition. Indeed, counsel in the lower court admitted that a trustee, for proper cause, could be removed at any time.

<sup>2</sup> Petitioners contend that in addition to disclosing the disposition of assets, respondent was required to disclose the breaches of fiduciary duty. We hold that it is sufficient that the account reflect what occurred with an asset. See, e.g., *Fraser v Southeast First Ban of Jacksonville*, 417 So 2d 707 (Fla App, 1982).

<sup>3</sup> We note that MCL 700.819; MSA 27.5819 further provides that "Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years." Petitioners do not address the issue of whether the statement informed the beneficiary of the location and availability of records. Perhaps, petitioners do not contest that requirement because the statement at issue in this case identified Michigan National Bank as the trustee, petitioners had been receiving, for several years, documents from respondent, and petitioners had sent correspondence to respondent during this time period. Indeed, at one point, petitioners sent a correspondence to respondent seeking copies of trust related documents. Petitioners obviously knew the location and availability of the records. In any event, we note, as did the trial court, that three days after Bruce Jr.'s death, counsel for respondent sent a correspondence to petitioners which, when fairly read, would substantially comply with the requirements of MCL 700.819; MSA 25.5819. Thus, although this issue was not raised and addressed by the parties, we conclude, as did the trial court, that the May, 1992, statement and correspondence dated April 8, 1992, taken together, were sufficient to satisfy the requirements of MCL 700.819; MSA 27.5819 and thereby invoke its limitation period.

<sup>4</sup>The Court in *Miller*, *supra*, relied upon the substantially similar predecessor to MCL 600.5805; MSA 27A.5805.