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# Obligation to **Account**

*In petition against fiduciary, whether actions constitute*

*'open repudiation' to trigger statute of limitations is a key issue.*

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**M**AY a fiduciary rely upon the theory of laches and/or the six-year statute of limitations as a defense to a compulsory accounting proceeding brought more than six years after her appointment?

With regard to the statute of limitations defense, the answer may seem self-evident, and even well-seasoned professionals would not hesitate in answering “absolutely, the statute has run.” The equitable defense of laches is one in which a fiduciary relies on the inaction or neglect of a beneficiary to assert a right within a reasonable period of time which, when taken together with the circumstances of a given case, may cause prejudice to the adverse party (i.e., the fiduciary who has failed to timely account). Collectively, the particular alleged circumstances and the lapse of time, when successfully asserted, operate as a bar in a court of equity. In fact, after careful thought and an examination of facts in a given case, the same seasoned professional would likely not hesitate to assert the equitable defense of laches and a show of prejudice as an alternative defense to what is perceived as a “delayed” demand for a compulsory accounting on the part of a beneficiary, believing that a fiduciary in such a case would necessarily prevail.

The real answer, in both cases, however, is “maybe,” because whether asserting a laches or statute of limitations defense, neither is triggered by the mere passage of time alone.

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### Open Repudiation

The statute of limitations applicable to a claim to compel a fiduciary to account and to pay a legacy is six years.<sup>1</sup> The key question, however, is when does the claim begin to accrue? In *Estate of Meyer*, 98 A.D. 7 (1904), the lapse of 13 years and nine months from the time of issuance of Letters Testamentary were not a bar to a proceeding to compel an executor to account, because despite the substantial lapse of time, the court held that there was no accompanying repudiation by the executor.

In succeeding years, courts have continued to consistently answer this question by holding that “the claim does not begin to accrue until there is either an open repudiation of the fiduciary’s obligation or a judicial settlement of the fiduciary’s obligation to account.”<sup>2</sup> The second part of the holding needs no explanation. Simply put, if a fiduciary judicially settles an accurate and complete account of his or her actions, then the statute of limitations is triggered and a claim made after the expiration of the six-year statute will be time barred. It is the concept of repudiation, however, that gives rise to judicial controversy. Problems arise where an account is not filed, years pass, and a person or entity with standing to do so, demands a judicial accounting of the fiduciary.<sup>3</sup>

Where a fiduciary has not triggered the statute of limitations by judicially settling an account, and a proper person or entity files a petition to compel the filing of a judicial accounting after the passage of a substantial period of time, a fiduciary may assert a defense that he or she has “openly repudiated” the claim for which an accounting is being sought. The question of what constitutes an “open repudiation,” and what the law requires in order for the repudiation to have triggered the statute to commence running such that the doctrine of laches and/or the statute of limitations may operate to bar a petitioner from seeking a compulsory accounting from the fiduciary is not always clear.

### Court Decisions

The decisions of the various Surrogates’ Courts turn on the facts of how, when and who allegedly made the statements that constitute the alleged repudiation. What is consistent, however, is that the statute of limitations does not begin to run against the beneficiary until it is clear, and made known to the beneficiary, that there is an open repudiation by the fiduciary of his obligation to administer the estate or that he has renounced, disclaimed or repudiated a trust.<sup>4</sup> Importantly, a mere lapse of time, without an open repudiation, is not sufficient for a fiduciary to claim the statute of limitations as a bar to a petition for compulsory accounting.<sup>5</sup>

Courts have also held that petitioners are not barred from demanding an accounting by a fiduciary by the running of the six-year statute of limitations in cases where a fiduciary never collected an asset or never accounted for an asset in a previously filed accounting. It is well-settled that the statute of limitations does not commence to run in favor of a fiduciary until he or she openly repudiates the trust or the bequest. In the case of omitted assets, the courts have held that there can obviously be no act of repudiation clearly made known to a beneficiary because the fiduciary never acknowledged that the omitted asset was part of the estate and/or the trust, and therefore the fiduciary could not have made an act of repudiation with respect to that asset.<sup>6</sup>

The law requires that the repudiation by a fiduciary be clear, and that it must be made known to the beneficiaries “viewed in the light of circumstances of the particular case.”<sup>7</sup> It is evident from the case law that the repudiation must be made by the fiduciary and not by anyone acting or speaking on behalf of the fiduciary in order for the act to constitute the clear act of open repudiation required by law. The requirement that the repudiation be clear on the part of the fiduciary is carefully analyzed in each particular case.

In *Matter of Barabash*, 31 NY2d 76 (1972), the decedent, a native of Russia, died intestate in 1951 in New York County. Letters of Administration were issued to the administrator in 1952, and in 1960 the decedent's children, who were residents of Russia, first learned of their father's death and sought contact with the administrator. After many unsuccessful attempts to obtain a voluntary accounting from the administrator, the children brought an action to compel the administrator to account. During that proceeding, it was learned that the administrator had spent the funds of the estate well before the children even knew of or asserted their cause of action.

On appeal, the administrator (respondent) argued that a letter written by the petitioner (appellant) which stated that if an informal accounting was not provided within two weeks, a petition to compel the administrator to account would be filed, constituted a clear repudiation. The New York Court of Appeals held that this alleged act of repudiation was not sufficient even though respondent's counsel replied to this letter by requesting further documentation as to appellants' status to maintain the proceeding and hinted at a possible counter-settlement. In so holding, the Court of Appeals noted, "the actions of respondent's counsel evince an equivocal course of conduct and fall far short of the clear act of open repudiation that our law mandates." Consequently, the court concluded that the statute of limitations never commenced to run and that the defense of statute of limitations was unavailable to the respondent.<sup>8</sup>

In a recent decision,<sup>9</sup> Surrogate John B. Riordan of the Nassau County Surrogate's Court held that there had been no open repudiation by an executrix, to the knowledge of the beneficiary, of her obligation to administer an estate. In that case, the demand for a compulsory accounting was made nine years after the appointment of the fiduciary. (The authors represented the petitioner before the Surrogate and are no longer involved in the case, which is now on appeal.)

The fiduciary premised her defenses of statute of limitations and/or laches upon an alleged conversation between the petitioner/beneficiary and his brother. The brother purportedly told the petitioner/beneficiary that "he would get nothing from his father's estate," and the fiduciary argued that the same constituted sufficient repudiation to commence the statute of limitations and bar the petition for a compulsory accounting. In the alternative, the fiduciary argued that the equitable doctrine of laches, coupled with the potential hardship that would be imposed upon the fiduciary in reconstructing nine years of records, should bar the petition for a compulsory accounting.

In reaching his decision, Surrogate Riordan held that the "alleged repudiation was not made by the

fiduciary" and thus did not constitute an act of repudiation which would have triggered the statute of limitations. The court similarly held that the equitable defense of "laches" also required proof of an open repudiation on the part of the fiduciary and dismissed that defense as well, directing that the fiduciary file an account within 60 days.

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### Lessons for Practitioners

These cases provide important lessons to counsel for both fiduciaries and beneficiaries. When acting as counsel to a fiduciary, one must keep in mind that while the passage of time creates a hardship in recreating records, some of which may have been lost or improperly maintained, it is important to remember that fiduciaries have an affirmative obligation to maintain such records, ensure their accuracy and account for his/her actions. Thus, practitioners must remind client/fiduciaries to maintain adequate records of all fiduciary transactions whether or not the fiduciary ever expects to file a formal accounting. This is especially important in light of the provisions of SCPA §711, which provides that if a fiduciary does not maintain proper records, he or she may be subject to a subsequent surcharge, denial of commissions, costs, or removal.

When acting as counsel to a beneficiary who has delayed his or her inquiry and/or right to demand a formal accounting by a fiduciary, counsel must carefully analyze the facts presented by the potential client. A beneficiary has no legal duty to inquire as to where or when he or she will receive estate or trust monies, and it is the fiduciary who is charged with the distribution of a decedent's estate according to the wishes of the decedent. Yet, when a considerable amount of time has passed and there is a factual question as to whether or not an open repudiation was made by the fiduciary, counsel must do a cost/benefit analysis before the commencement of the Petition for a Compulsory Accounting. It must be considered whether or not the time and money to be invested in the commencement of the proceeding and in pleading and proving an alleged lack of repudiation, will exceed the amount to be recovered on behalf of the beneficiary. Given the passage of time and the unavailability of financial information (which is what is sought in the petition

to compel an accounting), a fact-based analysis of the beneficiary's claim is critical prior to the commencement of the case.

Most importantly, a fiduciary cannot simply rely upon the concept of "open repudiation" in asserting the statute of limitations and/or laches as a defense to a demand for a compulsory accounting. The law requires proof that the open repudiation was made by the fiduciary, in a clear manner, and that the repudiation was made known to the beneficiary who is, in the fiduciary's estimation, belatedly seeking to compel an accounting. Whether preparing to commence or defend against a petition for a compulsory accounting which is commenced in what seems to be an untimely fashion, i.e., six years or more after appointment of a fiduciary, counsel must carefully examine the facts and circumstances of the particular case in determining whether the legal defense of statute of limitations and/or the equitable defense of laches may be properly and successfully asserted.

While it may seem to be a simple matter of calculating the number of years which have passed, if accompanied by a clear act of repudiation on the part of the fiduciary, it is unlikely that either the legal or equitable defense will shield the fiduciary from the necessity to account. In other words, although most practitioners may believe that the simple passage of time is enough to trigger these defenses, it is clearly not, and the facts in each particular case, when properly asserted, may undo the defenses and determine the outcome.



1. *Matter of Barabash*, 31 NY 76 (1980); *Matter of Seaman*, 146 Misc.2d 563 (1990).

2. *Matter of Meyer*, 303 AD2d 682, 683 (2003).

3. SCPA 2205(2) sets forth who may petition the court for an accounting. In addition, the court on its own initiative may compel an accounting.

4. *Estate of Emma C. Beard*, 141 Misc. 888, 253 NYS 316 (1931), *Matter of Barabash*, 31 NY 76, 80 (1972).

5. *Matter of Barabash*, supra. Also see, *Estate of Meyer*, the lapse of 13 years and nine months from the time of the issue of letters testamentary were not a bar to a proceeding to compel the executor to account because there was no repudiation by the executor. 98 AD 7 (1904).

6. *In re Estate of Zilkha*, 174 AD2d 331, 570 NYS2d 807, 810, (1991).

7. *Matter of Meyer*, 303 AD2d 682, 683 (2003).

8. *Matter of Barabash*, 31 NY 76 (1980).

9. *Matter of Omanoff*, Dec. No. 675 (Dec. 5, 2006).