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PROBATE LAW CASE SUMMARY

BY: Alan A. May Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007-2017, 2019 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2020 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and
"Sons of Adam," an International Terror Mystery.

DT: September 14, 2020
RE: ***In re Conservatorship of Lee***
STATE OF MICHIGAN COURT OF APPEALS

"Alan, you cannot write about baseball all your life"
- Mrs. Pollinger
- 12th Grade English Comp
- Mumford High - 1959

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BASEBALL – GREAT EUROPEAN BASEBALL PLAYERS

Just as Canada produced but one Hall of Famer, Ferguson Jenkins, Europe has produced only one.

That member is Burt Blyleven, who was born in Zeist, Netherlands. As most of you know, Burt was a pitcher. He played primarily as a Minnesota Twin. He had a win/lost record of 287-250, an ERA of 3.31, with 3,701 "K's". At 19 years of age, he was named Rookie of the Year. Burt played on two All Star teams and two World Series Champion teams. Burt was famous for giving his teammates a "Hot Foot" and was once gave the finger to a tv cameraman live. He pitched for 22 years. He led the league once in games started and complete games and strike outs and twice in shut outs and innings pitched.

Harry Wright, a Brit made it to the Hall but primarily as a manager. In 23 years, he had a winning record of 1,225 and 885 and won six Pennants. He wasn't much of a player.

My favorite was from the Emerald Isle, "Dirty Jack" Doyle. He beat up his opponents, teammates, two umpires and many fans. He, like President Trump, attended Fordham University; "Dirty Jack" graduated. He was once arrested and fined for his pugilist endeavors.

And, don't forget Bobby Thompson, born in Scotland, who hit the shot heard round the world.

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

RE: *In re Conservatorship of Lee*

- Standards Regarding In Pro Per Litigant
- Standards for Dismissal as Remedy
    - Legal
    - Evaluation of Alternatives
- Error of Law – Automatic Abuse of Discretion

A matter had been pending in the lower Court for some time. The matter concerned Appellant's objections to an Accounting. Appellant did not appear for the hearing. Appellant was in the hospital caring for her ward. The Court was informed of this fact. The Court said that because Appellant didn't call in to the Court, that the hearing would proceed. The nonappearance resulted in the sanction of dismissal of Appellant's objection.

The Court of Appeals reversed and remanded instructing the lower Court to conduct a hearing on Appellant's objections and inter alia said:

1. An In Pro Per litigant must be treated with lenity. This was a new word for me. In English, it means kindness or gentleness. Jurisprudentially, in this matter, it meant stretching rules and helping the litigant put her best face forward.

2. The *Vincenzo* case, 211 Mich App 506-507, sets forth seven standards to be applied in determining whether the sanction of dismissal should be employed.

3. All other options other than dismissal should be considered and evaluated.

4822-6637-2810

STATE OF MICHIGAN

COURT OF APPEALS

In re CONSERVATORSHIP OF BOBBIE JEAN LEE.

BRENDA FAY BOND, Successor Conservator of BOBBIE JEAN LEE, a legally protected person,

Petitioner-Appellant,

v

DEBORAH RENEE LEE and SHARON DENISE STARKS,

Appellees.

UNPUBLISHED
August 20, 2020

No. 349206
Oakland Probate Court
LC No. 2017-374911-CA

Before: RONAYNE KRAUSE, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Petitioner, Brenda Fay Bond, appeals as of right the order dismissing with prejudice her petition regarding objections to an annual account of the co-conservators for the estate of Bobbie Jean Lee (hereinafter, "Bobbie Jean"). Bond argues the trial court abused its discretion by failing to reconsider the order dismissing her petition with prejudice for her failure to appear at a hearing regarding the petition, when the trial court was aware that Bond was assisting Bobbie Jean's discharge from the hospital at the time of the hearing. Bond further argues the trial court engaged in fact-finding without input from Bond, which amounted to an impermissible summary disposition of Bond's claims before completion of discovery. We vacate and remand.

I. BACKGROUND

This case arises out of a dispute over alleged inconsistencies in an annual accounting prepared by Bobbie Jean's other two daughters, and former co-conservators: Deborah Renee Lee (hereinafter, "Deborah") and Sharon Denise Starks. Bond, Bobbie Jean's remaining daughter, initially filed a petition requesting that she be appointed conservator of Bobbie Jean's estate, alleging that Bobbie Jean was unable to manage her property and business affairs effectively

because of mental deficiency and physical illness. At this time, Bond had power of attorney for Bobbie Jean and was serving as her guardian. After a hearing regarding the petition, the trial court determined that Bobbie Jean needed a conservator, and the parties stipulated to the appointment of Deborah and Starks as co-conservators with independent authority of Bobbie Jean's estate. However, considerable friction between Deborah, Starks, Bond, and Bobbie Jean ensued; all of them finding, at various times and for various reasons, the situation to be unsatisfying. The trial court eventually removed Starks and Deborah as co-conservators and appointed Bond as successor conservator. That same day, Starks and Deborah filed the first annual account as fiduciaries of Bobbie Jean's estate.

Bond timely filed an objection to the account and the petition at issue in this appeal. Bond argued, generally, that the account was not substantiated with documentation or receipts, included unreasonable expenses, was not itemized, and was not properly provided to interested persons; and that Starks and Deborah misappropriated funds or permitted the misappropriation of funds. Bond sought, in part, professional fees and an order compelling Starks and Deborah to produce receipts proving the expenses, pursuant to MCR 5.310(C)(2)(c) and MCR 5.310(C)(2)(d). Bond also contended, in part, that a diamond cocktail ring belonging to Bobbie Lee was missing. The trial court entered ordered the conservatorship continued, set a discovery period for records related to the account, and ordered the parties to attend mediation. The mediation did not initially occur, because the mediation center was unable to contact one or all of the parties; the mediation center did not specify which parties it could not contact. The parties then stipulated to adjourn a contested hearing and did attend mediation, but they were unable to come to an agreement.

On the day of the scheduled contested hearing, the only person to appear was counsel for Bobbie Jean. Neither Bond, who was acting *in propria persona* at the time, nor Deborah nor Starks appeared. Bobbie Jean's counsel informed the trial court that Bond was possibly absent as a result of Bobbie Jean's recent hospitalization. The trial court remarked that "this is a long time coming," and

> Well, even if that were the case I hope – I'm sorry to hear about your mom being in the hospital, but she could have called. So, I'm just gonna dismiss her petition . . . And I'm gonna dismiss it with prejudice. This has been going on way too long. And in reviewing everything and backing it up I do think that there is just a double – it was the initial inventory was in error. I mean, at the – even in the best scenario, even if Bobbie Lee's [sic] objections were found to be legitimate, there's less than a $820.00 differential . . . So, I'm going to dismiss the petition with prejudice.

Bond moved for reconsideration, explaining that she had been unable to attend the hearing because she was facilitating Bobbie Jean's discharge and transfer from the hospital to a rehabilitation center on that day. The trial court denied the motion, stating that: (1) Bond's request for professional fees was moot because her attorney withdrew; (2) the missing cocktail ring was attributed to Bond, because she was duty bound as Bobbie Jean's guardian to preserve her assets and file a claim at the item's disappearance; (3) any discrepancies in the account were as a result of an error in the initial inventory of the co-conservators, and that the most that could be claimed was a *de minimis* discrepancy. Because Bond failed to demonstrate a palpable error, and failed to satisfy the

requirements under MCR 2.119(F)(3), Bond was not entitled to relief and the motion for reconsideration was denied.

This appeal ensued. Bond asserts the trial court abused its discretion in dismissing her petition with prejudice without evaluating alternatives to dismissal, or considering factors necessary to determining the appropriate sanction for her failure to appear. Bond also claims the trial court improperly made factual determinations on the merits of her petition without having been apprised of the full evidence at issue, allegedly akin to determining summary disposition on an issue before discovery was completed.

II. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Generally, an issue is preserved for appeal if it is presented to the trial court and pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). This Court might consider an unpreserved issue if justice so requires, if necessary to resolve the matter, or if the issue is one of law and the record is sufficient for its resolution. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Furthermore, parties may make more sophisticated or fully-developed arguments on appeal than they made in the trial court. *Id*. Parties appearing *in propria persona* are not excused from providing support for their claims, but they are entitled to more generosity and lenity in construing their pleadings than would be lawyers. *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976). Bond's motion for reconsideration specifically asserted that she had been unable to attend the hearing due to the urgency of Bobbie Lee's medical transfer, but did not argue that the trial court failed to make proper findings of fact before imposing the dismissal. Thus, Bond's appeal was only preserved in part. Because of Bond's self-representation at the time, we nevertheless choose to consider the entirety of her arguments on appeal.

To the extent Bond's arguments were not preserved, however, our review is for plain error affecting her substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Under that standard, an error must have plainly occurred and either affected the outcome of the proceedings or undermined the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We review for an abuse of discretion a trial court's decision to dismiss an action, *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995), a probate court's substantive decisions and dispositional rulings, *In re Weber Estate*, 257 Mich App 558, 560; 669 NW2d 288 (2003), and a grant or denial of reconsideration, *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014). "An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes." *Macomb Co Dep't of Human Servs*, 204 Mich App at 754. A trial court automatically and necessarily abuses its discretion if its decision is premised upon an error of law, *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016), or if it fails to recognize or exercise its discretion when called upon to do so, *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998).

Questions of law considered by a probate court are reviewed de novo on appeal. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). Interpretation of court rules is a question of law that is considered de novo on appeal. *In re Burnett Estate*, 300 Mich App 489, 494; 834

NW2d 93 (2013). The principles of statutory interpretation apply to the interpretation and application of court rules. *Haliw v Sterling Hts*, 471 Mich 700, 704-705; 691 NW2d 753 (2005).

III. SANCTION OF DISMISSAL OF PETITION

Bond argues the trial court abused its discretion in dismissing Bond's petition with prejudice and in denying Bond's motion for reconsideration regarding the order of dismissal. Specifically, Bond alleges that dismissal was a harsh, unjustified sanction considering that Bond was absent because she was assisting Bobbie Jean during a medical emergency. Bond further claims the trial court failed to consider, on the record, the factors for evaluating possible sanctions of a party's failure to appear at trial as required by *Vicencio*, 211 Mich App at 507, and that an assessment of those factors indicates that dismissal is an inappropriate sanction in this instance. The trial court's failure to grant Bond's motion for reconsideration was, therefore, also an abuse of discretion. We agree.

"A court, in its discretion, may dismiss a case with prejudice or enter a default judgment when a party or counsel fails to appear at a duly scheduled trial." *Vicencio*, 211 Mich App at 506; see also MCR 2.504(B)(1). However, "[d]ismissal is a drastic step that should be taken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id.* (citations omitted). "The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000) (quotation omitted). Failure to evaluate all available options on the record is an abuse of discretion. *Vicencio*, 211 Mich App at 506-507. Before imposing the sanction of dismissal, a trial court should consider several factors, including but not necessarily limited to:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id.* at 507 (quotation omitted).]

Here, the trial court apparently deemed Bond's violation willful because "she could have called," but it did not consider whether a medical emergency might be a relatively less egregious level of willfulness. The trial court otherwise simply found that the case had been going on longer than the court felt warranted, and, as will be discussed, made improper factual findings. The record does not reflect that Bond had a history of noncompliance or delay, and we note that *none* of Bobbie Lee's children appeared. The circumstances suggest little prejudice to any party. Most importantly, we appreciate the trial court's frustration, but it clearly gave *no* consideration to whether a lesser sanction would be more appropriate.

The trial court did not offer adequate justification for dismissing the petition upon Bond's failure to appear. Such a harsh result, particularly when the trial court failed to examine alternatives and to evaluate the *Vicencio* factors, falls outside the range of reasonable and principled outcomes and is a palpable error. See *Vicencio*, 211 Mich App at 506-507. We

conclude that the trial court made a palpable error that affected the outcome of the proceedings, which is the standard for reconsideration. *Luckow v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011). We therefore vacate the trial court's order denying reconsideration. We do not necessarily hold that the trial court may not, on remand, again dismiss the petition, but it must articulate on the record its consideration and application of the *Vicencio* factors before doing so.

IV. FACTUAL DETERMINATIONS

Bond argues that trial court effectively granted summary disposition to the former co-conservators concerning Bond's objections to the annual accounting before completion of discovery regarding the petition. We disagree. However, as alluded to above, we do find that the trial court abused its discretion by making a factual determination regarding Bond's objections without a hearing on the issue allowing Bond to present her case, in contravention of MCR 5.310(C)(2)(c)(iv).

Bond submitted objections to Deborah's and Starks' annual accounting of the estate as an interested person, and requested to review proofs of income and disbursements listed in the accounting under MCR 5.310(C)(2)(c). We decline to consider Bond's argument that the trial court effectively granted summary disposition before the completion of discovery, because it is unnecessary for us to do so. However, we observe that Bond misunderstands part of the trial court's order, which she characterizes as imposing upon her a nonsensical obligation to appeal a previous order that had been granted in her favor. Rather, the trial court simply observed that some of Bond's requests were essentially moot because the trial court's prior order had already granted the requested relief.

However, MCR 5.310(C)(2)(c) provides:

> (c) Contents. All accountings must be itemized, showing in detail receipts and disbursements during the accounting period, unless itemization is waived by all interested persons. A written description of services performed must be included or appended regarding compensation sought by a personal representative. This description need not be duplicated in the order. The accounting must include notice that (i) objections concerning the accounting must be brought to the court's attention by an interested person because the court does not normally review the accounting without an objection; (ii) interested persons have a right to review proofs of income and disbursements at a time reasonably convenient to the personal representative and the interested person; (iii) interested persons may object to all or part of an accounting by filing an objection with the court before allowance of the accounting; and (iv) if an objection is filed and not otherwise resolved, the court will hear and determine the objection.

Thus, MCR 5.310(C)(2)(c)(iv) specifically obligates the trial court to hold a hearing where there remain unresolved objections to the annual accounting before making its determination on the merits. As discussed, the trial court had the authority under MCR 2.504(B)(1) to dismiss the petition with Bond's objections due to her absence from the hearing, provided the trial court made a proper record of its consideration of the *Vicencio* factors. However, even if the trial court were to have properly dismissed the petition, the trial court did not have the authority to make factual

determinations regarding the merits of the objections without Bond having the opportunity to be heard or to object to a determination on the written objections only.

Bond asserts that new records, and information within them, were to be discussed during the hearing that could have formed the basis for new objections to be resolved before allowing the accounting. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *In re Adams Estate*, 257 Mich App 230, 234; 667 NW2d 904 (2003), quoting *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976) (quotation marks and citations omitted). Bond does not merely disagree with the trial court's determination of the objections, but rather identifies evidence and new objections that were to be raised in the hearing. Therefore, the trial court abused its discretion in addressing Bond's objections and allowing the accounting before Bond was able to participate in a related hearing.

V. CONCLUSION

The trial court abused its discretion when it dismissed Bond's petition with prejudice and denied Bond's motion for reconsideration, because the trial court failed to consider alternatives to dismissal. The trial court abused its discretion by deciding the merits of Bond's objections to the annual account without a hearing, in contravention of MCR 5.310(C)(2)(c)(iv).

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ David H. Sawyer
/s/ Mark T. Boonstra