

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Patrick B. McEuen
McEuen Law Office
Portage, Indiana

ATTORNEY FOR APPELLEE

Gerald M. Bishop
Gerald M. Bishop & Associates
Merrillville, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Estate of
Suzanne M. Neitzel, Deceased:

Rita Tafelski,
Appellant,

v.

Linda Salmon,
Appellee.

April 13, 2022

Court of Appeals Case No.
21A-ES-1485

Appeal from the Lake Circuit Court
The Honorable Marissa McDermott,
Judge

The Honorable Jewell Harris, Jr.,
Probate Commissioner

Trial Court Cause No.
45C01-1401-ES-11

Friedlander, Senior Judge.

Statement of the Case

[1] Rita Tafelski appeals the probate court's Trial Rule 41(E) dismissal of her mother's estate for failure to prosecute, arguing the court erred by determining

that no action had been taken in the case for more than sixty days. Concluding the probate court did not abuse its discretion by dismissing the estate, we affirm.

Issue

- [2] Tafelski presents one issue for our review, which we restate as: whether the probate court erred by dismissing the estate pursuant to Trial Rule 41(E).

Facts and Procedural History¹

- [3] Rita Tafelski is the daughter of decedent, Suzanne Neitzel, and Linda Salmon is the sister of Neitzel. Neitzel died intestate in April 2012. In May, Salmon petitioned for appointment as personal representative of Neitzel's estate and for unsupervised administration of the estate, both of which the court granted.
- [4] In April 2013, Tafelski filed a motion to convert the estate to supervised administration and to remove Salmon as the personal representative. She also filed a complaint against Salmon under cause number 45D02-1304-CT-29 alleging tortious interference, fraud, conversion, breach of fiduciary duty, and intermeddling and seeking the imposition of a constructive trust. By June 2014,

¹ As Salmon notes, Tafelski's opening brief contravenes Appellate Rule 46(A). This rule directs that the Statement of Case section of the appellant's brief should "briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues by the trial court." Ind. Appellate Rule 46(A)(5). Similarly, the Statement of Facts section should "describe the facts relevant to the issues presented for review." App. R. 46(A)(6). Yet, these sections of Tafelski's brief relate proceedings not relevant to the issue presented for review and contain argumentative and conclusory statements. Although Salmon requests that we strike both sections from Tafelski's brief, *see* Appellee's Br. pp. 5, 9, we will instead disregard the non-compliant statements and caution counsel to abide by the dictates of Appellate Rule 46 in the future.

Tafelski's suit against Salmon had been consolidated with the estate case for purposes of discovery and pre-trial proceedings, Salmon had been removed as personal representative of the estate, and Tafelski had been appointed as successor personal representative. Throughout the next several years, the parties filed numerous discovery and dispositive motions in these highly contentious proceedings. On June 29, 2020, Salmon filed a motion to dismiss the estate action pursuant to Trial Rule 41(E). Tafelski filed a response, and the court granted the motion to dismiss. Thereafter, Tafelski filed a motion to correct error. Following a hearing, the court denied the motion to correct error. Tafelski now appeals.

Discussion and Decision

[5] As a threshold matter, we address Salmon's argument that this Court was divested of jurisdiction to consider this appeal due to Tafelski's failure to include a copy of her motion to correct error in her appendix. In support of her argument, Salmon relies on *Moore v. Spann*, 157 Ind. App. 33, 298 N.E.2d 490 (1973). There, the Court dismissed the appeal due to the appellants' failure to include in the record a certified copy of the motion to correct error, which at that time was a jurisdictional defect under Appellate Rule 7.2.² Since 1973,

² In 1973, Appellate Rule 7.2 stated in part: "The record of the proceedings shall consist of the following documents: (1) A certified copy of the motion to correct errors or an assignment of errors. (a) In all appeals from a final judgment, a certified copy of the motion to correct errors filed with the trial court shall constitute for all purposes the assignment of errors." Ind. Appellate Rule 7.2 (A)(1)(a).

however, the appellate rules have been amended several times, and this version of Rule 7.2 was no longer in effect at the time of these proceedings.

[6] This Court has jurisdiction in all appeals from final judgments. Ind. Appellate Rule 5(A); *In re Est. of Botkins*, 970 N.E.2d 164 (Ind. Ct. App. 2012). A dismissal pursuant to Trial Rule 41(E) is a final, appealable order. *Houston v. Wireman*, 439 N.E.2d 732 (Ind. Ct. App. 1982). In addition, the timely filing of a notice of appeal is a prerequisite to invoking this Court's subject matter jurisdiction. *Termination of Parent-Child Relationship of J.G. v. Ind. Dep't of Child Servs.*, 4 N.E.3d 814 (Ind. Ct. App. 2014), *trans denied*. Here, Tafelski filed her notice of appeal on July 15, 2021, within 30 days of the court's order denying her motion to correct error as required by our current appellate rules. *See* Ind. Appellate Rule 9(A)(1) (party initiates appeal by filing notice of appeal within thirty days after court's ruling on motion to correct error). Consequently, the fact that Tafelski did not include, by affirmative decision or oversight, her motion to correct error in her appendix does not deprive this Court of jurisdiction, and Salmon's argument to the contrary strikes us as disingenuous.

[7] We turn now to the heart of this appeal. We will reverse a dismissal for failure to prosecute only in the event of an abuse of discretion. *Lee v. Pugh*, 811 N.E.2d 881 (Ind. Ct. App. 2004). Such an abuse occurs only where the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.* This Court will affirm the trial court if any evidence supports its decision. *Belcaster v. Miller*, 785 N.E.2d 1164 (Ind. Ct. App. 2003), *trans. denied*.

[8] Trial Rule 41(E) provides, in pertinent part:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

The purpose of this rule is to ensure plaintiffs diligently pursue their claims. *Belcaster*, 785 N.E.2d 1164. The burden of moving the litigation forward is on the plaintiff, not the court or the defendant. *Olson v. Alick's Drugs, Inc.*, 863 N.E.2d 314 (Ind. Ct. App. 2007), *trans. denied*. Courts cannot be asked to carry cases on their dockets indefinitely, and adverse parties should not be compelled to respond to a lawsuit indefinitely. *Lee*, 811 N.E.2d 881.

[9] We generally consider several factors to determine whether the trial court abused its discretion by dismissing a case for failure to prosecute. These factors include:

(1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred

into action by a threat of dismissal as opposed to diligence on the plaintiff's part.

Olson, 863 N.E.2d at 319-20. The weight any particular factor has in a case depends on the facts and circumstances of that case. *Id.* For instance, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay. *Lee*, 811 N.E.2d 881.

[10] Neither party addresses these factors in their briefs, and Tafelski claims that “none [of these factors] are especially appropriate for consideration” in this case because the probate court “incorrectly treated” the estate case and the civil litigation as two distinct proceedings. Appellant’s Br. p. 17. We disagree and see no reason to deviate from our customary practice of considering these factors to determine whether the court abused its discretion. Moreover, while consolidation of similar cases is permitted as a matter of convenience and economy, it does not merge suits into a single cause. *Clarkson v. Neff*, 878 N.E.2d 240 (Ind. Ct. App. 2007), *trans. denied* (2008).

[11] Here, several of the factors favor the probate court’s dismissal of the estate, including the length of the delay, the failure to justify the delay, and the presence of deliberate action that hampered the progress of the case.

[12] In support of her contention that there was no period of inactivity in the estate case to support its dismissal, Tafelski points to (1) an October 2018 petition to discover and recover assets and for imposition of a constructive trust and (2) a

June 2019 petition to discover and recover documents. Tafelski filed a motion to correct error in August 2019 when this petition was denied. Nevertheless, these filings do not demonstrate that Tafelski was actively moving the estate case forward. There was a period of 238 days between the October 2018 filing and the June 2019 filing. Furthermore, the June 2019 filing was followed by a 370-day period of inactivity—305 days if calculated from the August motion to correct error—before Salmon moved to dismiss on June 29, 2020.

[13] Tafelski also identifies her filing of a “Praeceptum Withdrawal Submission Under Ind. T.R. 53.1” on February 6, 2020, as an action she took to move the case forward. The praecipe concerns her April 2019 motion to quash notice of deposition and for protective order as well as a motion to allow discovery and Salmon’s motion to compel deposition. Appellant’s App. Vol. 2, p. 128. Even assuming these filings were associated with the estate action, which it appears they were not, there was still a period of 161 days between Tafelski’s August 2019 motion to correct error and the February 2020 praecipe, and then another 144 days before Salmon moved to dismiss. Dismissal under Trial Rule 41(E) requires only a sixty-day period of inaction, and these intervals far exceed that, even if we include the Trial Rule 53.1 praecipe in the calculation.

- [14] In addition, Tafelski presented no justification for the length and history of delay, as was her burden.³ See Ind. Trial Rule 41(E) (“if the *plaintiff* shall not show sufficient cause at or before” the hearing) (emphasis added); see also *Metcalf v. Est. of Hastings*, 726 N.E.2d 372 (Ind. Ct. App. 2000) (under T.R. 41(E), burden is on plaintiff to prove, at or before hearing, there was sufficient cause or excuse for delay), *trans. denied*.
- [15] Furthermore, Tafelski’s actions that served to stall and frustrate the process came to light at the hearing on her motion to correct error. She inconsistently claimed, on the one hand, that she was moving the case forward and that the court erred by dismissing the estate case when objections to Salmon’s final accounting had been pending since 2014 without a ruling. On the other hand, she acknowledged that she had purposely not requested a hearing on those objections.
- [16] The factors weighing in Tafelski’s favor include our preference of deciding cases on their merits and the fact that sanctions less severe than dismissal may have been available. Yet, the probate court’s decision is supported by the length of the delay, the lack of justification for the delay, and the presence of deliberate action resulting in delay. Thus, we cannot say that the probate court abused its discretion when it chose to dismiss the estate. See *Lee*, 811 N.E.2d 881 (lengthy

³ In her brief, Tafelski cites principles of statutory construction and asserts that under Trial Rule 41(E) Salmon was obligated to prove either Tafelski’s failure to comply with the trial rules or her failure to take action for a period of sixty days. See Appellant’s Br. p. 15. This is not the case.

period of inactivity may be enough to justify dismissal under circumstances of particular case, especially if plaintiff has no excuse for delay); *see also Belcaster*, 785 N.E.2d 1164 (court need not impose sanction less severe than dismissal where record of dilatory conduct is clear). Accordingly, we affirm the order of the probate court denying Tafelski's motion to correct error.

[17] Judgment affirmed.

Bailey, J., and Tavitas, J., concur.