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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

GOVERNMENT OF GUAM,
Plaintiff-Appellant,

v.

EVELYN O'KEEFE,
on behalf of the Heirs of the J.M. Torres Estate,
Defendant-Appellee.

OPINION

Cite as: 2018 Guam 4

Supreme Court Case No.: CVA16-001
Superior Court Case No.: CV1378-10

Appeal from the Superior Court of Guam
Argued and submitted on February 28, 2017
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; David A. Wiseman, Justice *Pro Tempore*; John Thos. Brown, Justice *Pro Tempore*.

MARAMAN, C.J.:

[1] Plantiff-Appellant Government of Guam ("the Government") appeals from a final judgment granting a motion to dismiss pursuant to Rule 25(a)(1) of the Guam Rules of Civil Procedure ("GRCP") filed by Defendant-Appellee Evelyn O'Keefe, on behalf of the heirs of the Estate of J.M. Torres ("the Estate"). The Government argues that the trial court erred by misinterpreting the applicable rules of procedure and abused its discretion by dismissing the case with prejudice. O'Keefe argues that the dismissal with prejudice was warranted because the Government failed to meet the applicable procedural requirements. For the reasons below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The Government brought suit against Evelyn O'Keefe in 2010 to quiet title to certain property and requested declaratory relief. In its Complaint and Amended Complaint, the Government named O'Keefe as defendant "on behalf of the heirs of the J.M. Torres Estate." Record on Appeal ("RA"), tab 1 at 1 (Compl. Cancellation Instrument, Aug. 16, 2010) (the "Complaint"); RA, tab 94 at 1 (Am. Compl. Cancellation Instrument & Declaratory J., Nov. 7, 2013) (the "Amended Complaint").

[3] O'Keefe passed away on October 21, 2013. Counsel for O'Keefe filed a Suggestion of Death on November 13, 2013, notifying the Government and the court of O'Keefe's passing. The Government took no action in the litigation for more than thirteen months after the Suggestion of Death was filed, at which time it moved to substitute Geraldine T. Gutierrez as defendant in place of the deceased O'Keefe. The trial court did not rule on this motion, as it was

outstanding when the parties drafted a tentative stipulation that Gutierrez would be substituted as defendant in place of O'Keefe. Although the parties signed this stipulation and filed it with the court clerk, the court never signed it. Almost one month after this stipulation, the Government entered a Notice of Intention to Take Default. In response, O'Keefe's counsel withdrew from the stipulation and moved to dismiss on the grounds that the Government failed to substitute a proper defendant within 90 days from the time O'Keefe's death was entered on the record, as required by GRCP 25(a)(1).

[4] In moving to dismiss, counsel for O'Keefe argued that the Government brought its suit against O'Keefe personally and not in her capacity as the administrator of the Estate. The Government did not provide any detailed reason why its suit was initially captioned as if it were against O'Keefe personally, other than to concede that there were "some mistakes made" in the pleadings. Transcript ("Tr.") at 7-8 (Mot. Hr'g, Oct. 29, 2015).

[5] In opposition to the Motion to Dismiss, the Government conceded it did not substitute O'Keefe within 90 days. RA, tab 114 at 2 (Opp'n Mot. Dismiss, Sept. 16, 2015) ("It is true that no motion to substitute Ms. Gutierrez was filed within ninety days as Rule 25(a) may or may not require . . . ."). The Government argued Gutierrez was automatically substituted as defendant, notwithstanding the way its case was initially pleaded, based on her status as administrator of the Estate. Alternatively, the Government asserted that the trial court had discretion to extend the 90-day deadline, and that it should have done so to satisfy the purpose of Rule 25 and achieve the most equitable outcome.

[6] O'Keefe's counsel responded by arguing that Gutierrez was not automatically substituted because such substitution applied only to "public officials" under GRCP 25(d)(1) and the Government filed suit against O'Keefe personally. RA, tab 115 at 2-7 (Reply Opp'n Mot.

Dismiss, Oct. 7, 2015). Moreover, O'Keefe argued, the Government failed to qualify for discretionary relief from the 90-day deadline under GRCP 6(b) because it did not make a showing of "excusable neglect." *Id.* During the course of litigating the Motion to Dismiss, neither party set forth any argument as to whether the dismissal should be with or without prejudice.

[7] The trial court granted O'Keefe's Motion to Dismiss for failure to comply with GRCP 25(a)(1) and for failure to show excusable neglect under GRCP 6(b) that would otherwise operate as an exception to GRCP 25(a).[1] However, the trial court failed to address whether the dismissal was with or without prejudice. Thereafter, O'Keefe's counsel drafted a proposed judgment dismissing the case with prejudice and sent this proposed judgment to the Government, which then objected to the prejudicial characterization of dismissal.[2] Counsel submitted this proposed judgment with the clerk of the court, which was timestamped as received on December 2, 2015. Two days later, the Government filed a Motion to Enter Judgment requesting that the case be dismissed without prejudice. The court did not address the Government's motion or hear any argument on how dismissal should be characterized when it entered final dismissal, with prejudice, on December 9, 2015. The Government timely appealed.

II. JURISDICTION

[8] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-140 (2018)); 7 GCA §§ 3107(b), 3108(a) (2005).

[1] The trial court also denied the Government's parallel motion for summary judgment without reaching the merits of that motion.

[2] We note that at oral argument and in its Motion to Enter Judgment, the Government conceded that it received a copy of this proposed judgment from O'Keefe's counsel prior to its filing. *See* RA, tab 121 at 1-2 (Mot. Enter J., Dec. 4, 2015).

III. STANDARD OF REVIEW

[9] As a threshold matter, we note that because the Guam Rules of Civil Procedure are generally derived from, although not identical to, the Federal Rules of Civil Procedure ("FRCP"), federal decisions that construe the federal counterparts to the Guam Rules of Civil Procedure are persuasive authority. *See People v. Quitugua*, 2009 Guam 10 ¶ 10.

[10] We review the trial court's interpretation of GRCP 25(a) *de novo* as a question of law. *See Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467, 469 (2d Cir. 1998) (citing *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994)).

[11] We review factual findings relevant to the application of GRCP 25(a) for clear error. Guam R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous . . . ."); *see also Unicorn Tales, Inc.*, 138 F.3d at 469 (citing *Barlow*, 39 F.3d at 233).

[12] We apply an abuse of discretion standard in reviewing the trial court's decision to dismiss with prejudice for failure to comply with procedural requirements under GRCP 25(a)(1). *See Kaubisch v. Weber*, 408 F.3d 540, 543 (8th Cir. 2005) (reviewing trial court's decision not to extend FRCP 25(a)(1) time period for abuse of discretion); *cf. Park v. Kawashima*, 2010 Guam 10 ¶ 7 (citing *Guam Hous. & Urban Renewal Auth. (GHURA) v. Dongbu Ins. Co.*, 2002 Guam 3 ¶ 14) (reviewing GRCP 41(b) dismissal with prejudice for abuse of discretion).

[13] When applying the abuse of discretion standard, we will not reverse a trial court's decision "unless we have a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Park*, 2010 Guam 10 ¶ 8 (quoting *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14 ¶ 4). "If the trial court does not make specific findings as to each factor, the appellate court reviews 'the

record independently to determine whether the court abused its discretion.'" *Santos v. Carney*, 1997 Guam 4 ¶ 5 (quoting *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994)).

IV. ANALYSIS

[14] A number of related procedural questions are presented in this appeal. First, we are asked to determine whether the trial court misinterpreted applicable GRCP rules, committed plain error in any factual findings relevant to the application of such rules, or abused its discretion in deciding to dismiss the case pursuant to such rules. Second, we must decide whether the trial court abused its discretion by dismissing the case specifically with prejudice.

A. The Trial Court Did Not Abuse Its Discretion in Dismissing the Case

[15] In its Decision and Order, the trial court granted O'Keefe's motion to dismiss because (1) the Government did not file its motion to substitute O'Keefe within the 90-day deadline set forth in GRCP 25(a)(1); (2) O'Keefe was not automatically substituted pursuant to GRCP 25(d)(1) because she was "not a public official sued in her official capacity"; and (3) the Government did not file a motion to enlarge time or otherwise provide evidence of "excusable neglect" pursuant to GRCP 6(b).[3] RA, tab 117 at 4-6 (Dec. & Order, Nov. 18, 2015). We shall address each rationale in turn.

[16] Guam Rule of Civil Procedure 25(a)(1) requires dismissal of an action against a deceased party when substitution of the proper party is not made within 90 days of the entry of a suggestion of death on the record, unless the period of time is enlarged pursuant to GRCP 6(b) or another exception applies. *See* Guam R. Civ. P. 25(a)(1) ("Unless the motion for substitution is made not later than 90 days after death is suggested . . . the action *shall* be dismissed as to the

[3] The trial court also stated that its decision was reached "[b]y a preponderance of the evidence." RA, tab 117 at 7 (Dec. & Order). This is erroneous because preponderance of the evidence is a burden of proof at trial. *See Ukau v. Wang*, 2016 Guam 26 ¶ 50. The correct standard for dismissal under GRCP 25(a)(1) is derived from the rule itself and GRCP 41(b). We disregard this error because it does not affect our analysis.

deceased party." (emphasis added)); Guam R. Civ. P. 6(b) ("[T]he court for cause shown may at any time in its discretion" permit a late filing.); *see also Zanowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1094 (9th Cir. 2017). The Government concedes that it moved for substitution more than 90 days after the Suggestion of Death was filed. *See, e.g.*, Appellant's Br. at 4-5 (Mar. 14, 2016). Consequently, we need address only whether an exception under GRCP 25(d)(1) or GRCP 6(b) might apply that would save the case from dismissal.

1. GRCP 25(d)(1)

[17] Guam Rule of Civil Procedure 25(d)(1) operates as an exception to the 90-day deadline of GRCP 25(a). Rule 25(d)(1) states, in relevant part: "When a *public officer* is a party to an action in an *official capacity* and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party." Guam R. Civ. P. 25(d)(1) (emphases added).

[18] The Government asserts that O'Keefe was a "public official" sued in her "official capacity" and that the proper defendant is the Estate. Appellant's Br. at 2, 10-12; Appellant's Suppl. Br. at 3-7 (May 22, 2017). Counsel for O'Keefe dispute this assertion, claiming that O'Keefe was not a public official, Appellee's Br. at 17 (Apr. 26, 2016), and that she was sued in her personal capacity, not as administrator of the Estate, Appellee's Suppl. Br. at 2-3 (May 22, 2017). Counsel for O'Keefe argue that she signed the easement license that underlies the present dispute in her personal capacity, not on behalf of the Estate; that O'Keefe had consistently understood the suit to be filed against her personally; and that the draft stipulation that Gutierrez would be substituted in place of O'Keefe was merely an accommodation to the Government in spite of the complaint naming O'Keefe as defendant in a personal capacity. *Id.* at 1-5.

[19] We do not find it necessary to address the issue of whether O'Keefe was sued in a personal capacity or as administrator of the Estate—an issue the parties dispute at some length—because we find that O'Keefe was not a public officer, thereby making GRCP 25(d)(1) unavailable. Rule 25(d)(1) is available only to "public officers" and is derived from its federal counterpart, FRCP 25. Guam R. Civ. P. 25, SOURCE. The Advisory Committee Notes to the federal rule state that "[t]he general term 'public officer' . . . comprises Federal, State, and local officers." Fed. R. Civ. P. 25(d) advisory committee's note to 1961 amendment; *accord* 2 Barron & Holtzoff, *Federal Practice and Procedure* § 626 (Wright ed. 1961) ("Undoubtedly [the term] refers to every officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, just as did the prior rule." (citation omitted)). In an opinion explaining the purpose of Rule 25(d), the Eighth Circuit explained that "[s]uch a statute was needed because the Supreme Court had ruled, in a number of cases, that actions brought against public officers to compel personal performance of their official duties could not be continued as against their successors, even though the successors consented." *Fleming v. Goodwin*, 165 F.2d 334, 337 (8th Cir. 1948) (collecting cases); *accord* Barron & Holtzoff, *supra*, § 625. Rule 25(d) thus plainly applies "to all actions brought by public officers for the *government*, and to any action brought in form against a named officer, but intrinsically against the *government* . . . ." Barron & Holtzoff, *supra*, § 626 (emphases added). The history of Rule 25 thus implies that the term "public officer" as it is used in GRCP 25(a) is meant to encompass only agents of government, such as elected and appointed officials, mayors, and government attorneys, acting in their official capacity. *See generally* Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963* (I), 77 Harv. L. Rev. 601, 608 (1964) ("It was suggested that this language [*i.e.*, the term "public officer"]

might be read restrictively . . . ."); *see also* 63C Am. Jur. 2d *Public Officers and Employees* § 5 (2018) ("The power to exercise some portion of the sovereign functions of government is one of the characteristics, or essential characteristics, of a public office. Indeed, the power to exercise some sovereign government function has been called the most important characteristic of a public office. Some authority holds that the primary, necessary, and fundamental test of a public office is that it should involve the exercise of some portion of the sovereign power of the state." (collecting cases)).

[20] We also find support for this definition under the Guam Code: "The term *official* means any person elected to any public office in Guam and any person appointed, with legislative concurrence *or* by the Guam Legislature, to any public office . . . ." 4 GCA § 13102(a) (as amended by P.L. 29-020:3 (Oct. 10, 2007)) (defining the term "official" in the context of the Public Official Disclosure Act).

[21] Here, O'Keefe was the administrator of a private estate. She did not hold public office, and was not serving as a public administrator or as an agent for any governmental department, agency, or branch, or any other entity with sovereign power. Although private administrators must meet certain requirements and are granted letters of administration by the court, similar to public administrators, *see* 15 GCA §§ 1701-1725, 1801-1821 (2005), that fact alone does not convert private administrators of estates into public officers for the purposes of Rule 25, the adoption of which, as discussed above, was primarily intended to capture individuals that act as representatives of the government or some branch or agency thereof. The important distinction between public and private administrators is affirmed in estate caselaw, such that "[w]hile in many respects the procedure the public administrator follows in many probate matters is the same as that followed by a private administrator, and while it is true that many of his duties

could be performed by a private administrator, there are many distinctions between the two." *In re Miller's Estate*, 55 P.2d 491, 493 (Cal. 1936). These distinctions indicate that while a public administrator may be viewed as a public officer perfoming an essentially governmental function, *see id.* at 494, a private administrator does not act as a representative of government, *Ramsay v. Van Meter*, 133 N.E. 193, 197 (Ill. 1921) ("[T]he ordinary [*i.e.*, private] administrator is not an officer within the legal definition of that term but is a mere trustee, acting in a private capacity for private persons."); *see also Crews v. Lundquist*, 197 N.E. 768, 770-71 (Ill. 1935) ("[A private administrator] acts in a private capacity for private persons and is not an officer within the legal definition of that term. In the case of administration by a private person the state has waived the right to administer the estate and is no longer interested therein.").

[22] As a result, we affirm the trial court's ruling that Rule 25(d) was inapplicable because O'Keefe was not a "public officer." *See* RA, tab 117 at 5 (Dec. & Order). We find the trial court interpreted Rule 25(d)(1) correctly and made no erroneous factual findings in applying it to the present case.

2. GRCP 6(b)

[23] Guam Rule of Civil Procedure 25(a) mirrors its federal counterpart. Federal Rule of Civil Procedure 25(a) provides for a 90-day deadline that "may be extended by Rule 6(b), including after its expiration if the party failed to act due to excusable neglect. Rule 6(b) works in conjunction with Rule 25(a)(1) to provide the intended flexibility in enlarging the time for substitution." *Zanowick*, 850 F.3d at 1094 (citations and internal quotation marks omitted). The Government asserts that GRCP 25 is "not intended to bar otherwise meritorious actions."

Appellant's Br. at 7 (citing *Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 296 (2d Cir. 1966)).[4] We agree, but the Government fails to acknowledge that GRCP 25(a) does not stand alone in this regard—it interacts with GRCP 6(b) in order to provide flexibility. *See, e.g.*, *Staggers*, 359 F.2d at 296 ("The [1963] amendments of Rules 6(b) and 25(a)(1) provided needed flexibility."); *Zanowick*, 850 F.3d at 1094 (explaining role of FRCP 6(b) as mechanism to provide flexibility). Guam Rule of Civil Procedure 6(b), in relevant part, operates to imbue the trial court with discretion, upon motion, to extend the expiration of any specified deadline after the period has expired "where the failure to act was the result of excusable neglect . . . ." Guam R. Civ. P. 6(b). This portion of the rule thus requires (1) a motion and (2) a showing that the failure to act was the result of excusable neglect.

[24] As to the first requirement, the Government did not file a motion to enlarge time as permitted under this provision. RA, tab 117 at 6 (Dec. & Order). On this basis alone, the Government did not satisfy the conditions of GRCP 6(b). We also find that the Government did not satisfy the second requirement of GRCP 6(b). The Government contends that its motion to substitute Gutierrez for O'Keefe "argued for excusable neglect" and that "the Defendant did not claim prejudice and the neglect was excusable." Appellant's Br. at 8-9. The sum total of the Government's argument for excusable neglect in the proceedings below consists of the following sentences: "Rule 6(b), which authorizes the court to amend the deadlines imposed by other Rules of Civil Procedure, applies to Rule 25. Thus the court can lengthen the time for compliance with

[4] The facts in *Staggers* provide a useful contrast to the Government's actions in the present case. In *Staggers*, the Second Circuit found that an appellant's motion to substitute under FRCP 25(a)(1) was only two days late because, *inter alia*, the appellant was required to obtain permission of a different court before filing the motion. 359 F.2d at 296. *Compare id.*, *with Kasting v. Am. Family Mut. Ins. Co.*, 196 F.R.D. 595, 601-02 (D. Kan. 2000) (affirming dismissal where motion to substitute was filed nearly nine months after suggestion of death and no reason was offered for the delay). Here, the Government filed its motion to substitute over one year after the suggestion of death was filed. RA, tab 117 at 6 (Dec. & Order). There is also no indication that the delay was the result of factors that were not under the Government's control.

the deadline." RA, tab 114 at 3 (Opp'n Mot. Dismiss) (citations omitted). The Government does not provide any justification for its failure to respond to the Suggestion of Death for over one year, "a delay of far greater magnitude than the typically brief delays of a few days or a few weeks generally found to arise from excusable neglect." *Scott v. Vasquez*, No. CV 02-05296, 2009 WL 8725114, at *2 (C.D. Cal. 2009) (citation omitted). The Government proffers no factual basis that would justify such a delay in responding. *See* Guam R. App. P. 13(a)(9)(A) ("[A]rgument . . . must contain . . . Appellant's contentions and the *reasons for them* . . . .") (emphasis added); *cf. Millies v. LandAmerica Transnation*, 372 P.3d 111, 118 n.5 (Wash. 2016) (en banc) (declining to consider an issue that the appellant supported with insufficient argument). Therefore, we affirm the trial court's interpretation of GRCP 6(b) and its finding that the Government failed to provide any evidence of "excusable neglect." RA, tab 117 at 5-6 (Dec. & Order).

[25] For the foregoing reasons, we conclude the trial court did not err in interpreting applicable GRCP requirements or in any related findings of fact and hold the trial court did not abuse its discretion in dismissing the case.

B. The Trial Court Did Not Abuse its Discretion in Dismissing With Prejudice

[26] The trial court entered final judgment dismissing the case with prejudice. RA, tab 123 (Judgment, Dec. 9, 2015). In doing so, the trial court did not explicitly address the Government's request that the dismissal be without prejudice. *See id.*; *see also* RA, tab 121 (Mot. Enter J.). The Government argues the trial court abused its discretion by dismissing with prejudice. Appellant's Br. at 12-14. It contends that the trial court "did not apply the appropriate factors" and that "[t]he four [*sic*] factors from Santos v. Carney . . . weigh heavily in the

[Government's] favor."[5] Appellant's Br. at 7; Reply Br. at 5 (May 10, 2016).[6] Counsel for O'Keefe respond that the trial court has discretion to dismiss with or without prejudice and that "[m]any courts dismiss under Rule 25(a)(1) with prejudice where . . . the dismissed party failed to demonstrate excusable neglect." Appellee's Br. at 17-18 (collecting cases).

1. The *Santos* test

[27] In *Santos*, we adopted the Ninth Circuit's five-factor test for determing when dismissal is appropriate for failure to prosecute under Rule 41(b). *See* 1997 Guam 4 ¶ 5. The five factors we consider are: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* (quoting *In re Eisen*, 31 F.3d at 1451). When balancing the *Santos* factors, "[d]ismissal is appropriate if at least four factors favor dismissal *or* three factors 'strongly' support dismissal." *Guam Dep't of Educ. v. Guam Civil Serv. Comm'n (Somerfleck)*, 2017 Guam 8 ¶ 10 (alteration in original) (emphasis added) (quoting *Park*, 2010 Guam 10 ¶ 10). "If the trial court does not make specific findings as to each factor, the appellate court reviews 'the record independently to

[5] The Government incorrectly states the test in *Santos* has four factors. *Santos* incorporates five factors, as discussed below. *Santos*, 1997 Guam 4 ¶ 5.

[6] The Government also contends in its Reply Brief that the original landowners of Guam should not be punished for errors of its counsel, an argument the Government did not present in its Opening Brief. Reply Br. at 4, 6. This court will exercise its discretion to reject issues raised for the first time in a reply brief. *See Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 7 n.3. We only note in passing that (1) in making this argument, the Government implicitly concedes that it mishandled the procedural requirements at issue, and (2) neither this argument nor the cases cited by the Government can be stretched to support the proposition that errors of counsel will *always* be excused whenever a client is adversely affected. As we held in *Duenas v. Brady*, "[a] 'plaintiff's entire lack of diligence and attention to the matter' does not constitute excusable neglect." 2008 Guam 27 ¶ 20 (quoting *Martella v. Marine Cooks Stewards Union*, 448 F.2d 729, 729 (9th Cir. 1971)); *see also Wallace ex rel. Wallace v. Novartis Pharm. Corp.*, 984 F. Supp. 2d 377, 383 (M.D. Pa. 2013) ("The law is well-established that clients must be held accountable for the acts and omissions of their attorneys." (citation and internal quotation marks omitted)).

determine whether the court abused its discretion.'" *Santos*, 1997 Guam 4 ¶ 5 (quoting *In re Eisen*, 31 F.3d at 1451).

[28] Alluding to our adoption of *Santos*, the Government argues that the court did not consider the appropriate factors. Reply Br. at 5 ("The four [sic] factors from Santos v. Carney, supra, weigh heavily in the [Government's] favor."). The Government does not, however, address whether the test appropriately applies in situations like the present case, where there is a dismissal for failure to substitute under a different rule, GRCP 25(a).[7] *See Santos*, 1997 Guam 4 ¶ 4; Appellant's Br. at 12-13; Reply Br. at 4-6.

[29] Rule 25(a) requires dismissal unless the court finds Rule 6(b) (or another exception) applicable, whereas the court in *Santos* applied a five-factor test to determine whether dismissal was appropriate *in the first instance*. 1997 Guam 4 ¶ 5. In other words, *Santos* does not speak specifically to whether dismissal should be made with or without prejudice. *See id.* In general, *Santos* and its progeny address only dismissals for failure to prosecute under GRCP 41(b). *See Somerfleck*, 2017 Guam 8 ¶ 10; *United Pac. Islanders' Corp. v. Cyfred, Ltd.*, 2017 Guam 6 ¶ 20; *Lujan v. McCreadie*, 2014 Guam 19 ¶ 6; *Park*, 2010 Guam 10 ¶ 9. Unless the court states otherwise, such dismissals operate as adjudications upon the merits, which effectively create prejudice to refiling. *See* Guam R. Civ. P. 41(b) ("Unless the court in its order of dismissal otherwise specifies, a dismissal . . . operates as an adjudication upon the merits.").

[7] Guam Rule of Civil Procedure 41(b) governs involuntary dismissal for failure to prosecute or to comply with other procedural rules—such as GRCP 25(a). Guam R. Civ. P. 41(b). It does not require trial courts to dismiss with or without prejudice, but instead contemplates courts retaining discretion to determine the appropriate sanction, presuming dismissal with prejudice unless the court specifies otherwise. *Id.*; *see also In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006) (The *Santos* factors are "not a series of conditions precedent before the judge can do anything, but a way for the district judge to think about what to do." (citation and internal quotation marks omitted)).

[30] There is no similar precedent in Guam covering GRCP 25(a) and GRCP 6(b), and both rules are silent on whether dismissal should be with or without prejudice. *See* Guam R. Civ. P. 6(b), 25(a). The rules are substantively similar to their federal counterparts. *See* Fed. R. Civ. P. 6(b), 25(a). In 1963, the U.S. Supreme Court adopted amendments to FRCP 25(a) and FRCP 6(b) to give courts flexibility, including the flexibility to grant dismissals with or without prejudice. *See Zanowick*, 850 F.3d at 1095 (citation omitted). No specific test is laid out in the federal rules for how to characterize a Rule 25(a) dismissal, and courts have dismissed cases under Rule 25 both with prejudice and without prejudice, depending on the facts. *Zanowick*, 850 F.3d at 1095 nn.5-6 (collecting cases).

[31] Therefore, the Government's reference to *Santos* presents us with the question of whether the five-factor *Santos* test is an appropriate guide for determining whether a case should be dismissed *with or without prejudice* for failure to substitute pursuant to GRCP 25(a). Because no specific test is laid out in the federal counterpart, and courts have dismissed cases under Rule 25 both with prejudice and without prejudice, *see id.*, we find that adopting the *Santos* test is appropriate on the facts before us, for the sole purpose of determining whether to dismiss with or without prejudice under GRCP 25(a) and where enlargement under GRCP 6(b) does not otherwise apply. We emphasize our decision to apply *Santos* should be construed narrowly and should *not* be read to mean that *Santos* applies to evaluate whether dismissal under GRCP 25(a) is an appropriate sanction in the *first instance*—rather, that analysis remains clearly governed by reference to the statutory language of GRCP 25(a) and GRCP 6(b).

[32] The trial court limited its analysis to applicable procedural rules and therefore understandably did not frame its analysis in light of *Santos*. *See* RA, tab 117 (Dec. & Order). Informed by *Santos*, we therefore review the record independently to determine whether the trial

court abused its discretion in granting dismissal specifically with prejudice. *See* 1997 Guam 4 ¶ 5 (citations omitted).

a. The public's interest in expeditious resolution of litigation and the court's need to manage its docket

[33] "The trial court is in the best position to decide when delay in a particular case interferes with the public interest and docket management, and we give deference to its determination of the reasonableness of the delay." *Somerfleck*, 2017 Guam 8 ¶ 12 (quoting *Park*, 2010 Guam 10 ¶ 19). Trial courts "have an inherent power to control their dockets. In the exercises of that power they may impose sanctions including, where appropriate, default or dismissal." *In re Phenylpropanolamine*, 460 F.3d at 1227. The record establishes that this has been a lengthy litigation, without the trial court having an opportunity to reach the merits. *See* RA, tab 117 at 2 (Dec. & Order) (noting initial complaint was filed in 2010 and O'Keefe passed away in 2013). Moreover, the Government delayed over one year from the entry of the Suggestion of Death before taking any responsive action. It did not provide justification for this delay at trial or on appeal. The trial court found that the Government did not "present[] sufficient evidence to show that its 'failure to act was the result of excusable neglect.'" *Id.* at 6. We find no reason, on the present facts, to disturb the deference we give to this finding. *See Somerfleck*, 2017 Guam 8 ¶ 12; *cf. In re Phenylpropanolamine*, 460 F.3d at 1242-43. Therefore, the first two *Santos* factors weigh strongly in favor of finding the trial court did not abuse its discretion in dismissing with prejudice.

b. The risk of prejudice to the defendants

[34] "Our case law makes clear that 'once a delay is determined to be unreasonable, prejudice . . . is presumed.'" *Id.* ¶ 15 (quoting *Park*, 2010 Guam 10 ¶ 21) (alteration in original). This presumption, however, is rebuttable, if the Government can show the delay was excusable and

that the Estate was not prejudiced by the delay. *See Park*, 2010 Guam 10 ¶ 21; *see also In re Phenylpropanolamine*, 460 F.3d at 1238 ("Prejudice is presumed from unreasonable delay[.]" (citing *In re Eisen*, 31 F.3d at 1452-53)).

[35] "[T]he policy undergirding this factor . . . is that unnecessary delay 'inherently increases the risk that memories will fade and evidence will become stale.'" *Guam Econ. Dev. Auth. v. Affordable Home Builders, Inc.*, 2013 Guam 12 ¶ 35 (quoting *Quitugua v. Flores*, 2004 Guam 19 ¶ 19). Failure to timely substitute without a good reason "increases the risk of prejudice from unavailability of witnesses or loss of records." *In re Phenylpropanolamine*, 460 F.3d at 1234. Further, "[t]hat the case is an involved, complex case increases the prejudice from the delay." *Id.* at 1228 (citation and internal quotation marks omitted). Here—in an undoubtedly involved, complicated case that defendant is burdened with the costs of litigating—the Government does not satisfactorily rebut this presumption of prejudice, as it offers no persuasive evidence that the delay was excusable. *See* Appellant's Br. at 12-13; Reply Br. at 5. This factor weighs strongly in favor of finding the trial court did not abuse its discretion in dismissing with prejudice.

c. The public policy favoring the disposition of cases on their merits

[36] "Although courts provide necessary procedural rules that bar certain actions from proceeding to final judgment, ideally all cases should find a resolution based on the merits." *Lujan*, 2014 Guam 19 ¶ 22 (citation omitted). Yet, "this factor should not be used defensively as a shield by a passive plaintiff who has failed in his obligation to prosecute the defendants with the vigor expected of a plaintiff." *Id.* ¶ 21 (quoting *Guam Econ. Dev. Auth.*, 2013 Guam 12 ¶ 43) (internal quotation marks omitted). "The question is whether the policy of determining cases on their merits justifies the delay and prejudice caused by [the party's] conduct." *Somerfleck*, 2017 Guam 8 ¶ 18 (alterations in original) (citations omitted).

[37] In *Lujan*, we examined what looked, on its face, to be a long-running action. However, after accounting for understandably appropriate delays—including the assignment and reassignment of seven different trial judges—we found the action, in fact, involved a delay that was "five months at the very maximum, but more likely only three days." *See* 2014 Guam 19 ¶ 22. Further, we noted that "the trial court had an opportunity to dispose of th[e] case on its merits in the same time period it took to rule on the motion to dismiss." *Id.* ¶ 23. Thus, we concluded in *Lujan* that this factor, favoring the disposition of cases on their merits, did not weigh in favor of dismissal. *Id.* In stark contrast, here, after several years of litigating this case—and without giving the trial court an opportunity to dispose of the case on the merits—the Government ultimately failed to substitute a proper defendant pursuant to GRCP 25(a). *Cf. In re Phenylpropanolamine*, 460 F.3d at 1242-43 (holding public policy factor offered little support to plaintiffs where delays ranged from one to three years); *Kasting*, 196 F.R.D. at 602 (dismissing where plaintiff waited over nine months after the expiration of the 90-day period). Therefore, while this factor does not weigh in favor of dismissal with prejudice, it does not ultimately outweigh the prior three factors—each of which weighs strongly in favor of finding the trial court did not abuse its discretion in dismissing with prejudice.

d. The availability of less drastic sanctions

[38] It is clear that "[t]he trial court is not required to impose lesser sanctions, when the rules do not so provide, and when to do so would encourage neglect and noncompliance with the [GRCP]. Nor is the trial court required to give a warning of possible dismissal." *Lujan*, 2014 Guam 19 ¶ 24 (citations and internal quotation marks omitted). "[I]t is not a per se abuse of discretion for a trial judge to dismiss an action due to a party's failure to prosecute without issuing advance warnings or lesser sanctions." *Park*, 2010 Guam 10 ¶ 24 (alteration in original)

(quoting *Santos*, 1997 Guam 4 ¶ 10). The court is not "required to examine every single alternate remedy in deciding if sanction of dismissal is appropriate." *Id.* (citing *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976)). "[T]he reasonable exploration of possible and meaningful alternatives is all that is required." *Id.* (citation omitted). "A trial court is entitled to say, under proper circumstances, that enough is enough and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear." *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1062 (7th Cir. 1989) (citations omitted) (dismissing with prejudice for failure to prosecute).

[39] Although the trial court did not explain whether other remedies were available, its failure to do so is understandable because this case presents us with the novel question of whether *Santos* is an appropriate guide for determining whether a case should be dismissed with or without prejudice for failure to substitute under GRCP 25(a). On our independent review of the record, it appears the Government has only lackadaisically pursued resolution of this case. *See supra* Part IV.B.1.a. (noting length of litigation). The inference we draw from the Government's conduct to date is that it prefers focusing on procedural wrangling rather than on reaching a final disposition on the merits. In light of this conduct, we find this factor weighs in favor of finding the trial court did not abuse its discretion in dismissing with prejudice. *Cf. Pyramid Energy*, 869 F.2d at 1062. Because we find that at least four *Santos* factors weigh in favor of affirming the trial court's judgment—and with three of those factors weighing strongly in that direction—we affirm the trial court's decision to dismiss with prejudice. *See Somerfleck*, 2017 Guam 8 ¶ 10.

2. The trial court's decision not to articulate its reasons for dismissing with prejudice

[40] The Government argues that the trial court "made no attempt to resolve the dispute and proceeded to sign the proposed judgment with no explanation. . . . The trial court should

articulate the reasons for its decision [to dismiss with prejudice]." Appellant's Br. at 14. We agree that it would have been better practice for the trial court to articulate in its Decision and Order why it chose to dismiss the case with prejudice. "[T]rial judges should 'articulate the reasons for their decisions.'" *Hawaiian Rock Prods. Corp. v. Ocean Hous., Inc.*, 2016 Guam 4 ¶ 29 (quoting *Rahmani v. Park*, 2011 Guam 7 ¶ 65). However, "the trial court's failure to explicitly indicate the basis of a judgment is not itself reversible error where such reasons are clear from the record." *Id.* ¶ 31; *see also In re Phenylpropanolamine*, 460 F.3d at 1226 ("Although it is preferred, it is not required that the [trial] court make explicit findings in order to show that it has considered these factors and we may review the record independently to determine if the [trial] court has abused its discretion." (citations omitted)).

[41] Here, none of the applicable procedural rules required the trial court to issue a written and reasoned decision, and we can conclude that the trial court's decision not to address the Government's Motion to Enter Judgment requesting that the case be dismissed without prejudice, RA, tab 121 (Mot. Enter J.), operated as a denial of the motion. *Cf. Gov't of Guam v. Gutierrez*, 2015 Guam 8 ¶ 45 ("[B]ecause the trial court ruled against the Estate, this court may assume that it denied the . . . motion, even though it did not mention it in the decision and order." (citations omitted)). We have reviewed the record independently and are not persuaded on these facts that the trial court abused its discretion in deciding to dismiss with prejudice without articulating its reasons therefor. *See Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6 ¶ 27 ("A trial court abuses its discretion . . . where the record contains no evidence on which the judge could have rationally based the decision." (citation omitted)).

3. GRCP 5 and General Rule 7.1

[42] Finally, we address two technical, and significantly underdeveloped, arguments that the Government makes with respect to GRCP 5 and General Rule 7.1 ("GR 7.1") of the Local Rules of the Superior Court of Guam. The Government contends, essentially, that the trial court abused its discretion in dismissing the case with prejudice because the Estate allegedly violated GRCP 5 by submitting a proposed judgment to the court without a concomitant motion to enter it. However, the Government does not pinpoint exactly which subsection of GRCP 5 it thinks was violated. *See* Appellant's Br. at 13-14; RA, tab 121 at 1-2 (Mot. Enter J.). The Government similarly asserts that the Estate "submitted the proposed judgment with no notice to the [Government] and no compliance with [GR] 7.1," again without pinpointing which specific subsection of GR 7.1 is allegedly at issue. Appellant's Br. at 14.

[43] We find these arguments would not alter the result in this case because there is nothing in the record indicating GRCP 5 or GR 7.1 were violated. The trial court issued its Decision and Order in response to a motion to dismiss. The Government was given notice and an opportunity to be heard on that motion and took advantage of that opportunity. RA, tab 114 at 2-5 (Opp'n Mot. Dismiss); Tr. at 7-8 (Mot. Hr'g). The most generous reading of the Government's contention is that the Estate violated GRCP 5(a), which generally requires court documents to be served upon the parties. *See* Guam R. Civ. P. 5(a). Rule 5(a) was not violated because the Decision and Order and Judgment were both in fact served upon the Government. *See* RA, tab 118 (Notice of Entry on Docket & Decl. of Mailing, Dec. & Order, Nov. 19, 2015); RA tab 125 (Notice of Entry on Docket & Decl. of Mailing (Judgment), Dec. 10, 2015). Guam Rule of Civil Procedure 5 does not, by its terms, require the court to provide a second notice or opportunity to be heard before the court enters a final judgment—such an untenable interpretation would give

every disappointed litigant the right to two hearings for one motion and burden the court's docket.

[44] Similarly, asserting that the Estate in some way violated GR 7.1 is unavailing to the Government's case. General Rule 7.1 deals with motion practice and administrative matters of the Superior Court Clerk and has no relevance to the submission of a proposed judgment. *See* GR 7.1. The submission of a form of proposed judgment is not a proceeding, but the culmination of a proceeding; hence, we do not find GR 7.1 particularly relevant. Further, the Government did not take any action to be relieved of the final judgment, as allowed by GRCP 60(b), even though it had opportunity to do so. We find the Government's lack of diligence cannot be mitigated by resort to these technical and inapplicable procedural rules.

V. CONCLUSION

[45] For the foregoing reasons, we **AFFIRM** the trial court's judgment dismissing the case with prejudice.

/s/
DAVID A. WISEMAN
Justice *Pro Tempore*

/s/
JOHN THOS. BROWN
Justice *Pro Tempore*

/s/
KATHERINE A. MARAMAN
Chief Justice