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KENNETH G. WOLFEL, JR., ET AL. *v.*
LAWRENCE C. WOLFEL
(AC 44316)

Prescott, Cradle and Suarez, Js.

Syllabus

The plaintiffs, K and R, appealed to the Superior Court from the decree of the Probate Court holding that they violated their fiduciary duties as cotrustees of a trust and ordering them to reimburse the defendant, their brother, for his share of certain trust assets. V had established the trust for the equal benefit of her three sons, K, R, and the defendant. All three sons were beneficiaries of the trust. After V's death, the plaintiffs were to hold their respective shares and the defendant's share in three separate trusts. The three separate trusts were never created and the plaintiffs continued to administer the single trust as they had before V's death. The defendant filed a petition for an accounting of the trust in the Probate Court, which that court granted. Following a hearing, the Probate Court issued a decree finding that the plaintiffs' accounting was substantially deficient and that they had violated their fiduciary duties as trustees by using trust assets to fund their personal business endeavors and interests. The Probate Court ordered the plaintiffs to reimburse the defendant for his equal share of the trust assets. The plaintiffs appealed from the Probate Court's decree to the Superior Court, claiming, *inter alia*, that they had returned certain funds to the trust. Following a trial *de novo*, the Superior Court concluded that the plaintiffs breached their fiduciary duties and, after determining that the three beneficiaries had shared unequally in the trust assets, entered orders to equalize their shares and to terminate the trust. On the plaintiffs' appeal to this court, *held*:

1. The plaintiffs' claim that the Superior Court exceeded its authority by addressing issues that they did not raise in their appeal from the Probate Court's decree was unavailing: the Superior Court, sitting as the Probate Court, as it was required to do, conducted a trial *de novo* on the plaintiffs' accounting and on the challenges to the accounting asserted by the defendant and rendered judgment resolving the issues related to the trust, addressing those issues that were necessary and proper for a determination of the parties' claims pertaining to the accounting.
2. The Superior Court did not err in finding that K failed to prove that he paid certain amounts into the trust in order to reimburse it for distributions made to him for his personal benefit: in its memorandum of decision, the court discussed in detail the evidence that the plaintiffs presented in support of their claims that they reimbursed the trust for distributions they had received and, after weighing that evidence, concluded that the plaintiffs had failed to prove that K reimbursed the trust in an amount sufficient to cure most of the self-dealing distributions made to him from the trust; moreover, although the plaintiffs asserted six grounds on which the court should have concluded that K reimbursed the trust in the amount that they claimed, the substance of each of their arguments was essentially the same, namely, that the evidence they presented was un rebutted by the defendant, the court was not required to credit the plaintiffs' evidence even if it was un rebutted; accordingly, this court was not left with the definite and firm conviction that a mistake had been committed.

Argued January 31—officially released April 18, 2023

Procedural History

Appeal from the decree of the Probate Court for the district of Newington holding that the plaintiffs breached their fiduciary duties as trustees of a trust and ordering them to reimburse the defendant for his share of certain trust assets, brought to the Superior Court in the judicial district of New Britain and tried

to the court, *Hon. Joseph M. Shortall*, judge trial referee; judgment reversing in part the Probate Court's decree, from which the plaintiffs appealed to this court; thereafter, Richard J. Margenot, the successor administrator of the Estate of Lawrence C. Wolfel, was substituted as the defendant. *Affirmed.*

Michael P. Kaelin, for the appellants (plaintiffs).

Terence J. Gallagher, with whom, on the brief, was *Patrick L. Poeschl* for the appellee (substitute defendant).

Opinion

CRADLE, J. This action stems from a dispute between three brothers, Kenneth G. Wolfel, Jr. (Kenneth), Rodney J. Wolfel (Rodney), and Lawrence C. Wolfel (Lawrence),¹ regarding their respective shares in assets set aside in the Wolfel Family Trust (trust), which was created by their mother, Vera Wolfel. The plaintiffs, Kenneth and Rodney, appeal from the judgment of the Superior Court affirming in part and reversing in part the decree of the Probate Court holding that they, as cotrustees of the trust, violated their fiduciary duties and ordering them to reimburse Lawrence, the defendant, for his equal share of the trust assets. On appeal, the plaintiffs claim that the Superior Court (1) exceeded its authority by addressing issues that they did not raise in their appeal from the decree of the Probate Court, and (2) erroneously found that Kenneth failed to prove that he had paid \$552,271 into the trust to reimburse it for distributions made to him for his personal benefit. We disagree and, accordingly, affirm the judgment of the Superior Court.

The following facts, as set forth by the Superior Court in its memorandum of decision, and procedural history are relevant to our resolution of this appeal. In December, 2000, Vera Wolfel established the trust for the equal benefit of her three sons, Kenneth, Rodney and Lawrence. All three sons were beneficiaries of the trust, and Kenneth and Rodney were the named trustees of the trust.²

Pursuant to the terms of the trust, the plaintiffs, as trustees, were authorized to “pay or apply all or any part of the net income and principal” to or for the benefit of Vera Wolfel’s descendants “for any such eligible beneficiary’s maintenance in health and reasonable comfort, complete education (including preparatory, college, postgraduate and professional training), or support in any such eligible beneficiary’s accustomed manner of living” Although the plaintiffs were afforded extensive “[m]anagement [p]owers,” the trust conferred the authority to make discretionary distributions to an independent trustee, which was defined in the trust as a trustee who is “not a current eligible income beneficiary of [the] trust” or a descendant of Vera Wolfel. Although the plaintiffs were empowered to appoint an independent trustee, they never did.

The trust was to continue until the death of Vera Wolfel, at which time it was to terminate, and the plaintiffs were to divide any assets in the trust into “separate shares, per stirpes, with respect to [her] then living descendants” When Vera Wolfel died on December 24, 2011, her “then living descendants” were her three sons. The plaintiffs were to hold their respective shares and the defendant’s share in three separate trusts, and apply the net income and principal for the

benefit of the beneficiary of each trust for his “maintenance in health and reasonable comfort, complete education (including preparatory, college, postgraduate and professional training), or support in any such eligible beneficiary’s accustomed manner of living” These separate trusts were never created and the plaintiffs continued to administer the single trust as they had before Vera Wolfel’s death.

On March 31, 2014, the Probate Court granted a petition for an accounting of the trust filed by the defendant, and ordered the plaintiffs to file an accounting of their activities as trustees of the trust, from December 19, 2000, to September, 2014. On December 31, 2014, the plaintiffs filed a revised accounting.³ On November 2, 2015, following a hearing on the plaintiffs’ accounting, the Probate Court issued a decree, finding, *inter alia*, that the accounting filed by the plaintiffs was substantially deficient and that they had violated their fiduciary duties as trustees “as they used the trust assets to fund their own personal business endeavors and interests” The Probate Court found that the plaintiffs had submitted no evidence supporting their claims that Kenneth had reimbursed the trust in the amount of \$552,271 or that Rodney had reimbursed the trust in the amount of \$789,795.95, for the distributions made to them in violation of the terms of the trust because they were not approved and made by an independent trustee. The Probate Court determined that each beneficiary was entitled to \$1,153,783.22, as his equal share of the trust assets, but that Lawrence had received only \$647,766.55.⁴ Accordingly, the Probate Court concluded that Lawrence had been underpaid \$506,016.67 of his equal share of the trust assets and ordered the plaintiffs to pay Lawrence the \$137,136.13 balance of the trust funds and an additional amount of \$368,880.54.

On December 2, 2015, the plaintiffs filed an appeal of the decree of the Probate Court with the Superior Court, alleging that, by way of reimbursement to the trust, Kenneth returned at least \$552,271 to the trust and Rodney returned at least \$789,795 to the trust; they did not make any unauthorized or improper payments from the trust; they were entitled to fees for the duties they performed as trustees; the defendant was not entitled to a payment in the amount of \$506,016.67 from the trust; the defendant was not entitled to any payments from their personal assets; and that the Probate Court did not have the legal authority or jurisdiction to order them to make any payments from their personal assets.

On September 17, 2020, following a trial *de novo*, the Superior Court issued a memorandum of decision in which it found, *inter alia*, that the plaintiffs breached their fiduciary duties by violating the trust’s explicit direction to divide the assets into three separate trusts following the death of Vera Wolfel, thereby allowing

them to “continue having access to the entire corpus in existence at that time for the purpose of financing their own personal and business interests”; failing to appoint an independent trustee; and engaging in “self-dealing transactions, including undocumented and unsecured ‘loans’ to support their personal and commercial interests, without participation by an independent trustee and without regard to their effect on the financial health of the trust or [the defendant’s] interest as a beneficiary.” The Superior Court concluded that the plaintiffs “treated the trust as a deep well into which they could dip their bucket of financial wants whenever it suited them.” The court found that Rodney made payments into the trust accounts sufficient to cure most of the self-dealing distributions made from the trust for his personal benefit but that Kenneth failed to make payments to the trust sufficient to cure more than a small portion of the self-dealing distributions made to him from the trust. The Superior Court concluded that the three beneficiaries had shared unequally in the trust assets and entered orders to equalize their shares. The Superior Court also ordered that the trust be terminated. This appeal followed.

I

The plaintiffs first claim that the Superior Court exceeded its authority by addressing issues that they did not raise in their appeal from the decree of the Probate Court. Specifically, the plaintiffs argue that, instead of “limiting its decision to whether the Probate Court correctly decided [that the] plaintiffs failed to prove that Kenneth deposited \$552,271 into the trust and that Rodney deposited \$789,795.95 into the trust, and correctly ordered the plaintiffs to pay [the defendant] \$137,136.13 from the assets of the trust and \$368,880.54 from the plaintiffs’ personal assets, the Superior Court performed its own calculations of how much [the plaintiffs] deposited into the trust, and then decided to ‘equalize’ the payments from the trust and to ‘terminate’ the trust when no party requested this relief in the pleadings in the Superior Court.” According to the plaintiffs, “[t]his clearly exceeded the Superior Court’s statutory authority as a matter of law.”⁵ We disagree.

“An appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court. . . .

“The function of the Superior Court in appeals from a Probate Court is to take jurisdiction of the order or decree appealed from and to try that issue de novo. . . . Thereafter, upon consideration of all evidence pre-

sented on the appeal which would have been admissible in the [P]robate [C]ourt, the [S]uperior [C]ourt should exercise the same power of judgment which the [P]robate [C]ourt possessed and decide the appeal as an original proposition unfettered by, and ignoring, the result reached in the [P]robate [C]ourt.” (Citations omitted; internal quotation marks omitted.) *Kerin v. Stangle*, 209 Conn. 260, 263–64, 550 A.2d 1069 (1988).

General Statutes § 45a-186, which governs probate appeals does, however, provide an exception where a trial de novo is not required. Section 45a-186 (d) provides in relevant part: “An appeal from a decision rendered in any case after a recording of the proceedings is made under . . . section 51-72 or 51-73, shall be on the record and shall not be a trial de novo.” In the present case, the parties do not dispute that no record was made before the Probate Court. The absence of a record required a trial de novo. See *Silverstein v. Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009). The plaintiffs do not dispute this.

The plaintiffs nevertheless argue that, “instead of only addressing the issues that were presented for review on the appeal to the Superior Court, the Superior Court decided this case as if it was an original accounting proceeding brought in the Superior Court. In essence, the Superior Court decided this case as if it was a ‘retrial’ of the original accounting proceeding rather than an ‘appeal’ on the specific issues presented in the appeal complaint, and rendered its own decision on the plaintiffs’ accounting rather than reviewing the correctness of the Probate Court’s decisions on the issues presented in the appeal to the Superior Court.” The plaintiffs’ argument belies the well settled principle that “[a]n appeal from probate is not so much an appeal as a trial de novo with the Superior Court sitting as a Probate Court and restricted by a Probate Court’s jurisdictional limitations.” (Internal quotation marks omitted.) *Gardner v. Balboni*, 218 Conn. 220, 225, 588 A.2d 634 (1991); see also *Kerin v. Stangle*, *supra*, 209 Conn. 264; *Baskin’s Appeal from Probate*, 194 Conn. 635, 641, 484 A.2d 934 (1984); *Prince v. Sheffield*, 158 Conn. 286, 298–99, 259 A.2d 621 (1969).

The plaintiffs’ argument that the Superior Court was limited in its review of the decree of the Probate Court to the claims of error set forth in their appeal from that decree reflects a misunderstanding of the distinction between a trial de novo and appellate de novo review. Contrary to the plaintiffs’ argument, the Superior Court does not sit as an appeals court that determines the correctness of the decree of the Probate Court. Although “[t]he Superior Court may not consider or adjudicate issues beyond the scope of those proper for determination by the order or decree attacked”; (internal quotation marks omitted) *Jackson v. Drury*, 191 Conn. App. 587, 607, 216 A.3d 768, cert. denied, 333

Conn. 938, 218 A.3d 1050 (2019); the Superior Court did not do so in the present case. The Superior Court, sitting as the Probate Court, as it was required to do, conducted a trial de novo on the accounting filed by the plaintiffs and the challenges to the accounting asserted by the defendant, and rendered judgment resolving the issues related to the trust. In so doing, the Superior Court did not improperly enlarge the scope of the issues of the appeal but, rather, addressed those issues that were necessary and proper for a determination of the parties' claims pertaining to the accounting of the trust.⁶ Indeed, the plaintiffs have failed to identify any actions taken by the Superior Court in adjudicating the propriety of the revised accounting or in ordering appropriate relief to remedy the breaches of fiduciary duty it found had occurred that the Probate Court could not have taken itself. Accordingly, the plaintiffs' claim that the Superior Court exceeded its authority is without merit.

II

The plaintiffs also claim that the court erred in finding that Kenneth failed to prove that he paid \$552,271 into the trust to reimburse it for distributions made to him for his personal benefit. We disagree.

“It is well established that [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed Our authority, when reviewing the findings of a judge, is circumscribed by the deference we must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. . . . The question for this court . . . is not whether it would have made the findings the trial court did, but whether in view of the evidence and pleadings in the whole record it is left with the definite and firm conviction that a mistake has been committed.” (Internal quotation marks omitted.) *J. M. v. E. M.*, 216 Conn. App. 814, 820–21, 286 A.3d 929 (2022).

“Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence.” (Internal quotation marks omitted.) *Cradle v. Connecticut State Employees Retirement Commission*, 342 Conn. 67, 100, 269 A.3d 72 (2022). The existence of a fiduciary duty is not disputed in the pres-

ent case.

Following the trial in this case, the Superior Court issued a thorough memorandum of decision in which it discussed in detail the evidence presented by the plaintiffs in support of their claims that they reimbursed the trust for distributions they had received. After weighing that evidence, the Superior Court concluded that the plaintiffs proved, by clear and convincing evidence, that Kenneth reimbursed the trust only \$66,100, not \$552,271.

The plaintiffs assert six grounds on which the Superior Court should have concluded that Kenneth proved that he reimbursed the trust in the amount of \$552,271.⁷ We need not address each of the plaintiffs' arguments separately because the substance of each argument is essentially the same, namely, that they met their burden of proving Kenneth's repayment of trust funds because the evidence that they presented was unrebutted by the defendant. This argument ignores the well established principles that the plaintiffs, as the fiduciaries in this case, bore the burden of proving by clear and convincing evidence the propriety of their administration of the trust; see *id.*, 100; and the court was entrusted to weigh the evidence presented and to determine which evidence to accept or reject. *Cusano v. Lajoie*, 178 Conn. App. 605, 609, 176 A.3d 1228 (2017). The court was not required to credit the evidence presented by the plaintiffs, even if it was unrebutted.⁸ Accordingly, we are not left with the definite and firm conviction that a mistake has been committed and we reject the plaintiffs' claim that the court's finding that they failed to prove that Kenneth reimbursed the trust in the amount of \$552,271 was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

¹ While this appeal was pending, Lawrence died. On December 16, 2022, Richard J. Margenot, the successor administrator of Lawrence's estate, was substituted as the defendant.

² The sole asset of the trust initially was Vera Wolfel's residential property located in Greenwich, the appraised value of which, at the time the trust was executed, was \$1,150,000. That property sold in 2002 for \$1,695,000. In 2003, the sale of another property located in Plainville resulted in an addition of \$275,000 to the trust. In 2012, after Vera Wolfel's death in 2011, \$1,000,000 in life insurance proceeds also were added to the trust.

³ In its decree, the Probate Court explained that the revised accounting was necessary because, "despite the voluminous amount of documentation contained within a five inch binder in support of the accounting, it was clear that the documentation failed to support the transactions claimed in the accounting"

⁴ Although the Probate Court did not indicate when or why Lawrence had received distributions in this amount, the accounting reflects that he received \$333,333.33 as his one-third share of the proceeds of Vera Wolfel's life insurance policy in February, 2012, and various smaller disbursements for personal and medical bills and charges. None of the parties have, at any point, challenged the propriety or accuracy of the amount of the distributions to Lawrence.

⁵ We note that neither party challenges the accuracy of the Superior Court's mathematical calculations.

⁶ Moreover, we note that the plaintiffs' claims regarding the amounts they alleged to have deposited into the trust and whether Lawrence was entitled

to a payment of \$506,016.67 necessarily required the Superior Court to perform its own calculations based on the evidence presented in the trial de novo.

We further note that, in the prayer for relief of their appeal to the Superior Court, the plaintiffs asked not only that the Superior Court reverse the decree of the Probate Court but also that the Superior Court “provide such other and further relief as the court deems just and equitable.” On the basis of that request, the Superior Court did not exceed its authority in terminating the trust, which, after the execution of its orders, would become insolvent.

⁷ Specifically, the plaintiffs argue that (1) they introduced contemporaneous business records to prove that Kenneth paid \$552,271 into the trust; (2) their expert witness confirmed that Kenneth made each of the claimed deposits based on commonly accepted accounting procedures; (3) the defendant did not introduce any evidence to impeach or rebut the evidence they presented; (4) Kenneth testified that there was a connection between him and Wilde Enterprises Corporation, an entity referred to as “WEC” on attachments to the accounting, which was listed as having made deposits into the trust; (5) they should be credited for the deposit of life insurance proceeds; and (6) they presented evidence that Kenneth made certain deposits into the trust account, not his own personal account.

⁸ To the extent that the plaintiffs contend that the accounting or the various attachments to the accounting constitute evidence of Kenneth’s payments to the trust, this argument misses the mark. The accounting is not evidence of those payments. It is simply evidence that someone listed those payments on the accounting. To prove their claim, the plaintiffs needed to present evidence of the actual payments. The court found that they did not.
