

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 33

September Term, 2016

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ERIC WESLEY

v.

TIMOTHY O'BRIEN, ET AL

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Graeff,  
Nazarian,  
Zarnoch, Robert A.,  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Zarnoch, J.

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Filed: April 11, 2017

\* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following the death of his father in 2009, Eric Wesley, appellant, was appointed as the trustee of his father’s Trust. The Trust had three named beneficiaries, appellant and his two sisters, Deborah Hall and Yolanda Wesley. Upset by appellant’s management of the Trust’s funds, Ms. Hall, several years later, asked the Circuit Court for Prince George’s County to remove appellant from his trustee position. After a hearing on June 5, 2014, the court found that appellant had failed to observe the standard of care required in administering the Trust. The court removed appellant as trustee, and replaced him with Timothy P. O’Brien, Esq. (“Successor Trustee”). By the time of his removal, the Trust had decreased from a value of \$1,951,368.16 to \$615,715.00. After appellant filed a Removed Trustee Accounting, the Successor Trustee filed exceptions to appellant’s accounting. A hearing was held on the exceptions, and the court concluded that appellant was liable to the Trust for \$757,070.04.

Appellant appealed, and now presents one question for our review:

Did the successor trustee satisfy his burden of proof as to the removed trustee’s misconduct and damages and establish that the alleged removed trustee’s misconduct was the proximate cause of damages claimed by the successor trustee?

For the following reasons, we answer yes to this question and affirm the judgment of the circuit court.

### **BACKGROUND**

Prior to his death, Clemons H. Wesley (the “Decedent”) executed a Last Will and Testament and established a Revocable Living Trust. Under the terms of the Will, the Decedent’s entire residuary estate poured over into the Trust. The Trust was to be

distributed equally to the Decedent’s three children—appellant, Deborah Hall, and Yolanda Wesley—as residuary beneficiaries.

The elder Wesley died on April 20, 2009, and appellant assumed responsibility as the trustee. At the time of the Decedent’s death, the Trust had a total value of \$1,951,368.16. Over the next several years, Ms. Hall became dissatisfied with appellant’s management of the Trust. On September 11, 2013, she filed a Petition for Accounting in the Circuit Court for Prince George’s County. The Petition requested that appellant account for his expenditures of funds during his time as trustee. On November 27, 2013, Ms. Hall filed a Petition Requesting the Court to Assume Jurisdiction of a Trust. The two cases were consolidated by the court. On June 5, 2014, a hearing was held on the Petition to Assume Jurisdiction. At the conclusion of the hearing, the court found that appellant “failed to maintain complete records of all trust property and trust transactions and otherwise failed to observe the standard of care required in administering the trust.” On June 10, 2014, the court issued an order assuming jurisdiction of the trust, removed appellant as trustee, and replaced him with the Successor Trustee. The court further ordered appellant to “file an accounting covering the period [of] April 20, 2009, that being the date of death of the [the Decedent], until the date that all assets are turned over to the Successor Trustee.”

On September 22, 2014, appellant filed his Removed Trustee Accounting. The Accounting included spreadsheets prepared by the brother of appellant’s trial counsel, an

enrolled agent.<sup>1</sup> The spreadsheets were prepared based on “information and representations made by [appellant].” On January 14, 2015, the Successor Trustee filed Exceptions to the Removed Trustee Accounting. The Successor Trustee listed the following exceptions:

- (a) The Removed Trustee has failed to state the total gross value of the Trust assets to be accounted for, including assets received from the Estate of Clemon H. Wesley;
- (b) The Removed Trustee has failed to provide an itemized list of all income received by him as trustee (Rule 10-708, Part II (A));
- (c) The Removed Trustee has failed to provide an itemized list of all disbursements made by him as trustee (Rule 10-708, Part II (B));
- (d) The Removed Trustee has failed to report the assets added to the Trust while serving as trustee (Rule 10-708, Part III (A)), including loans made by him to related parties;
- (e) The Removed Trustee has failed to report assets deleted from the Trust while serving as trustee (Rule 10-708, Part III (B)), including the distributions of assets to himself and other trust beneficiaries (including the distribution of interests to Wes Tex Properties, LLC), the sale of the Anne Arundel County property (including the gain or loss from that sale), the transfer of assets to related corporations, and assets turned over to the Successor Trustee.

(underlines in original).

On April 20, 2015, an evidentiary hearing was held on the Exceptions. At the trial, the Successor Trustee told the court that appellant owed \$757,070.04 to the Trust. The Successor Trustee explained to the court how he arrived at that number by detailing

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<sup>1</sup> An enrolled agent is someone who is authorized to prepare and file tax returns.

the unexplained expenditures made by appellant. The first category was distributions made to appellant. The Successor Trustee compiled a list that depicted “disbursements from the various trust accounts . . . that [he] found questionable and that needed further documentation and explanation.” These disbursements were paid from the Trust to appellant, made out to “cash,” or written to an illegible payee. The total amount of these unexplained disbursements was \$248,650. The Successor Trustee testified that he asked appellant’s lawyer to produce receipts explaining where all this money had gone, but was told that “no such documentation existed.”

Appellant also made several transfers from the Trust to Wes Tex Properties, LLC (“Wes Tex”). Wes Tex was a company formed by appellant and the Decedent to buy and sell property. At the time of his death, the Decedent owned sixty percent of Wes Tex and appellant owned forty percent. The Successor Trustee testified that there was a total of \$87,500 transferred from the Trust to Wes Tex. The Successor Trustee also identified a BB&T bank account in the name of Wes Tex which had a balance of \$223,078.19 at the time of the Decedent’s death. Appellant had not identified this bank account in his Accounting. The Trust’s sixty percent interest in the Wes Tex bank account was worth \$133,846.91. Wes Tex also sold property in Portsmouth, Virginia, for which it received \$382,487.51. The Decedent’s sixty percent interest in the sale proceeds was \$229,492.51.

The Successor Trustee also identified a variety of transactions from the Trust where he could not determine where the money was being sent. The Successor Trustee

asked for receipts explaining these transfers, and was told by appellant’s attorney that “no such documentation existed.” The total amount of these unexplained disbursements was \$361, 677.10.

The Successor Trustee also noted that appellant gave him a copy of a check for an IRS refund of \$63,613.00 from the U.S. Treasury made out to the Decedent. Appellant deposited the check into the Wes Tex bank account, but did not include the check in his accounting filed with the court.

In addition to those amounts, the Successor Trustee also acknowledged a number of credits to appellant. The Successor Trustee was provided with a promissory note detailing a loan to Wes Tex from the Trust for \$166,500 on December 31, 2011. On July 7, 2014, the Successor Trustee received a check from Wes Tex for \$191,653.71. The amount of the check repaid the principal loan to Wes Tex along with \$25,153.71 in interest. Appellant also received credit for a \$26,000 cash deposit to the Trust, a \$45,000 deposit from a company named Tex Com, and a payment of \$91,756.28 to the Trust from appellant’s attorney. Finally, \$38,450.20 in unidentified deposits were made to the Trust. The Successor Trustee testified that he gave appellant the benefit of the doubt and credited those deposits to him. All together, the Successor Trustee identified \$392,863.19 in credits for appellant.

At trial, appellant testified that in drafting his accounting, he and his accountant detailed “every penny that went in and out of the account.” When testifying about how he prepared his accounting, appellant admitted that he did not have a lot of the supporting

documentation because he “did not keep transactional documentation,” and “was very bad about that.” For those transactions where he did not have supporting documentation, he orally identified the expenditures to the enrolled agent that prepared the accounting.

Christopher Morris, a Certified Public Account, testified as an expert in accounting. Mr. Morris compiled a Statement of Assets, Liabilities and Equity for the Trust for both April 20, 2009 and August 1, 2014. Mr. Morris testified that when the Decedent died, the Trust was valued at \$1,951,368.16. As of August 1, 2014, the Trust was valued at \$615,715.00.

At the conclusion of the hearing, the court took the case under advisement. On February 5, 2016, the court issued an order that stated the following:

Upon consideration of the hearing held and the evidence and testimony presented at the hearing held before the Honorable Daneeka Varner Cotton on April 20, 2015 on Successor Trustee’s Exceptions to Account of Removed Trustee and post-hearing memoranda filed by the Successor Trustee; **the Court finds that the Removed Trustee failed to maintain the standard of care and duties of trustee as required by law in that he failed to administer the trust in the interest of the beneficiaries; failed to administer the trust in a reasonable and prudent fashion; failed to exercise the reasonable skill and caution required; and grossly failed to keep adequate records of the administration of the trust in sufficient manner as to provide proof of how distributions were made and the purpose of said distributions. Specifically the evidence supplied demonstrates, and by the Removed Trustee’s own admission, many of the disbursements from the trust were cash withdrawals with no accompanying documentation provided.** This Court finds that given the Removed Trustee’s breach of the standard of care required under the law and principals of equity, the trustee is liable to the beneficiaries and thus must restore the value of the trust property and trust distributions for which he failed to reasonably substantiate through accurate record keeping; therefore it is this 5<sup>th</sup> day of

February 2016, by the Circuit Court for Prince George’s County,  
Maryland

**ORDERED that the Removed Trustee is liable to the trust and its beneficiaries and shall pay to the Successor Trustee the sum of Seven Hundred Fifty Seven Thousand, Seventy Dollars and Four Cents (\$757,070.04); and it is further**

ORDERED that said amount shall be reduced to a judgment;  
and it is further

ORDERED that this case is closed statistically.

(Emphasis added).

On March 7, 2016, appellant noted an appeal of the circuit court’s ruling.

#### **STANDARD OF REVIEW**

“When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Md. Rule 8-131(c). “If there is any competent material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous.” *YIVO Inst. For Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005). “The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court’s determination, it is not clearly erroneous and cannot be disturbed.” *Clickner v. Magothy River Ass’n Inc.*, 424 Md. 253, 266 (2012).



## DISCUSSION

Appellant contends that the Successor Trustee failed to satisfy the burden of proof as to appellant's misconduct. Appellant argues that there was no evidence establishing a causal connection between his alleged failures—failing to keep documentation of numerous disbursements, loaning money to himself, and commingling personal and trust funds—and the losses claimed. Appellant asserts that he testified in great detail to his management and expenditure of trust funds, but that the Successor Trustee refused to give consideration to appellant's accountings.

A trustee owes a fiduciary duty to the trust's beneficiaries. Regarding this duty, the Court of Appeals has stated that

A trustee owes to the beneficiaries of a trust duties of administration, prudence and loyalty. The trustee's duty of loyalty—as the duty is known in this state—is well-established in the common law. Broadly put, the duty prohibits a trustee from using the property of a beneficiary for the trustee's own purposes. A trustee is otherwise prohibited from placing himself in any position where his self-interest will or may conflict with his duties as trustee, and using the advantage of his position to gain any benefit for himself at the expense of the beneficiary. A trustee also must refrain from using the advantages of the fiduciary relationship for the benefit of a non-beneficiary third party.

*Hastings v. PNC Bank, NA*, 429 Md. 5, 25 (2012) (Citations and internal quotation marks omitted).

“The burden of proof on the issue of breach of trust is not initially on the fiduciary.” *Jacob v. Davis*, 128 Md. App. 433, 454 (1999) (Citation omitted). “The burden, however, shifts to the trustee once the beneficiary has introduced a certain

quantum of proof.” *Id.*

The person who challenges the conduct of a trustee, must first allege that the trustee has a duty and has been derelict in the performance of this duty, and offer evidence in support of this allegation. Then, and not until then, does the trustee have the burden of rebutting the allegation. In the absence of such proof, there is no duty on the trustee to prove a negative: i.e., that he has not been derelict in the performance of his duties.

*Goldman v. Rubin*, 292 Md. 693, 713 (1982) (Citation omitted).

Appellant contends that the Successor Trustee never met this initial burden. We disagree. The Successor Trustee did offer evidence in support of his allegation that appellant breached his fiduciary duty to the Trust. The Successor Trustee called into question a variety of expenditures from the Trust made under appellant’s supervision. The Successor Trustee also emphasized that appellant had no contemporaneous documentation to explain why these disbursements were made, and in several instances, where all the money had gone. The amount at issue was a significant portion of the Trust assets, with the Successor Trustee calling into question undocumented expenditures that totaled \$1,149,933.23. The Successor Trustee demonstrated that appellant was derelict in his duties as trustee and offered evidence in the form of various unexplained and undocumented monetary disbursements. Several of these disbursements also raised issues of self-dealing and commingling of funds, as much of the Trust money was transferred either directly to appellant or to Wes Tex, the company of which he was the only surviving owner. This “certain quantum of proof” was enough to shift the burden to appellant to rebut these allegations of misconduct. *Jacob*, 128 Md. App. at 454.

A trustee typically rebuts allegations of misconduct through documentation of his expenditures. Maryland law requires trustees to maintain accurate records. The Maryland Rules provide that “[a] fiduciary shall keep records of the fiduciary estate and upon request of the court that has assumed jurisdiction over the fiduciary estate or any interested person, shall make the records available for inspection.” Md. Rule 10-706(a). The necessity of a trustee to maintain accurate records is also detailed in the Restatement (Third) of Trusts.

A trustee who fails to keep proper records is liable for any loss or expense resulting from that failure. A trustee’s failure to maintain necessary books and records may also cause a court in reviewing a judicial accounting to resolve doubts against the trustee. These failures by trustees may furnish grounds for reducing or denying compensation, or even for removal, or for charging the trustee with the costs of corrective procedures or of having to conduct otherwise unnecessary accounting proceedings in court.

Restatement (Third) of Trusts § 83 cmt. a(1) (2007). “It is well settled that such an accounting must be precise, complete and accurate.” *Berlage v. Boyd*, 206 Md. 521, 532 (1955) (Internal citation omitted). Moreover, “[i]f the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor.” *Jacob*, 128 Md. App. at 448 (Citation omitted). A trustee who fails to keep proper accounts also carries the burden of proving his entitlement to credits he claims. *Lopez v. Lopez*, 250 Md. 491, 502 (1968).

Accordingly, appellant bore the burden of proving that all expenditures called into question were made for the benefit of the Trust and its beneficiaries. The accounting

provided by appellant was not the type of precise and accurate accounting required of a fiduciary. Appellant did not document the transactions as they occurred. The accounting he later submitted to the court was based on his oral representations to his enrolled agent regarding the purpose of each transaction. Appellant failed to keep records despite the requirement of a fiduciary to do so. Appellant also provided a weak explanation for his lack of record keeping. When questioned at the hearing about his process for preparing his accounting, he gave the following answer:

[Appellant]:               So the accounting was me understanding that we had to account for all of the monies going in and out of the trust, so I sat down with my attorney and my accountant and went—I call it excruciatingly—through every check and debit that came in and out of the account, to account for where it went, because **I did not have a lot of the supporting documentation.**

[Counsel]:               And why didn't you have that documentation?

[Appellant]:               **I did not keep transactional documentation. It was—I was very bad about that, actually.**

[Counsel]:               Did you keep any?

[Appellant]:               **I may have kept some. I'm an electronic guy. If you have it electronically, I can do it. Paper, I'll lose it in a second.**

(Emphasis added).

Appellant asserts that his testimony provided great detail on his management and expenditure of trust funds. It is true that appellant did testify; however, “[i]n its

assessment of the credibility of witnesses, the Circuit Court was entitled to accept—or reject—all, part, or none of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence.” *Omayaka v. Omayaka*, 417 Md. 643, 659 (2011). The court in the instant case was not persuaded by appellant’s testimony at the hearing. Appellant’s lack of contemporaneous documentation clearly undercut his representations to the court. There is an inherent difficulty in producing records from memory, and the court did not err by viewing appellant’s financial accounting with skepticism.

Appellant has also pointed to a portion of the Successor Trustee’s testimony, in which he admitted that the undocumented transactions could have been valid trust expenditures. Although the Successor Trustee did in fact say this, he was only acknowledging the mere possibility that they could have valid. Nevertheless, the problem remains that there was no documentation to prove their validity. Simply stating that there is a possibility that they could have been valid expenses is not sufficient to meet appellant’s burden of rebutting the Successor Trustee’s allegations. As stated *supra*, “[i]f the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor.” *Jacob*, 128 Md. App. at 448 (Citation omitted).

As for the determination of the amount owed to the Trust, it was specifically detailed by the Successor Trustee during his testimony. Appellant made unexplained disbursements to either himself, “cash,” or to an illegible payee. The total of these disbursements was \$248,650. There were checks made out to Wes Tex from the Trust in

the amount of \$87,500. There was a Wes Tex bank account in which the Trust had an interest worth \$133,846.91. Wes Tex sold property in Virginia, to which the Trust was entitled to \$229,492.51 of the proceeds. Decedent received an IRS refund for \$63,613.00 that was deposited into a Wes Tex bank account instead of to the Trust. There were transactions from the Trust to unidentified recipients in the amount of \$361,677.10. Finally, there was \$25,153.71 due in interest on a loan from the Trust to Wes Tex. In totality, there was \$1,149,933.23 in unexplained expenditures. Appellant was credited for \$392,863.19. After his credits, appellant owed \$757,070.04, which was the amount he was held liable for in the court's order.

A trustee cannot hope to discharge his fiduciary obligations by discarding any documentation of how he handled trust assets and then claiming there is no proof of a breach of duty. The evidence adduced at the hearing supported the court's conclusion that appellant failed to administer trust in a prudent fashion. Causation was sufficiently proven and the amount of damages was not clearly erroneous. The court did not err in entering judgment against appellant for his failure to properly document his disbursements of trust money.

**JUDGMENT OF THE CIRCUIT  
COURT FOR PRINCE GEORGE'S  
COUNTY AFFIRMED. COSTS TO BE  
PAID BY APPELLANT.**