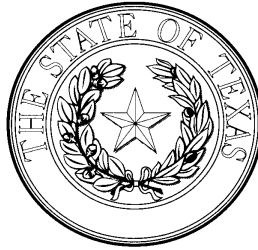


Opinion issued January 19, 2017



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-16-00411-CV

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**IN RE SHEILAH A. LUDINGTON, DEPENDENT ADMINISTRATOR OF  
THE ESTATE OF PETER MITCHELL LUDINGTON, DECEASED**

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**On Appeal from the Probate Court No. 2  
Harris County, Texas  
Trial Court Case No. 359,330**

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**MEMORANDUM OPINION**

Sheilah Ludington, as dependent administrator of the estate of Peter Mitchell Ludington, appeals from an order denying her petition for a statutory bill of review. Sheilah contends that the trial court abused its discretion in denying her petition without permitting her to present her case. We conclude that the trial court

afforded Sheilah the opportunity to present her case, and, therefore, affirm the trial court's order denying her petition.

### **Factual and Procedural Background**

#### ***Bettison is appointed and later discharged as limited guardian of Peter's estate***

The underlying proceeding in this appeal is the guardianship of Sheilah's father, Peter Ludington. Peter's siblings initiated the guardianship proceeding because Peter was unable to manage his money.

Initially, Peter's brother, Frederick Ludington, was appointed as limited guardian of Peter's estate. Frederick served as guardian from 1990 until 1995. Then Dennis Bettison, an attorney unrelated to the Ludingtons, was appointed successor guardian of Peter's estate. Dennis served as successor guardian from 1995 until 2006, while Merchants Bonding Company, in turn, served as the surety on Dennis's bond. Finally, Peter's wife, Myra Ludington, was appointed second successor guardian in 2006.

In 2008, while Myra was serving as second successor guardian, Dennis filed an amended account for final settlement of his guardianship of Peter's estate. The trial court did not immediately sign an order approving Dennis's final account.

Peter died in 2012, and Sheilah was appointed dependent administrator of Peter's estate.

In 2013, after Peter had died and Sheilah had been appointed dependent administrator, the trial court ruled on the final account Dennis had filed in 2008. The trial court signed an order that approved Dennis's final account, relieved Dennis of his duties, and discharged Merchants of further liability under the bond.

***Sheilah is appointed administrator of Peter's estate and petitions the trial court for a bill of review***

After Peter died, Sheilah was appointed dependent administrator of Peter's estate. In 2014, Sheilah, as dependent administrator, petitioned the trial court for a statutory bill of review of its 2013 order that approved Dennis's final account and discharged Dennis and Merchants from further liability. In her petition, Sheilah alleged that Peter had been a part-owner of Provident, Ltd., a closely-held family company located in the Turks and Caicos Islands. She further alleged that, although Dennis had been required to disclose in his final account all matters affecting Peter's estate, he failed to account for the value of Peter's stock in Provident, the annual dividends paid to Peter as a Provident shareholder, and certain shareholder loans that had been made to Peter over the years. Sheilah therefore claimed that the trial court had erred in entering the 2013 order discharging Dennis and Merchants. Sheilah's petition was governed by Section 55.251 of the Texas Estates Code.

***The trial court holds an evidentiary hearing on Sheilah's petition***

In late January 2016, Sheilah, Dennis, and Merchants attended an evidentiary hearing on Sheilah's petition for bill of review. At the beginning of the hearing, Sheilah announced that she was ready to prove her case. She then offered into evidence a copy of a sworn statement supporting a claim against the estate. Merchants objected that the statement was not authenticated. The trial court sustained Merchants's objection and excluded the sworn statement.

Sheilah then offered into evidence the entire transcript of Dennis's deposition. Dennis objected. The trial court stated that Sheilah should offer specific designations from the deposition rather than the entire transcript. Sheilah stated that specific designations had been prepared and could be tendered to the trial court. Dennis continued to object to the admission of any portion of his deposition. Following some discussion of the background of the case, Sheilah asked if the parties could make opening statements and discuss the issues related to Sheilah's claims with the trial court to put the objections in context. The trial court agreed.

Each side then made an opening statement, and the trial court and parties continued to discuss the facts and legal bases of Sheilah's claims. The trial court then indicated that it would need to review the orders from Peter's guardianship before it could rule on Sheilah's petition:

I need to look back at all of the orders appointing guardian and all the orders, amended orders, appointing guardian before I make any

decision. If he didn't have authority to—if he only had limited authority over that stock, I'm not sure what he should have done with it. I don't know what the order was that appointed Frederick Ludington. I just need to see all the orders. So if somebody could get those for me.

In response, Sheilah did not request that the trial court consider additional exhibits, state that she had any witnesses to support her claims, object that she had not been afforded sufficient time to make her case, or move for a continuance of the hearing. Nor did Sheilah ask that the record remain open until she filed her deposition designations or ask whether the trial court would consider the deposition designations before ruling. Instead, Sheilah told the trial court that she would provide the requested guardianship orders and thanked the judge. The hearing then ended.

***Sheilah and Merchants file post-hearing briefs***

Three days after the hearing, Sheilah filed a post-hearing brief. Sheilah attached thirteen exhibits to the brief, including the guardianship orders that the trial court had requested at the hearing. The other exhibits consisted of accounts, inventories, and other filings related to Peter's guardianship.

In the introductory portion of her brief, Sheilah noted that the trial court had already heard and considered her petition for bill for review and that her brief was filed to address certain arguments raised by Dennis at the hearing. At the conclusion of her brief, Sheilah prayed that the trial court grant her petition.

Sheilah's brief did not contend that she had not been afforded the opportunity to present her case or that she had additional exhibits or testimony to present. Nor did she request that the trial court hold an additional hearing or consider additional evidence, other than the guardianship filings attached to the brief.

In its response to Sheilah's post-hearing brief, Merchants characterized the hearing as a bench trial at which Sheilah failed to call any witnesses or offer any admissible evidence.<sup>1</sup> Therefore, Merchants argued, Sheilah had failed to meet her burden of proof. Merchants prayed that Sheilah's petition be denied.

Sheilah did not reply to Merchants's response.

***The trial court denies Sheilah's petition and motion for new trial***

On February 18, 2016, twenty-three days after the hearing, and sixteen days after the filing of Merchants's response to Sheilah's post-hearing brief, the trial court signed an order denying Sheilah's petition for statutory bill of review.

Sheilah then moved for a new trial, arguing for the first time that she had not been afforded the opportunity to present her case. In its response to Sheilah's motion, Merchants reminded the trial court that, although Sheilah was the party

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<sup>1</sup> Merchants further argued that Sheilah herself understood that the hearing constituted a bench trial on her petition. At the introduction of its response, Merchants stated: "On January 26, 2016, the court conducted a bench trial on Administrator's Second Amended Petition for Bill of Review. That it was considered as such by the Administrator was evidenced by the fact that counsel for the Administrator presented the court with proposed findings of fact and conclusions of law." Sheilah's proposed findings of facts and conclusions of law were attached to Merchants's response.

who set the hearing, she failed to obtain rulings on her exhibits, call any witnesses, move for a continuance, or object that she had not been afforded adequate time to present her case. Therefore, Merchants argued, there was no basis for the trial court to vacate or set aside its order denying Sheilah’s petition.<sup>2</sup>

Sheilah’s motion was denied, and she appealed.

### **Analysis**

In her sole issue, Sheilah contends that the trial court abused its discretion in denying her petition for statutory bill of review before she presented all of her evidence or announced that she had rested her case.<sup>3</sup>

#### **A. Applicable law and standard of review**

A bill of review is a separate, independent suit to set aside a judgment that is no longer subject to a motion for new trial or appealable. *Woods v. Kenner*, 501 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.). There are two types of bills of review: equitable and statutory. *See id.* at 191. Sheilah petitioned for a statutory bill of review. The purpose of a statutory bill of review is “to revise and correct errors, not merely to set aside decisions, orders, or judgments rendered

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<sup>2</sup> Dennis made a substantially similar argument in his response to Sheilah’s motion for new trial.

<sup>3</sup> Sheilah does not contend that the trial court erred in denying her motion for new trial. Nor does she appeal the merits of the trial court’s denial of the petition. Instead, she raises a procedural issue that she was not permitted to present her evidence.

by the probate court.” *Nadolney v. Taub*, 116 S.W.3d 273, 278 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Sheilah filed her petition under Section 55.251 of the Estates Code. Section 55.251 provides, in part, that “[a]n interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.” TEX. EST. CODE § 55.251(a). The error must be “substantial” and must be proven by a preponderance of the evidence . *Valdez v. Hollenbeck*, 465 S.W.3d 217, 226–27 (Tex. 2015); *Nadolney*, 116 S.W.3d at 278.

Thus, to prevail on a petition for bill of review under Section 55.251, the petitioner must prove, by a preponderance of the evidence, that the trial court’s order or judgment contains substantial error. *Valdez*, 465 S.W.3d at 226–27. If the petitioner meets its burden, the trial court vacates the erroneous order or judgment, and renders a revised and corrected one after a new trial. *Cf. Caldwell v. Barnes*, 154 S.W.3d 93, 97–98 (Tex. 2004) (per curiam).

We review a trial court’s ruling on a petition for statutory bill of review for an abuse of discretion, indulging every presumption in favor of the trial court’s ruling. *Woods*, 501 S.W.3d at 190; *see also Ablon v. Campbell*, 457 S.W.3d 604, 608 n.8 (Tex. App.—Dallas 2015, pet. denied) (concluding that standard of review for trial court’s ruling on statutory bill of review is abuse of discretion); *Chavez v.*



*Chavez*, No. 01–13–00727–CV, 2014 WL 5343231, at \*2 (Tex. App.—Houston [1st Dist.] Oct. 21, 2014, no pet.) (mem. op.) (same). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without reference to guiding rules and principles. *Woods*, 501 S.W.3d at 190.

**B. Opportunity to present evidence**

Sheilah contends that the trial court did not permit her to present certain evidence that would have conclusively proved her right to a statutory bill of review, including excerpts from Dennis’s deposition, copies of the annual accounts and orders from Peter’s guardianship, a summary of the shareholder loans issued by Provident to Peter, and the transaction ledger for the shareholder loans issued by Provident to Peter. We disagree. The trial court afforded her opportunities to present this evidence and to prove her case. Sheilah had the opportunity to present evidence at the evidentiary hearing, through her post-hearing brief, or by filing a reply to Merchants’s response to her post-hearing brief, which she did not do.

First, Sheilah had the opportunity to present evidence at the evidentiary hearing. At the hearing, Sheilah announced that she was ready to prove her case. During the hearing, she offered two exhibits into evidence—a copy of the sworn statement supporting a claim against Peter’s estate and a copy of the entirety of the transcript of Dennis’s deposition. The trial court did not rule on their admissibility and Sheilah did not object to the trial court’s failure to rule. Finally, the exhibits

that Sheilah now complains she was not permitted to present—copies of the annual accounts and orders from Peter’s guardianship, a summary of the shareholder loans issued by Provident to Peter, and the transaction ledger for the shareholder loans issued by Provident to Peter—were not offered as exhibits by her when she offered her exhibits.<sup>4</sup>

Sheilah maintains that she was prevented from presenting any other evidence at the hearing because time ran out. Nothing in the record indicates that is what in fact happened. At the conclusion of the hearing, instead of asking for additional time, objecting that she had not been afforded the opportunity to prove her case, or moving for a continuance, Sheilah thanked the judge and told him that she would provide him with the guardianship orders he requested to review before ruling on her petition.

If Sheilah believed time constraints had prevented her from presenting all of her evidence, she should have objected and made an offer of proof. When a trial court limits the amount of time a party has to present its case, and thereby prevents the party from presenting all of its evidence, the party must object to the time limit and make an offer of proof of the evidence it was prevented from presenting to

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<sup>4</sup> Sheilah did, however, submit page and line designations from Dennis’s deposition in advance of the hearing. Nothing indicates that the trial court did not consider these designations in ruling on Sheilah’s petition; the order denying her petition states that the trial court “considered the pleadings, evidence and arguments” of both sides.

preserve error on appeal. *See, e.g., In re A.E.A.*, 406 S.W.3d 404, 419 (Tex. App.—Fort Worth 2013, no pet.) (“Because [appellant] did not object to the two-and-a-half-hour time limit nor make an offer of proof concerning evidence that was excluded because of the allegedly restrictive time constraints, we have nothing to review.”); *Health Enrichment & Longevity Inst., Inc. v. State*, No. 03–03–00578–CV, 2004 WL 1572935, at \*5 (Tex. App.—Austin July 15, 2004, no pet.) (mem. op.) (“Assuming that the effect of the time limit was to exclude evidence, error may not be predicated on a ruling excluding evidence unless a party makes known to the court the substance of the evidence by an offer of proof.”); *Abraham v. Exxon Corp.*, No. 14–98–00888–CV, 2001 WL 894261, at \*6 (Tex. App.—Houston [14th Dist.] Aug. 9, 2001, pet. denied) (holding that party who did not present witnesses due to trial court time limit was required to make offer of proof of testimony he sought to introduce to preserve error). Sheilah made no objection or offer of proof.

Second, Sheilah had the opportunity to present evidence through her post-hearing briefing. In fact, Sheilah *did* present evidence through her post-hearing briefing—the order, accounts, inventories, and other filings from Peter’s guardianship—and the record indicates that the trial court considered that evidence before denying her petition. Other than the guardianship filings, Sheilah did not attach any evidence to her brief. Nor did she object that she was not afforded the

opportunity to present her case at the evidentiary hearing or request that she be permitted to present additional evidence. Sheilah began her brief by stating that the trial court had already “heard and considered” her petition, implicitly acknowledging that she had already been afforded the opportunity to present her case. Her prayer for relief, asking that the trial court “grant her Second Amended Bill of Review,” suggested that the matter had been submitted and was ripe for a ruling.

Third, Sheilah had the opportunity to attach evidence to a reply to Merchants’s response to her post-hearing brief. In its response to Sheilah’s post-hearing brief, Merchants characterized the hearing as a bench trial at which Sheilah failed to produce any evidence in support of her petition. Despite Merchants’s contention that Sheilah had failed to meet her burden of proof, Sheilah did not request that the trial court hold an additional hearing or otherwise consider additional evidence. Nor did she file a reply challenging Merchants’s characterization of the hearing.

It was Sheilah’s burden to present evidence in support of her petition. She had three opportunities to do so. Without any indication that she required additional opportunities, she requested a ruling from the trial court on her motion. To the extent her submitted evidence failed to establish her right to a bill of review, Sheilah did not meet her burden.

Sheilah also contends that the trial court abused its discretion by ruling on her petition before she formally announced that she had rested her case. According to Sheilah, Rules 262 and 265 of the Texas Rules of Civil Procedure prohibited the trial court from ruling on her petition until she formally announced that she had rested her case. We disagree.

Neither of these rules provide that the petitioner must formally declare that she “rests her case” before a trial court may rule. *See* TEX. R. CIV. P. 262, 265.<sup>5</sup> They do not prohibit the trial court from ruling before the petitioner has formally rested; rather, they prohibit the trial court from ruling without first allowing the petitioner to present evidence.<sup>6</sup> *Producer’s Constr. Co. v. Muegge*, 669 S.W.2d 717, 718–19 (Tex. 1984) (per curiam) (reversing trial court’s judgment because defendant “was not given an opportunity to present its defense and evidence in support of its counterclaims”); *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84, 86–87 (Tex. App.—Houston [1st Dist.] 1993, no writ) (explaining that, “in a series of decisions reversing and remanding judgments and stating that

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<sup>5</sup> Rule 262 “states that the rules governing jury trials shall govern nonjury trials ‘in so far as applicable.’” *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84, 87 (Tex. App.—Houston [1st Dist.] 1993, no writ) (quoting TEX. R. CIV. P. 262). “Rule 265 specifies the order of proceeding in jury trials, [but] never speaks of a party ‘resting.’” *Id.*; *see* TEX. R. CIV. P. 265.

<sup>6</sup> Sheilah appears to recognize this. In her brief, she states that, “[w]hile Rule 265 does not expressly define what it means to ‘rest’ a case, the rule provides a party the right to introduce her evidence, cross-examine opposing witnesses and present rebuttal evidence.”

the trial court cannot render judgment until a party has ‘had an opportunity to present evidence *and rest its case*[,]’ . . . the words ‘and rest its case’ are dicta”).

As we have explained, that is not what happened here. Sheilah was afforded an opportunity to present her case. And after Sheilah was afforded her first opportunity to present her case, she rested (albeit informally) when she thanked the judge at the conclusion of the hearing. She then filed a brief with the additional evidence requested by the trial court (the guardianship orders) and again requested the relief she sought—further indicating that she had presented her case.

Even after the trial court denied her petition for review, and Sheilah filed her motion for new trial, she did not identify any specific witnesses or documents that she intended to offer, other than Dennis’s deposition. Nor did she indicate what the substance of the evidence would have been and why it would have been dispositive. Thus the record contains no indication that re-opening the evidentiary hearing would have resulted in the trial court receiving any additional information that could have changed the outcome. *See* TEX. R. APP. P. 44.1(a)(1).

We overrule Sheilah’s sole issue that the trial court abused its discretion by not affording her the opportunity to present her case.

## **Conclusion**

We affirm the trial court's order denying Sheilah's petition for statutory bill of review.

Harvey Brown  
Justice

Panel consists of Justices Massengale, Brown, and Huddle.