IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 8, 2022 Session

IN THE MATTER OF THE CONSERVATORSHIP OF MARY ANN TAPP/ IN RE MARY ANN TAPP LIVING TRUST DATED AUGUST 10, 2015

Appeal from the Chancery Court for Fayette County
No. 16848 William C. Cole, Chancellor

No. W2021-00718-COA-R3-CV

This appeal arises from a conservatorship proceeding in which the appellants filed a complaint to set aside a trust established by the ward, along with a motion to recuse the trial judge. The trial judge entered orders dismissing the complaint, resolving various other matters, and closing the conservatorship, without entering any order mentioning the motion for recusal. We vacate the orders entered by the trial court while the recusal motion remained pending and remand for further proceedings before a different trial judge.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and KENNY W. ARMSTRONG, JJ., joined.

Olen M. Bailey, Jr., and Jared W. Eastlack, Memphis, Tennessee, for the appellants, Judy Bishop, Mark C. Simmons, Sarah S. Manscoe, Linda Taylor, David Allen Simmons, and Bobbi B. Hall.

William H. Shackelford, Jr., and John Patrick Wills, Jackson, Tennessee, for the appellees, John E. Simmons and Thomas M. Minor.

Matthew Reeves Armour, Somerville, Tennessee, for the appellee, Charles Ross Simmons.

OPINION

I. FACTS & PROCEDURAL HISTORY

On November 18, 2015, this proceeding began with the filing of a petition for appointment of a conservator for Mary Ann Tapp. Ms. Tapp had eight siblings, who all joined in the petition and alleged that she was disabled and in need of a conservator. Ms. Tapp's "personal attorney for more than 25 years," Thomas Minor, also joined in the petition. According to the petition, Ms. Tapp was in her seventies, had no spouse or children, and had been diagnosed with dementia. The petition stated that Ms. Tapp owned several parcels of property, comprising several hundred acres and valued at millions of dollars. Thus, the petition alleged that Ms. Tapp was in need of assistance in conducting her affairs and preserving her estate. The petition stated that Ms. Tapp had been examined by her primary care physician within the last ninety days and that his medical report was attached and incorporated by reference. It also stated that Ms. Tapp had been examined by a neuropsychologist, and he would need to submit his affidavit and medical report. The petition sought appointment of one of Ms. Tapp's brothers, John, along with Ms. Tapp's long-time attorney, Mr. Minor, as co-conservators of her person and estate.

The attached physician's report from Ms. Tapp's primary care physician stated that Ms. Tapp had been examined by him on July 28, 2015, and that she had a "decline in cognitive functioning" with "poor" mental condition. He opined that she was "a disabled person" and unable to adequately manage her financial or business affairs due to her disability or incapacity. He stated that she was in need of a conservator to handle her financial affairs, medical treatment, and physical well-being. The primary care doctor also noted that the neuropsychologist had administered a mental examination to Ms. Tapp on August 5, 2015, and that she had also been examined on March 30, 2015.

One day after the petition for a conservator was filed, on November 19, 2015, Chancellor William Cole entered an order appointing John and Mr. Minor as co-conservators for Ms. Tapp. The court found by clear and convincing evidence that Ms. Tapp was fully or partially disabled and in need of assistance from the court. The court cited the report and affidavit submitted by Ms. Tapp's primary care physician regarding her decline in cognitive functioning. The order also directed the neuropsychologist to submit his affidavit and medical report related to his August 5 examination of Ms. Tapp.[1]

[1] The neuropsychological evaluation from the August 5 visit was later filed with the court. It stated that Ms. Tapp had already been diagnosed with Alzheimer's disease with paranoid delusions at her previous examination by another doctor in March 2015. The August 2015 report stated that Ms. Tapp had "shown cognitive and memory decline for more than a year." It stated that her brother John, who accompanied her to the evaluation and held power of attorney, had assumed responsibility for managing her finances and medication. During the August 5 evaluation, Ms. Tapp was "unable to answer basic orientation questions" and did not know her age or the current month, and she guessed that the current year was 1950. She struggled to name her siblings and was unable to remember several family members. The neuropsychologist's impression was moderate to severe senile dementia of the Alzheimer's type. According to the evaluation, the neuropsychologist explained to Ms. Tapp and John that she was "not capable of managing complex activities of daily living," such as shopping, cooking, or managing her finances or medication. He opined that Ms. Tapp needed a conservator and that she was not capable of making or changing a will. According to the evaluation, the neuropsychologist "explained to Ms. Tapp and

Among other things, the order directed the co-conservators to establish a conservatorship bank account that would require joint signatures of the co-conservators for the withdrawal of funds therefrom.

Five months later, in April 2016, co-conservator John filed a "Motion to Re-Transfer Assets to the Mary Ann Tapp Living Trust." According to John's motion, Ms. Tapp had established a trust dated August 10, 2015, three months prior to the filing of the petition for a conservator. The motion stated that Ms. Tapp had named herself and John as co-trustees of the trust, and upon the incompetency of Ms. Tapp, John was to serve as sole trustee. The motion stated that Ms. Tapp had "made specific provisions on how she wanted her personal and real property to be devised" and transferred all of her assets to the trust, including her real property and banking and investment accounts. However, the motion stated that when the petition for a conservator was filed in November 2015, "the Petition failed to state that Ms. Tapp had no property, said property having been previously transferred to the Trust[.]" Thus, according to the motion, the petition for appointment of a conservator "mistakenly made no mention of the fact that [Ms. Tapp's] assets, to include real property and banking and investments accounts, were owned by the Mary Ann Tapp Living Trust and not Ms. Tapp, individually." The motion noted that the order appointing co-conservators had directed them to establish a conservatorship bank account, and thereafter, Mr. Minor had transferred the banking and investment accounts into a conservatorship account in order to manage Ms. Tapp's funds. John asserted that this transfer of assets created uncertainty as to how the assets would be distributed in the event of Ms. Tapp's death, and he contended that Ms. Tapp "wanted her assets to be distributed in accordance with the Trust on August 10, 2015 and to its beneficiaries." The motion stated that "under the circumstances" John had no objection to Mr. Minor serving as co-trustee of the trust with him, as well as co-conservator over the person and property of Ms. Tapp. According to the motion, Mr. Minor did not object to transferring the assets back to the trust and requested that they manage the assets as co-trustees and co-conservators "and have oversight over those funds and [] account to the Court for all disbursements and expenditures."

In May 2016, the chancery court entered an order granting the motion to re-transfer assets to the trust. The order found that Ms. Tapp had established the trust on August 10, 2015, naming herself and John as co-trustees and making specific provisions on how she wanted her property to be devised. The court found that all of her assets were transferred to the trust. It also found that when the petition for a conservator was filed three months later, it "mistakenly made no mention of the fact" that Ms. Tapp's assets were owned by the trust and not by her individually. Thus, the court found that the transfer of assets out of the trust had the unintended consequence of creating uncertainty as to how the assets would be distributed at her death. Accordingly, the court ordered that "the assets in the

her brother that this is something her attorneys can handle and that it will be up to the court to determine capacity."

Conservatorship accounts should be re-transferred to accounts in the name of The Mary Ann Tapp Living Trust," and it appointed Mr. Minor "to also serve as a Co-Trustee of the Trust as well as Co-Conservator over the person and property of Ms. Tapp." However, the court ordered that there could be no distributions from the trust, aside from incidentals, until a further hearing could be held. The court subsequently entered various orders concerning the trust. For instance, it approved a sale of real estate conveyed by John and Mr. Minor as co-conservators and co-trustees of the trust. It ordered all investment accounts to be titled to John and Mr. Minor as co-trustees of the trust. It also approved a request for attorney fees incurred by John's attorney "for services rendered on behalf of the estate of Mary Ann Tapp and the Mary Ann Tapp Living Trust."

In October 2016, one of Ms. Tapp's other brothers, Charles, filed a petition to set aside the trust and return the assets to the conservatorship. Charles noted that the date of Ms. Tapp's neuropsychological evaluation was August 5, 2015. He alleged that John took Ms. Tapp to the office of Mr. Minor five days later, on August 10, 2015, where she executed the trust documents without the knowledge of the other siblings. Charles alleged that Ms. Tapp suffered from dementia and was not competent to execute the documents, and he further alleged that the documents were executed as a result of undue influence by John. Charles noted that John held power of attorney for Ms. Tapp and was therefore in a confidential relationship with her, and he alleged that John benefitted from the execution of the trust documents because the trust terms were contrary to Ms. Tapp's previous will and substantially favored John, his children, and his grandchild. Thus, he alleged that a presumption of undue influence arose. Charles asked the court to declare the trust invalid, set it aside, and transfer its assets to the conservatorship. John filed an answer and counter-claim, asserting, among other things, that the trust contained a no contest clause such that Charles must forfeit his interest under the trust if he challenged it. A consent order was entered thereafter, dismissing Charles's petition and the counterclaim with prejudice.

Over the next several years, the trial court continued to enter various orders involving the trust. It approved accountings and payments from the trust accounts and approved the gift of a vehicle that constituted a trust asset. It was admittedly the practice of the co-trustees to seek court approval before the payment of any funds to the co-trustees or their counsel.

In 2018, Ms. Tapp's seven remaining siblings filed a petition to remove John as co-conservator based primarily on allegations that he was isolating her from the other siblings. After an evidentiary hearing, at which the court heard expert testimony regarding the difficulties that Alzheimer's patients can experience with visitors, the court found that the evidence did not rise to the level to justify removing John as co-conservator. However, it did find that it was in Ms. Tapp's best interest to maintain a relationship with her siblings and set forth a visitation schedule for them. The trial court interpreted a particular statute as requiring a "mandatory" award of attorney fees to John and awarded such fees accordingly. On appeal to this Court, we reversed the award of attorney fees upon finding

the cited statute inapplicable. *See In re Conservatorship of Tapp*, No. W2020-00216-COA-R3-CV, 2021 WL 225684, at *6 (Tenn. Ct. App. Jan. 22, 2021). Our opinion noted that Ms. Tapp had passed away while the appeal was pending, on October 5, 2020. *Id.* at *1. n.1.

Shortly after this Court's decision, on February 1, 2021, John and Mr. Minor, in their capacities as "Co-Conservators" and "Co-Trustees," filed a preliminary final accounting. On March 22, 2021, four of Ms. Tapp's siblings, along with two other relatives, filed a complaint to set aside the trust and notice of will contest. The complaint alleged that the trust had become irrevocable upon the death of Ms. Tapp. The six petitioners alleged three grounds for invalidating the trust: (1) Ms. Tapp lacked the capacity to create the trust due to her dementia, (2) the trust was presumptively the result of undue influence due to the existence of a confidential relationship and a transaction benefitting John, and (3) it was not properly created under the applicable statutes. Thus, the petitioners asked the court to invalidate the trust and set it aside, in addition to a will executed by Ms. Tapp on the same day as the trust, and to transfer the assets of the trust to the probate estate of Ms. Tapp. The petition alleged that the trial court had been exercising jurisdiction over the trust since 2016, by approving inventories, accountings, receipts, and disbursements. It asked the court to set aside or void all orders entered during the conservatorship proceeding relating to the trust.

On April 22, 2021, the six petitioners also filed a motion for recusal of Chancellor Cole. The recusal motion first noted that the original petition for the appointment of a conservator, filed on November 18, 2015, had relied on a physician report from Ms. Tapp's primary care doctor, who based his opinion on his own examination of Ms. Tapp on July 28, 2015, in addition to her neuropsychological examination on August 5, 2015, and her previous exam in March 2015. The recusal motion noted that the trial court granted the petition the next day, finding Ms. Tapp disabled based on the attached report regarding those three examinations. The petitioners noted that all three of the examinations had taken place by August 5, 2015, when she visited the neuropsychologist. They pointed out that Ms. Tapp signed the revocable living trust agreement and will five days *later*, on August 10, 2015. The recusal motion also noted that the trial court had proceeded to exercise jurisdiction over the trust throughout the course of the conservatorship. Citing Rule of Judicial Conduct 2.11, the petitioners alleged that the trial judge's "impartiality might reasonably be questioned" as to the issues raised in the trust contest complaint given his prior rulings throughout the course of the conservatorship. They contended that Chancellor Cole should be disqualified because he had already ruled on central issues raised in the trust contest complaint during the conservatorship proceeding, such as finding that Ms. Tapp was disabled based on the three examinations. The petitioners contended that they would be relying on that same evidence, in addition to other testimony, while the respondents would be required to discredit or challenge those examinations and the trial judge's previous ruling as to disability. They also suggested that Chancellor Cole would have to decide such issues as whether to "reverse" his prior ruling regarding disability,

whether the doctrines of res judicata or collateral estoppel applied, and whether to void all of its prior orders regarding the trust entered during the conservatorship. Again, the petitioners suggested that a party might reasonably question Chancellor Cole's impartiality to rule on those issues related to the validity of his own prior rulings. The petitioners further suggested that a jury might be confused or influenced by the presence of Chancellor Cole on the bench in a case involving the effect of his prior rulings. They also suggested that he might be needed as a witness. Finally, they argued that it would be a waste of judicial resources to proceed with a trial of the trust contest complaint and then have an additional unforeseen conflict arise for which impartiality was asserted.

The recusal motion stated that it was not filed for any improper purpose and that the affidavit of one of the siblings, Linda, was attached. It also quoted Sections 1.02 and 1.03 of Tennessee Supreme Court Rule 10B and stated that the court should refrain from ruling on any other matters in the proceeding until a written ruling was entered on the recusal motion. The petitioners also filed an amended trust contest complaint, adding claims for elder exploitation and seeking compensatory and punitive damages.

On May 3, 2021, John and Mr. Minor filed a motion to dismiss the trust contest complaint. However, it sought dismissal of not only the trust complaint but "all related Motions, to include but not limited to, [the] Motion for Recusal." The motion to dismiss cited Tennessee Code Annotated section 34-3-108(e), which provides,

> (e) When the person with a disability dies or the court earlier determines a conservator is no longer needed and issues an order terminating the conservatorship, the conservatorship shall terminate. If the conservator has responsibility for the property of the person with a disability, within one hundred twenty (120) days after the date the conservatorship terminates, the conservator shall file a preliminary final accounting with the court, which shall account for all assets, receipts, and disbursements from the date of the last accounting until the date the conservatorship terminates, and shall detail the amount of the final distribution to close the conservatorship. If no objections have been filed to the clerk's report on the preliminary final accounting within thirty (30) days from the date the clerk's report is filed, the conservator shall distribute the remaining assets. The receipts and final cancelled checks evidencing the final distributions shall be filed with the court by the conservator. When the evidence of the final distribution is filed with the court and on order of the court, the conservatorship proceeding shall be closed.

In light of Ms. Tapp's death, John and Mr. Minor asked the court to close the conservatorship, approve the final accounting, and pay the related fees. They argued that the petitioners had "improperly filed" their trust contest complaint under the docket number for the conservatorship when the complaint had "nothing to do with the Conservatorship."

John and Mr. Minor argued that the trust contest complaint was a "new and unrelated matter," that there was no controversy tying the two cases together, and that there was no authority for filing "an unrelated matter under an existing docket number." They also argued that there was "not jurisdiction in this matter (a conservatorship) to hear a trust and will contest." They asked the court to dismiss the trust contest complaint "and all related motions" pursuant to Tennessee Rule of Civil Procedure 12.02, then rule on their pending motions for payment of fees and related matters. They suggested that the petitioners could then "re-file same under a separate docket number at their pleasure." John and Mr. Minor also filed a response in opposition to the motion for recusal, repeating the same arguments. They contended that the recusal motion and imbedded request for the court to refrain from ruling on other matters had effectively prohibited the trial judge from hearing motions required to close the conservatorship after the death of the ward. However, they insisted that the trust contest complaint and recusal motion had nothing to do with the conservatorship and were improperly filed under the wrong docket number, "rendering same void."

The six petitioners filed a response to the motion to dismiss, arguing that the parties' dispute was really about the proper docket number, not the jurisdiction of the court. The petitioners acknowledged that the caption of this case did not reference the trust but maintained that "the substance" of the proceeding had "included administration of the [t]rust." In fact, according to the petitioners, the only assets being administered under the current docket number were trust assets. They argued that John and Mr. Minor should be estopped from raising any challenge to jurisdiction when they did not raise it when the previous trust contest complaint was filed by Charles earlier in the conservatorship proceeding. They also claimed that several motions pending before the court sought relief "related to the administration of the very Trust which the Motion to Dismiss alleges the Court has no jurisdiction over." The petitioners claimed that John and Mr. Minor were attempting to obtain approval of the trust accounting, complete the trust administration, terminate the trust, and have its assets distributed without any adjudication of the trust contest complaint. However, because there were "no Conservatorship estate assets," the petitioners argued that dismissal of the trust complaint was not necessary. They suggested that the court discharge the co-conservators of the person, due to the death of the ward, and the co-conservators of the estate, due to the absence of assets, but proceed to hear the trust contest before entering any order that would discharge the co-trustees, approve a trust accounting, distribute trust assets, or close the trust administration. Most importantly, however, the petitioners argued that their recusal motion should be resolved before the motion to dismiss was heard and decided. They emphasized that the recusal motion was filed first and contended that the motion to dismiss was an attempt to circumvent a ruling on the recusal motion by seeking dismissal of the complaint and all related motions. They argued that such maneuvering would enable a party to circumvent recusal by having the judge with the alleged partiality decide the case on a dispositive motion, undermining Rule 10B. The petitioners argued that Chancellor Cole's prior rulings might cause a person to reasonably question his impartiality to rule on the motion to dismiss as it related to the

invalidation of his prior orders. Thus, they insisted that the motion to dismiss should not be heard or decided until a written order was entered on the recusal motion.

The petitioners also filed an amended recusal motion, stating that the motion to dismiss had been filed after their original recusal motion. They argued that the recusal motion had priority and must be heard before any other pending motions, including the motion to dismiss. They again asked the court to refrain from ruling on any other matters before resolving the recusal motion. John and Mr. Minor filed an additional memorandum reiterating their position that the trust contest complaint and all related motions, including the recusal motion, were "not properly before the Court in the Conservatorship matter and do not require action by the Court." They contended that the court was authorized to dismiss the complaint and all other motions, close the conservatorship, and rule on their requests for fees rendered in their capacity as co-conservators and co-trustees.

The trial court held a hearing on all of the outstanding motions on May 20, 2021. That same day, the trial court entered an order granting the motion to dismiss filed by John and Mr. Minor. The order reads, in its entirety:

> This cause came to be heard on the 20th day May, 2021, before the Honorable William C. Cole, Chancellor of the Chancery Court of Fayette County, Tennessee, upon the Motion to Dismiss Plaintiffs' Complaint to Contest Validity of and to Set Aside Trust and Notices of Contested Will and Related Motions filed by the Co-Conservators; upon statements of counsel, and the entire record herein, from all of which the Court finds that said Motion is well taken; and therefore, it is accordingly ORDERED, ADJUDGED AND DECREED as follows:
>
> 1. That the Cross-claim against Charles Simmons is hereby dismissed without prejudice.
> 2. That the Motion to Employ[] Attorneys to Defend Trust is hereby dismissed without prejudice.
> 3. That the Complaint to Contest Validity of and to Set Aside Trust and Notices of Contested Will is hereby dismissed without prejudice.
> 4. The Court makes no finding or determination as to the validity of the Trust.
> 5. This Court has entered this Order as to all issues in this matter and there is no just reason for delay and said Order shall be final as to all matters adjudicated by this Court in this Conservatorship proceeding pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.
>
> IT IS SO ORDERED this 20th day of May, 2021.[2]

[2] We note that even though Rule 52.01 "exempts a trial court from having to state its findings of fact and conclusions of law on decisions of Rule 12 motions, 'it is most often a good idea for the court to include its findings in its order regardless of whether the lack thereof constitutes error.'" *City of Morristown*

Notably, the order of dismissal did not mention the recusal motion. That same day, the trial court entered four additional orders resolving other matters discussed at the hearing. The court approved conservator fees and attorney fees, approved the final accounting, discharged Mr. Minor as co-trustee and co-conservator, appointed a successor co-trustee, discharged John as co-conservator, and closed the conservatorship. However, none of these additional orders mentioned the recusal motion. The petitioners timely filed a notice of appeal.

II. ISSUES PRESENTED

The petitioners present the following issues for review on appeal:

1. Whether the Trial Court Followed Proper Procedures in Hearing and Denying the Amended Recusal Motion.
2. Whether the Trial Court Erred in Denying the Amended Recusal Motion.
3. Whether the Trial Court Erred in Dismissing the Trust Contest Complaint.
4. Whether the Co-Trustees Filed a Responsive Pleading to the Trust Contest Complaint.
5. Whether the Co-Trustees Waived All Defenses to the Trust Contest Complaint by Failing to Allege Any Defenses in Their Initial Responsive Pleadings to the Trust Contest Complaint.
6. Whether the Co-Trustees Were Estopped from Alleging that the Trial Court Did Not Have Jurisdiction to Hear the Trust Contest Complaint.
7. Whether the Co-Trustees Waived Defenses Relating to Personal Jurisdiction, Subject Matter Jurisdiction, and Venue by Failing to Object to Any of the Nine (9) Subpoenas Duces Tecum Issued and Served by Appellants in the Trust Contest.
8. Whether the Trial Court Erred in Closing and Terminating the Trust Administration.
9. Whether the Trial Court Erred in Closing the Conservatorship.
10. Whether the Trial Court Erred in Awarding Fiduciary Fees and Attorney's Fees from the Assets of the Trust.

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v. Ball, No. E2020-01567-COA-R3-CV, 2021 WL 4449237, at *8 n.8 (Tenn. Ct. App. Sept. 29, 2021) (quoting *PNC Multifamily Cap. Institutional Fund XXVI Ltd. P'ship v. Mabry*, 402 S.W.3d 654, 660 (Tenn. Ct. App. 2012)). "[A] trial court's failure to provide any legal basis for its dismissal o[n] a Rule 12.02 motion to dismiss can hamper this Court's ability to review the dismissal on appeal." *Crenshaw v. Kado*, No. E2020-00282-COA-R3-CV, 2021 WL 2473820, at *6 (Tenn. Ct. App. June 17, 2021); *see, e.g., Buckingham v. Tenn. Dep't of Corr.*, No. E2020-01541-COA-R3-CV, 2021 WL 2156445, at *2-3 (Tenn. Ct. App. May 27, 2021) (vacating a Rule 12 order of dismissal that did not provide any reasoning when this Court was unable to ascertain the basis of the trial court's ruling).

The appellees frame the issues as follows:

1. Whether the trial court correctly found that the Trust Contest Complaint was improperly filed in the conservatorship action?
2. Whether the trial court correctly denied the Appellants' Amended Motion for Recusal?
3. Whether the trial court correctly closed the conservatorship and discharged the co-conservators/co-trustees?

For the following reasons, we vacate the orders of the chancery court and remand for further proceedings.

III. DISCUSSION

We begin with the issues regarding recusal because we find them to be dispositive of this appeal. The petitioners contend that the trial judge did not hear and decide the recusal motion before any other motion as required by Section 1.02 of Rule 10B, nor did it enter a written order granting or denying the motion in compliance with Section 1.03. We agree on both issues.

Judicial recusal is governed by Tennessee Supreme Court Rule 10B. It provides, in pertinent part:

> The procedures set out in this rule shall be employed to determine whether a judge should preside over a case.
>
> **Section 1. Motion Seeking Disqualification or Recusal of Trial Judge of Court of Record.**
>
> **1.01**. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal. . . .
> **1.02**. While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.
> **1.03**. Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion. . . .

Tenn. Sup. Ct. R. 10B. Here, the trial judge failed to comply with Section 1.03 because he did not enter a written order either granting the motion or denying the motion and "stat[ing] in writing the grounds" upon which it was denied. *Id.* The court also failed to comply with Section 1.02, which provided that while the motion was pending, the trial judge could "make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken." *Id.*

As the petitioners aptly note on appeal, "[a]t the hearing on May 20, 2021, despite the urging of counsel for [the petitioners] for the Trial Court to hear and decide the Amended Recusal Motion first, the Trial Court first heard arguments on the Co-Trustee's Motion to Dismiss." They correctly note that "[t]he Co-Trustees urged the Trial Court to hear and decide the Motion to Dismiss in order to circumvent a ruling on the Amended Recusal Motion by a simple dismissal of the Trust Contest Complaint." The transcript of the May 20, 2021 hearing reveals that the trial judge began the hearing by considering and deciding a motion regarding attorney fees, in light of this Court's ruling in the first appeal. Next, counsel for John and Mr. Minor began to argue their motion to dismiss. Counsel for the petitioners asked if they were going to be arguing the motion to dismiss first or "arguing which motion we're supposed to take up first." The trial judge responded, "It sounds to me like he's arguing his motion." The trial judge remarked that "your motion to recuse really is piggybacked by your other lawsuits that you filed in the conservatorship action." Counsel for John and Mr. Minor argued:

> So I think it's proper today for the Court to address the motion to dismiss the will trust contest before addressing the issue of motion to recuse, which is what they want you to do. And if you find that they improperly filed their case, a new adversary proceeding in an existing adversary proceeding, and you dismiss it, there is no motion to recuse.
>
> There are no more motions before the Court because they're not properly before the Court.

He reasoned that the petitioners' trust contest complaint "should be thrown out. And all the other motions, to include the motion to recuse, should not be heard by the Court, because they're not properly before the Court." The ensuing discussion intertwined the issues regarding the motion to dismiss and the issue of recusal. The trial judge remarked that "[a]ny recusal issue may be moot" if the trust contest complaint was dismissed and refiled, then assigned to another chancellor. Addressing counsel for John and Mr. Minor, the trial judge stated, "But is the Court not required to avoid an appearance of impropriety and avoid a conflict? I mean, at this point, I think it's premature. *I'm going to grant your motion to dismiss.* But when the case comes back, should I be the judge to hear it?" (emphasis added). Counsel stated, "I'm not going to address it, because we're not here about the motion to recuse. . . . [W]e can reserve that until they file the motion – file their case properly and hear the motion to recuse." The trial judge stated to petitioners' counsel, "Well, when it's a timely motion, I'll address it at that time." Counsel insisted that his

motion was "a timely motion." The trial judge then immediately announced that he was denying the motion to recuse on two grounds – "one, I think it's premature, because I don't think it's properly before the Court in the conservatorship proceeding, because the conservatorship is over with," and two, he had only decided that she was "disabled" under the conservatorship statute, "which would not preclude the Court from hearing undue influence or lack of capacity issues against the creation of the trust," and in any event, he said, opposing counsel could not wait until the end of trial to challenge his impartiality because the issue would be waived. The trial judge then addressed the remaining accounting and fee issues.

Despite this oral ruling in the transcript, none of the orders entered after this hearing mention the recusal motion, provide any grounds for its denial, or incorporate the transcript of the hearing. "Tennessee law is clear that the trial court speaks through its written orders, not the transcript." *In re Navada N.*, 498 S.W.3d 579, 594 (Tenn. Ct. App. 2016) (citing *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015)); *see also Harcrow v. Harcrow*, No. M2019-00353-COA-T10B-CV, 2019 WL 1397085, at *3 (Tenn. Ct. App. Mar. 27, 2019) (explaining that "[a] trial court's oral pronouncements, if made a part of the written judgment through incorporation by reference, become a part of the judgment and reviewable as such" and are "sufficient to meet the requirements of section 1.03 of Rule 10B"). Even if we were inclined to consider the oral ruling in the transcript, which was not incorporated in any order, the transcript clearly indicates that the trial judge announced his intention to grant the motion to dismiss well before he eventually issued an oral ruling on the recusal motion. In other words, he had already decided the motion to dismiss by the time he reluctantly issued an oral ruling regarding the recusal motion. The orders addressing the various substantive matters were entered by the trial court on the same day as the hearing, without any order addressing the recusal motion.

We now consider the proper remedy. In *Dougherty v. Dougherty*, No. W2020-00284-COA-T10B-CV, 2020 WL 1189096, at *2-3 (Tenn. Ct. App. Mar. 12, 2020), this Court vacated a written order for failure to comply with Rule 10B because it failed "to address and make specific findings" related to the movant's allegations regarding recusal. Because the trial judge "made insufficient findings as to his reasoning for denying the motion to recuse as required by Rule 10B, § 1.03," we vacated the order and directed the trial judge on remand to "either grant the motion or state in writing all the grounds upon which the motion is denied." *Id.* at *3. Likewise, in *Prewitt v. Brown*, No. M2017-01420-COA-R3-CV, 2018 WL 2025212, at *9 (Tenn. Ct. App. Apr. 30, 2018), a written order summarily stated that a recusal motion was denied, which we explained was "woefully inadequate." This Court noted that we could have chosen "to remand with instructions for the trial judge to comply with the mandate in Section 1.03, *or* reverse with instructions for the trial court to grant the motion." *Id.* (emphasis added).[3]

[3] The *Prewitt* Court ultimately chose a different course and affirmed the denial of the recusal motion because it was based on Tennessee Rule of Civil Procedure 63, which was inapplicable, it failed to

Here, however, the error was compounded by the substantive rulings the trial judge made even in the absence of an order resolving the recusal motion. Simply put, "Rule 10B precludes a trial judge from taking further action in a case when a motion for recusal is pending against him or her." *Rich v. Rich*, No. M2018-00485-COA-T10B-CV, 2018 WL 1989619, at *12 n.3 (Tenn. Ct. App. Apr. 27, 2018); *see, e.g.*, *Carney v. Santander Consumer USA*, No. M2010-01401-COA-R3-CV, 2015 WL 3407256, at *1 (Tenn. Ct. App. May 28, 2015) ("We affirm the trial court's decision to deny the motion to recuse, but vacate the order entered by the trial court while the recusal motion was pending."). "'The purpose of section 1.02 is to ensure that a trial court makes no *substantive* decisions while the motion to recuse is pending.'" *Austermiller v. Austermiller*, No. M2022-01611-COA-T10B-CV, 2022 WL 17409921, at *7 (Tenn. Ct. App. Dec. 5, 2022) (quoting *Guo v. Rogers*, No. M2020-01321-COA-T10B-CV, 2020 WL 6781244, at *4 (Tenn. Ct. App. Nov. 18, 2020)).

John and Mr. Minor argue on appeal that there was no valid basis for the recusal motion because the petitioners' trust contest complaint was a legal nullity and the petitioners were never proper parties before the court.[4] They argue that "without a valid basis to file and maintain the Trust Contest Complaint, the Appellants had no valid basis to seek recusal." However, this Court has cautioned against intertwining rulings on recusal and substantive issues. *See, e.g.*, *Clay Cnty. v. Purdue Pharma L.P.*, No. E2022-00349-COA-T10B-CV, 2022 WL 1161056, at *4 (Tenn. Ct. App. Apr. 20, 2022) (citing *State v. Coleman*, No. M2017-00264-CCA-R3-CD, 2018 WL 1684365, at *9 (Tenn. Crim. App. Apr. 6, 2018)). A trial court took a similar approach in *In re Estate of Abbott*, No. W2017-02086-COA-T10B-CV, 2017 WL 4864816, at *1 (Tenn. Ct. App. Oct. 27, 2017), determining that a motion to disqualify was moot because the will at issue in the case was not properly witnessed and therefore "the probate must be rescinded." On appeal, this Court observed that the recusal motion was meritless because the party was merely dissatisfied with an adverse ruling, but, we explained, the recusal motion was not moot:

> Tennessee Supreme Court Rule 10B, Section 1.02 provides that while the motion to disqualify "is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken." The record in this case indicates that the motion to disqualify was originally the sole purpose of the October 2017 hearing. However, disqualification and the validity of the will were quickly conflated both by Appellant's counsel and

substantially comply with Rule 10B, and the asserted ground for recusal did not warrant disqualification. 2018 WL 2025212, at *9.

[4] To clarify, John and Mr. Minor argue that the parties seeking recusal were never proper parties before the court, even though some of the petitioners are the same siblings who originally filed the petition for a conservator and previously filed the petition to remove John as co-conservator. Therefore, at a minimum, those previous petitioners were already parties to the case.

> the trial court. However, Rule 10B, Section 1.02 requires the trial court to first analyze the motion to disqualify before proceeding to any substantive issues in the case. *See In re Conservatorship of Tate*, No. M2012-01918-COA-10B-CV, 2012 WL 4086159 at *3 (Tenn. Ct. App. Feb. 17, 2012). Here, the trial court seemingly determined that the will at issue was ineffective, thereby obviating the probate and making the motion to recuse moot. Instead, Section 1.02 required the trial court to analyze the motion to disqualify, which in this case would have required a denial of that motion, before determining whether the will was effective. *See Rodgers v. Sallee*, No. E2013-02067-COA-R3-CV, 2015 WL 636740 (Tenn. Ct. App. Feb. 13, 2015). As such, we modify the trial court's order to deny the motion to recuse and vacate its order regarding the validity of the will. We remand for further hearing regarding the validity of the will at issue.

Id. at *2.

The Court of Criminal Appeals considered even more similar violations of Rule 10B in *State v. Coleman*, No. M2017-00264-CCA-R3-CD, 2018 WL 1684365 (Tenn. Crim. App. Apr. 6, 2018). In that case, a trial judge "declined to rule" on a recusal motion and proceeded to impose judgment instead. *Id.* at *3. She reasoned that if her decision was reversed on appeal, then she would entertain a motion to recuse and probably recuse herself. *Id.* at *9. The appellate court concluded that the trial court's failure to rule on the recusal motion while continuing to hear other matters involving the case provided an independent basis for reversal. *Id.* at *1. It explained:

> We note the impropriety of the trial judge deciding she would "entertain" the motion only in the event of reversal. This in effect denied the State a ruling on the motion to recuse from which it could even seek appellate review. The State's motion laid out specific allegations of improper conduct which violated the Rules of Judicial Conduct and which imbued the proceedings with an appearance of partiality. The trial judge was not at liberty to ignore this motion or to address it only if this court found the sum of her other actions amounted to reversible error.
>
> When presented with a motion to recuse, a trial judge is obligated to promptly make a ruling on it and to refrain from further action in the case absent good cause. *See* Tenn. Sup. Ct. R. 10B § 1.02 ("While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken."); Tenn. Sup. Ct. R. 10, RJC 2.11(D) ("Upon the making of a motion seeking disqualification, recusal, or a determination of constitutional or statutory incompetence, a judge shall act promptly by written order and either grant or deny the motion."). While it appears that the State failed to comply with the procedural requirements of a

Rule 10B motion for recusal, *see* Tenn. Sup. Ct. R. 10B § 1.01 (requiring motion to be supported by an affidavit affirming factual and legal grounds and lack of improper purpose); *State v. Watson*, 507 S.W.3d 191, 193-94 (Tenn. Crim. App. 2016), *perm. app. denied* (Tenn. June 23, 2016) (noting that failure to comply with Rule made "meaningful appellate review difficult"), the trial court should have ruled on the motion even if it chose to deny the motion for failure to follow the procedural requirements.

When a trial court ignores a pending motion to recuse and enters further orders in a case without making a finding of good cause as dictated by Rule 10B section 1.02, the orders entered during the pendency of the motion to recuse may be vacated on appeal. *See Ophelia Carney v. Santander Consumer USA*, No. M2010-01401-COA-R3-CV, 2015 WL 3407256, at *7 (Tenn. Ct. App. May 28, 2015) (vacating order entered while motion to recuse was pending); *Frances G. Rodgers v. Yarboro A. Sallee*, No. E2013-02067-COA-R3-CV, 2015 WL 636740 (Tenn. Ct. App. Feb. 13, 2015) (vacating orders entered after filing of motion to recuse but prior to trial court's decision to grant motion to recuse); *see also Neal v. Hayes*, No. E2011-00898-COA-R3-CV, 2012 WL 260005 (Tenn. Ct. App. Jan. 30, 2012) (concluding prior to the enactment of Rule 10B that an order which simultaneously ruled on contested issues and granted a motion to recuse must be vacated in regard to the contested issues). We note that the Court of Appeals in *Ophelia Carney* vacated the order entered during the pendency of the motion to recuse despite the movant's failure to comply with the dictates of Rule 10B. 2015 WL 3407256, at *4 (noting failure to state that the motion was not filed for an improper purpose). On the other hand, the Court of Appeals has declined to vacate an order entered during the pendency of a motion to recuse when the trial judge had orally denied the motion to recuse prior to entering the written order on the substantive issues. *In re Conservatorship of John Danieal Tate*, No. M2012-01918-COA-10B-CV, 2012 WL 4086159, at *3 (Tenn. Ct. App. Sept. 17, 2012) (noting that entering the order regarding recusal would have been the "better practice" when the court simultaneously issued an oral ruling on the two motions but entered the written order on the substantive issue prior to the written order on the motion to recuse); *cf. Samuel C. Clemmons, et al., v. Johnny Nesmith*, No. M2016-01971-COA-T10B-CV, 2017 WL 480705, at *10 (Tenn. Ct. App. Feb. 6, 2017) (noting that the trial court acted improperly when it informed the parties it would deny a motion to recuse but held further proceedings before entering a written order, but concluding that the delay itself did not rise to grounds for recusal). Here, the trial judge unjustifiably intertwined her rulings on the recusal with her substantive rulings, indicating that her ruling on the motion to recuse would hinge on whether her other judgments were reversed on appeal. The trial court did not deny the motion or indeed enter any order regarding it. Because the trial court ignored the

> motion to recuse in contravention of the Rule, we conclude that the failure to rule on the motion to recuse was itself error. Accordingly, the failure to rule on the motion to recuse provides a separate basis to vacate the judgments filed while the motion to recuse was pending.

Id. at *9.[5] The Court concluded by stating that "it will not be necessary for the trial judge to address the motion to recuse because we direct that the matter be set before a different judge." *Id.* at *12.

The Court of Criminal Appeals considered another similar situation in *Tucker v. State*, No. M2018-01196-CCA-R3-ECN, 2019 WL 3782166 (Tenn. Crim. App. Aug. 12, 2019). In that case, the trial court, "in violation of Tennessee Supreme Court Rule 10B, failed to rule on Petitioner's motion to recuse before entering an order denying the petition [for a writ of error coram nobis]." *Id.* at *1. Instead of resolving the recusal motion, the trial judge summarily denied the petition for writ of error coram nobis, finding that it was not filed within the applicable statute of limitations and that there were no due process concerns that would entitle the petitioner to relief. *Id.* Thus, the court did not address the motion for recusal or enter a separate order ruling on the recusal motion. *Id.* On appeal, the appellant argued that the trial court never ruled on his Rule 10B motion for recusal. *Id.* Relying heavily on the *Coleman* case, the Court of Criminal Appeals concluded that the trial court erred by not ruling on the motion to recuse before entering an order denying the underlying petition. *Id.* at *3. Therefore, the Court vacated the order denying the petition and remanded for further proceedings. *Id.* However, the Court added,

> Since the error coram nobis court ruled on a pending matter while the Rule 10B motion was pending, in order to avoid all possibility of an appearance of impropriety, we further order that the original error coram nobis court judge is recused from hearing this matter further on remand and that the case is to be assigned to another criminal court judge in Davidson County.

Id.

In conclusion, "Tennessee Supreme Court Rule 10B sets out the procedures that ***shall be*** employed to determine whether a judge should preside over a case." *Prewitt*, 2018

[5] John and Mr. Minor also argue that the petitioners "never filed any affidavit in the trial court in support of any effort to recuse the trial judge. This is fatal to their recusal appeal." We note that the *amended* motion was not accompanied by an affidavit in support, but the original motion for recusal was accompanied by an affidavit. The absence of the affidavit with the amended motion was never mentioned at the hearing, and we express no opinion as to the validity of the argument raised by John and Mr. Minor. As explained in *Coleman*, 2018 WL 1684365, at *9, even where the movant has failed to comply with the procedural requirements of Rule 10B, the trial court should rule on the recusal motion. *See also Halliburton v. Ballin*, No. W2022-01208-COA-T10B-CV, 2022 WL 4397190, at *4 n.4 (Tenn. Ct. App. Sept. 23, 2022) (noting that the trial judge should have promptly addressed a recusal motion even if it was improperly filed).

WL 2025212, at *8; *see* Tenn. Sup. Ct. R. 10B ("The procedures set out in this rule shall be employed to determine whether a judge should preside over a case."). "[T]he requirements of Rule 10B are mandatory for the litigants, and they are also mandatory for the trial court." *In re Adison P.*, No. W2015-00393-COA-T10B-CV, 2015 WL 1869456, at *8 (Tenn. Ct. App. Apr. 21, 2015) (Gibson, J., dissenting). "Upon the filing of the motion for recusal, pursuant to the clear and mandatory language of Section 1.02 of Tennessee Supreme Court Rule 10B, the trial court should have 'ma[d]e no further orders and take[n] no further action on the case' until the recusal issue was addressed." *Rodgers*, 2015 WL 636740, at *4 (quoting Tenn. Sup. Ct. R. 10B § 1.02). In addition, "'Section 1.03 of Rule 10B requires every judge who denies a motion for recusal to 'state in writing the grounds upon which he or she denies the motion.'" *Elseroad v. Cook*, 553 S.W.3d 460, 468 (Tenn. Ct. App. 2018) (quoting Tenn. Sup. Ct. R. 10B § 1.03). Given that the trial judge failed to enter any order mentioning the recusal motion and proceeded to rule on several substantive matters instead, we vacate the five orders entered by the trial court on May 20, 2021. In order to avoid all possibility of an appearance of impropriety, we order that the trial judge is recused from hearing this matter further on remand. *See Tucker*, 2019 WL 3782166, at *3.

IV. CONCLUSION

For the aforementioned reasons, the decision of the chancery court is vacated and remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to the appellees, John E. Simmons and Thomas M. Minor, for which execution may issue if necessary.

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CARMA DENNIS MCGEE, JUDGE