

Commonwealth of Kentucky
Court of Appeals

NO. 2025-CA-1044-MR

ESTATE OF WILMA ALLEN BY
AND THROUGH ITS EXECUTORS
SUSAN JONES AND YETTA
FREEMAN

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE DANIEL M. HEADY, JUDGE
ACTION NO. 22-CI-00022

CYNTHIA TYSON

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

** **

BEFORE: CALDWELL, A. JONES, AND McNEILL, JUDGES.

JONES, A., JUDGE: Susan Jones and Yetta Freeman, in their capacities as co-executors of the Estate of Wilma Allen (the “Estate”), appeal from orders of the Crittenden Circuit Court entered following a bench trial in this action against Cynthia Tyson, Wilma Allen’s former attorney-in-fact. The Estate alleged Tyson breached her fiduciary duties by misappropriating Allen’s property and making

unauthorized gifts while acting pursuant to a power of attorney. Following a bench trial, the circuit court concluded Tyson was liable for certain transactions, but rejected the Estate's remaining claims and denied its request for attorney's fees pursuant to Kentucky Revised Statute ("KRS") 457.170. On appeal, the Estate contends the circuit court erred by declining to hold Tyson liable for additional transactions and by denying its request for attorney's fees. Following our review, we affirm in part, reverse in part, and remand.

I. BACKGROUND

Wilma Allen executed a power of attorney ("POA") in favor of her daughter, Cynthia Tyson, on July 5, 2018. The POA authorized Tyson to conduct Allen's business affairs and manage her property. Tyson served as Allen's attorney-in-fact until September 3, 2021. During that period, Tyson assisted Allen with numerous financial matters, including the sale of farm equipment and livestock, banking transactions, and the operation of an upholstery business they jointly owned and ran.

On June 8, 2020, Allen revoked the July 5, 2018 POA and executed a new POA naming Tyson as her attorney-in-fact. Unlike the prior instrument, the new POA expressly prohibited Tyson from making gifts on Allen's behalf. The parties agree that Allen remained mentally competent throughout the relevant period and continued to participate in her financial affairs.

Allen died testate on February 1, 2022. Thereafter, Susan Jones and Yetta Freeman, two of Allen's daughters and the co-executors of her Estate, filed this action against Tyson alleging she had breached her fiduciary duties as Allen's attorney-in-fact by misappropriating Allen's funds and making unauthorized gifts. The Estate sought restoration of the allegedly misappropriated assets and an award of attorney fees pursuant to KRS 457.170.

Following a bench trial, the circuit court entered findings of fact, conclusions of law, and judgment on October 18, 2024. The circuit court determined that Tyson was liable for certain unsupported transactions and an unauthorized \$5,000 gift she made to herself, resulting in a judgment against Tyson in the amount of \$8,677.43. However, the circuit court rejected the Estate's remaining claims after finding Tyson's testimony regarding those transactions credible. In a subsequent order entered July 24, 2025, the circuit court denied the Estate's request for attorney fees. This appeal followed.

II. ANALYSIS

A. The Allegedly Misappropriated Sums.

The Estate first argues the circuit court erred by declining to hold Tyson liable for every sum of Allen's money that came into Tyson's possession during her tenure as attorney-in-fact but was not deposited into Allen's bank account. Specifically, the Estate contends Tyson failed to adequately account for

various cash proceeds derived from the sale of livestock, farm equipment, hay, pasture rentals, and upholstery work, as well as cash withheld from deposits and other cash withdrawals. According to the Estate, Tyson's testimony alone was insufficient to establish that she properly disposed of these funds. This issue largely turns upon who bore the burden of proof and whether substantial evidence supported the circuit court's findings.

Tyson served as Allen's attorney-in-fact from July 5, 2018, through September 3, 2021. As Allen's attorney-in-fact, Tyson owed Allen fiduciary duties, including the duty to account for the disposition of property she received on Allen's behalf. *Deaton v. Hale*, 592 S.W.2d 127, 130 (Ky. 1979); *see also* KRS 457.140. There is no dispute that the funds at issue came into Tyson's possession while she was acting as Allen's attorney-in-fact. Accordingly, Tyson bore the burden of "explaining to the satisfaction of the court what disposition was made" of those funds. *Deaton*, 592 S.W.2d at 130. Absent a satisfactory explanation, an attorney-in-fact may be held liable for property received on behalf of the principal but not properly accounted for. *Id.* at 131.

Following the bench trial, the circuit court determined Tyson had adequately accounted for most of the challenged transactions. However, the circuit court found Tyson liable for several unsupported reimbursement checks, a \$1,150 payment for farm equipment made directly to Tyson, and a \$5,000 gift Tyson made

to herself. Tyson has not appealed those determinations. However, with respect to the remaining challenged transactions, the circuit court accepted Tyson's testimony that she either delivered the cash proceeds directly to Allen or used the funds for Allen's benefit.

The circuit court acknowledged Tyson's admittedly poor recordkeeping but nevertheless found Tyson's testimony credible. In so doing, the circuit court emphasized that all parties agreed Allen remained mentally competent throughout the relevant period, continued to participate in her financial affairs, and was capable of handling and spending cash on her own behalf.

As this matter was tried without a jury, our review is governed by Kentucky Rule of Civil Procedure ("CR") 52.01. Under this rule, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. Findings of fact supported by substantial evidence will not be disturbed on appeal. *Commonwealth v. Deloney*, 20 S.W.3d 471, 473-74 (Ky. 2000). Although we defer to the circuit court's factual findings, we review its legal conclusions *de novo*. *Sawyers v. Beller*, 384 S.W.3d 107, 110 (Ky. 2012).

The Estate emphasizes that Tyson's testimony regarding many of the challenged transactions was largely uncorroborated and unsupported by contemporaneous documentation. In this respect, the Estate correctly notes that an

attorney-in-fact is expected to maintain adequate records and, whenever possible, substantiate transactions through documentation other than her own testimony. *See Thomas v. Hodge*, 897 F. Supp. 980, 983 (W.D. Ky. 1995); *see also* KRS 457.140(2)(d) (requiring an agent to “[k]eep a record of all receipts, disbursements, and transactions made on behalf of the principal”). Indeed, “[a]ll presumptions are applied and all doubts are resolved against a trustee who fails to keep proper records of his trust.” *Thomas*, 897 F. Supp. at 983 (quoting *Burton v. Clere*, 271 Ky. 411, 112 S.W.2d 57, 60 (1938)).

Nevertheless, we are aware of no authority holding that an attorney-in-fact may satisfy her burden of accounting only through documentary evidence or corroborating witnesses. Nor are we aware of any authority requiring a fact-finder to disregard an attorney-in-fact’s testimony merely because that testimony is self-serving or inadequately documented. To the contrary, the credibility of witnesses and the weight to be afforded their testimony remain matters committed to the sound discretion of the trial court sitting as fact-finder. CR 52.01.

Here, the circuit court expressly acknowledged Tyson’s deficient recordkeeping but nevertheless found her testimony credible. Tyson consistently testified that whenever she received cash on Allen’s behalf or withheld cash from a deposit, she delivered those funds directly to Allen, who then retained or spent them as she wished. The circuit court was entitled to believe that testimony.

Moreover, the court's credibility determination was bolstered by undisputed evidence demonstrating that Allen remained mentally competent throughout the relevant period, continued to actively participate in her financial affairs, regularly wrote checks, and frequently utilized cash for her personal expenses.

Simply put, the Estate points to no evidence so overwhelming as to compel a finding that Tyson retained or misappropriated the disputed funds. While the Estate understandably questions Tyson's account and speculates that Allen could not have spent or otherwise disposed of such substantial sums of cash, speculation is insufficient to render the circuit court's findings clearly erroneous. Because the circuit court's findings are supported by substantial evidence, we may not disturb them on appeal. Accordingly, we affirm the circuit court's determination regarding the challenged cash transactions.

The Estate next argues the circuit court erred by declining to hold Tyson liable for approximately \$800 in tithes Tyson paid to Seven Springs Baptist Church on Allen's behalf after June 8, 2020. We agree.

The circuit court correctly determined that Tyson was liable for the \$5,000 check she wrote to herself on November 26, 2020, concluding that Tyson lacked authority under the June 8, 2020 POA to make gifts on Allen's behalf. However, the circuit court reached a different conclusion regarding eight checks Tyson wrote to Seven Springs Baptist Church between September 2020 and May

2021. The circuit court reasoned that these payments were consistent with Allen's longstanding practice of tithing to her church and therefore were not contrary to her wishes.

The June 8, 2020 POA expressly prohibited Tyson from making gifts on Allen's behalf. The tithes Tyson paid to Seven Springs Baptist Church were unquestionably gifts because they constituted voluntary transfers made without consideration. *See Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. App. 1977). Tyson offered no testimony that Allen specifically directed her to make these particular donations or subsequently ratified them.

An attorney-in-fact must "[a]ct in accordance with the principal's reasonable expectations to the extent actually known by the agent[.]" KRS 457.140(1)(a). Likewise, an agent may make gifts only when doing so is consistent with the principal's objectives, if the agent actually knows them. KRS 457.400(3)(e). Here, Tyson knew Allen's expectations because they were expressly set forth in the June 8, 2020 power of attorney, which withheld from Tyson the authority to make gifts. Tyson was not free to disregard that express limitation based on her own assessment of what Allen would likely have wanted or on Allen's prior history of charitable giving.

Accordingly, we reverse that portion of the circuit court's judgment declining to hold Tyson liable for the post-June 8, 2020 tithes paid to Seven

Springs Baptist Church, and we remand for entry of an amended judgment consistent with this Opinion.

B. Attorney's Fees.

The Estate next argues the circuit court erred by denying its request for attorney's fees under KRS 457.170. Because the issue requires us to interpret a statute, our review is *de novo*. *Sawyers*, 384 S.W.3d at 110.

Kentucky follows the American Rule, under which attorney's fees are not recoverable absent a contractual agreement or statutory authority expressly authorizing such an award. *See AnyConnect US, LLC v. Williamsburg Place, LLC*, 636 S.W.3d 556, 562 (Ky. App. 2021). That rule applies equally to actions alleging a breach of fiduciary duty. *See Bryan v. Security Trust Co.*, 296 Ky. 95, 176 S.W.2d 104, 112 (1943).

The Estate contends KRS 457.170 authorizes an award of attorney's fees because it prevailed on portions of its claims against Tyson. We disagree. KRS 457.170 provides:

An agent that violates this chapter is liable to the principal or the principal's successors in interest for the amount required to:

- (1) Restore the value of the principal's property to what it would have been had the violation not occurred;
- and

(2) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

Subsection (1) plainly authorizes recovery of the amount necessary to restore the value of the principal's property. It does not specifically or expressly authorize an award of attorney's fees. In light of the American Rule, we decline to infer such authorization from the statute's general reference to restoring the value of the principal's property. *See AnyConnect*, 636 S.W.3d at 562.

Nor does subsection (2) support the Estate's position. By its plain language, subsection (2) authorizes reimbursement for attorney's fees and costs "paid on the agent's behalf." KRS 457.170(2). It does not authorize reimbursement of attorney's fees incurred by the principal or the principal's successors in prosecuting an action against the agent. Had the General Assembly intended to authorize prevailing principals or their successors to recover their own litigation expenses, it easily could have done so. It did not.

Accordingly, we conclude the circuit court correctly determined that KRS 457.170 does not authorize the Estate to recover its attorney's fees in this action.

III. CONCLUSION

We AFFIRM IN PART, REVERSE IN PART, and REMAND as set forth above.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Christopher Stearns
Morganfield, Kentucky